STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARON ANTONI RUTLEDGE,

Defendant-Appellant.

UNPUBLISHED
March 21, 1997

No. 187911
Saginaw Circuit Court
LC No. 94-009595-FC

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and one count of breaking and entering with intent to commit criminal sexual conduct, MCL 750.110; MSA 28.305. He was convicted, following a jury trial, of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b) and aggravated assault, MCL 750.81a; MSA 28.276(1), stemming from incidents that occurred on July 6, 1994, and entering without permission, MCL 750.115; MSA 28.310, stemming from the incidents of August 4, 1994. He was sentenced to ninety months to fifteen years' imprisonment for his CSC III conviction, ninety days for his aggravated assault conviction, and ninety days for his entering without permission conviction. We affirm defendant's convictions, but remand to the trial court for articulation of its reasons for the sentence imposed, or resentencing.

The complainant testified that from April through June of 1994, she and her three-year old son lived with defendant, her former boyfriend. According to the complainant, she had an argument with defendant at her house on July 5, 1994, wherein she threatened to call the police. The complainant indicated that defendant broke into her home and physically assaulted her on July 6, 1994, at approximately 3:30 a.m. The complainant testified, and a witness verified, that defendant struck the complainant at least twice. The confrontation continued in the bathroom, where defendant struck the complainant five to ten more times, causing bumps on her head and choke marks on her throat. They argued about a man that the complainant had dated. There was evidence that after some time elapsed, defendant and the complainant appeared to have calmed down. Defendant then wanted to have sex with the complainant, but she refused. She claimed that defendant threatened to resume beating her if she did not submit. She testified that defendant then made her go into her bedroom, he undressed after

making her undress, and they had penile/vaginal intercourse. After the defendant left, some time elapsed and the complainant called the police. For reasons not explained in the record, defendant was not arrested at that time.

The complainant asserted that on August 3, 1994, defendant knocked on her door around 4:00 a.m. They discussed the complainant's intent to press charges relating to the July 6, 1994 incidents. According to the complainant, defendant became upset, began yelling, and pulled open the screen door and kicked in the door leading from the porch to the house. The complainant testified that defendant pushed her onto the living room couch and continued yelling. The complainant explained that defendant left the house at that point to turn off the car engine, but she did not leave before he returned because she could not have gotten her son out of the house. She further indicated that defendant then said that he wanted to have sex with her, but she refused. Defendant then threatened to beat her. The complainant testified that, during this exchange, defendant was hitting the living room table and chair with a foot-long souvenir baseball bat. She claimed that defendant then held the bat over her head and instructed her to go into the bedroom and undress. They had penile/vaginal intercourse. The complainant indicated that she submitted only because she feared being beaten. Defendant left between 6:00 a.m. and 8:00 a.m. The complainant indicated that she waited a couple of hours before calling the police because she was unaware of defendant's whereabouts.

Defendant first argues that the evidence was insufficient to sustain a jury verdict of guilty beyond a reasonable doubt. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994), aff'd 450 Mich 349; 537 NW2d 857 (1995).

CSC III is sexual penetration accomplished by force or coercion. MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Force or coercion may be established "[w]hen the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats. MCL 750.520b(ii); MSA 28.788(2)(f)(ii).

Here, the substance of defendant's argument is that there was insufficient evidence presented concerning whether the sexual encounter was coerced rather than consensual. The question, however, is "whether there was evidence that the jury, sitting as the trier of fact, could choose to believe and, if it did so believe that evidence, that the evidence would justify convicting defendant." *Smith*, *supra*. In this case, the complainant testified that defendant beat her, that she initially refused his request for sex, that he threatened to resume beating her if she did not submit, and that she submitted only because she feared that defendant would beat her again. We find that the complainant's testimony was sufficient to allow a rational jury to find that her sexual encounter with defendant was coerced by defendant's threat of beating her. Moreover, defendant's argument is essentially an attack on complainant's credibility. It is well settled that this Court will rarely overturn a conviction when the issue is the credibility of a witness. *Wolfe*, *supra*; *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993).

Defendant next contends that his conviction for CSC III must have been the result of an impermissible compromise verdict because, depending on whether the jury believed complainant's testimony, he should have been convicted either of the more serious crime of CSC I or the less serious crime of assault. We disagree.

Inconsistent verdicts are not permissible in Michigan. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1982). The question, however, is not whether the jury sought a compromise verdict, but, rather, whether an objective examination of the record reveals that the prosecution presented adequate evidence of the elements of CSC III to support such a conviction. See, *People v Heflin*, 434 Mich 482, 526; 456 NW2d 10 (1990); *People v Lugo*, 214 Mich App 699, 711; 542 NW2d 921 (1995). In this case, there was evidence that on July 6, 1994, defendant beat the complainant and later, after defendant appeared to have calmed down, he requested sex and in response to the complainant's refusal, threatened to beat her again. The complainant testified that she had sexual intercourse with defendant because she believed he would carry out his threat. Based on the evidence presented, the jury could have found that defendant beat the complainant without an intent to force her into having intercourse, and later threatened to beat her again with the intention of coercing her into having intercourse. This view of the evidence would properly result in a conclusion that defendant was guilty of CSC III but not guilty of CSC I.

