STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 7, 2001
v	No. 223712 Wayne Circuit Court
FREDERICK D. DANIELS, Defendant-Appellant.	LC No. 98-012622

Before: Saad, P.J., Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Defendant Frederick Daniels appeals as of right his bench trial convictions of two counts of first-degree criminal sexual conduct.[1] The trial court sentenced Daniels, as a third habitual offender,[2] to thirteen years, four months to twenty-six years, eight months in prison for each first-degree criminal sexual conduct conviction. We affirm in part, and remand in part.

I. Basic Facts And Procedural History

According to her testimony at trial, on Friday, October 30, 1998, the victim left her job at K-Mart, after an eight-hour shift, and drove to her boyfriend's house at approximately 8:30 p.m. Not finding her boyfriend at home, the victim drove to her own home located at 19445 Justine Street, Detroit. Upon arriving home, the victim went upstairs and began to watch television. At approximately 9:00 p.m., the victim heard a persistent knock at her front door and, after procrastinating for a minute, she went downstairs and asked, "who is it?" The victim testified that she heard someone say, "'It's Fred. . . . Fred from across the street.'" The victim looked out her window and saw Daniels standing on her front porch. The victim testified that Daniels said to her, "'[c]ould you give Rick [the victim's sister's boyfriend] some money for me?'" . . . "[a]nd I said, I was like, yes." Daniels then asked for Rick's number, and if he could use the victim's telephone. The victim said, "yes," and went to retrieve the telephone from her room, leaving Daniels outside on the front porch. When the victim returned, she found Daniels in her living room, and she noticed that the front door was closed. The victim did not say anything to Daniels at this point because she was "shocked" that he had entered her home uninvited. The

[1] MCL 750.520b(1)(e).

[2] MCL 769.11.

victim handed Daniels the telephone and, according to the victim, Daniels "pretended" to dial some numbers for approximately two to three minutes. Daniels then put the telephone down, removed a gun from his rear pocket, and told the victim that he was going to rape her. The victim continued her testimony as follows:

Q. Did he give you – after he told you that did he give you any instructions . . .?

A. He tells me to go in the back room and take off all my clothes.

The victim testified that she removed her clothes as ordered, while Daniels walked "back and forth smoking on some crack." Daniels told the victim to get a blanket off the bed and lay on the floor in the other room. The victim stated that Daniels told her to "'play with herself—get wet for him.'" Daniels, still with the gun in his hand, ordered the victim into the bathroom and, while watching her, told her to wash herself. After the victim washed herself, Daniels and the victim went upstairs to her bedroom.

According to the victim, with the gun still in his possession, Daniels ordered her to lay on the bed and to "play with herself" again. Daniels then told the victim that his wife was in a serious car accident, that his baby was dead, and that his wife and other two children were in the hospital. On direct-examination by the prosecution, the victim continued her testimony:

Q. Okay. What happens, what happens after that, what happens then?

A. He performed oral sex on me.

Q. Okay. I'm going to need a definition of that. You said he performed—did a part of his body touch your body?

A. Yes, . . . [h]e sticks his tongue into my vagina.

Q. Okay. Did you want that to happen?

A. No.

Q. When he did that was he clothed at the time?

A. Yes . . . .

* * *

Q. Okay. What position did he have you in. Tell the [c]ourt what position he had you in?

A. My knees on the bed with my face like in the mattress.

Q. After he performed oral sex or cunnilingus on you what happens next . . .?

A. He gets up. He takes off all his clothes and he comes and gets on the bed and makes me perform oral sex on him and he performed oral sex on me.

