

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALIOUNE BADARA SECK,

Defendant-Appellant.

UNPUBLISHED

April 19, 2002

No. 226576

Kalamazoo Circuit Court

LC No. 99-000958-FC

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of six counts of first-degree criminal sexual conduct (“CSC”), MCL 750.520b, and one count of first-degree home invasion, MCL 750.110a(2). He was sentenced to six concurrent terms of 210 to 480 months’ imprisonment for the CSC convictions, consecutive to seven to twenty years’ imprisonment for the home invasion conviction. We affirm.

Defendant argues that there was insufficient evidence to support his convictions. A challenge to the sufficiency of the evidence requires us to determine “whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

Defendant does not take issue with the evidence that establishes that the victim was penetrated in a sexual manner six times against her will by a man wielding a knife and threatening to kill or kidnap her; rather, he argues specifically that there was insufficient evidence to identify him as the attacker. We disagree. The victim testified that the man who assaulted her was a “tall Black man, skinny, had a white T-shirt on” and wore her ski jacket, as well as gym shorts and white tennis shoes. White tennis shoes were located in defendant’s apartment. The victim also testified that her attacker had a distinct body odor. The victim described his strong body odor to Kalamazoo Department of Public Safety Detective Amy Hicok during an interview. Hicok testified that when she questioned defendant she noticed his “bad body odor.” The victim also testified that her attacker engaged in an extensive conversation and she noticed his distinct accent. Hicok noticed defendant’s distinct accent when she spoke with him.

Most significantly, however, the victim testified that on several occasions she was able to clearly see her attacker. Although the lights were not on in her bedroom, her blinds were open

and it was bright enough for her to see her attacker's features. She was able to look at her attacker's face for ten minutes while he had forced intercourse with her the first time. The victim was again face-to-face with her attacker as he attempted intercourse with her a second time. Later, the victim was allowed to turn on a light and get dressed. During the fifteen minutes that the lights were on, she was only "a couple feet" from her attacker and she looked him in the face. Again around 6:00 a.m. the victim could see her attacker clearly and could look him in the eye because light was beginning to shine through the living room windows and a small, fluorescent light over the eating area in the kitchen was on. As the two left the victim's apartment, they walked through the lighted hallway where the victim was able to see her attacker again; she could also see his face once they were outside because it was dawn. The victim was with her attacker for three hours—from approximately 3:00 a.m. to approximately 6:00 a.m. Furthermore, she quickly identified him in a photographic lineup provided by Detective Hicok. The victim testified that she was "sure" that defendant was the perpetrator and that she would never forget his face. She told Hicok that, on a scale of 1 to 10, her certainty scored a "9."

Moreover, DNA evidence revealed that defendant could not be excluded as a contributor to the DNA found on the vaginal swab sample taken from the victim. To the extent that defendant contends that the victim's testimony was "questionable," that is a credibility determination; this Court should not interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Thus, the prosecutor presented sufficient evidence to support beyond a reasonable doubt the six jury-based convictions for first-degree criminal sexual conduct.

Similarly, there was sufficient evidence to support defendant's conviction of home invasion beyond a reasonable doubt. MCL 750.110a(2) provides that an individual is guilty of first-degree home invasion if he or she merely:

"enters a dwelling without permission and, at any time while he or she is entering, present in, or exiting the dwelling, commits a felony, larceny, or assault is guilty of home invasion in the first degree if at any time while the person is entering, present in, or exiting the dwelling either of the following circumstances exists:

- (a) The person is armed with a dangerous weapon.
- (b) Another person is lawfully present in the dwelling.

