

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK STEVEN BROWN,

Defendant-Appellant.

UNPUBLISHED

October 23, 2007

No. 270328

Kent Circuit Court

LC No. 04-009220-FC

Before: Hoekstra, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c) and (e), and one count each of first-degree home invasion, MCL 750.110a(2), kidnapping, MCL 750.349, and armed robbery, MCL 750.529. He was subsequently sentenced, as a second habitual offender, MCL 769.10, to life imprisonment for each of the first-degree criminal sexual conduct convictions, 10 to 30 years' imprisonment for the first-degree home invasion conviction, and 40 to 80 years' imprisonment for the kidnapping and armed robbery convictions. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court improperly permitted the victim's examining physician to testify beyond his realm of expertise. Specifically, defendant challenges that portion of the physician's testimony in which he agreed with the prosecutor's query regarding whether "[p]eople sometimes give up resisting." A trial court's determination regarding the admissibility of testimony is reviewed for an abuse of discretion. *People v Murray*, 234 Mich App 46, 52; 593 NW2d 690 (1999). An abuse of discretion exists when a trial court's decision is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006); *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The opinion testimony of an expert is admissible under MRE 702 if it will assist the jury in its understanding of the evidence or the factual issues present in the case, and the expert has sufficient qualifications to allow the expert's opinion to aid the trier of fact in its determination of the truth. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). Under MRE 701, a lay witness may also testify as to his opinion on matters that are related to his observations and findings and are not "overly dependant upon scientific, technical, or other specialized knowledge." *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989) (internal quotation marks omitted); see also *People v McLaughlin*,

258 Mich App 635, 657-659; 672 NW2d 860 (2003). Here, having cited the “breadth and length” of the physician’s experience practicing emergency medicine and the fact that the inquiry was “not necessarily one that goes to expertise,” but rather, was “within the relatively common experience of humankind,” it appears that the trial court admitted the challenged testimony under both MRE 701 and 702. From our review of the record, we are not persuaded that the trial court’s decision to admit the testimony on these grounds falls outside the range of reasonable and principled outcomes. Accordingly, we do not conclude that the trial court abused its discretion in allowing the challenged testimony.

Defendant also argues, however, that the prosecutor committed misconduct by enabling the examining physician to improperly vouch for the victim’s credibility through this testimony. This unpreserved allegation of prosecutorial misconduct is reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Expert testimony regarding the credibility of a witness is impermissible, because questions of credibility are solely to be decided by the jury. *Franzel v Kerr Mfg Co*, 234 Mich App 600, 622; 600 NW2d 66 (1999). An examining physician in a criminal sexual conduct case is allowed to testify, however, as long as the testimony will assist the jury in their determination of the existence of either of two crucial elements of the offense charged, (1) penetration, and (2) lack of consent. *People v McGillen #2*, 392 Mich 278, 284; 220 NW2d 689 (1974). In this case, the issues of penetration and consent were before the jury. The prosecutor was thus permitted to introduce evidence that the victim did not consent to the penetration and that the lack of injury to her vagina did not negate her claim of penetration by the defendant through the use of a knife and stick. The examining physician did not impermissibly bolster the victim’s credibility and the prosecutor did not commit misconduct. Therefore, we find no plain error in the elicitation of this testimony.

Defendant next argues that his life sentences for first-degree criminal sexual conduct were disproportionate to the crimes for which he was convicted. We disagree.¹

We review the imposition of defendant’s sentences for an abuse of discretion. See *People v Gatewood (On Remand)*, 216 Mich App 559, 560; 550 NW2d 265 (1996). It is an abuse of discretion for a trial court to impose a sentence that violates the principle of proportionality; a sentence must be proportionate to the seriousness of the crime for which the defendant is convicted, as well as the defendant’s prior record. *People v Milbourn*, 435 Mich 630, 636, 654; 461 NW2d 1 (1990). Here, the record reveals that defendant has 11 prior felony convictions and 12 misdemeanor convictions. Several of defendant’s past crimes were assaultive, including convictions for felonious assault, assault with intent to do great bodily harm less than murder, and first-degree criminal sexual conduct. The circumstances of defendant’s instant convictions were similarly assaultive and also heinous. Defendant entered the victim’s home in the middle of the night and, after threatening the life of her two-year-old daughter, sexually assaulted the victim with his penis and a knife before transporting her in the trunk of a

¹ Because defendant’s crimes were committed before January 1, 1999, the legislative sentencing guidelines do not apply. MCL 769.34(1).

car to other locations where he committed additional acts of sexual misconduct. On these facts, we conclude that the life sentences imposed by the trial court were proportionate to the offenses and the offender. The trial court did not, therefore, abuse its discretion in imposing such sentences.

Defendant also argues that resentencing is required because the trial court abused its discretion in sentencing him to indeterminate sentences that he could not possibly serve during his life expectancy. We disagree. We are no longer required to remand for resentencing of a defendant because his indeterminate sentence is effectively a life term without the possibility of parole. See *People v Kelly*, 213 Mich App 8, 15-16; 539 NW2d 538 (1995). Rather, the proportionality standard as set forth in *Milbourn, supra*, is the appropriate standard by which to judge the legality of a defendant's sentence. *Kelly, supra* at 16. For the reasons already discussed, we find defendant's indeterminate sentences to be proportionate to the offenses and the offender. Remand for resentencing is thus not required.

Affirmed.

/s/ Joel P. Hoekstra
/s/ David H. Sawyer
/s/ Christopher M. Murray