STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD E. SECRETO,

Defendant-Appellant.

UNPUBLISHED
April 21, 1998

No. 195927
Oakland Circuit Court
LC No. 95-140844-FC

Before: Doctoroff, P.J. and Reilly and G.S. Allen, Jr.*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (involving personal injury to the victim and use of force or coercion), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, malicious destruction of property under $100, MCL 750.377a; MSA 28.609(1), and domestic violence, MCL 750.81(2); MSA 28.276(2). Defendant was sentenced to ten to fifteen years' imprisonment for his conviction of first-degree CSC, five to ten years' imprisonment for his conviction of assault with intent to do great bodily harm less than murder, ninety days' imprisonment for his conviction of malicious destruction of property under $100, and ninety days' imprisonment for his conviction of domestic violence. The trial court vacated defendant's sentences for the assault conviction and for the first-degree CSC convictions and sentenced defendant as an habitual offender, second offense, MCL 769.10; MSA 28.1082, to fifteen to thirty years' imprisonment. Defendant appeals as of right. We affirm.

During the evening of June 17, 1995, defendant was drinking with his live-in girlfriend, and another couple (the victim and her live-in boyfriend, Hobart Rickmon), in the other couple's apartment in the City of Royal Oak. After the victim passed out on the couch, Rickmon and defendant's girlfriend left the apartment. Defendant later found them naked in a nearby field. It appeared to defendant that his girlfriend and Rickmon had just had sex. Defendant chased Rickmon around the area and yelled at him; he also yelled at and hit his girlfriend. Defendant then proceeded back into the apartment building, where he beat up the victim and sodomized her with a carrot. When two Royal Oak police officers

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

arrived at the apartment, they discovered defendant hunched over the victim who was naked from the waist down and covered in blood. The victim

told one of the officers, "He beat me," and pointed toward defendant. A few minutes later, when asked by another officer, the victim identified defendant as the man responsible for her condition. According to one of the officers, the victim was hysterical. The other officer testified that the victim appeared to be extremely upset. The victim, whose blood alcohol level was .296 on the night of the incident, did not recall the police coming to the apartment. All she could remember was drinking shots with Rickmon, his girlfriend and defendant, and then waking up in the hospital.

On appeal, defendant first argues that his assault and sexual conduct convictions must be reversed on the ground that he was denied effective assistance of counsel when defendant's trial counsel failed to object to testimony from the police officers regarding the victim's on-scene identification of defendant. We disagree. To properly advance a claim of ineffective assistance of counsel, a defendant must make a testimonial record at the trial court level in an evidentiary hearing or in connection with a motion for a new trial. *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). Because defendant failed to do so in this case, our review is limited to mistakes apparent on the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Defendant first contends that the officers' testimony was inadmissible pursuant to MRE 602, which requires that the testimony of a witness be based on personal knowledge. Defendant argues that the personal knowledge requirement also applies to the declarant of an extra-judicial statement and that, in this case, the prosecution could not have proven by a preponderance of the evidence that the victim had an opportunity to observe and actually did observe defendant beating her. Initially, we note that defendant assumes, without citing to any Michigan authority, that MRE 602 applies to an extra-judicial statement.[1] Without deciding the question whether MRE 602 is applicable to extra-judicial statements, we reject defendant's contention on the basis that there was overwhelming evidence that the victim had an opportunity to observe and actually did observe the person who beat her. One could certainly infer from the fact that the victim was present during the beating and conscious shortly after the beating that she observed the beating while it was happening to her. Failure to raise a meritless objection does not constitute ineffective assistance of counsel. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Defendant next contends that the officers' testimony was inadmissible hearsay. Hearsay is a statement, other than the one made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Harris*, 201 Mich App 147, 150-151; 505 NW2d 889 (1993). Hearsay is not admissible unless it comes within one of the exceptions provided by the Michigan Rules of Evidence. MRE 802. An exception to the hearsay rule is made if the statement qualifies as an excited utterance. MRE 803(2); *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979). To qualify as an excited utterance, a statement must (1) arise out of a startling event or condition, (2) be made before there has been time to contrive or misrepresent, and (3) relate to the circumstances of the startling event or condition. MRE 802(3); *Gee*, *supra* at 282.

