STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 11, 1999
v	No. 205737 Kalamazoo Circuit Court
WILLIAM HALL, Defendant-Appellant.	LC No. 97-000230-FC

Before: Gage, P.J., and White, and Markey, JJ.

PER CURIAM.

Defendant appeals by right his convictions and sentences for extortion and two counts of first-degree criminal sexual conduct. We affirm.

Defendant was charged with assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, extortion, MCL 750.213; MSA 28.410, and two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). After a four-day jury trial he was convicted of the lesser offense of aggravated assault on count one, MCL 750.81a; MSA 28.276(1), and convicted as charged on the remaining counts. Defendant was sentenced as a fourth habitual offender to twenty to thirty years' imprisonment for the extortion conviction, and forty to sixty years' imprisonment for each of the first-degree criminal sexual conduct convictions. He argues that these convictions and sentences should be vacated, making four claims of error. Defendant does not appeal his assault conviction. We deny all claims.

I

Defendant first contends that the trial court erred in refusing to grant his motions for directed verdict on the extortion and first-degree criminal sexual conduct charges and argues that there was insufficient evidence to support conviction on these charges. We disagree.

When reviewing a claim that the trial court erred in denying a motion for directed verdict because there was insufficient evidence to support conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found

that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Defendant was convicted of first-degree criminal sexual conduct under the aggravating factor of "personal injury," MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), requiring proof that he caused the victim personal injury, such as bodily injury, disfigurement or mental anguish. See CJI2d 20.9(2). Defendant contends that the prosecution failed to sustain its burden of showing that the sexual acts were accompanied by violence. Though admitting he severely assaulted the victim, he claims this action and the resultant injuries were separate and distinct from the sexual acts. He argues that the sexual acts were consensual, engaged in as he and the victim were "making up."

Contrary to defendant's assertion that the intercourse was not accompanied by threats or intimidation, the victim testified that the first sexual act occurred during the beating, explaining that she did not feel she could tell defendant to stop because he was hitting her. She testified that the second incident occurred when she awoke to defendant having sex with her, stating that "he -- he just had sex again. . . . and then afterwards, he says, I, hmm, I probably shouldn't have did that." Allowing that defendant did not strike her during the second incident, the victim testified that she did not object for fear of being hit again, and also asserted that she could hardly move due to the prior beating.

This Court has held that injuries sustained in an initial beating will satisfy the personal injury element for subsequent penetrations and multiple convictions. *People v Martinez*, 190 Mich App 442, 444-445; 476 NW2d 641 (1991); *People v Hunt*, 170 Mich App 1, 8; 427 NW2d 907 (1988). Although the time span between the beating and the subsequent penetration was quite a bit longer in the instant case, the victim was still suffering from the personal injuries inflicted by the defendant at the time of the second penetration. The evidence presented was both sufficient to allow the question to go to the jury, and viewed in a light most favorable to the prosecution, sufficient that a rational trier of fact could find that the essential elements of first-degree criminal sexual conduct were proven beyond a reasonable doubt. *Jolly, supra*, 442 Mich 466.

Regarding the extortion conviction, defendant submits both that the victim's testimony supporting the fact that he threatened her with harm was improperly elicited and that testimony from the investigating detective relating the victim's hospital-bed statement was inadmissible hearsay.

The elements of extortion include (1) a communication; (2) threatening future injury to the person or property or family of another; (3) with malice; and (4) with the intent either to obtain some monetary or pecuniary advantage or to compel the threatened person to do or not do some act, against his or her will. See CJI2d 21.1 and 21.3; *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985). The fourth element is satisfied where the threat is intended to prevent the victim from reporting a sexual assault or from testifying. *Id*. at 792-793. The threat must be definite enough to be understood by a person of ordinary intelligence as being a threat of injury, though it can be stated in general or vague terms, or even be made by suggestion. CJI2d 21.3.

