STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES GARY HAISLIP,

Defendant-Appellant.

UNPUBLISHED
May 19, 2000

No. 211132
Macomb Circuit Court
LC No. 97-002990-FC

Before: Murphy, P.J., and Collins and Owens, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Defendant was sentenced to five to fifteen years' imprisonment. We affirm.

On August 15, 1997, the victim went to a party at the home of Eric Perez with several friends. On that day, the victim was fifteen years old, six days shy of her sixteenth birthday. While at the party, the victim and her friends consumed alcohol and smoked marijuana. Defendant, whom the victim previously met at the mall and had seen a few times before, arrived at the party after the victim. At some point during the party, the victim and defendant were alone in the basement kissing on a couch. Defendant and the victim left the couch and went to a nearby bed where defendant took off the victim's shirt. The victim admitted that she voluntarily kissed defendant and wanted defendant to take off her shirt. However, when defendant got on top of the victim and took off her pants, the victim objected and told defendant to "get off." Thereafter, defendant unzipped his pants and put his penis in the victim's vagina. The victim testified that she did not want to have sex with defendant, and that, during the act, she felt a sharp pain. After the assault, the victim went to the bathroom where Perez threw her on the floor and also assaulted her.

After leaving the scene of the incident, the victim noticed that she was bleeding. The Warren police were called and the victim was transported to Bi-County Hospital. Dr. Matthew Dikin testified that he examined the victim and his notes taken regarding the victim's medical history indicated, in part, that the victim stated that she did not know if defendant penetrated her. Defendant was charged with CSC I, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and found guilty of CSC III.

Defendant's first issue on appeal is that the trial court erred when it denied defendant's request for instruction on the cognate lesser offenses of CSC II, MCL 750.520c; MSA 28.788(3), and CSC IV, MCL 750.520e; MSA 28.788(5). We disagree. Criminal jury instructions are reviewed in their entirety to determine whether error requiring reversal exists. *People v Mass*, 238 Mich App 333, 339; 602 NW2d 322 (1999). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Id*.

There are two types of lesser included felony offenses, necessarily included offenses and cognate lesser offenses. *People v Marji*, 180 Mich App 525, 530; 447 NW2d 835 (1989). A necessarily included offense is one which must be committed as part of the greater offense; it would be impossible to commit the greater offense without first having committed the lesser. *People v Bailey*, 451 Mich 657, 667-668; 549 NW2d 325 (1996); *People v Garrett*, 161 Mich App 649, 651; 411 NW2d 812 (1987). A cognate lesser offense is one which shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). Before a court instructs on a cognate lesser offense, it must examine the specific evidence to determine whether it would support a conviction of the lesser offense. *People v Pouncey*, 437 Mich 382, 387; 471 NW2d 346 (1991); *People v Heflin*, 434 Mich 482, 495; 456 NW2d 10 (1990). If the defendant requests an instruction regarding a cognate lesser offense and the evidence supports it, the trial court must give the instruction. *People v Veling*, 443 Mich 23, 36; 504 NW2d 456 (1993); *People v Sullivan*, 231 Mich App 510, 517-518; 586 NW2d 578 (1998).

In *People v Lemmons*, 454 Mich 234, 254, n 29; 562 NW2d 447 (1997), the Michigan Supreme Court recognized that CSC II is a cognate lesser offense of CSC I. Here, the issue was whether there was evidence that defendant had sexual contact rather than intercourse with the victim, which would support the cognate lesser offense instructions. The trial court determined that there was no dispute that defendant had sexually penetrated the victim, and that there was no evidence to support just sexual contact. A review of the record supports the trial court's rulings. The victim testified at trial that there was penetration. Although Dr. Dikin testified that the victim was not sure of penetration when he took her medical history, the prosecution produced two other witnesses that testified that the victim told them the night of the incident that she was penetrated. Furthermore, defendant's trial counsel conceded penetration during his opening statement. Therefore, the trial court's decision to deny defendant's request for the instruction on cognate lesser offenses was not error.