Here, defendant contends that the testimony regarding declarant's out-of-court statements would not have been admissible under the excited utterance exception, because the statements were made in response to a specific questions, and therefore were not spontaneous. At trial, the first officer testified that the victim's statement was made in response to his questions, "[W]ho did this to you[?]"

and "[W]hat happened[?]" The other officer testified that the victim pointed at defendant in response to the same questions. After the victim pointed at defendant, the officer sought to verify her identification of defendant by asking her three or four times, "Did he do this to you?" and "This man right here?"[2] Evidence that the declarant's statement was made in response to an inquiry, while not justification for automatic exclusion, is an indication that the statement may have been the result of reflective thought. Where the time interval between the startling event and the statement permitted such thought, this factor might swing the balance in favor of exclusion. See *People v Straight*, 430 Mich 418, 426 n 6; 424 NW2d 257 (1988), quoting McCormick, Evidence (3d ed), § 293, p 857; *People v Petrella*, 124 Mich App 745, 759-760; 336 NW2d 761 (1983). In this case, the officers' questions were not the sort of questions which called for reflective thought or would have prompted the victim to make a statement she would not have made spontaneously. Moreover, all of the other circumstances surrounding the victim's statement militated in favor of its admission as an excited utterance over a hearsay objection.[3] Cf. *Straight*, *supra* at 425-426. Again, defense counsel's failure to raise a meritless objection did not constitute ineffective assistance of counsel. *Torres*, *supra* at 425.

Next, defendant contends that the officers' testimony was excludable because its admission denied defendant his right to confrontation. As long as the declarant testifies as a witness and is subject to cross-examination, a defendant is not denied his right to confrontation by the admission of a declarant's out-of-court statements at trial. *People v Malone*, 445 Mich 369, 382; 518 NW2d 418 (1994), citing *California v Green*, 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489 (1970). The opportunity for cross-examination is not lost when the declarant cannot recall the basis for his past statement. *Malone*, *supra* at 384. Effective cross-examination requires only that the declarant take the stand and answer questions under oath. There is no requirement that the declarant be able to answer questions about the basis for his past declaration. *Id.*, citing *United States v Owens*, 484 US 554, 561; 108 S Ct 838; 98 L Ed 2d 951 (1988).

Here, the victim took the stand and answered questions under oath. By denying that the victim was effectively cross-examined because of her total lack of memory of the events, defendant fails to appreciate that he has received all of the benefit cross-examination can produce. The victim's lack of memory can be and was attributable directly to the head injury she sustained as well as her blood alcohol level. These same factors which prevented her ability to recall her statements, also raise questions regarding her identification of defendant to the police officers. If there were any reasons to question the accuracy of the victim's identification of defendant, it was placed before the jury as well, which gave the testimony its due weight. Moreover, even if the victim had not been present to testify at trial, the admission of her out-of-court statement pursuant to a firmly-rooted exception to the hearsay rule (in this case, the excited utterance exception) would have alleviated any Confrontation Clause concerns. See *People v Poole*, 444 Mich 151, 162-163; 506 NW2d 505 (1993), citing *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980). Accordingly, because an objection based on defendant's right to confrontation would have been meritless, defendant was not denied effective assistance of counsel when defense counsel failed to so object. *Torres*, *supra* at 425.

