STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 20, 2000
v	No. 214718 Wayne Circuit Court
TIMOTHY LEE POWELL, Defendant-Appellant.	LC No. 98-002891

Before: Neff, P.J., and Talbot and J. B. Sullivan,* JJ.

PER CURIAM.

Defendant was convicted of one count of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4), and one count of fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5). He was sentenced to nine to fifteen years in prison and appeals as of right. We affirm.

At trial, the prosecution sought to establish each count of criminal sexual conduct through alternative theories. The prosecution first sought to show that defendant engaged in sexual contact with a victim who was mentally incapable of consenting and whom defendant knew or had reason to know to be mentally incapable. Alternatively, the prosecution sought to establish each count by showing that defendant accomplished the proscribed sexual acts through the use of force or coercion. Defendant challenges the sufficiency of the evidence introduced under both theories.

In particular, defendant first claims there was insufficient evidence to establish that defendant engaged in sexual contact and sexual penetration with a mentally incapable person. We need not address this issue because we find the prosecution presented sufficient evidence to support a conviction under the alternative theory prohibiting sexual acts accomplished through the use of force or coercion.

In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the

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

essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

To establish third- and fourth-degree criminal sexual conduct under the theory of force, the prosecution must prove, beyond a reasonable doubt, that defendant used force or coercion to accomplish the proscribed sexual act. MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). Force or coercion includes, but is not limited to, physical force or violence, threats of force, and threats of retaliation. *Id*.; *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992).

It is defendant's contention that the prosecution failed to present sufficient evidence because the testimony established that any force used occurred after the sexual activity; thus, force was not used to *accomplish* the sexual acts. Defendant is mistaken. At trial, the victim testified that defendant used threats and force at various times during the sexual activity. According to the testimony, defendant forced the victim onto his stomach despite his efforts to prevent defendant from doing this. This force occurred before penetration and other continuing sexual contact. The victim also testified that he pushed defendant, that defendant threatened to hit him if he did not stop pushing defendant, and that the threat occurred before defendant inserted his finger into the victim's anus. Thus, the record clearly establishes the use of force to accomplish the proscribed sexual acts. We hold that sufficient evidence was introduced at trial to sustain defendant's convictions.

Defendant next contends that the trial court abused its discretion when it failed to redact a prejudicial remark in defendant's statement to the police, suggesting a prior history of criminal sexual conduct. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). The trial court did not abuse its discretion when it admitted defendant's denial of penetration into evidence. Although defendant contends that the statement was unduly prejudicial, prejudice means more than just damage to one's case. *People v Vasher*, 449 Mich 494, 501-502; 537 NW2d 168 (1995). It means an undue tendency to move the tribunal to decide the case on an improper basis. *Id*. at 501.

Defendant's remark that there was "no penetration" after being informed that he might face charges of first-degree criminal sexual conduct, at most, suggests that defendant is familiar with the elements of this crime. However, it does not follow that such knowledge was necessarily derived from having been previously convicted of first-degree criminal sexual conduct. Thus, defendant's contention that the remark caused the jury to infer prior criminal sexual conduct is tenuous at best.

Nor is it clear that the prosecution referred to the remark in closing argument for the purpose of planting a seed in the jury's mind that defendant had such a history. The purpose was apparently to apprise the jury that defendant had a more thorough knowledge of what occurred than someone who did not commit the crime. In other words, the question "how does he know to deny this?" could be construed as meaning "how does defendant know what did and did not happen to the victim on that night?" Thus, defendant's assertion that the prosecution made this remark for the purpose of causing

the jury to convict defendant on the basis of his past history of criminal sexual conduct is hardly self-evident.

Because we are unconvinced that the challenged remark resulted in unfair prejudice to defendant, we hold that the trial court did not abuse its discretion when it failed to redact the remark.

Affirmed.

/s/ Janet T. Neff
/s/ Michael J. Talbot
/s/ Joseph B. Sullivan