

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL SCOTT GODFREY,

Defendant-Appellant.

UNPUBLISHED

March 11, 1997

No. 146156

Recorder's Court

LC No. 90-010430

AFTER REMAND

Before: Sawyer, P.J., and T.G. Kavanagh* and L.L. Heathscott,** JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of criminal sexual conduct in the first degree. MCL 750.520b; MSA 28.788(2). He was sentenced to concurrent terms of twelve to twenty years in prison. In our original opinion, we remanded the matter to the trial court for further consideration of an issue raised by defendant, namely whether particular documents should have been released to defendant during discovery.

Following various orders of this Court, and a modification of our earlier opinion by the Supreme Court, the trial court eventually held a hearing on remand. At that hearing, the trial court apparently accepted the prosecutor's argument that defendant was engaged in nothing more than a "fishing expedition" and declined to review the documents in camera. We are satisfied that defendant has not made a sufficient showing to warrant an in camera review of the documents and possible discovery of those documents by defendant. See *People v Stanaway*, 446 Mich 643; 527 NW2d 557 (1994).

Turning to the other issues raised by defendant in his original appeal but not addressed in our original opinion, defendant argues that the trial court erred in denying his motion for disqualification of the trial judge and that the trial judge's conduct at trial denied him a fair trial. We disagree. Defendant argues that his initial motion for disqualification should have been granted because defense counsel had filed a complaint against the trial judge with the Judicial Tenure Commission. However, complaints

* Former Supreme Court justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-3.

** Circuit judge, sitting on the Court of Appeals by assignment.

alone do not require disqualification. *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 334 (1995), aff'd 451 Mich 457; 547 NW2d 686 (1996). Defendant also points to a number of comments made by the trial judge during trial as evidence that the trial judge was biased or prejudiced against defendant or counsel. While it does appear that the trial judge and defense counsel enjoyed a less than ideal relationship, we are not persuaded that the trial judge displayed such actual bias or prejudice and was unable to serve as a neutral and detached judicial officer over defendant's trial.

Next, defendant argues that the trial court denied his right of confrontation by restricting defendant's recross-examination of two prosecution witnesses. We disagree. The trial court enjoys broad discretion in limiting cross-examination and we will not reverse unless there is a clear abuse of that discretion. *People v Taylor*, 386 Mich 204, 208; 191 NW2d 310 (1971). The trial court stated that it was restricting recross because no new matters had been raised during redirect. We are not persuaded that the trial court clearly abused its discretion.

Next, defendant argues that the prosecutor engaged in substantial and material misconduct that denied defendant a fair trial. We disagree. Defendant points to various instances which he argues constitute misconduct. A number of these points were not preserved for appeal by a timely objection in the trial court. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). Accordingly, we will only consider those matters which were properly preserved by a timely objection.

First, defendant argues that the prosecutor acted improperly in introducing into evidence the victim's bloody clothing and photographs of the bloody bathroom area. It is not misconduct to seek admission of evidence and it certainly is not misconduct to be successful in getting evidence admitted.

Second, defendant also objected to statements by the prosecutor during closing argument which defendant characterizes as improperly vouching for the victim's credibility. The comments, however, did not vouch for the victim's credibility. Rather, they merely argued that, based upon the testimony, the jury should find the victim credible.

Defendant next argues that the evidence presented at trial was legally insufficient to establish the personal injury element of first-degree criminal sexual conduct. We disagree. We review this evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find each element of the offense proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748 (1992). Although there was sufficient evidence that the victim sustained a personal injury, defendant argues that the evidence did not establish whether the injuries were sustained when he penetrated the victim or when the codefendant penetrated the victim. One infliction of a personal injury can satisfy that element for multiple counts of CSC arising out of the same incident. See *People v Martinez*, 190 Mich App 442; 476 NW2d 641 (1991); see also *People v Brown*, 197 Mich App 448; 495 NW2d 812 (1992). Accordingly, we are satisfied that there was sufficient evidence to convict defendant.

Next, defendant argues that the trial court gave insufficient jury instructions on the personal injury element of first-degree CSC and on the jury's duty to reach a unanimous verdict. However,

defendant failed to preserve this issue for appeal by raising the appropriate objection in the trial court. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Finally, defendant argues that he is entitled to be resentenced because of an inaccurate scoring of the Sentencing Information Report and because the sentence imposed was disproportionate. We disagree.

Turning first to the scoring issues, we will uphold the scoring of the guidelines if there is any evidence to support it. *People v Buck*, 197 Mich App 404, 430; 496 NW2d 321 (1992). Defendant first asserts that the trial erred in assessing ten points for Offense Variable 9 as a leader in a multiple offender situation. While the evidence on this point was admittedly minimal, there was some evidence to support the view that defendant took the lead in this offense. Accordingly, we will not disturb the scoring.

Next, defendant argues that the trial court erred in the scoring of OV 12 for multiple penetrations. The trial court correctly scored the guidelines based upon the number of penetrations which occurred. Although defendant was not convicted on the charge related to a rectal penetration, the trial court could still consider it if it were established by a preponderance of the evidence. *People v Ratkov (After Remand)*, 201 Mich App 123, 126; 505 NW2d 886 (1993). We also note that a change in the scoring of this variable alone would be insufficient to change the recommendations of the sentencing guidelines.

Finally, defendant argues that the trial court erred in scoring both Prior Record Variable 7 (concurrent felony convictions) and OV 12 (criminal sexual penetrations) based upon the same act of penetration. That act of penetration formed both the basis for the concurrent conviction and for the additional sexual penetration. We see nothing improper with using the single penetration to support both scores. Prior record variables and offense variables address different aspects of the sentencing decision. Therefore, it is not improper to consider the same conduct in the scoring of both a PRV and an OV.

Finally, defendant argues that the sentence imposed violates the principle of proportionality set forth in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). We disagree. The sentencing guidelines recommended a minimum sentence in the range of ten to twenty-five years. Defendant's minimum sentence of twelve years was near the low end of that recommendation. Given the brutal nature of this offense, we cannot say that a sentence within guidelines, particularly near the low end of the guidelines, is disproportionately harsh.

Affirmed.

/s/ David H. Sawyer

/s/ Lynda L. Heathcott

T.G. Kavanagh, J., not participating.