

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL M. REGAN,

Defendant-Appellant.

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UNPUBLISHED

August 18, 2000

No. 208807

Wayne Circuit Court

Criminal Division

LC No. 97-004263

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

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279. He was sentenced to concurrent prison terms of fifteen to thirty years each for the first-degree CSC convictions and five to ten years for the assault conviction. He now appeals as of right. We affirm.

The evidence presented at trial indicated that defendant, a 47-year-old-man, tortured and physically and sexually abused the victim, a 29-year-old mentally disabled woman, over a two-month period.

Defendant first claims that the trial court abused its discretion in denying his request for a court-ordered medical/psychological examination of the victim to determine her mental capacity. We do not find that the trial court's decision to deny defendant's request for an independent, court-ordered medical/psychological examination was an abuse of discretion. *People v Freeman (After Remand)*, 406 Mich 514, 516; 280 NW2d 446 (1979); *People v Wells*, 102 Mich App 558, 563; 302 NW2d 232 (1980). An independent medical examination of a victim is permissible only where there exists a compelling reason for the examination. *People v Payne*, 90 Mich App 713, 723; 282 NW2d 456 (1979). Defendant has failed to meet this burden. The critical question for the jury was whether any existing mental defect or incapacity of the victim was apparent to a reasonable, objective person. See *People v Baker*, 157 Mich App 613, 615-616; 403 NW2d 479 (1986). There is nothing in the

record to indicate that the jury was unable to determine whether the victim suffered from a mental disability. *Id.* Therefore, there was no need for a court-ordered medical evaluation of the victim.

Defendant next claims that the trial court erred by admitting into evidence at trial pornographic video tapes taken from his apartment. Any error relating to the admission of this evidence was harmless in light of (1) the compelling testimony given by the victim, which was supported by the emergency room physician who treated her, (2) defendant's admission at trial that he owned pornographic videotapes, and (3) the testimony of defendant's ex-girlfriend, who testified that she had watched pornographic videotapes with defendant. Defendant has not established that it is more probable than not that a different outcome would have occurred but for the alleged error. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999); *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

Defendant also claims that various statements made in the prosecutor's opening statement deprived him of a fair trial. Defendant did not object to the challenged statements at trial. "[F]ailure to object during trial precludes appellate review of alleged prejudicial remarks by the prosecutor unless the prejudicial effect would not have been cured by a cautionary instruction and failure to consider the issue would result in a miscarriage of justice." *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). We find that the prosecutor's remarks were not prejudicial. In any event, defendant has failed to demonstrate that the prosecutor's comments could not have been cured by an appropriate instruction upon timely objection. *Id.*

We also find without merit defendant's claim that the prosecutor erred in conducting a voir dire into the competency of the victim. The prosecutor was permitted to qualify the victim as a witness and show that she was competent to testify at trial. *People v Burch*, 170 Mich App 772, 774; 428 NW2d 772 (1988). In any event, any error in allowing this voir dire was harmless in light of the other evidence presented at trial indicating that the victim suffered from a mental disability. *Carines*, *supra* at 764, 774.

We also find no abuse of discretion arising from the admission of the victim's statement to police. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). The statement was admissible pursuant to MRE 801(d)(1)(B) because the victim was subject to cross-examination at trial, the victim's prior statement was consistent with her testimony at trial, and the statement was offered to rebut an implied charge of fabrication or improper influence or motive.

Next, defendant claims that the trial court should have permitted him to ask the victim whether the injuries to her legs were caused by drug dealers. However, defendant never attempted to elicit this information from the victim and made no offer of proof to this effect. See MRE 103(a)(2). Additionally, we note that evidence was eventually introduced through defendant's testimony to the effect that the victim allegedly told him that drug dealers caused the injury to her legs. Therefore, the jury was provided with this evidence, albeit through the testimony of defendant.

Defendant also claims that the trial court should have instructed the jury that it should apply a reasonable person standard in determining whether he knew or had reason to know of the victim's mental disability. It is proper for a trial court to instruct a jury that it is to apply a reasonable person

standard in determining whether the defendant knew or had reason to know that the victim was mentally disabled or incapacitated. *Baker, supra* at 615. However, this Court did not hold that such an instruction was always required. *Id.* The instruction given in this case was consistent with the standard jury instruction, CJI2d 20.11(6). The jury was instructed that, in order to find defendant guilty, the prosecutor must have proved either that he knew *or should have known* of the victim's disability. This was a correct statement of the law. *Baker, supra*. Additionally, even if the instruction given by the trial court encouraged the jury to apply a subjective standard (as to whether defendant subjectively knew that the victim suffered from a mental disability) as defendant claims, that would have inured to defendant's benefit, because defendant testified at trial that he did not know of the victim's mental disability. This was the only evidence presented at trial regarding defendant's subjective state of mind. Therefore, if the jury did apply a subjective standard, defendant was not prejudiced thereby, *Carines, supra* at 764, 774, and reversal is not required. *Id.*

Next, we reject defendant's claims that the trial court's instructions regarding mental disability were confusing because the trial court referred to both "mental disability" and "mental incapacitation" when instructing the jury. The instructions given, although somewhat imperfect, fairly presented the element of mental disability to the jury and protected defendant's rights. *People v Holt*, 207 Mich App 113, 116; 523 NW2d 856 (1994); see also *Carines, supra* at 764, 774. The instructions included all of the elements of the crime charged and did not exclude any material issues or defenses. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Although the trial court erroneously referred to a "mental incapacity" instead of a "mental disability" when instructing the jury on the requirement that defendant either knew or should have known of the victim's mental condition, that one mistaken reference did not prejudice defendant. The term "mental incapacity" was never defined for the jury. Moreover, the trial court had previously correctly indicated that the jury was required to find that the victim suffered from a mental disability. There is no dispute that the trial court correctly defined the term "mental disability" for the jury. See CJI2d 20.11. Under these circumstances, where there was no additional reference to "mental incapacity," that term was never defined for the jury, and the jury was properly instructed on the definition of "mental disability," the singular inadvertent reference to "mental incapacity" did not prejudice defendant. *Carines, supra* at 764, 774.

The jury was properly instructed in regard to the fact that it must find that the victim suffered from a "mental disability" as that term was defined by the trial court. The jury was never instructed that any element of the offense involved "mental incapacity" and was never given a definition of that term. Thus, defendant's claim that some of the jurors may have found that the victim suffered from a "mental incapacity" while others found that she suffered from a "mental disability" is without merit.

We also reject defendant's claim that the evidence was insufficient to support his convictions for first-degree CSC. Viewing the evidence in a light most favorable to the prosecution, *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992), we conclude that the evidence was more than sufficient to find that the essential elements of each crime in each count were proven beyond a reasonable doubt.

Lastly, having found no prejudicial errors in this case, we reject defendant's claim that the cumulative effect of any errors denied him a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Brian K. Zahra

/s/ Henry William Saad

/s/ Hilda R. Gage