Q. What did you, what did you have to do with him?

A. I had to stick his penis in my mouth.

Q. Okay. While you were doing that what did he do to you?

A. He put his tongue inside my vagina.

Q. Okay. Did you know where the gun was when this happened?

A. I'm not sure.

Q. All right. Did you want this to happen?

A. No.

Q. Did any other, do you remember any other sex acts taking place upstairs?

A. He had stuck his finger in my butt and asked me had I ever had sex in the butt before.

Q. Did he do anything to make this a little easier, the insertion of the finger into the rectum?

A. Yeah, he put Vaseline on my butt. . . .

* * *

Q. Did he, did he in fact place his penis inside your vagina?

A. Yes; to my knowledge, yes.

The victim testified that Daniels continued to smoke crack while at her home and offered her some of the drug, which she refused. Daniels told the victim to get up and put her clothes on. Daniels then instructed the victim to "wipe down" specific items and fixtures in the house with Tilex. The victim testified that, during this time, Daniels was still in possession of the gun, and told her that if she told anyone about what happened he would kill her and her family.

The victim testified that she and Daniels then left her house in her vehicle, with Daniels in the passenger's seat; the victim was under the misapprehension that Daniels wanted to get something to eat, but she stated that she "ended up taking him to go get some weed . . . in the Six Mile and Hoover area." The victim testified that Daniels exited the car, taking her car keys with him, and approached several homes in the area in an attempt to purchase marijuana. When asked by the prosecution why she did not flee at that point, the victim responded that she could not run because one of her lungs was removed due to a previous bout with pneumonia, and that she currently is suffering from sickle-cell anemia, which exacerbates her pulmonary deficiency.

According to the victim, after Daniels purchased some marijuana, they returned to her house. Daniels began smoking marijuana, and according to the victim, they were "basically just

sitting there" for "a couple of hours." Daniels and the victim again left her house at approximately 4:00 a.m. to 4:45 a.m., purportedly to get something to eat at White Castle, but instead, Daniels had the victim drive to Farwell Park. The victim asked Daniels if he was going to hurt her, to which he replied, "no." According to the victim, a police car suddenly appeared, and Daniels told her to "hurry up and pull off." The victim said she, "pulls off as fast as I can going across a big, ol' field to, I think that's Sunset, and when I get to Sunset and Outer Drive the police was following a little bit, but then they stopped, and then I ask, you know, am I taking you home—I turn down the wrong way on the side of his house and he hurry up and get out and he runs." Shortly thereafter, the victim went to her mother's house at 19409 Justine, Detroit, letting herself in with her own key. The victim stated that she went into the back room and laid down on her brother's futon, and dozed off for a few minutes, until she was awakened by her mother at approximately 7:30 a.m.

The victim's mother testified that in the evening hours of October 30, 1998, after returning from shopping, she went to her daughter's home and unsuccessfully attempted to contact the victim by knocking on her door and telephoning her. While thinking it unusual, because the victim "always lets her know where she is," the mother made several more unsuccessful attempts to contact her daughter. The next morning, the mother awoke and asked her husband who was downstairs, to which he replied with their daughter's name. The mother, thinking it unusual for her daughter to come to the house and lay on the bed, went downstairs and saw the victim "laying flat on my son's bed. And her hands are under her and she has tears coming in her eyes."

The mother testified that she then asked her daughter, "'. . . what's wrong?' And she looked up at me, and I said, '[t]ell me what's wrong,' because she had tears in her eyes . . . [a]nd she told me, she said, 'you promise not to . . .'" At this point in the mother's testimony, Daniels' counsel objected as to hearsay, and oral argument between the prosecution and Daniels' counsel transpired as to the admissibility of statements made by the victim to her mother. The trial court ruled on the objection by stating, "I think that the case law, just not only citing these two cases, but it's pretty clear that in this particular instance questions – that testimony can be related from . . . [the victim] – so the court will hear that testimony." The prosecution's direct examination of the mother continued:

Q. And you asked her what's wrong?

A. Yes.

Q. All right. What did she say to you?

A. She told me, "I've been raped." And she jumps up from the, from the bed.

Q. Did she – before she told you that – did she say anything else to you first?

A. She told me that the man across the street had raped her.

Q. Okay.

A. And then she jumped up running around the house. I said, "What do you mean, raped you?" She ran around the house trying to look into all the windows like the man was still outside. And I said, "[w]hat man?" And she said, "[t]he man across the street." And then she kept saying, "[b]e quiet, be quiet, be quiet. He might be around here. . . . He said he was going to kill us all. . . ."