Defendant contends that the victim's only testimony regarding defendant's threat came after improper leading questions and over objection and court instruction. However, the record shows

otherwise. When asked whether defendant made any statements about reporting the incident to the police, the victim testified that "he threatened me, threatened my mother and sister, burn up her building and that he would take the kids." Only after this testimony, as the prosecution attempted to elicit defendant's exact language, do defense objections appear. The line of questioning was not pursued, and no testimony improperly elicited. Though unable to relate defendant's specific language, the victim's initial testimony was sufficient to demonstrate a threat definite enough to be understood by a person of ordinary intelligence as being a threat of injury.

Defendant also alleges that there was no testimony from the victim's mother regarding any threat. The victim's mother testified that as she attempted to assist her daughter from the couch to her car, defendant kept pushing her daughter back down, forcing her to stay put. She testified that as he finally allowed them to leave, defendant said to the victim, "you be back here by noon or I will do what I said I was going to do. I -- you know what I told you. . . . . [R]emember what I told you." Though specifics were not elicited, combined with the victim's testimony a reasonable jury could infer that defendant's statement referenced a prior threat.

Investigating detective Hicok testified that in her interview of the victim, during treatment at the hospital, the victim expressed reluctance to speak with the police. She testified that the victim was concerned about prosecuting because she was frightened of defendant. She also related the victim's statement that defendant threatened to "kill her and her family if she went to the police." Defendant claims that Hicok's testimony regarding the threat is inadmissible hearsay.

This assertion forms the premise of defendant's second claim of error, discussed *infra*. However, even without Hicok's testimony, sufficient evidence was presented by the testimony of the victim and her mother to pass a directed verdict motion. Circumstantial evidence and reasonable inferences arising from the evidence may constitute satisfactory proof of the elements of an offense. *Jolly, supra*, 442 Mich 466. Viewed in a light most favorable to the prosecution, the combined evidence is sufficient that a rational trier of fact could find that the essential elements of extortion were proven beyond a reasonable doubt. *Id.*

II

Defendant's second claim of error, that the victim's statement to Hicok was erroneously and harmfully admitted, is denied. The victim testified to defendant's intimidation, noting that he threatened to harm her, her mother and her sister if she went to the police, but she was unable to relate specific language. Because Hicok's statement under oath was offered to prove the truth of the matter asserted, i.e., that defendant's threat was to kill the victim and her family, the statement was clearly hearsay. MRE 801(c). We review admission of hearsay testimony under the excited utterance exception for abuse of discretion. See *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996).

MRE 803(2) provides that hearsay testimony is admissible as an excited utterance if it relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." To come within the excited utterance exception to the hearsay rule, a statement must arise out of a startling event; it must be made before there has been time to contrive and

misrepresent; and it must relate to the circumstances of the startling event. *People v Straight*, 430 Mich 418, 424; 424 NW2d 257 (1988). The criterion that a statement must be made before there has been time to contrive and misrepresent has been recognized as simply a reformulation of the inquiry whether the statement was made while still under the influence of an overwhelming emotional condition. *Id.* at 425. In other words, as Michigan courts have frequently explained, the question is not controlled strictly by the length of time; the rule does not contemplate a sequence in which the utterance necessarily follows immediately on the startling event. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998); *Straight, supra* at 424; *Kowalak, supra*, 215 Mich App 558.

Defendant asserts that the victim had sufficient time for reflection before she spoke to Hicok, and submits that she fabricated a self-serving statement. We disagree.

"Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum." *Smith, supra*, 456 Mich 551-552 (citing 5 Weinstein, Evidence (2d ed), §803.04[4], p 803-24). Here, there was testimony that the declarant-victim was severely beaten by defendant and that she drifted in and out of consciousness throughout the night and the following morning. She needed assistance to reach her mother's car in the morning, and testified that she was still extremely scared and upset at the hospital, and had a hard time speaking because her mouth was swollen. Although the victim initially expressed reluctance to speak to the police, the record presents no evidence of persistent or suggestive questioning. Compare *Straight, supra*, 430 Mich at 426, and *Smith, supra*, 456 Mich at 553. The examining physician testified that the victim had been severely traumatized over her entire body, and Hicok testified that on arrival at the hospital to interview the victim, she appeared "extremely shaken up, visibly shaken and very upset." The trial court determined that this testimony demonstrated the victim was still under the stress of excitement caused by defendant's attacks. In addition, the court determined that the above related testimony of the victim and her mother specifically established foundation of defendant's threat. We conclude that fear of defendant's reprisals better explains the relatively brief passage of time than does defendant's contention that the dazed and medicated victim concocted this statement with her mother.