Defendant finally contends that the officers' testimony was excludable because her statements of identification were made in the context of a suggestive confrontation under circumstances in which there was a likelihood of misidentification. Identification procedures which are impermissibly suggestive and

conducive to irreparable misidentification offend due process. *People v Johnson*, 113 Mich App 414, 417-418; 317 NW2d 645 (1982), citing *Stovell v Denno*, 388 US 293, 302; 87 S Ct 1967; 18 L Ed 2d 1199 (1967). The determination whether identification procedures constitute a denial of due process is made in light of the totality of the circumstances surrounding the pretrial identification. *People v Lee*, 391 Mich 618, 626; 218 NW2d 655 (1974). In the case at bar, the identification occurred within minutes of the police finding defendant with the victim, which allowed the victim to identify defendant while her memory was still fresh. Cf. *People v Purofoy*, 116 Mich App 471, 480; 323 NW2d 446 (1982). More importantly, it is undisputed that the victim knew defendant prior to the alleged attack. This fact would certainly tend to lessen the danger of misidentification. Accordingly, the victim's identification would not have been inadmissible on due process grounds. Once again, defense counsel's failure to raise a meritless objection did not constitute ineffective assistance of counsel. *Torres*, *supra* at 425.

Defendant next argues on appeal that insufficient evidence was presented at trial to support his conviction for first-degree CSC. We disagree. In reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

In challenging the sufficiency of the evidence, defendant first contends that there was insufficient evidence of a sexual penetration, because there was no showing that defendant penetrated the victim with a sexual purpose. However, this Court has repeatedly held that first-degree CSC requires only a sexual penetration as defined by statute, see MCL 750.520a(*l*); MSA 28.788(1)(*l*), and does not require the sexual penetration to have as its purpose sexual gratification or stimulation. See *People v Anderson*, 111 Mich App 671, 678; 314 NW2d 723 (1981) (citing additional cases). We decline defendant's invitation for us to reject the rule stated in *Anderson*, and hold that, in this case, the evidence of a sexual penetration was sufficient with or without any evidence of a sexual purpose.

Defendant's sexual-purpose argument also suggests that the statute is unconstitutionally vague and overbroad in the sense that it could operate to punish innocent acts. Due to considerations of the principles of standing and the gravity of declaring a statute unconstitutional, vagueness challenges which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand without concern for the hypothetical rights of others. See *People v Lynch*, 410 Mich 343, 352; 301 NW2d 796 (1981); *People v Gunnett*, 158 Mich App 420, 426-427; 404 NW2d 627 (1987). Here, defendant asserted no violation of the First Amendment. As applied to the facts of this case, the first-degree CSC statute prohibited the "sexual penetration" of the victim as a circumstance of defendant's violent physical attack on the victim. As such, it did not prohibit an innocent act, but rather operated to punish defendant for subjecting the victim to a degrading and dehumanizing act during the course of the assault. Cf. *Anderson*, *supra* at 678-679 & n 1.

Defendant also contends that there was insufficient evidence of the element of force or coercion. Use of force or coercion includes situations in which the actor overcomes the victim through the actual application of physical force or violence. MCL 750.520b(1)(f)(i); MSA 28.788(2)(1)(f)(i). Viewed in

a light most favorable to the prosecution, the evidence indicated that defendant sexually penetrated the victim's rectum during the course of a violent physical attack on the victim. On this evidence, a rational trier of fact could infer, beyond a reasonable doubt, that defendant accomplished the sexual penetration by overcoming the victim through the actual application of force or violence. Therefore, the evidence was sufficient to sustain defendant's conviction of first-degree CSC. MCL 750.520b(1)(f)(i); MSA 28.788(2)(1)(f)(i).

Next, defendant argues that his conviction must be reversed because the trial court erred in preventing defendant's counsel from inquiring into the potential bias and interest of Rickmon, a key prosecution witness. We disagree. A trial court's limitation of cross-examination is reviewed for an abuse of discretion. *People v Richmond*, 35 Mich App 115, 121; 192 NW2d 372 (1971).