Defendant next asserts that he is entitled to a new trial because the prosecutor improperly expressed his personal opinion of defendant's guilt, vouched for the truthfulness of witnesses, and shifted the burden of proof by referring to certain testimony as undisputed. Again, we disagree. The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). By not raising a timely objection in the trial court, defendant failed to preserve these issues for appeal. *Smith*, supra at 75-76. Our review is, therefore, limited to whether the resulting prejudice, if any, was so great that it could not have been cured by an appropriate instruction by the trial court and whether failure to consider the issue would result in a miscarriage of justice. *Id.*

Defendant challenges the propriety of the prosecutor's statement that defendant was "guilty of criminal sexual conduct in the first-degree for what he did to [the complainant] back on . . . July 6. A prosecutor is free to relate the facts adduced at trial to his theory of the case, and to argue the evidence and all reasonable inferences arising from it to the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In addition, a prosecutor may argue that the defendant or another witness is not worthy of belief or is lying. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). Viewing the statement in context, we find that it was a fair statement of the culmination of the prosecutor's summary of how the evidence fit his theory of the case. Furthermore, in light of defendant's failure to object to this statement at trial, we are convinced that any prejudice could have been cured by an appropriate instruction from the court. Moreover, counsel may not sit back and harbor error, to be used as an appellate parachute in the event of an unfavorable jury verdict. *People v Hardin*, 421 Mich 296, 322; 365 NW2d 101 (1984); *People v Bart*, 220 Mich App 1, 15; ___ NW2d ___ (1996).

Defendant next challenges several prosecutorial statements relating to the complainant not having a motive to lie. A prosecutor may not vouch for the credibility of a witness. *Id.* at 276. We are not convinced that the prosecutor's statements rise to the level of being improper vouching for the complainant's credibility. In any event, any resulting prejudice could have been cured by an appropriate instruction by the trial court and we do not find that a miscarriage of justice resulted from the prosecutor's comments.

Defendant also claims that the prosecutor shifted the burden of proof to him by arguing that no contradictory evidence was presented. A prosecutor may not suggest in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because this argument tends to shift the burden of proof. *People v Foster*, 175 Mich App 311, 317; 437 NW2d 395 (1989), rev'd on other grounds 450 Mich 94 (1995). In addition, a prosecutor may not comment upon a defendant's failure to testify. MCL 600.2159; MSA 27A.2159; *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). We, however, are not convinced that the comments in question impermissibly shifted the burden of proof to defendant. This Court has held that a statement that the evidence is uncontroverted does not constitute an impermissible comment on a defendant's failure to take the stand. See *Perry*, *supra*; *People v Smith*, 143 Mich App 122, 135; 371 NW2d 496 (1985); *People v Balog*, 56 Mich App 624, 629; 224 NW2d 725 (1974). Furthermore, the trial court instructed the jury that defendant was presumed innocent until proven guilty, defendant had the absolute right not to testify and that defendant's choice to not testify must not influence the jury's verdict in any way.

Defendant finally argues that the trial court failed to individualize his sentence and failed to articulate reasons for the sentence it imposed. In order to aid in the appellate review process of determining whether there has been an abuse of discretion, the trial court must, at the time of sentencing, articulate on the record its reasons for imposing the sentence given. *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989); *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987); *People v Sandlin*, 179 Mich App 540, 542; 446 NW2d 301 (1989).

In sentencing defendant, the trial court merely indicated that "[t]his sentence is pursuant to the sentencing guidelines and the habitual offender statute." Based on our review of the sentencing transcript, we are not satisfied that the trial court adequately stated its reasons for the sentence imposed. We therefore remand to the trial court for articulation of the reasons for the sentence imposed or for resentencing. *Triplett*, *supra*. We, however, find no support in the record for defendant's claim that the sentencing court harbored prejudice against him.[1]

Defendant's convictions are affirmed. Defendant's CSC III sentence is vacated and the case is remanded to allow the trial court an opportunity to articulate its reasons for the sentence imposed, or resentence defendant. We do not retain jurisdiction.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen

[1] In arguing that his sentence was not individualized and disproportionate, defendant appears to rely heavily on the sentencing guidelines range of 2 to 5 years' imprisonment for the CSC III conviction. We note that, while the guidelines range may be a potentially useful tool in deriving a "proportionate" sentence for the habitual offender, *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990), a trial court has no obligation to take the guidelines into consideration in determining a sentence for an habitual offender, and appellate review of habitual offender sentences using the guidelines is inappropriate. *People v Haacke*, 217 Mich App 434, 437-438; 553 NW2d 15 (1996).