STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DEANDRE ANDERSON,

Defendant-Appellant.

UNPUBLISHED
December 27, 2002

No. 233212
Wayne Circuit Court
LC No. 99-007043

Before: Jansen, P.J., and Holbrook, Jr., and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of assault with intent to rob while armed, MCL 750.89, one count of criminal sexual conduct, MCL 750.520b(1)(c) (sexual penetration occurring during the commission of a felony), one count of first-degree criminal sexual conduct, MCL 750.520b(1)(d) (sexual penetration while aided and abetted by one or more persons and actor using force or coercion), one count of first-degree criminal sexual conduct, MCL 750.520b(1)(e)(sexual penetration by an actor armed with a weapon), one count of first-degree home invasion, MCL 750.110a(2), and one count of possession of a firearm during the commission of a felony, MCL 750.227b. After vacating defendant's original sentences for the assault, criminal sexual conduct, and home invasion convictions, defendant was sentenced, as a third habitual offender, MCL 769.11, to twenty to thirty years' imprisonment, and to two years' imprisonment for the felony-firearm conviction to be served consecutive with and preceding his other sentence. We affirm defendant's convictions, but remand this case to the trial court to enter an amended judgment of sentence.

First, defendant argues that the trial court improperly admitted expert testimony regarding the DNA analysis of a mixed sperm sample taken from the victim without accompanying statistical analysis. We disagree.

Defendant contends that the admission of the DNA evidence violated the principles set forth in *People v Coy*, 243 Mich App 283; 620 NW2d 888 (2000). The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Herndon*, 246 Mich App 371, 406; 633 NW2d 376 (2001). In the instant case, Turek testified at length regarding the procedures utilized in the DNA testing and the results obtained therefrom. Specifically, Turek testified in regard to the evidence sample taken from the first victim in comparison to the evidence sample taken from defendant:

> If it is assumed that there is only one donor of sperm on the vaginal swab item H 3, Mr. Anderson is excluded as a possible source of the sperm. However, if there is more than one donor of sperm, Mr. Anderson cannot be excluded as a possible donor, because the combination of the observed alleles, Mr. Anderson and [the first victim] and a third individual, would mask the presence of Mr. Anderson's alleles at some loci.

Turek also stated:

> When you have more than one donor of sperm, a lot of times what happens is you have one that contributed a higher concentration of sperm cells than another. In those kind of instances what happens sometimes is alleles may be lost or masked. What they call masked is that both individuals may share some of the same alleles. And it is -- you can't determine[,] you can't positively determine whether or not those alleles came from one or the other individual.

The *Coy* Court held that the testimony in that case regarding the consistency of the defendant's DNA with a mixed sample lifted from a knife blade and a doorknob was inadequate by itself to meaningfully inform the jury concerning the likelihood of the defendant's identity as the DNA donor. *Coy*, *supra* at 295. In support of its holding, the *Coy* Court stated:

> "DNA typing produces two distinct, but interrelated, items of information: 1) whether a match exists between the samples; and 2) if a match exists, the ratio expressing the statistical likelihood that 'the crime scene samples came from a third party who had the same DNA pattern as the suspect.' The latter correlation is necessary because, even though two human genomes may vary at approximately three million sites, the DNA typing analysis currently employed examines only a few sites for variation in the DNA sequence. The theory is that, besides identical twins, no two individuals will have entire DNA sequences which are identical. The DNA prints which result from the current FBI procedure may not be unique since the entire DNA molecule is not analyzed. Since two unrelated individuals may have identical DNA patterns from the fragments examined in a particular analysis, the potential exists for a match to be mistakenly found. For this reason, statistical interpretation regarding the probability of a coincidental match or the likelihood that two unrelated individuals have the same DNA type is necessary." [*Coy*, *supra* at 295, quoting *Nelson v State*, 628 A2d 69, 75-76 (Del, 1993) (citations omitted).]