Q. Did the police, did the police come out?

A. Yes, they did.

Officers Kevin Payton and Matthew Closurdo, of the Detroit Police Department, testified that they were dispatched to 19409 Justine, Detroit, at approximately 8:55 a.m., in response to a criminal sexual conduct complaint. Officer Payton testified that, as a result of their investigation, Daniels was identified as the person who sexually assaulted the victim, and was subsequently arrested by Officer Payton for first-degree criminal sexual conduct. Officer Payton stated that during the course of the investigation, he went to Daniels' house, dressed in full uniform, and asked Daniels if his name was Fred, to which Daniels responded, "yes." Officer Payton testified as follows in response to direct examination by the prosecution:

Q. Okay. What happens or what's said next?

A. Next he said, "I was just tricking with her. I didn't touch her. . . ."

* * *

Q. He blurted that out to you?

A. Yes, sir.

Q. You didn't tell him why you were there?

A. No, sir.

Q. You didn't tell him what you wanted to talk to him about?

A. No, sir. . . .

* * *

Q. Okay. When he says that to you, "I was just tricking. I didn't touch her," what do you do?

A. Then I had him step outside and I advised him that he's under arrest.

Q. Okay. Did you tell him at that point what he was under arrest for?

A. No; not at that point . . . .

* * *

Q. Does he say anything more to you when you tell him that he's under arrest?

A. He just continues on with, "I was just tricking with her. I didn't touch her. She's lying."

Shortly after Officer Payton's testimony, the prosecution ended its case-in-chief, and Daniels presented his proofs. Daniels' witness Jemel Lavender, testified that he was the victim's neighbor on October 30, 1998, and that he remembered being outside "on his porch" at approximately 9:00 p.m. to 9:30 p.m. Lavender said that he saw the victim pull "up in front of her house" in a two-door purple Cavalier. Lavender observed the victim have a conversation with Daniels, as both she and Daniels walked toward each other. Lavender continued, testifying as follows in response to direct examination by defense counsel:

Q. Okay. And then they met up; is that correct?

A. Yes.

Q. And then when they met up together did they walk together from there?

A. She was leading. They met up at the sidewalk and she was leading towards her front door with her house keys.

Q. All right. And where was Mr. Daniels as she walked up with her house keys in her hand?

A. Following behind her.

Q. And what happened next?

A. She opened the door. . . .

* * *

Q. And after she opened the door what did you see happen?

A. Fred followed behind.

Q. Inside – did they both go inside the house?

A. Yes. . . .

* * *

Q. And did she open the door for him to come in or he just followed her in? How – what did you see?

A. She opened the door for Fred to come in. . . .

* * *

Q. Later on, hour, two hours later, did you ever see –

A. About a half hour or hour later, yeah, they both came out.

Q. You said – who are the people you are referring to?

A. Excuse me?

Q. The same two people?

A. Yes; same two.

Q. Okay. And where – what door did they come out of the house?

A. She entered out the front and – exited out the front and Fred left out the side.

Q. So, she came out the front door of her house.

A. Uh-huh.

Q. Is that a yes?

A. Yes.

Q. And Mr. Daniels came out the side door?

A. Yes.

Q. Is that at the same time?

A. Yes . . . .

* * *

Q. All right. Just tell us exactly what you saw.

A. She walked around the driver's side and they got in the car.

Q. All right. Did you ever see a gun in Mr. Daniels' hands that time?

A. Never . . . .

* * *

Q. Did you, did you see anything that would—that looked unusual on her face?

A. No; not at all.

Daniels then called George Dickerson to testify. Dickerson, a neighbor, testified that, on the morning in question, he was on his porch getting ready to leave for work when he observed a purple car "pull up" shortly before 5:00 a.m. Dickerson said he saw a woman, whom he later identified as the victim, driving the car. Dickerson continued, stating, "[a]ll I heard was voices. All I heard was an argument going on." Dickerson testified as follows in response to direct-examination by defense counsel:

