STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONNIE LAMARR HESTER,

Defendant-Appellant.

UNPUBLISHED
June 27, 1997

No. 178595
Macomb Circuit Court
LC No. 93-002655 FC

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), one count of armed robbery, MCL 750.529; MSA 28.797, and one count of breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305. He was sentenced to 50 to 75 years' imprisonment for the criminal sexual conduct convictions, 50 to 75 years' imprisonment for the armed robbery conviction, and 10 to 15 years' imprisonment for the breaking and entering conviction. Defendant now appeals as of right. We affirm.

I

Defendant first argues that there was insufficient evidence to convict him. He claims that the jury could not rationally conclude that the prosecution had proven his identity as the perpetrator beyond a reasonable doubt. He argues that the only evidence tying him to the crimes was a fingerprint, and that the proof regarding the print was insufficient to allow a jury to convict him on that evidence alone.

As an initial matter, we must point out that there was additional circumstantial evidence that suggested that defendant was the perpetrator of this crime. First, there was evidence regarding an extremely similar assault that defendant committed nine years earlier. Second, there was a pubic hair recovered by the victim that was consistent with defendant's pubic hair. We conclude that this evidence, combined with the fingerprint evidence, was sufficient to sustain defendant's conviction. Even if, as defendant argues, the fingerprint was the only properly admissible evidence on identity, we still conclude that it was sufficient to sustain his conviction.

The general rule is that "fingerprint evidence alone is sufficient to establish identity if the prints are found at the scene of the crime under such circumstances that they could have only been made at the time of the commission of the crime." *People v Himmelein*, 177 Mich App 365, 374-375; 442 NW2d 667 (1989). See also *People v Willis*, 60 Mich App 154, 158-159; 230 NW2d 353 (1975); *People v Ware*, 12 Mich App 512, 515; 163 NW2d 250 (1968). In applying this general rule, this Court simply considers whether the evidence was sufficient to allow a rational trier of fact to conclude that the defendant's identity as the perpetrator had been established beyond a reasonable doubt. See *Himmelein, supra* at 374-375; *Willis, supra* at 158-159; *Ware, supra* at 514-515.

Here, there was sufficient evidence to allow a jury to convict defendant. A police fingerprint expert testified that defendant's fingerprint matched that found on a phone in the victim's trailer. There was also evidence that defendant told the police that he had never been in the victim's trailer. In addition, the victim testified that defendant had never had permission to enter her trailer. Finally, the victim testified that the phone had been in the trailer for about three months prior to the attack. We conclude that this evidence was sufficient to allow a rational trier of fact to find that defendant's identity as the perpetrator was established beyond a reasonable doubt.

II

Defendant next argues that the trial court improperly allowed evidence regarding his prior criminal sexual conduct conviction. He argues that this evidence was inadmissible under MRE 404(b). Under MRE 404(b), evidence of prior bad acts is inadmissible where it is "offered solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994). In *VanderVliet*, the Michigan Supreme Court outlined a four-part test for determining the admissibility of prior-acts evidence. First, the evidence must be relevant to an issue other than the defendant's propensity to commit the crime. Second, the evidence must be logically relevant. Third, the judge must determine whether the danger of undue prejudice substantially outweighs the probative value of the evidence, in light of the other evidence available to the prosecution. Finally, when requested by the defendant, the trial court may provide a limiting instruction to the jury. *Id.* at 74-75. The Court in *VanderVliet* recognized several requirements of logical relevance necessary to satisfy the second part of this test where the prior acts evidence is offered to prove identity. First, there must be substantial proof that defendant committed the prior bad act. Second, there must be some special quality or circumstance of the bad act tending to prove the defendant's identity. Third, the identity of the perpetrator must be at issue in the trial. *Id.* at 66-67, n 16 (citing *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982).

Here, it is clear that the evidence was offered for a proper purpose, that is, to prove defendant's identity. It is also clear that this evidence was relevant to show identity: there was substantial evidence that defendant committed the prior sexual assault, the similarities between the current offense and the prior assault tended to prove defendant's identity as the perpetrator, and finally, the identity of the perpetrator was the primary issue at trial. In addition, after the evidence was admitted, the trial court gave the jury a limiting instruction. Thus, parts one, two, and four of the *VanderVliet* test clearly are met here. The only remaining question is whether the probative value of

this evidence was substantially outweighed by the danger of unfair prejudice, in light of the other evidence available to the prosecution. *VanderVliet, supra* at 74-75; MRE 403.

We conclude that the similarities between the two crimes were sufficient to make the evidence of the prior sexual assault highly probative. While the evidence also presented great danger of unfair prejudice, that danger did not substantially outweigh its probative value. Under these circumstances, this evidence was properly admissible, and the trial court did not abuse its discretion in admitting it. See *People v McMillan*, 213 Mich App 134, 137-139; 539 NW2d 553 (1995).

III

Defendant next argues that the trial court erred in denying his motions for a mistrial based on the unresponsive answers of two witnesses. First, a police officer referred to defendant as a "serial rapist." In addition, one of the victim's neighbors was called as a defense witness and volunteered that, after defendant was arrested "we had no more problems." This Court has expressed serious concern over the unresponsive answers of police officers that introduce prejudicial evidence against a defendant. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). However, we review a trial court's decision whether to grant or deny a motion for a mistrial for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). "The standard for reviewing an abuse of discretion is narrow; the result must have been so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or an exercise of passion or bias." *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Here, the witnesses' unresponsive remarks were potentially prejudicial to defendant. However, the trial court was in a better position to determine what effect, if any, these remarks had on the jury. The record clearly establishes that the trial court carefully weighed the remarks and considered their possible prejudicial effect. There is no evidence of any passion or bias on the part of the trial court. Under these circumstances, we cannot conclude that the trial court's decisions to deny defendant's motions for a mistrial based on the witnesses' unresponsive answers were an abuse of discretion.

