STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EUGENE WALKER,

Defendant-Appellant.

UNPUBLISHED
December 20, 1996

No. 190096
LC No. 94-008631-FH

Before: Taylor, P.J., and Markman and P. J. Clulo,* JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(f); MSA 28.788(3)(1)(f), and his sentencing as an habitual second offender, MCL 769.10; MSA 28.1082. Defendant was sentenced to serve twelve to twenty-two years in prison. We remand for further factual findings.

On appeal, defendant contends that the trial court erred by finding that a defense expert, Dr. John Stryker, had not addressed the elements listed in the definition of legal insanity under MCL 768.21a(1); MSA 28.1044(1)(a). We review a trial court's finding of fact for clear error. MCR 2.613(C); *People v Anderson*, 112 Mich App 640, 648; 317 NW2d 205 (1981). Upon review, we agree that the trial court clearly erred.

At trial, after properly raising the issue of insanity by filing a notice of insanity defense, defendant presented the testimony of Dr. Stryker to establish his claim. MCL 768.21a(1); MSA 28.1044(1)(a) defines legal insanity by stating in pertinent part:

> A person is legally insane if, as a result of mental illness . . . or as a result of mental retardation . . . that person lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

* Circuit judge, sitting on the Court of Appeals by assignment.

Upon being questioned whether defendant met the requirements of the statute concerning diminished capacity and legal insanity, Dr. Stryker stated he believed that defendant was mentally ill and that, as a result of his mental illness, defendant could not appreciate the wrongfulness of his behavior. However, in rendering its findings of fact, the trial court stated that Dr. Stryker had not mentioned the requirements of the statute and had not put in "any evidence" to show defendant was insane. The prosecution concedes that this finding was clear error and, therefore, the issue must be remanded to the trial court for further findings of fact in accordance with the existing record. MCR 6.403; *People v Jackson*, 63 Mich App 249, 254; 234 NW2d 471 (1975). The trial court must explain whether it finds the prosecution proved defendant was not insane beyond a reasonable doubt notwithstanding Dr. Stryker's testimony that defendant could not appreciate the wrongfulness of his conduct.

In a related argument, defendant claims that he was denied the effective assistance of counsel because his trial attorney did not elicit the appropriate questions in order to establish a defense of insanity. As counsel did indeed elicit testimony to establish the elements of the statutory definition of legal insanity as set forth in MCL 768.21a(1); MSA 28.1044(1)(a), defendant's claim of ineffective assistance is without merit.

Further, in the event the trial court, upon rendition of additional findings of fact, affirms its verdict that defendant was guilty but mentally ill of second-degree CSC, we address defendant's remaining claims on appeal. First, defendant asserts that there was insufficient evidence to sustain his conviction of guilty but mentally ill because the evidence of his insanity was overwhelming. We disagree.

We review a question of sufficiency of the evidence by viewing the evidence in a light most favorable to the prosecution to determine whether a 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, 516 n 6; 489 NW2d 748 (1992), amended 441 Mich 1201-1202 (1992). Viewing the evidence in that light here, we find the evidence sufficient to convict defendant as guilty but mentally ill of second-degree CSC.

The nature and amount of evidence required to sufficiently overcome a defendant's assertion of insanity typically varies from case to case. *People v Banks*, 139 Mich App 45, 47; 361 NW2d 1 (1984). A strong showing of insanity must be rebutted by something more than minimal evidence of sanity. *People v Murphy*, 416 Mich 453, 465-467; 331 NW2d 152 (1982). However, sufficiency is ultimately a question for the trier of fact. *People v Walker*, 142 Mich App 523, 527; 370 NW2d 394 (1985). Further, the trial court is not required to accept expert testimony where the use of lay testimony provides competent evidence of sanity. *People v McBride*, 55 Mich App 234, 240; 222 NW2d 195 (1974); *Murphy*, *supra*, at 465.

Here, the trial court heard the testimony of both defendant and defendant's expert. In rendering its verdict, the trial court stated that upon listening to defendant's testimony it believed that defendant could appreciate the wrongfulness of his act at the time of the commission of the crime. Viewing the testimony in a light most favorable to the prosecution, and noting that sufficiency is ultimately a question

for the trier of fact, we find sufficient evidence existed to find defendant guilty but mentally ill. *Wolfe, supra* at 515; *Walker*, *supra* at 527.

Defendant also contends that the trial court abused its discretion and violated the principle of proportionality when it sentenced him to twelve to twenty-two years in prison as an habitual offender. We disagree.

In reviewing a sentence for proportionality on a conviction as an habitual offender, we determine whether the sentence is proportionate to the seriousness of the offense and the characteristics of the offender, taking into consideration the defendant's criminal history and his potential for rehabilitation. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990). We do not consider the sentencing guidelines for the underlying offense. *People v Gatewood (On Remand)*, 216 Mich App 559; 550 NW2d 265 (1996). Here, defendant's criminal history demonstrated repeated unsuccessful attempts by the criminal justice system to rehabilitate defendant. Defendant committed a violent sexual assault. After reviewing the record, we are satisfied that the lower court did not violate the principle of proportionality by sentencing defendant to twelve to twenty-two years, a sentence which did not exceed the statutorily prescribed enhanced maximum sentence allowed under MCL 769.10; MSA 28.1082. We find defendant's sentence reflected the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995).

Remanded for a clarification of the findings of fact. We do not retain jurisdiction.

/s/ Clifford W. Taylor
/s/ Stephen J. Markman
/s/ Paul J. Clulo