Q. All right. Now, did you hear what was being said?

A. Something said to the effect: "Give me my money and get out, get out of my car."

Q. Was that the woman that was saying that?

A. Yeah.

Q. Was that the woman inside the car?

A. Yes.

Q. Was that the woman who you later found out to be was [the victim]?

A. Yeah.

Q. All right. Did you hear anybody say anything in response?

A. Yeah, drop me off at my house.

Q. All right. Do you know who was saying that?

A. Yeah, I saw who it was when the guy got out.

Q. Who was that?

A. It was Fred.

Q. Is that Mr. Daniels here in court?

A. Yes. . . .

* * *

Q. Then what did you see?

A. I saw him go in the house and I kept going to work to the bus stop.

Q. Okay. And what house did you see Mr. Daniels go into?

A. He went into his own house.

The prosecution, during cross-examination, asked Dickerson, "[y]ou do have a conviction, though, don't you, sir, for – ." Daniels' counsel objected. The trial court interceded, stating, "[c]onvictions don't matter, Mr. Hutting, if they're not based on theft, dishonesty or false statement and within the last ten years; right?" The prosecution responded, "[i]f he wasn't discharged from probation or parole within the last [ten] years; yes. Okay." The trial court then stated, "[a]nd deals with truth, voracity [sic] or false statement." The prosecution interjected, "[h]ow about unarmed robbery?" The trial court responded, "[e]lement of theft; right?" The trial court allowed the prosecution to continue its cross-examination of Dickerson:

> *Q*. Were you connected – you have a conviction, do you not, sir, for an unarmed robbery?
>
> *A*. Yes.
>
> *Q*. Okay. That conviction was in 1986 and you were discharged from probation in 1991; is that correct?
>
> *A*. Yeah, something like that.
>
> *Q*. All right. You got five years probation; right?
>
> *A*. Yeah.

Daniels' counsel asked that this statement be excluded, to which the trial court replied, "[w]ell it's from the time of parole or probation within [ten] years; so, it's only been eight since the termination of parole or probation, as I understand the rule."

Patricia Harrison, an acquaintance of Daniels, testified that he came to her house on the night in question, and asked her if she had a room for rent, and if she knew where he could get some marijuana. Harrison said that she observed a small, purple car in her driveway when Daniels came to the door, and it was occupied by a female driver. Harrison told Daniels that she did not have any rooms to rent, nor did she have any marijuana for him. On cross-examination by the prosecution, Harrison testified that she could not identify the female driver of the vehicle.

After closing arguments, the trial court rendered its verdict. During its recitation of its findings, the trial court held:

> It's strictly based on the testimony of [the victim], . . . this court finds proof beyond a reasonable doubt and I do find, based on her testimony, that I am convinced in count two that there was an act of cunnilingus performed by Mr. Daniels on [the victim] beyond a reasonable doubt and it was not consensual.
>
> I'm even going to find that as in count three there was a non-consensual act of fellatio . . .
>
> * * *
>
> I am not convinced, however, that there was a penetration of the penis in the vagina of [the victim] for count four, but I am convinced that both count one and

> count two were done by the defendant when a weapon was produced and find that count two and three were committed; that is criminal sexual conduct in the first degree.
>
> I'm not convinced of the felony[-]firearm beyond a reasonable doubt based on the evidence, so I will find Mr. Daniels not guilty of felony[-]firearm; that's the findings of the [c]ourt; that Mr. Daniels is guilty of count two and count three, not guilty of one, four and five.