Although there was no evidence of breaking and entering, defendant did not have permission to enter the victim's dwelling, which is all that is required under the statutory provision. Moreover, MCL 750.110a(1)(b)(ii) defines a "dangerous weapon" to include a knife. Thus, the victim's testimony that defendant threatened her with a knife supports a finding that he was armed with a dangerous weapon while inside the victim's dwelling. Moreover, the victim was lawfully present in the dwelling when defendant entered, was present, and exited. In addition, defendant was found guilty of committing six felonies while in the dwelling. Accordingly, the evidence was plainly sufficient to support defendant's first-degree home invasion conviction. *Nowack, supra* at 399. Next, defendant argues that he was denied his constitutional right to effective assistance of counsel because counsel failed to request an instruction on identification, CJI2d 7.8. Because defendant did not request a new trial or an evidentiary hearing on this issue, our review is limited to the facts on the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502

(2000). A successful claim of ineffective assistance of counsel requires a defendant to “show that counsel’s performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant.” *Id.* at 423-424. Reversal is not required where the jury instructions, taken as a whole, sufficiently protect the defendant’s rights. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995).

The identification instruction invites the jury to consider: the quality and duration of the witness’s observations of the offender; whether the witness had previously seen the offender; the proximity of the witness to the offender at the time of the observations; the lighting of the area when the witness observed defendant; and the witness’s state of mind at the time of the observation. CJI2d 7.8(2). The instruction further invites the jury to consider the circumstances surrounding the witness’s identification of the offender, such as the time between the crime and the identification, the witness’s confidence in the identification of the offender, and the witness’s state of mind at the time of the identification. CJI2d 7.8(3). The instruction notes that the witness’s failure to either identify the witness or provide a consistent description may be relevant to the inquiry. CJI2d 7.8(4).¹ Finally, the jury instruction reminds the jury that it must carefully consider the witness’s reliability. CJI2d 7.8(5).

At first glance, it would appear that the effort undertaken by defense counsel to raise questions regarding the victim’s identification of defendant makes it curious that the aforementioned jury instruction was not requested. However, upon review of the jury instruction, an argument could be made that the jury instruction was worse for defendant because most of the individual factors that the jury is invited to consider weigh in favor of the victim’s identification. For example, the victim testified that, despite the absence of normal lighting, she was able to get a very good look at defendant at times during the incident because of the light passing through her open blinds. She further testified that she got an even better look at defendant during the approximately fifteen minutes near the end of the incident after she turned a light to get dressed. She testified that the unfortunate events took place over a period of nearly three hours, preventing any concerns that her observations were fleeting. During the incident, defendant was obviously in close proximity to her. After the incident, she was able to observe defendant at close range both inside her apartment and outside when he followed her to her car.

In addition, although there was evidence suggesting that the victim was quite upset by the time she sought help from her friends, we note that her state of mind near the end of the incident was clear enough to outsmart defendant twice—by convincing him that she had to get ready for work and by providing him a fake telephone number. Finally, we note that the victim’s identification of defendant at the end of the incident is quite distinct, from a reliability standpoint, from an individual’s unexpected witnessing of a crime. Thus, although the victim had never seen defendant before, the factors that the jury was invited to consider in CJI2d 7.8(2) supported the reliability of the identification.

Along the same lines, the victim was unwavering in her identification. She failed to identify anyone in a photographic lineup not containing defendant’s photograph, but did identify him out of twenty-six photographs in a subsequent lineup. Both of these photographic lineups

¹ However, CJI2d 7.8(4) is only to be given when supported by the evidence.

occurred within days of the incident. There was no evidence that her state of mind was remarkable at the time of the identification, except that she became visibly upset after seeing defendant's photograph. If anything, this fact supports the reliability of her identification. In fact, the only evidence that even remotely undermines the victim's identification of defendant was that, on a scale of 1 to 10, her certainty of identification at the time of the photographic lineup was "only" a "9."

Thus, after comparing the victim's testimony to the jury instruction, it actually appears that defense counsel may have been exercising sound trial strategy by not requesting the identification instruction. Instead, defense counsel was able to introduce challenges to the victim's identification without providing the jury with factors that, ultimately, support the victim's identification. In other words, a factor-by-factor review of the victim's identification, as invited by the jury instruction, was not beneficial to defendant's challenge to the witness's identification. Thus, even if we were persuaded that defense counsel should have requested the jury instruction, it is not reasonably probable that, but for failing to request the instruction, the jury would not have convicted defendant. *Snider, supra* at 423-424. Consequently, we reject defendant's contention that he was deprived of his constitutional right to effective assistance of counsel.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray