STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENJAMIN CAULTON,

Defendant-Appellant.

UNPUBLISHED
December 4, 1998

No. 203341
Macomb Circuit Court
LC No. 96-002198 FC

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of third-degree criminal sexual conduct (CSC 3), MCL 750.520d; MSA 28.788(4). The trial court subsequently verified that defendant was an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, and sentenced him to eight to twenty years' imprisonment. We affirm.

On appeal, defendant first contends that there was insufficient evidence of sexual penetration to sustain his conviction. We disagree. When reviewing the sufficiency of the evidence in a criminal case, this Court must view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from it may constitute satisfactory proof of the elements of an offense. *People v Greenwood*, 209 Mich App 470, 472; 531 NW2d 771 (1995).

"Sexual penetration," an essential element of CSC 3, is defined in part as "anal intercourse, or any other intrusion, however slight, of any part of a person's body." See MCL 750.520a(*l*); MSA 28.788(1)(*l*); MCL 750.520d(1); MSA 28.788(4)(1). In this case, the victim testified that, while in locked in a jail cell with defendant, defendant attempted to kiss him and stated, "You are going to be my bitch," and "I am going to F[---] you." Defendant then choked the victim to the point of unconsciousness. When the victim awoke in defendant's bed, his pants and underwear were down, his rectum was sore and bleeding, and he saw defendant washing his penis in the sink. Furthermore, a forensic serologist testified that a semen stain found in the back of the victim's underwear was

inconsistent with the victim's blood type but consistent with defendant's blood type. Viewing this circumstantial evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found the element of "sexual penetration" proven beyond a reasonable doubt. Cf. *People v Whitfield*, 425 Mich 116, 135; 388 NW2d 206 (1986).

Defendant next argues that the trial court erred in excluding evidence of the victim's 1994 conviction of unarmed robbery, MCL 750.530; MSA 28.798, which defendant sought to introduce for purposes of attacking the victim's credibility as a witness. We disagree. The decision to admit or exclude evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

Evidence of a nonaccused witness' prior conviction of a theft crime is not admissible for impeachment purposes unless the trial court determines, in light of the "nature and vintage" of the offense," that it is "significantly probative of veracity." *People v Allen*, 429 Mich 558, 608; 420 NW2d 499 (1988); see also MRE 609(2)(B). Here, we cannot say the trial court's decision constituted an abuse of discretion because the victim's conviction was three years' old at the time of defendant's trial, and the crime of unarmed robbery has a lower probative value on the issue of credibility than other theft crimes. See *Allen*, *supra* at 611. Moreover, the jury was already aware that the victim/ witness was an inmate in the Macomb County Jail. Accordingly, defendant is not entitled to the relief requested.

Finally, defendant argues that the trial court erred in excluding evidence that the victim consulted a lawyer regarding the possibility of bringing a civil lawsuit as a result of the underlying incident. Again, we disagree with defendant's contention. Because no civil lawsuit was pending, the fact that the victim may have once consulted with a lawyer was of little or no probative value. Cf. *People v Adamski*, 198 Mich App 133, 141-142; 497 NW2d 546 (1993); *People v Grisham*, 125 Mich App 280; 335 NW2d 680 (1983); *People v Johnston*, 76 Mich App 332, 336; 256 NW2d 782 (1977). Accordingly, we hold that the trial court did not abuse its discretion in excluding the evidence pursuant to MRE 403.

Affirmed.

/s/ Peter D. O'Connell
/s/ Roman S. Gribbs
/s/ Michael J. Talbot