The trial court later heard oral argument on Daniels' motion for a new trial. Daniels argued that the facts, along with the inconsistencies and confusing articulation of the trial court's recitation of its findings, did not support the trial court's verdict that there was an assault within the meaning of the statute, because the "aggravating circumstances applicable to this case was possession of a firearm as to which the trial court specifically found in favor of defendant. . . ." The trial court ruled:

> The thing, though, however in assessing it, as I remember at the time, the prosecution had to prove felony[-]firearm; that in fact it was a gun. And for the particular offense, I could find that there was a gun or that there was something that was formed and fashioned to reasonably believe the person to have been assaulted that it was a gun[;] it didn't have to be a firearm. And it is on that juncture that I decided the case. . . .
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> * * *
>
> So I didn't see it as an inconsistency and still don't because in my findings of fact and analyzation [sic] of the felony[-]firearm statute, I would have to be convinced beyond a reasonable doubt that it was a firearm instead of something that was formed or fashioned that could reasonably believe the person so assaulted to conclude that it was a gun. . . .
>
> * * *
>
> You know, to me you either had the gun or you didn't have the gun. But we all realize that sometimes people are trying to justify sentences and therefore do that. But I can assure you that in this particular case the best of my ability that that wasn't done and for that reason I'm going to deny the motion. . . .

II. Impeachment

A. Standard Of Review

Daniels argues that the trial court erred when it allowed the prosecution to impeach Dickerson's credibility with a prior conviction for unarmed robbery that was over ten years old.

We review a trial court's decision with regard to the admission of evidence for an abuse of discretion.[3]

B. Harmless Error

We conclude that the trial court erred when it allowed the prosecution to question Dickerson in regard to his prior conviction, because a period of more than ten years had elapsed since the date of the conviction or of his release from confinement. However, we find that the error was harmless.[4]

Generally, a witness' credibility may be impeached with prior convictions, but only if the convictions satisfy the criteria set forth in MRE 609.[5] MRE 609 provides in part:

> (a) General Rule. For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross examination, and
>
> (1) the crime contained an element of dishonesty or false statement, or
>
> (2) the crime contained an element of theft, and
>
> (A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and
>
> (B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.
>
> * * *
>
> (c) . . . [e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date.

Here, Dickerson was convicted of unarmed robbery in 1986, and was placed on a period of probation; no prison sentence was imposed. Because robbery contains an element of theft, it was admissible under MRE 609.[6] A sentence is not an element of a conviction but rather a

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[3] *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

[4] MCR 2.613(A); *People v Reed*, 172 Mich App 182, 188; 431 NW2d 431 (1988).

[5] *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999).

[6] *People v Cross*, 202 Mich App 138, 146; 508 NW2d 144 (1993).

declaration of its consequences.[7] The ten-year cutoff continues for use of any prior convictions for impeachment purposes[8] and the rule is clear in that it specifically states, "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date."[9] In this case, the date of conviction is the controlling factor, and it was apparent from the record that Dickerson's conviction occurred more than ten years before Daniels' trial. The trial court therefore erred when it allowed the prosecution to question Dickerson in regard to his prior conviction, because it was over the ten-year limit established by MRE 609(c). As a result, we employ a harmless error analysis, under MCR 2.613(A), to resolve this issue.[10] MCR 2.613(A) provides:

> (A) An error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the court or by the parties is not grounds for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.

Similarly, MCL 769.26 provides:

> No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

This statute is consistent with the Supreme Court's authority to regulate practice and procedure.[11] Whether a preserved error is harmless depends upon the nature of the error and its effect on the reliability of the verdict in light of the weight of the untainted evidence.[12] An error can be intolerable to the judicial system if it was deliberately injected into the proceedings by the prosecution, if it deprived the defendant of a fundamental element of the adversarial process, or if it was particularly persuasive or inflammatory.[13]

Error can be harmless if committed during a bench trial. Unlike a jury, the trial court possessed an understanding of the law, which allowed it to ignore errors and decide the case

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[7] *People v Kennebrew*, 220 Mich App 601, 606; 560 NW2d 354 (1996).

[8] MRE 609(c).

[9] *Id.*

[10] *Reed, supra* at 188.

[11] *People v Mateo*, 453 Mich 203, 210; 551 NW2d 891 (1996).

[12] *Id.* at 215.