The *Coy* Court also noted, "'DNA statistical analysis determines the frequency with which a particular match occurs in a target population . . . how likely or unlikely it is that an individual other than the defendant has the same DNA bands as those found at the crime scene and in [the] defendant's blood.'" *Coy*, *supra* at 296 (citation omitted).

In the instant case, Turek testified that she utilized a population database and frequency for the metropolitan Detroit area in determining the statistical analysis for the samples taken from the second victim and Markenvan Love, the second assailant. Turek then provided the statistical analysis for the samples taken from the second victim and Love and reported that the likelihood of finding another individual that had the same profile as Love would appear in one

out of every 146,000 African-Americans with the same profile, one in thirty million Caucasians with the same profile, and one in five million Hispanics. Turek reported that there were no numerical reports from the evidence sample involving the victim in this case because the evidentiary sample was a mixed sample. Turek further stated that, although a calculation is not reported, there was a calculation that she could and did perform. On cross-examination, defense counsel questioned Turek as to whether she was able to say what percentage of the African-American population in the metropolitan area could not be excluded regarding the tests performed on the samples taken from the first victim, her boyfriend, and defendant. Turek testified that 180,000 African-Americans could have contributed to the mixed sample, 1,081,000 Caucasians could have contributed to the mixed sample, and 1,003,000 Hispanics could have contributed to the mixed sample in the Detroit metropolitan area. In accordance with the DNA testimony provided by Turek, we find that such evidence was able to meet the requirements of *Coy* in that Turek provided significant analytical or interpretive evidence through her testimony regarding the mixed sample calculations.

We also hold that, even if the trial court abused its discretion in admitting the DNA evidence in this case, such error was harmless. The two victims testified extensively regarding the acts that occurred in their apartment on June 30, 1998. The issue in this case became the identification of the assailant known as the "skinny guy." Although neither witness was able to positively identify defendant as the skinny guy, the first victim testified that defendant had the same build as the skinny guy, and that the skinny guy attempted to disguise his voice, which was muffled. The second victim testified that the skinny guy had a similar build and complexion as defendant, and that the skinny guy may have been disguising his voice. Additionally, Martin Gaynor testified that defendant admitted he was with Tony Carter[1] and Love on June 30, 1998, but stated that he was only with Carter and Love for approximately twenty minutes before being dropped off at his girlfriend's house. Defendant told Gaynor that he knew Carter and Love were planning on robbing a house on Calvert for money and drugs. The prosecution also presented two letters, written by defendant, which related to the crimes involving the two victims in this case. Finally, after defense counsel asked the first victim why she believed defendant had anything to do with this case, she replied, "I told that [sic] because the guy MarKevin [sic] when he was arrested he said that it was Deandre. That's why Deandre got picked up for the DNA testing." Accordingly, there was sufficient other evidence from which the jury could find that the elements of the crime were proven beyond a reasonable doubt.

In connection with this issue, defendant also argues that the prosecutor mischaracterized the DNA testimony in her opening statement and closing argument. The prosecution's statements must be considered as a whole and evaluated in light of defense arguments and the relationship they bear on the evidence admitted at trial. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Further, no error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Id*. at 586. The prosecutor's statements, when read in the context of the opening statement and closing argument, do not mischaracterize the DNA evidence. Turek's testimony demonstrated that the particular alleles that could be attributed to defendant appeared in the mixed sample.

[1] Carter was arrested in connection with this case; however, the DNA results positively excluded him as a contributor of the evidentiary samples taken from both victims.

Additionally, the prosecutor's statements related to her theory of the case, which utilized circumstantial evidence in proving the elements of the crime in this case. Further, even if the prosecutor's comments may have been an improper characterization of the evidence, the trial court instructed the jury that the lawyers' statements and arguments were not evidence, and that they were only meant to help the jury understand the evidence and each side's legal theories. Accordingly, any prejudicial effect that may have been caused by the prosecutor's statements could have been cured by the trial court's instructions.

Defendant next argues that there was insufficient evidence to support his conviction for felony-firearm. We disagree.

"When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt." *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of a crime." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999).

