STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 24, 2000
v	No. 220814 Van Buren Circuit Court
TEDDIE RAY DANIEL, Defendant-Appellant.	LC No. 99-011369-FH

Before: Fitzgerald, P.J., and Hood and McDonald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(e); MSA 28.788(3)(1)(e), assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1), and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to prison terms of 5 years and 11 months to 15 years for the criminal sexual conduct conviction, and 3 to 10 years for the conviction of assault with intent to commit criminal sexual conduct involving sexual penetration. The latter two sentences are to be served concurrently, with credit for 102 days served. Defendant was sentenced to an additional two years for the felony-firearm conviction, with no credit for time served. Defendant appeals as of right. We affirm.

I

Defendant first argues there was insufficient evidence to convict him of second-degree criminal sexual conduct, MCL 750.520c(1)(e); MSA 28.788(3)(1)(e), and assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). Defendant claims the prosecution failed to prove the required specific intent element of either crime. We disagree.

In reviewing defendant's challenge to the sufficiency of the evidence, this Court "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt."

People v Carines, 460 Mich 750, 757; 597 NW2d 130 (1999); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

Second-degree criminal sexual conduct, MCL 750.520c(1)(e); MSA 28.788 (3)(1)(e), involves sexual contact, which is defined in MCL 750.520a(k); MSA 28.788(1)(k):

> Sexual contact includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being *for the purpose of sexual arousal or gratification*. [Emphasis added.]

The specific intent necessary for the crime of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1), is that the defendant must have intended to commit a sexual act "involving some actual entry of another person's genital or anal openings or some oral sexual act." *People v Snell*, 118 Mich App 750, 755; 325 NW2d 563 (1982). Intent is a question of fact to be inferred from the circumstances by the trier of fact. *People v McBride*, 204 Mich App 678, 682; 516 NW2d 148 (1994).

Regarding second-degree criminal sexual conduct, defendant argues that the prosecution proved only that defendant touched the victim's breast and did not prove that he intended to "sexually gratify" himself. Instead, defendant claims the evidence shows he intended to humiliate and demean the victim. Defendant relies on the victim's testimony that defendant told her "women like you never give a guy like me a chance," and that he "grabbed and squeezed" her breast, argued with her about her presence at the predominately Hispanic bar, and was "violently mad" after she rejected his advances. We disagree.

The victim testified that defendant threatened her at gunpoint, choked her, forced her into her own pickup truck, physically dragged her back to the pickup after she tried to escape, and made her fear for her life. He told her that he wanted a "piece of ass" and that he was "tired of jacking off." The victim also testified that defendant grabbed her breast, said something similar to "I want you" to her, questioned why she would not "do" a white man and attempted to justify his actions by declaring that she would not have given a man like him a chance otherwise. There was ample evidence from which the jury could conclude that defendant touched the victim's breast with the required specific intent.

Defendant also argues there was insufficient evidence that he intended to sexually penetrate the victim. Although he threatened the victim, defendant states "there was a substantial amount of other conversation, over an extended period of time that mitigated against a finding that defendant really intended a sexual assault." Defendant also argues he did not attempt to take the victim's clothes off, did not touch or fondle her genital area, and did not place her in a position to accomplish sexual penetration. Defendant cites cases where the defendants were closer to accomplishing penetration than in this case. However, it is not necessary to show that the sexual act was started or completed in order to prove the required specific intent. *Snell*, *supra* at 755. The evidence was sufficient for the jury to infer that defendant assaulted the victim intending to force her to engage in sexual intercourse.

II

Defendant next argues that the trial court erred in refusing to allow defendant to produce an alibi witness four days before the start of the trial despite a violation of the notice of alibi statute, MCL 768.20, MSA 28.1043. We disagree.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). For preserved, nonconstitutional errors, the defendant has the burden to "demonstrate that after an examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The notice of alibi statute requires a defendant planning to offer an alibi defense to file a notice listing the proposed witnesses "… not less than 10 days before the trial of the case, *or at such other time as the court directs* …." MCL 768.20; MSA 28.1043 (emphasis added). In *People v Travis*, 443 Mich 668, 679; 505 NW2d 563 (1993), our Supreme Court held that the emphasized language gives the trial court discretion to determine whether notice was timely given in light of the circumstances. In *Travis*, *supra* at 683-684, the Court adopted the test from *United States v Myers*, 550 F2d 1036 (CA 5, 1977), for a judge's exercise of discretion for the Michigan notice of alibi statute. The *Myers* factors that a judge should consider when determining whether to allow an alibi witness despite a notice violation include prejudice, the reason for nondisclosure, the extent to which the harm from nondisclosure was mitigated by subsequent events, the weight of the evidence against defendant and other relevant factors. *Id*. at 682.

Defendant had waited to add Jeannie Swanner as an alibi witness until late on a Friday afternoon before a Monday trial date. Despite defendant's attempt to characterize the notice as adequate under the circumstances, under *Travis* it most definitely is not.

The result of allowing the alibi witness would certainly be prejudicial to the prosecution, which had almost no time to prepare for the additional witness. Defense counsel's excuse that he did not know of the witness until just before trial is of no matter where defendant does not assert that he only recently learned of her. The statute puts the onus for notification squarely on defendant. Here, defendant's contention is not that he only recently learned of the witness, but that he only recently remembered that she could give alibi testimony. Defendant had a month in which to report any alibi witnesses to the court. That defendant would "remember" a new alibi witness only a few days before trial, considering that the potential witness had visited defendant in jail several times, seems questionable at best. The harm presented by allowing this alibi witness to testify could possibly be mitigated once this witness' story is compared to the various stories of defendant's other alibi witnesses, but in light of the overwhelming weight of the evidence against defendant, the additional alibi witness would not have helped his case. Further, according to what defense counsel told the court, Swanner's testimony would be merely cumulative to that of Kretta Caldwell, defendant's niece. Therefore, the trial judge properly exercised its discretion disallowing defendant's alibi witness where defendant violated the notice statute.

Defendant's argument that the judge committed error in denying defendant's alibi witness is utterly without merit. Defendant has failed to show a "miscarriage of justice" that resulted from any "abuse of discretion" on the part of the judge.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ Gary R. McDonald