Defendant's second issue on appeal is that the trial court erred when it denied defendant's request for a consent jury instruction. We disagree. Defendant was convicted of CSC III. A person can be found guilty of third-degree criminal sexual conduct if (1) there is sexual penetration, and (2) the victim is at least thirteen years of age and under sixteen years of age. MCL 750.520d; MSA 28.788(4). Consent is not a defense to CSC III. *People v Worrell*, 417 Mich 617, 622-623; 340 NW2d 612 (1983). On the date of the incident, the victim was fifteen years old. The consent of a person under the age of sixteen is legally ineffective. *Id.* at 623. Therefore, even if the court erred by not giving the instruction, defendant suffered no harm by the absence of an instruction on consent.

Defendant's third issue on appeal is that he was denied a fair trial due to several incidences of prosecutorial misconduct. We disagree. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Claims of prosecutorial misconduct are decided on a case by case basis and the reviewing court examines the record and evaluates the alleged improper remarks in context. *Id*.

The first instance of alleged misconduct occurred when the prosecutor, in opening statement, stated that defendant admitted to police that he had sex with the victim. When a prosecutor states that evidence will be presented, which later is not presented, reversal is not required if the prosecutor acted in good faith and the defendant was not prejudiced by the statement. *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997); *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). In this case, the prosecution argues on appeal that it decided not to present defendant's statement to police after defense counsel, during opening statement, conceded sexual intercourse between defendant and the victim. Whether the prosecution's assertion is true, defendant did not suffer any prejudice given this defense concession and the victim's uncontroverted testimony that defendant penetrated her and that she did not consent.

Defendant's next claim of prosecutorial misconduct allegedly occurred during closing argument when the prosecutor stated that sexual penetration was uncontroverted. We disagree. A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Here, the evidence of penetration was uncontroverted, therefore, defendant's claim is without merit.

Next, defendant argues that misconduct occurred when the prosecutor stated in closing argument that "more than half of high school students have used marijuana at least once," and that "42,000 people in prison in Michigan . . . think[] they're innocent." Defendant also contends that the prosecutor's statement, that defendant "had a duty to protect her," and that he should be dating someone his own age, denied him a fair trial. We disagree. A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). Although the prosecutor's statements are not supported by the evidence, we find that defendant was not prejudiced by the remarks. Defendant had sexual intercourse with the victim, and the victim was fifteen years old.

Defendant next alleges that the prosecutor misstated the law when, during closing argument, he stated that the jury would not hear an instruction on consent and that consent was not a defense because there was no evidence of consent. We again disagree. Where the prosecutor's misstatement of the law remains uncorrected and severely undermines a viable defense theory, the defendant has been deprived of a fair trial. *People v Matulonis*, 115 Mich App 263, 267-268; 320 NW2d 238 (1982). Here, however, the prosecutor did not misstate the law. Prior to closing arguments the trial court, defense counsel, and the prosecutor discussed the instructions that were to be given. The court correctly decided that there was no evidence to support the consent instruction.

The next incidence that defendant claims constituted misconduct occurred during rebuttal argument. The prosecutor argued that people who commit crimes do not have a certain look, and then gave the example of Ted Bundy. Otherwise improper prosecutorial remarks might not require reversal if they were made in response to issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). In this case, defense counsel, in closing argument, argued that after defendant emerged from the house after the incident, he did not look like a person that had committed rape. We find no error in the prosecutor's statement, because the statement was directly in response to defense counsel's closing argument.

Last, defendant argues that the prosecutor inappropriately tried to shift the burden of proof to defendant when he argued that defendant's actions of calling and paying for a taxi cab for the victim were an attempt to cover his criminal actions. We disagree. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, the prosecutor was drawing proper inferences from the evidence presented at trial. Therefore, we find no error.

Defendant also argues that the trial court should have intervened sua sponte to the alleged misconduct to ensure defendant received a fair trial. Because the prosecutor did not commit misconduct, the trial court's inaction was not error.

Defendant's fourth issue on appeal is that he was denied effective assistance of counsel as a result of the trial court's refusal to allow defense counsel to argue consent, and defense counsel's failure to make appropriate objections to the prosecutorial misconduct. We disagree. To establish a denial of effective assistance of counsel under the state and federal constitutions, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced the defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Furthermore, the defendant must overcome a strong presumption that the challenged action is sound trial strategy. *Stanaway*, *supra* at 687. Here, as earlier stated, the trial court did not err in finding that there was no evidence to support consent. Furthermore, the prosecutor's comments and arguments were not inappropriate. Therefore, defendant has failed to overcome the presumption of effective assistance of counsel.