On direct examination of the first victim by the prosecutor, the following testimony was presented:

> *Q*. And when you saw them walking around your house, did you get up?
>
> *A*. No. I was actually startled and shocked. I couldn't move. I saw these two guys walking around my house very quietly looking in the bathroom. And rambling around. Just rumbling around the house. And they came into my room. Went into the closet. And walked right past me. And then they came back in my room[,] put a gun to my head and told me to get up. Bitch, get up.
>
> *Q*. And do you remember whether it was the fat one or the skinny that said bitch get up?
>
> *A*. I think it was the fat one.
>
> *Q*. And when he said that what was he doing?
>
> *A*. Standing over me with a gun to my head.

On cross-examination by defense counsel, the first victim testified as follows, regarding the possession of the firearm:

> *Q*. [D]o you remember going back to when the two men came into your house and you said that one of them put a gun to your head. Do you remember which one it was?
>
> *A*. The skinny guy.
>
> *Q*. The skinny guy put a gun to your head?

A. Yes.

Q. Do you remember testifying 15 minutes ago that you thought it was the fat one?

A. No. I'm so nervous. That was my ankles.

Q. I appreciate that. Is it possible that you're confused as to which one actually had the gun that night?

A. Am I confused? I don't know. There was definitely a gun and one of them put it to my head and made me get up.

"The felony-firearm prohibition is set forth in MCL 750.227b(1) . . . and applies to '[a] person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony . . . .'" *People v Burgenmeyer*, 461 Mich 431, 436; 606 NW2d 645 (2000). "To be guilty of felony-firearm, one must *carry* or *possess* the firearm, and must do so *when* committing or attempting to commit a felony." *Id*. at 438 (emphasis in original).

Defendant does not contest the occurrence of one of the three enumerated felonies in relation to this issue. Instead, defendant contests the evidence relating to his possession or carrying of the firearm during the commission of the felonies. Defendant contends that the first victim's inconsistent and confused testimony that "the skinny guy" had possession of the firearm was insufficient evidence to convict defendant of felony-firearm. Although the testimony appears to be inconsistent, the first victim clearly stated twice that "the skinny guy" was the person that held the gun to her head. "Questions of credibility are left to the trier of fact and will not be resolved anew by this Court." *Avant, supra* at 506. In viewing the evidence in the light most favorable to the prosecution, we hold that there was sufficient evidence for a rational trier of fact to find that the elements of felony-firearm were proved beyond a reasonable doubt.

Finally, defendant argues that his three convictions of first-degree criminal sexual conduct for one penetration violated his right against double jeopardy. We agree. This Court reviews double jeopardy questions de novo. *People v Mackle*, 241 Mich App 583, 592; 617 NW2d 339 (2000).

In *Mackle, id.* at 601, this Court stated, "The double jeopardy prohibition includes subjecting a defendant to multiple punishments for a single offense." The *Mackle* Court then stated the following:

> In *People v Bigelow*, 229 Mich App 218; 581 NW2d 744 (1998), this Court concluded that separate convictions and sentences for both premeditated murder and felony murder, both of which arose from a single instance of criminal conduct, violated the rule against double jeopardy. *Id*. at 220. The Court remedied the double jeopardy problem by directing the lower court to amend the judgment of sentence to reflect a single conviction and a single sentence for a crime that was supported by two separate theories. *Id*. at 221-222. We likewise remand this case to the trial court so that it may reflect that two alternate theories supported each of the six counts of CSC I. Accordingly, we further direct the trial

court to vacate six of defendant's twelve sentences for CSC I. [*Mackle*, *supra* at 601.]

We hold that the same reasoning and solution is applicable in the instant case. Here, defendant was convicted by a jury of three counts of first-degree criminal sexual conduct on alternate theories, but which related to a single act of penetration. Accordingly, we remand this case to the trial court to amend the judgment of sentence to reflect that the three alternate theories support but one count of first-degree criminal sexual conduct.

We affirm defendant's convictions and remand this case to the trial court for amendment of defendant's judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Jessica R. Cooper