STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR H. CAYCE,

Defendant-Appellant.

UNPUBLISHED
June 18, 1999

No. 207774
Oakland Circuit Court
LC No. 96-143597 FC

Before: Doctoroff, P.J., and Markman and J.B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349; MSA 28.581, first-degree criminal sexual conduct (sexual penetration in circumstances involving commission of another felony), MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), and extortion, MCL 750.213; MSA 28.410. Defendant was sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to forty to eighty years' imprisonment for the kidnapping conviction, forty to eighty years' imprisonment for the criminal sexual conduct conviction, and ten to forty years' imprisonment for the extortion conviction. Defendant now appeals as of right. We affirm, but remand for amendment of the judgment of sentence.

Defendant forcibly kidnapped a young woman, with whom he had previously had a relationship, in a public parking lot. As he dragged her to his car, he told her that he had a gun in his pocket and that, if she screamed, he would "blow [her] fuckin' head off." Defendant subsequently handcuffed and gagged his victim inside of the car and, while transporting her to a motel, periodically punched her in the face and threatened several times to kill her. The victim was eventually raped by defendant at the motel.

Defendant first argues that there was insufficient evidence to support the jury's finding that he was not insane at the time of the crimes.[1] However, MCL 768.21a; MSA 28.1044(1) provides that legal insanity is an affirmative defense which the defendant must prove by a preponderance of the evidence:

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

(1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400a of the mental health code, . . . that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness . . . does not otherwise constitute a defense of legal insanity.

* * *

(3) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

"[T]he question of whether an affirmative defense has been established is usually a question for the jury and any challenge in that regard goes to the weight and not the sufficiency of the evidence." *People v McNeal*, 152 Mich App 404, 415; 393 NW2d 907 (1986). Because insanity is an affirmative defense, no question regarding sufficiency of the evidence arises. *Id*. at 417. In order to preserve for this Court's review the argument that the jury verdict was against the weight of the evidence, defendant was required to move for a new trial below. MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Because he failed to do so, the issue is not preserved for our review. *Id*; *McNeal*, *supra* at 417.

Moreover, the jury's finding that defendant was not legally insane at the time of the crimes was not against the great weight of the evidence. In support of his insanity claim, defendant presented the testimony of Dr. Van Horn, who opined that defendant was "temporarily insane" on the day of the incident and that he did not understand the wrongfulness of his actions. On cross-examination, however, Van Horn admitted that defendant had given her a false version of the facts. When confronted with additional evidence concerning defendant's duplicity in carrying out his actions, Van Horn testified that she would have to "re-evaluate" her position.

In rebuttal, the prosecution's expert witness, Dr. Heffner, testified that defendant exhibited no signs of mental illness, and that the evidence adduced at trial demonstrated that he recognized the wrongfulness of his conduct. Heffner's testimony was supported by evidence that defendant lied to several people regarding the victim's injuries, that he attempted to conceal his victim from view, that defendant told a friend that he had done something "real bad" and that the police were going to be looking for him, and that defendant fled from police when they attempted to apprehend him. These were actions consistent with an appreciation of one's own course of criminal conduct.

It is the province of the jury to determine questions of fact and to assess the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Viewing the evidence in the light most favorable to the prosecutor, there was sufficient evidence presented from which a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, and that defendant was not insane at the time the crime was committed.

Defendant additionally argues that his sentences violate the principle of proportionality. This Court reviews a sentence for an abuse of discretion. *People v St John*, 230 Mich App 644, 650; 585 NW2d 849 (1998). A sentence constitutes an abuse of discretion if it is not 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); *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998). This Court's review of an habitual offender sentence is limited to considering whether the sentence violates the principle of proportionality, without reference to the sentencing guidelines. *People v Crawford*, 232 Mich App 608, 621; 591 NW2d 669 (1998); *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996).

Because defendant was a fourth habitual offender, the trial court had broad discretion to sentence him to any period of incarceration up to life. MCL 769.12(1)(a); MSA 28.1084(1)(a); *Crawford*, *supra* at 622. The crimes in this case were extremely serious. Defendant dragged his victim to his car, telling her that he had a gun in his pocket and that, if she screamed, he would blow her head off. He handcuffed her and, as he drove, continuously hit her in the face, threatening to kill her. He gagged her and reclined her seat back to avoid detection. He then used her credit card to pay for a motel room, forcing her to sign the receipt, and subsequently raped her.

The presentence investigation report in this case indicates that defendant has twelve prior felony convictions, including delivery of marijuana; malicious destruction of police or fire property; felonious assault; assault and battery; and two counts of first-degree murder. It is appropriate for "persons whose conduct is more harmful and who have more serious prior criminal records to receive greater punishment than those whose criminal behavior and prior records are less threatening to society." *People v Cervantes*, 448 Mich 620, 628-29; 532 NW2d 831 (1995), quoting *Milbourn*, *supra* at 651. Moreover, "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; 562 NW2d 460 (1997). The sentences imposed in this case were within the limits authorized by the Legislature for a fourth habitual offender, pursuant to MCL 769.12(1)(a); MSA 28.1084(1)(a). In light of the serious nature of these crimes, defendant's extensive criminal record, and his demonstrated inability to reform, we believe that the instant sentences are proportionate to the offense and the offender. *Hansford*, *supra* at 326; *Crawford*, *supra* at 622.

We note, however, that the judgment of sentence incorrectly states that defendant was sentenced to ten to forty years' imprisonment for the CSC I conviction and to forty to eighty years' imprisonment for the extortion conviction. We remand to the trial court to amend the judgment of sentence to correctly reflect defendant's sentences of forty to eighty years' imprisonment for the CSC I conviction and ten to forty years' imprisonment for the extortion conviction.

Affirmed and remanded for amendment of the judgment of sentence. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Stephen J. Markman
/s/ Joseph B. Sullivan

[1] "Mental illness" is defined by MCL 330.1400(g); MSA 14.800(400)(g) as "a substantial disorder of thought or mood that significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life."