[13] *People v Minor*, 213 Mich App 682, 686; 541 NW2d 576 (1995).

based solely on the properly admitted evidence.[14] Here, the prosecution's case was so strong that a reasonable trier of fact could not have found to acquit Daniels had the impeachment evidence been suppressed. Given the evidence presented by the prosecution, the error did not result in prejudice to Daniels, or a miscarriage of justice. The trial court, well versed in the rules of evidence, acted consistently with its duty, and did not use the evidence to draw any improper inferences. Because the trial court used this evidence in a limited and proper way, we do not find any negative effect on the fairness, integrity, or public reputation of the trial that would require reversing defendant's conviction on this basis. Therefore, we conclude that the trial court's error in admitting the prior conviction of the witness was harmless.

III. State Of Mind Testimony

A. Standard Of Review

Daniels argues that the trial court erred when it allowed the mother's testimony concerning the then existing state of mind of the victim, because the statements were made after an opportunity to fabricate arose. We review a trial court's decision with regard to the admission of evidence for an abuse of discretion.[15]

B. MRE 803

MRE 803 governs the admissibility of evidence under hearsay exceptions when the availability of the declarant is immaterial, and states in part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness. . . .
>
> * * *
>
> (3) A statement of the declarant's then existing state of mind, emotion sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered . . . .[16]

Here, the disputed statement arose during the prosecution's direct examination of the mother. As noted above, in response to questions by the prosecution, the mother testified:

> *A.* She [the victim] told me, "I've been raped." And she jumps up from the, from the bed.
>
> *Q.* Did she – before she told you that – did she say anything else to you first?

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[14] *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988).

[15] *Bahoda*, *supra* at 289.

[16] MRE 803(3).

A. She told me that the man across the street had raped her.

Q. Okay.

A. And then she jumped up running around the house. I said, "What do you mean, raped you?" She ran around the house trying to look into all the windows like the man was still outside. And I said, "[w]hat man?" And she said, "[t]he man across the street." And then she kept saying, "[b]e quiet . . ."

Daniels objected on the basis of hearsay, and the trial court, after considering oral argument, allowed the testimony.

MRE 801(c) provides that "hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Here, the trial court found that the testimony of the mother was offered to show that the statement was made to establish the victim's emotional state of mind, rather than to prove the truth of the statement.[17] The prosecution argued that the mother's testimony was proffered to establish the victim's state of mind, rather than to establish the truth of the statement itself. The trial court agreed, finding that the testimony fell under the hearsay exception of MRE 803(3).[18]

We also agree. The evidence established that the victim ran throughout the house in an agitated state of mind, kept looking out the windows, and told the mother that she had been raped. The victim then told the mother, "be quiet, be quiet, . . . [h]e said he was going to kill us." We conclude that the trial court properly used its discretion when it admitted the mother's statements, for they clearly showed the victim's state of mind

IV. Great Weight of The Evidence

A. Standard Of Review

Daniels argues that the verdict was against the great weight of the evidence, and the trial court abused its discretion when it denied him a new trial. We review the trial court's denial of a motion for a new trial for an abuse of discretion.[19]

B. Legal Standards

A new trial may be granted, on some or all of the issues, if a verdict is against the great weight of the evidence.[20] The test is whether the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.[21] It is in the trial court's discretion to grant or deny a new trial. This discretion will not be disturbed on appeal

[17] MRE 803(3).

[18] *People v Sanford*, 402 Mich 460, 491; 265 NW2d 1 (1978).

[19] *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

[20] MCR 2.611(A)(1)(e); *Domako v Rowe*, 184 Mich App 137, 144; 457 NW2d 107 (1990).

[21] *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

unless there is clear abuse.[22] Motions for new trial are not favored and should be granted only when the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.[23]

Here, the trial court heard testimony from both prosecution and defense witnesses, and subsequently made its determination based on the totality of the evidence presented. This Court gives deference to the trial court's opportunity to hear the witnesses[24] and its consequent unique qualification to assess credibility.[25] We also give a trial court's determination that a verdict is not against the great weight of the evidence substantial deference. An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence.[26]