On cross-examination, Rickmon testified that he served six months in the county jail for breaking and entering and carrying a concealed weapon. In response to defendant's questions, Rickmon testified that while incarcerated he was not free to eat, drink or sleep when he wanted. The prosecution interrupted this line of examination with an objection to the relevance. He argued that MRE 609 allows testimony of a prior conviction, but not all of the details surrounding the conviction. The trial court ruled that the prejudice outweighed the probative value and did not allow defendant to continue with his line of examination regarding the disadvantages of incarceration. Further testimony was presented that Rickmon had been taken into custody on the night of the incident, but released the following morning after giving a statement regarding the incident.

On appeal, defendant contends that trial court's limitation of his cross-examination of Rickmon prevented him from fully developing his theory that Rickmon actually committed the crimes and was trying to "pin them" on defendant in order to avoid his own conviction. The bias or interest of a witness is always a relevant subject of inquiry on cross-examination. *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995). Thus, a limitation on cross-examination which prevents a defendant from placing before the jury facts upon which an inference of bias, prejudice, or lack of credibility of a witness may be drawn amounts to an abuse of discretion and can constitute a denial of the right of confrontation. *People v Holliday*, 144 Mich App 560, 566; 376 NW2d 154 (1985). However, MRE 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

In this case, defendant was not prevented from presenting his theory to the jury. He was able to show that Rickmon had been incarcerated in the past, that Rickmon's freedom had been severely limited during his incarceration, and that Rickmon had been detained and released in connection with the case against defendant. The trial court's decision to prevent defense counsel from further probing the disadvantages of incarceration was not an abuse of discretion because the slight probative value of such testimony would have been substantially outweighed by confusion of the issues and by considerations of undue delay and waste of time. MRE 403. Accordingly, defendant is not entitled to relief on this issue.

Finally, defendant argues on appeal that he should be resentenced because his sentences were so excessive and disproportionate as to constitute an abuse of discretion. We disagree. Sentencing decisions are subject to review by this Court on an abuse of discretion standard. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). A sentence constitutes an abuse of the trial court's discretion if it violates the principle of proportionality. The principle of proportionality requires sentences to be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id.* at 636. When a defendant is sentenced as an habitual offender, the sentencing guidelines have no bearing with regard to whether an abuse of discretion has occurred. *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996).

In sentencing defendant to fifteen to thirty years' imprisonment, the trial court stated that defendant was convicted of something that was excessively brutal and took whatever vestige of dignity the victim had away from her. Further, the court stated that defendant's crime against the victim was for no reason other than meanness and vindictiveness and that defendant did not belong in society. Although the trial court had broad discretion to sentence defendant to any period of incarceration up to life on the habitual offender conviction, MCL 769.10; MSA 28.1082, the trial court sentenced defendant to a minimum term of fifteen years' imprisonment. In light of the seriousness of the offenses that were committed, we hold that the sentence was proportionate to the offense and the offender.

Defendant argues that the trial court abused its discretion by failing to take into consideration his insubstantial prior criminal record and that he acted in the heat of passion in committing this offense. We are not persuaded that these reasons should shorten the length of defendant's sentence. Defendant used the innocent victim as a tool for revenge against Rickmon. Defendant not only seriously injured the victim by hitting her about the face and head resulting in a basilar skull and a mandible fracture, but he attempted to degrade her by using a carrot to sodomize her. Although defendant's prior criminal history standing alone may not contribute to a sentence of fifteen to thirty years' incarceration, his prior criminal history along with the nature of the crimes he committed, persuade us that the sentence was proportionate to the offense and the offender. Because the sentence was proportionate to the offense and the offender, defendant is not entitled to resentencing.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Maureen Pulte Reilly
/s/ Glen S. Allen, Jr.

[1] The prosecution also failed to address this particular aspect of defendant's first issue on appeal.

[2] Because these repeated questions came after the victim had already identified defendant, defendant's argument that the officer's "pressed [the victim] to identify her assailant" by way of repeated questioning is, at best, factually misleading.

[3] Because the statement would have been admissible as an excited utterance, we need not address whether it would also have been admissible as a non-hearsay statement of identification under MRE 801(d)(1)(C).