Defendant's fifth issue on appeal is that the prosecution failed to establish that the victim's personal injury was caused by defendant. Defendant argues that given the allegedly insufficient proofs, the trial court erred in denying his motion for a directed verdict. We disagree. When reviewing a trial court's ruling on a motion for directed verdict, this Court tests the validity of the motion by the same standard as the trial court. *People v Warren*, 228 Mich App 336, 345-346; 578 NW2d 692 (1998). When ruling on a motion for a directed verdict, a trial court must consider the evidence presented by the prosecutor up to the time the motion was made in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the charged crime were proven beyond a reasonable doubt. *People v Vincent*, 455 Mich 110, 121; 565 NW2d 629 (1997). Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

In this case, defendant was charged with CSC I, and convicted of CSC III. To prove CSC I, the prosecution must establish beyond a reasonable doubt that (1) defendant penetrated the victim, (2) force or coercion was used, and (3) personal injury occurred. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Defendant argues on appeal that the prosecution did not establish that the personal injuries sustained by the victim were caused by defendant, rather than Perez. Defendant specifically cites to the testimony that the victim was raped by Perez after having sexual intercourse with defendant. However, the record reflects that the victim testified that she felt pain during the act with defendant. The victim also testified that she felt ill the morning afterwards and bled after the incident. Furthermore, the victim testified that she continued to be scared following the incident. The evidence is clear that the victim was penetrated by defendant, and there was testimony that the victim did not want to have sexual intercourse with defendant, and told defendant to get off of her. Viewing the evidence in the light most favorable to the prosecution, the prosecution sufficiently established the elements of CSC I, and therefore, the trial court properly denied defendant's motion for a directed verdict.

Defendant's sixth issue on appeal is that his sentence violated the principle of proportionality. We disagree. In reviewing a trial court's sentencing decision, the appropriate standard of review is abuse of discretion. *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990); *People v McCrady*, 213 Mich App 474, 483; 540 NW2d 718 (1995). A sentencing court abuses its discretion when it violates the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the crime and the defendant's prior record. *Milbourn*, *supra* at 635-636. Defendant was convicted of CSC III, and sentenced to five to fifteen years' imprisonment. The guidelines range was three to eight years. Therefore, defendant's sentence was within the sentencing guidelines range. A sentence imposed within an applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996). However, a sentence within the guidelines range can conceivably violate proportionality in unusual circumstances. *Milbourn*, *supra* at 661.

In this case, defendant had a criminal record that included eight misdemeanors and two felonies. Defendant claims that his sentence was disproportionate to the offense because of the unusual circumstances that the victim had consensual sexual intercourse with him, that she lied about her age, and that at the time of the incident the victim was only six days from her sixteenth birthday. Although the jury returned a verdict on CSC III, that does not necessarily mean that the jury found that the victim consented to sexual intercourse with defendant. The jury was not instructed on consent, and there was sufficient testimony that the victim did not consent. The jury could have found that the evidence did not support the element of force or coercion, or that defendant injured the victim. Further, unusual circumstances are not presented by the fact that the victim lied to defendant about her age, or that, at the time of the incident, the victim was six days short of her sixteenth birthday. Unusual circumstances are those that are "uncommon, not usual, [or] rare." *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). The trial court having sentenced defendant within the guidelines, we find that there are no unusual circumstances such that would render the sentence an abuse of discretion. *Milbourn*, *supra* at 635-636.

Defendant's final issue on appeal is that the cumulative effect of the multiple errors committed during the trial denied defendant due process of law. We find defendant's argument without merit. Although it is possible that the cumulative effect of a number of errors may constitute error requiring reversal, only actual errors may be aggregated to determine their cumulative effect. *Rice*, *supra* at 448. In this case, no single error constituted error requiring reversal. Furthermore, although there may have been some flaws in the proceedings, defendant received a fair trial. Defendant is entitled to only a fair trial, not a perfect one. *People v Reed*, 449 Mich 375, 379; 535 NW2d 496 (1995).

Affirmed.

/s/ William B. Murphy
/s/ Jeffrey G. Collins
/s/ Donald S. Owens