C. The Trial Court's Decision

Here, the vast compilation of evidence arose from the witnesses' testimony. The trial court made reasonable inferences, and credibility decisions, using all properly admitted direct and circumstantial evidence in reaching its decision. The victim testified that Daniels removed a gun from his pocket and forced her to perform sexual acts. The victim went on to describe the details of the attack in great detail during trial. In *People v Avant*,[27] this Court held that "circumstantial evidence, and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime." The *Avant* Court also noted that, "on the basis of this [the witnesses'] testimony, we find sufficient evidence was presented to establish that [the victim] was placed in fear."[28] The same is true in this case, where the victim's testimony was sufficient to establish that the prohibited acts occurred, and the elements were proven beyond a reasonable doubt. Based on this reasoning, we hold that the trial court did not abuse its discretion, as the great weight of the evidence clearly supported its verdict.

V. Sufficiency Of The Evidence In Establishing Credibility; Weight Of The Evidence

A. Standard Of Review

Daniels argues that the trial court erroneously based its conviction on its disbelief of his statements during the police investigation of the incident. The issue here necessarily involves a matter of credibility. An issue of credibility is properly left to the trier of fact in determining the

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[22] *Harrigan v Ford Motor Co*, 159 Mich App 776, 788; 406 NW2d 917 (1987).

[23] *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

[24] *In re Leone Estate*, 168 Mich App 321, 324; 423 NW2d 652 (1988).

[25] *Kochoian v Allstate Ins Co*, 168 Mich App 1, 11; 423 NW2d 913 (1988).

[26] *Daoust, supra* at 16.

[27] *People v Avant*, 235 Mich App 499, 505-506; 597 NW2d 864 (1999).

[28] *Id.*

weight of evidence.[29] This Court should avoid weighing the proofs or determining what testimony to believe.[30]

B. Officer Payton's Testimony

As noted above, Officer Payton testified as follows in response to direct examination by the prosecution:

Q. Okay. What happens or what's said next?

A. Next he said, "I was just tricking with her. I didn't touch her. . . ."

* * *

Q. He blurted that out to you?

A. Yes, sir.

Daniels argues that the trial court erroneously based its conviction on its disbelief of his statement during the police investigation. However, there is ample evidence to support the trial court's conclusion as to the veracity, or lack of veracity, of this statement. Question of credibility are left to the trier of fact and will not be resolved anew by this Court.[31] Juries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony.[32] Here, the trial court, acting in its role as the trier of fact, was entitled to consider all properly admitted evidence and to make reasonable inferences when determining the weight to give to such evidence. The trial court was not obliged to believe the testimony of any witness simply because the testimony was, or was not, contradicted by other witnesses. Here, the trial court heard testimony from all the witnesses presented by both the prosecution and Daniels in making its determination. Consequently, we conclude that the issue of credibility is properly left to the trier of fact when assessing the weight and sufficiency of evidence.

VI. Reasonable Doubt

A. Standard Of Review

Daniels argues that the trial court erred when it failed to establish a reasonable-doubt standard when it convicted him. He claims that the trial court did not adequately articulate its factual findings when it declined to convict him on the felony-firearm charge, which was integral

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[29] *Lemmon, supra* at 642-643, n 22.

[30] *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997) citing to *People v Herbert*, 444 Mich 466, 474; 511 NW2d 654 (1993).

[31] *Avant, supra* at 506, citing to *People v Givans*, 227 Mich App 113, 123-124; 575 NW2d 84 (1997).

[32] *People v Palmer*, 392 Mich 370, 376; 220 NW2d 393 (1974).

to his first-degree criminal sexual conduct convictions, and that the cumulative effect of the trial court's lack of accurate factual findings, which were confusing and internally inconsistent, amounted to error by the trial court.[33] This Court reviews this issue de novo to determine the sufficiency of the trial court's findings.

B. MCL 750.520b(1)(e)

MCL 750.520b(1)(e) defines first-degree criminal sexual conduct:

> (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 exist: . . .
>
> * * *
>
> (e) The actor is armed with a weapon or an article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon.

