

S T A T E O F M I C H I G A N
C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

May 26, 2000

Plaintiff-Appellee,

v

No. 217371

Kent Circuit Court

LC No. 98-002948-FC

SHAWNTAE LAINELLE MCINTOSH,

Defendant-Appellant.

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Defendant was sentenced as an habitual third-time offender, MCL 769.11; MSA 28.1083, to an enhanced prison term of 25 to 75 years. We affirm.

This case arises out of a sexual assault that occurred in February 1998, in Kent County, at a nursing home where both defendant and the victim, a mildly mentally retarded woman, were working. Defendant grabbed the victim's breast and subsequently dragged the victim into a hallway where he forcefully penetrated her, causing personal injury.

Defendant argues that the prosecutor failed to present sufficient evidence to prove the element of personal injury to the victim beyond a reasonable doubt. We disagree.

Defendant was convicted of CSC I pursuant to MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), which provides, in pertinent part: (1) "A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists: . . . (f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration"

Viewing the evidence in a light most favorable to the prosecution, we must 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 Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Ample evidence was adduced at trial regarding personal injury to the victim to support the jury's verdict beyond a reasonable doubt. A nurse testified that upon examination of the victim after the sexual assault, she found a laceration in the lower portion of the vaginal opening accompanied by redness and bloody discharge. The nurse further testified that she would not have expected to have observed these injuries in the absence of sexual assault. Finally, the victim testified that she experienced pain when defendant forcibly penetrated her vagina with his penis. Viewing this testimony in a light most favorable to the prosecution, we conclude that the prosecution presented sufficient evidence to establish beyond a reasonable doubt that defendant caused personal injury to the victim. See *People v Swinford*, 150 Mich App 507, 512; 389 NW2d 462 (1986) (visible handprints on the neck and tears and swelling in the vaginal area are sufficient to establish the bodily injury element of CSC I).

Defendant next advances several claims of prosecutorial misconduct, all of which he failed to preserve for appellate review by timely objecting at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because these claims are unpreserved, we review their merits under the plain error rule. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). Defendant must show that plain error affected his substantial rights. *Id.* We will not reverse unless defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* Viewing the challenged remarks in context, *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992), defendant has failed to demonstrate that plain error occurred.

Defendant's claim that the prosecutor used the prestige of his office to improperly vouch for "the validity of the People's case" lacks record support. Rather than personally vouching for the guilt of defendant, the challenged comments constitute proper argument based on the record evidence and the inferences reasonably drawn therefrom challenging the validity of defendant's characterization of his sexual assault of the victim as an illicit, consensual act. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Similarly, defendant's claims that the prosecutor improperly appealed to the sympathy of the members of the jury lacks record support. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). The challenged remarks constitute proper argument that the victim should be believed based on her demeanor on the witness stand and the evidence presented at trial, *id.*, as well as proper argument of the evidence adduced at trial and the inferences reasonably drawn therefrom, *Bahoda, supra*.

Furthermore, we are unconvinced that the prosecutor engaged in misconduct when he characterized defendant's consensual sex defense as "ridiculous," "preposterous," and as "lies." The trial record is replete with defendant's admissions that he lied numerous times about the circumstances of his sexual contact with the victim. Given the circumstances of the sexual contact as testified to by defendant and his admissions to repeatedly lying about those circumstances, the prosecutor's characterizations of defendant's claim of consent constitute proper argument of the evidence and the reasonable inferences drawn therefrom. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor was not required to state his argument in the blandest of terms. *People v Parker*, 76 Mich App 432, 450; 257 NW2d 109 (1977).

We are also unconvinced that the prosecutor improperly “denigrated the defendant’s choice to take the stand on his own behalf.” Viewing the challenged remarks in context, we conclude that the remarks constitute proper argument that defendant was not to be believed. *Launsbury, supra*.

Because defendant has failed to establish individual instances of plain error, defendant’s claim that the totality of errors committed by the prosecutor deprived defendant of a fair trial fails for lack of record support. *People v Skowronski*, 61 Mich App 71, 77; 232 NW2d 306 (1975).

Defendant also challenges the testimony of the law enforcement official who administered a polygraph examination to defendant. We review this unpreserved evidentiary challenge for plain error. *Carines*, 460 Mich at 774. A review of the testimony of the witness reveals that he did not mention that he had administered a polygraph examination of defendant. Compare *People v Smith*, 211 Mich App 233, 234-235; 535 NW2d 248 (1995). Defendant advanced no challenge to the voluntariness of the statements defendant made to the examiner and, on the record before us, we find no evidence to suggest that the statements were not voluntarily made. Under such circumstances, defendant’s statements were admissible. *People v Ray*, 431 Mich 260, 267; 430 NW2d 626 (1988). Further, defendant had ample opportunity to explain his answers. Defendant has failed to show that his substantial rights were affected by any plain error.

We decline to address defendant’s challenge to the racial composition of the jury array in light of his failure to challenge the array before his jury was impaneled and sworn. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996).

Finally, defendant argues that the trial court abused its discretion by sentencing defendant to an excessive sentence of twenty-five to seventy-five years in prison. We disagree.

Provided permissible factors are considered, appellate review is limited to whether the sentencing court abused its discretion. *People v Hansford (After Remand)*, 454 Mich 320, 323-324; 562 NW2d 460 (1997); *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998). A sentencing court does not abuse its discretion in sentencing an habitual offender within the statutory limits established by the Legislature when the offender’s underlying felony, in the context of previous felonies, evinces the defendant’s inability to conform his conduct to the laws of society. *People v Reynolds*, ___ Mich App ___; ___ NW2d ___ (Docket No. 211458, issued March 17, 2000), slip op at 1.

The trial court did not abuse its discretion when it sentenced defendant to twenty-five to seventy-five years’ imprisonment. The sentence imposed fell within the statutory limits. See MCL 765.11; MSA 28.1083. Defendant has a substantial prior record which demonstrates his inability to reform and his lack of rehabilitative potential. The nature of the instant offense demonstrates that defendant has escalated the severity of the crimes that he is willing to commit, because it involves forceful penetration causing injury to an obviously vulnerable victim. Furthermore, it demonstrates an escalated animosity toward women, as defendant’s most recent prior offense involved domestic violence. Defendant was on probation for the domestic violence incident at the time that this assault occurred. Defendant demonstrated absolutely no remorse for what occurred. In light of the serious nature of the crime, the extent of defendant’s criminal history, the particularly egregious circumstances

involving a vulnerable victim, and his demonstrated lack of rehabilitative potential, the trial court did not abuse its discretion when it imposed the 25- to 75-year sentence.

We have carefully considered the issue raised in defendant's supplemental brief and conclude that it merits neither reversal nor discussion.

Affirmed.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ Mark J. Cavanagh