

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EUGENE GRISSOM,

Defendant-Appellant.

UNPUBLISHED

November 18, 2004

No. 251427

St. Clair Circuit Court

LC No. 03-000881-FC

Before: Borrello, P.J. and Murphy and Neff, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction of two counts of first-degree criminal sexual conduct (CSC I). He was sentenced to two concurrent prison terms of 15 to 35 years. We affirm.

The incident giving rise to this case occurred on May 12, 2001, when the victim was beaten and raped inside her vehicle in a store parking lot. Following the attack, the victim returned home where her spouse noticed she had a cut and was distraught. The victim initially reported to police a few days later that she had been beaten, but did not report the sexual assault. Some days later, she reported part of the sexual assault by contacting her doctor and reporting that she had been digitally penetrated. Given the passage of time between the attack and the victim's report to her doctor, doctors did not believe a rape kit would be useful. Later, in June 2002, she contacted police again to tell them she spotted the man that she believed attacked her. At that time, she disclosed that her attacker had forced both his finger and his penis into her vagina.

Defendant first argues that his conviction is not supported by sufficient evidence. We disagree. We review this claim de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We look at the evidence "in a light most favorable to the prosecution" to 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 Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

Due process requires that the prosecutor introduce sufficient evidence which would justify a trier of fact in reasonably concluding that defendant is guilty beyond a reasonable doubt before a defendant can be convicted of a criminal offense. *Id.*; *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be

accorded those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Circumstantial evidence and the reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant was charged with two counts of CSC I involving the use of force or coercion and resulting in personal injury to the victim. MCL 750.520b(1)(f). To sustain a guilty verdict for this type of CSC I, the prosecutor had to prove beyond a reasonable doubt that defendant (1) engaged in a sexual act that involved entry of his penis (for one count) and his finger (for the second count) into the victim's genital opening; (2) caused personal injury to the victim; and (3) used force or coercion to commit the sexual act. MCL 750.520b(1)(f).

Defendant argues that the evidence was insufficient to identify him as the perpetrator and disputes that the victim was raped because she waited more than a year after the attack to report to police that the incident involved a sexual assault. Defendant does not dispute that the victim was injured during the attack. The victim testified as to the varying accounts she initially gave her husband, the police, and doctors. The jury found the victim's testimony credible, and we cannot interfere with this determination in evaluating the sufficiency of the evidence. *Wolfe*, *supra* at 514-515.

Defendant relies on testimony that the victim identified another man during a lineup as her attacker. While this is true, there was also evidence presented that the deputy who requested defendant's presence in the lineup earlier that day did not recognize him because he had shaven off his long beard and hair just prior to the line-up. There was also evidence that defendant's appearance before the lineup comported with the victim's description of the assailant. Additionally, the victim told police that her assailant had a skull tattoo on his upper arm. During trial, the prosecutor asked that defendant reveal his upper arm for the jury to see. The record reflected that he had a skull tattoo on his right arm. We defer to the jury's assessment of the credibility of the identification testimony. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). A witness's positive identification of a defendant has been held to be sufficient evidence to support a conviction. *Id.* Review of the entire record reveals that defendant's conviction was supported by sufficient evidence.

Defendant also argues that the verdict in this case was against the great weight of the evidence. But this issue is not properly preserved for our review. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). Regardless, the verdict was not against the great weight of the evidence because the evidence did not heavily preponderate against the verdict, *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 124 (1998), but rather amply supported it.

Defendant next argues that the trial court abused its discretion in departing from the sentencing guidelines. We disagree. We review a trial court's decision to depart from the sentencing guidelines based on a finding of a substantial and compelling reason to do so for an abuse of discretion. *People v Babcock*, 469 Mich 247, 268-269; 666 NW2d 231 (2003). An abuse of discretion exists where the court chooses an outcome outside the range of principled outcomes. *Id.* at 269. The question of whether a factor exists is reviewed for clear error, and the question of whether the factor is objective and verifiable is reviewed de novo. *Id.* at 265.