When analyzing whether the trial court articulated sufficient findings of fact in applying the law under MCL 750.520b(1)(e), this Court must look to the standard established by MCR 2.517(A)(1)(2), which provides:

> (1) In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.
>
> (2) Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without over elaboration of detail or particularization of facts.

C. Motion For New Trial

At his motion for new trial, Daniels argued that the trial court's findings were confusing and inconsistent and that the facts did not support the trial court's verdict that there was an assault within the meaning of the statute. He asserts that this is so because the aggravating circumstances applicable to this case was possession of a firearm, as to which the trial court specifically found in his favor. At the conclusion of oral argument, the trial court stated in denying the motion:

> The thing, though, however in assessing it, as I remember at the time, the prosecution had to prove felony[-]firearm; that in fact it was a gun. And for the particular offense, I could find that there was a gun or that there was something that was formed and fashioned to reasonably believe the person to have been

[33] Daniels' claim that cumulative error deprived him of a fair trial need not be addressed by this Court as the case is remanded for additional findings.

> assaulted that it was a gun, it didn't have to be a firearm. And it is on that juncture that I decided the case. . . .
>
> * * *
>
> So I didn't see it as an inconsistency and still don't because in my findings of fact and analyzation [sic] of the felony[-]firearm statute, I would have to be convinced beyond a reasonable doubt that it was a firearm instead of something that was formed or fashioned that could reasonably believe the person so assaulted to conclude that it was a gun. . . .
>
> * * *
>
> You know, to me you either had the gun or you didn't have the gun. But we all realize that sometimes people are trying to justify sentences and therefore do that. But I can assure you that in this particular case the best of my ability that that wasn't done and for that reason I'm going to deny the motion . . . .

We observe that the trial court's findings, both at trial and during Daniels' hearing for a new trial, were internally inconsistent, and confusing, as demonstrated when the trial court ruled, "I am convinced in count two that there was an act of cunnilingus performed by Mr. Daniels on [the victim] beyond a reasonable doubt and it was not consensual. I'm even going to find that as in count three there was a non-consensual act of fellatio . . . ." The trial court continued,

> I am not convinced, however, that there was a penetration of the penis in the vagina of [the victim] for count four, but I am convinced that both count one and count two were done by the defendant when a weapon was produced and find that count two and three were committed; that is criminal sexual conduct in the first degree.

Not only are the findings by the trial court internally inconsistent, but the court clearly acquitted Daniels on count one, and the felony-firearm count, when it said, "I'm not convinced of the felony[-]firearm beyond a reasonable doubt based on the evidence, so I will find Mr. Daniels not guilty of felony[-]firearm; that's the findings of the [c]ourt; that Mr. Daniels is guilty of count two and count three, not guilty of one, four and five."

The shortfall of the trial court's findings is demonstrated by its inherent inaccuracies, which reveal the court's confusion when it asserted that both count one and count two "were done by defendant when a weapon was produced," and then found that only "counts two and three were committed," but that the court "was not convinced of the felony[-]firearm beyond a reasonable doubt." Further, the trial court illustrated the factual ambiguity when, during Daniels' motion for a new trial, the trial court based its reasoning in denying a new trial on its assertion that the weapon "didn't have to be a firearm . . . [a]nd it is on that juncture that I decided the case. . . ."

Findings of fact in a non-jury case serve a function paralleling the judge's charge in a jury case, that of revealing the law applied by the fact finder.[34] Where the factual findings are insufficient, the appropriate remedy is to remand the case for additional fact-finding.[35] In this case, the trial court's findings were internally inconsistent and inherently confusing. The trial court failed to accurately delineate on which counts it found Daniels guilty and under what factual basis it convicted him. The trial court was obliged to accurately articulate its findings and its reasoning supporting its decision. Here, the trial court failed to find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment as required by MCR 2.517(A)(1)(2). Therefore, we remand this case for additional findings by the trial court.

Affirmed in part and remanded in part for additional findings consistent with this Court's holding. We retain jurisdiction.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck

[34] *People v Jackson*, 390 Mich 621, 627-628; 212 NW2d 918 (1973).

[35] *Id*.