# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN F. MARTIN,

Defendant-Appellant.

UNPUBLISHED
March 26, 1999

No. 209387
Oakland Circuit Court
LC No. 97-155284 FH

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Before: Murphy, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Defendant was sentenced as an habitual offender, third offense, MCL 769.11; MSA 28.1083, to concurrent terms of six to thirty years' imprisonment. He appeals as of right. We affirm.

The victim and defendant had been in an on and off romantic and sexual relationship for approximately eight years. Prior to September 20, 1997, they had not had sexual contact for approximately three months. On the evening of September 19, 1997, the victim voluntarily went to defendant's home to collect money owed to her by defendant and to discuss defendant's father's illness. The victim, an asthmatic, was suffering from a respiratory infection. At approximately 10:00 p.m., because she was feeling sleepy from the medication she was taking, the victim asked to lay down in defendant's bedroom while he continued to entertain two friends. She indicated that she would leave when defendant wanted to go to bed. At approximately 1:00 a.m., while fully clothed, the victim was awakened by defendant standing next to the bed completely naked. Defendant demanded sex and the victim refused. The assault ensued.

Defendant first argues that the evidence was insufficient to support his convictions. When reviewing a claim of insufficient evidence following a bench trial, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Petrella,* 424 Mich 221, 268-270; 380 NW2d 11 (1985); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174

(1995). This Court will not disturb a trial court's findings of fact if it appears from the record that the trial court was aware of the issues and correctly applied the law when making its determination. *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). Third-degree criminal sexual conduct involves sexual penetration of another person by force or coercion or penetration of a victim whom the actor knows to be physically helpless. *Hutner, supra* at 283.

Defendant claims there was insufficient evidence that he used force and that the victim did not consent to intercourse. We disagree. The prosecution presented evidence from which the trier of fact could conclude that defendant unlawfully penetrated the victim on two occasions using force or coercion. In his initial statement to the police, defendant denied having sexual intercourse with the victim. He then admitted to having sex with the victim but claimed it was consensual. In additional statements to the police defendant indicated that he ripped the victim's underwear off of her body, closed his bedroom window so that the victim's screams could not be heard and forced the victim's legs apart. Defendant testified at trial that he begged for sex even after the victim continuously refused his advances, put his hand over the victim's mouth, raised his hand to "shut her up," undressed her as she was "throwing elbows" and engaged in sexual intercourse with the victim.

Defendant's contention that his encounter with the victim was consistent with their prior pattern of sexual behavior, where the victim would initially refuse sex and then submit, we find, is incredible under the circumstances of this case. Moreover, the victim's testimony to the effect that defendant penetrated her twice after she repeatedly refused sex and while she physically struggled, was uncontradicted by accounts she gave to the police and hospital staff soon after the attack. Bruises on the victim and abrasions on defendant were documented by police as proof of the force used during defendant's assault. Viewed in the light most favorable to the prosecution, the prosecution presented sufficient evidence to prove its case beyond a reasonable doubt.

Defendant also argues that his sentences of six to thirty years are disproportionate. We disagree. The proportionality of an habitual offender's sentence is reviewed under the abuse of discretion standard. *People v Edgett*, 220 Mich App 686, 694; 560 NW2d 360 (1996). A sentence constitutes an abuse of discretion when it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990); *People v Honeyman*, 215 Mich App 687, 697; 546 NW2d 719 (1996).

Under the habitual offender, third offense, statute, MCL 769.11; MSA 28.1083, the court is given discretion, considering a defendant's prior convictions, to fix the length of defendant's minimum and maximum sentences. "[A] trial court does not abuse its discretion in giving a sentence within the statutory limits established by the Legislature when an habitual offender's underlying felony, in the context of his previous felonies, evidences that the defendant has an inability to conform his conduct to the laws of society." *People v Hansford (After Remand),* 454 Mich 320, 326; 526 NW2d 460 (1997). Because defendant's sentence is within the statutory limits and the serious nature of his crime and his prior record suggest to us that defendant is

unable to conform his conduct to the laws of society, we find no abuse of discretion by the sentencing judge.

Affirmed.

/s/ William B. Murphy
/s/ Hilda R. Gage
/s/ Brian K. Zahra