The trial court's determination whether the declarant was still under the stress of the event is given wide discretion. McCormick, Evidence (3d ed), §297, p 857. The instant trial court did not abuse its discretion in determining Hicok's testimony relating the victim's statement was admissible as an excited utterance. *Kowalak, supra*, 215 Mich App 558.

III

Defendant's third claim of error regards the proportionality of his sentence. He contends that the sentences imposed on the extortion and criminal sexual conduct convictions are disproportionate in light of his background.

Habitual offender sentencing is reviewed for an abuse of discretion. *People v Cervantes*, 448 Mich 620, 627; 532 NW2d 831 (1995). *People v McFall*, 224 Mich App 403, 415; 569 NW2d 828 (1997). An abuse of discretion will be found where the sentencing court violates this principle of proportionality, which requires sentences imposed by the court to be proportionate to the seriousness of

the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Defendant's claim has no merit. The court expressed concern about defendant's lack of remorse and lack of awareness as to the criminal nature of his actions, noting specifically his refusal to accept that he committed rape. Disputing his contention that the intercourse demonstrated long-time lovers "making up," the court deemed incredulous defendant's assertion that the acts were separate and distinct from the brutal assault. The court found that defendant possessed a dangerous nature, likely to result in a repeat of the events, and referencing his prior criminal history concluded he had little chance of rehabilitation.

The trial court properly considered all relevant criteria. In light of the fact that defendant's habitual offender status allowed for life sentences on each of the three counts, we find the terms of imprisonment imposed to be proportional, and conclude that there was no abuse of discretion. *Cervantes, supra; People v Hansford* (*After Remand*), 454 Mich 320, 326; 562 NW2d 460 (1997).

IV

Finally, defendant makes two connected claims of error. Alleging ineffective assistance of counsel in the failure to request an instruction on third-degree criminal sexual conduct, defendant also asserts error on the part of the trial court in its failure to sua sponte instruct on this lesser offense. We deny both claims.

Defendant did not request instruction on the lesser offense of third-degree criminal sexual conduct, nor did he object to the instructions as given. Absent a request, review of a failure to give an instruction will be granted only if the failure to review the issue would result in miscarriage of justice. *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997). Even when requested, failure to instruct on a necessarily lesser included offense is not error mandating reversal where the omission is harmless. *People v Spivey*, 202 Mich App 719, 727; 509 NW2d 908 (1993).

In the instant case, the charge of first-degree criminal sexual conduct was brought on the aggravating factor of personal injury. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Defendant sought to separate the sexual conduct from the personal injury, asserting that the penetrations were consensual. Thus, defendant admitted the assault resulting in personal injury, but denied the use of force of coercion related to the sexual conduct. Because the aggravating element distinguishing first-degree from their-degree criminal sexual conduct (personal injury) was not in dispute, but only whether the had been **any** criminal sexual conduct (force or coercion), the failure to instruct on third-degree criminal sexual conduct was harmless.

An ineffective assistance of counsel claim is reviewed to determine whether defendant has shown that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Because defendant failed to move for either a *Ginther*[1] hearing or

resentencing based on ineffective assistance of counsel, review of this claim is limited to mistakes apparent on the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995).

To demonstrate ineffective assistance, defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). He must also show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 687-688. As demonstrated by the previous conclusion, instruction on third-degree criminal sexual conduct was unwarranted. Consequently, defendant was not prejudiced by his counsel's representation.

We affirm.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jane E. Markey

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).