Defendant does not dispute the scoring here. Instead, he contests the court's departure from the guidelines' range for the "Class A" offenses of which defendant was convicted. See MCL 777.16y. With a prior record variable (PRV) score of 22, putting defendant at level C, and an offense variable (OV) score of 50, putting him at level III, the recommended minimum sentence range pursuant to MCL 777.62 was 81 to 135 months. The court sentenced him to 15 to 35 years.

In its departure evaluation, the trial court stated:

The sentencing guidelines in this case failed to take into account the extreme heinousness of this crime. Although the defendant's prior record is considered, the guidelines make no provision for someone who commits the same crime in an aggravated fashion. In this case, the defendant was scored for a concurrent felony, and a subsequent felony that occurred after this incident. There is no consideration for the fact that the subsequent felony was also a criminal sexual conduct offense. That crime occurred approximately two months after this incident, in the presence of witnesses, and the child's mother was in the next room. That case and the circumstances of the present case show that the defendant acts without regard to possible consequences...It appears that the defendant is not concerned with the consequences if caught; therefore he is substantially less likely to be deterred. Therefore, specific deterrence is necessary to protect the public from this defendant in the future. Further, although points were scored for bodily injury requiring treatment, the guidelines do not take into account the extent of injury to this victim of the transmission of disease. In this case, the victim contracted Human Papilloma Virus (HPV), a disease that potentially may cause cervical cancer in the future.

Thus, the trial court determined that defendant was a "predator" from whom "the public" should be protected. The reasons set forth by the trial court are substantial and compelling. MCL 769.34(3). We are convinced as well that the court would have sentenced defendant as it did without regard to the fact that defendant may have transmitted a sexually-transmitted disease to the victim.¹ Therefore, we affirm defendant's sentence. *Babcock, supra* at 260-261.

Defendant argues that the court erred in denying his motion to suppress the victim's in-court identification of him. We disagree. We review this issue for clear error. *People v Harris*, 261 Mich App 44, 51; 680 NW2d 17 (2004). We conclude that the trial court did not clearly err in finding that the victim's identification of defendant was supported by a sufficiently independent basis. *People v Colon*, 233 Mich App 295, 304; 591 NW2d 692 (1998). In deciding whether there was a sufficiently independent basis for the victim to identify defendant as her attacker during the preliminary examination, the court focused on "the fact that [she] was able to observe her attacker, that she was able to describe him with great particularity, [and] that she was able to pick out a photograph of him." A trial court deciding this factual question "may

¹ There was no evidence presented below regarding the allegation that the victim contracted this disease as a result of being raped by defendant, and defendant declined to be tested before trial.

put greater or lesser weight” on any of the pertinent factors depending on the circumstances. *People v Gray*, 457 Mich 107, 117 n 12; 577 NW2d 92 (1998). It appears that this trial court gave greater weight to the fact that the victim observed and described her attacker and identified defendant from his photograph as her attacker. This independent basis purges the taint resulting from any impermissibly suggestive identification procedure based on the nature of defendant’s appearance at the preliminary examination. *Id.* at 304. Thus, we conclude that the trial court did not clearly err in finding a sufficiently independent basis for the in-court identification and its consequent denial of defendant’s motion to suppress that identification.

Defendant next argues that the trial court erred in denying his discovery request for information gathered by the physicians, psychologists, and counselors who treated the victim in this case. We disagree. We review this question for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). We are satisfied that the trial court did not abuse its discretion where defendant failed to show – as he likewise fails here – that the privileged materials contained material necessary to his defense. MCR 6.201(C)(2); *People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557 (1994). Thus, because defendant failed to meet this threshold requirement, the court did not abuse its discretion in declining to review the materials *in camera* pursuant to MCR 6.201(C)(2). See *Stanaway*, *supra* at 677.

Defendant advances his last argument on appeal without any reasonably applicable supporting authority. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998). We deem this issue abandoned. *Yee v Shiawassee Co Bd of Comm’rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002). Further, it is apparent that there is no reasonable basis to impute to the prosecution the challenged conduct of the victim in evidently disposing of her clothes.

Affirmed.

/s/ Stephen L. Borrello
/s/ William B. Murphy
/s/ Janet T. Neff