IV

Defendant next argues that the trial court abused its discretion by allowing the prosecutor to elicit evidence regarding defendant's silence in response to certain questions from the police. This argument is without merit. Defendant never invoked his right to remain silent. Where a defendant has not invoked this right, his silence in response to police questions is admissible against him. See *People v Sholl*, 453 Mich 730, 734-738; 556 NW2d 851 (1996); *People v McReavy*, 436 Mich 197, 218-220; 462 NW2d 1 (1990). Defendant argues that his silence was, in fact, an exercise of his right to remain silent. However, the Michigan Supreme Court has refused "to characterize as a matter of law nonutterances as being the equivalent of an affirmative exercise of Fifth Amendment rights." *McReavey, supra* at 201-202, n 2. Thus, the trial court properly concluded that evidence regarding defendant's failure to respond to certain questions from the police was admissible.

V

Defendant also challenges his convictions on the basis of the prosecutor's closing remarks. He argues that the prosecutor improperly commented on his failure to testify, and that the trial court should have granted his motion for a mistrial.

A prosecutor may not comment on a defendant's failure to testify. *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995); *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). This rule stems from a defendant's Fifth Amendment right to be free from compulsory self-incrimination. *United States v Robinson*, 485 US 25, 30; 99 L Ed 2d 23;108 S Ct 864 (1988); *Fields, supra* at 108-109. Generally, however, a prosecutor may comment that evidence is undisputed or uncontradicted, even where the defendant is the only person who could provide contradictory testimony. *Guenther, supra* at 177. But see *People v Centers*, 141 Mich App 364, 377-378; 367 NW2d 397 (1985), rev'd and remanded on other grounds 422 Mich 951 (1985). Essentially, a prosecutor is prohibited from arguing that a defendant's silence is evidence of his guilt. *Fields, supra* at 110-111 (citing *Robinson, supra* at 33-34). However, a prosecutor is entitled to "fair comment" or a "fair response" to issues or theories raised by the defense. *Id.* As the Michigan Supreme Court has noted, "the protective shield of the Fifth Amendment should not be converted into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case." *Id.* at 109 (citation, brackets, and quotation marks omitted).

As previously noted, the prosecutor was properly permitted to comment on defendant's silence in response to some of the police officers' questions. In addition, we find that the prosecutor's remark that there was no evidence corroborating defendant's wife's testimony was proper. The prosecutor was simply pointing out that defendant's wife had a strong incentive to lie, and that there was no evidence that her story was anything other than a fabrication. This was a proper comment on the weight to be given to her testimony, rather than a comment on defendant's silence. See *Guenther, supra* at 177-178.

Finally, the prosecutor properly pointed out that no one had testified that the fingerprint found in the victim's trailer did not belong to defendant. The prosecutor only made this remark after defense counsel attacked the reliability of the fingerprint evidence in his closing argument. Here, the prosecutor was simply pointing out that defendant could have called his own expert to refute the prosecution's expert testimony regarding the fingerprint. This argument was a fair comment on the weakness of defendant's theory. *Fields, supra* at 110-111 (citing *Robinson, supra* at 33-34). Thus, the trial court properly denied defendant's motion for a mistrial based on these comments.

However, defendant argues that the prosecutor's remarks were improper based on this Court's decision in *Centers, supra* at 377-378, because defendant himself was the only one who could have provided contradictory testimony. *Centers* is factually distinguishable. There, the prosecutor referred to fingerprint evidence as "totally uncontradicted" and "completely unexplained." *Id.* at 377. This Court summed up the distinction between proper and improper comment on such evidence:

> Although the prosecutor here could properly argue, for example, that the expert testimony identifying the fingerprints as those of defendant was uncontradicted, the argument made here exceeded the bounds of propriety, because only defendant could

> explain how, if he was innocent, his fingerprints came to be at the scene of the crimes. [*Id.* at 378.]

Here, the prosecutor argued defendant's failure to call a fingerprint expert as a witness, not defendant's failure to explain how his fingerprint came to be at the scene of the crime. Thus, the prosecutor's remark falls squarely within the safe ground identified in *Centers*. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial based on the prosecutor's closing argument.

Defendant also argues that the prosecutor's remarks were improper under the rule applied in federal cases. This Court addressed and applied the federal law in *Guenther*. *Guenther, supra* at 179-180. In applying the federal law, this Court "looks at the comments in the context in which they were made and determines whether the language used was manifestly intended to be or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Id.* at 179 (citation and internal quotation marks omitted). We cannot conclude that the prosecutor's remarks regarding defendant's wife's testimony or the fingerprint evidence were improper under this test. Even were these remarks improper, they still would not require reversal, as they were isolated comments. *Id.* at 179-180. Thus, federal law does not require reversal here.

VI

Defendant raises three additional issues relating to his sentence. First, he contests the scoring of the sentencing guidelines. We have reviewed defendant's challenges and do not consider them to state cognizable claims for relief. *People v Mitchell*, ___ Mich ___, ___ NW2d ___ (Docket Nos. 98984 and 98985, issued March 25, 1997, slip op at 32-34).

Next, defendant argues that the trial court improperly considered his age upon completion of his sentence and the chances of recidivism at that age and departed from the guidelines recommended range. While a trial court may depart from the sentencing guidelines, such departures are suspect and subject to careful review. *People v Coulter (After Remand)*, 205 Mich App 453, 456; 516 NW2d 827 (1994). In departure cases, our first inquiry is whether the case involves circumstances that are not adequately embodied within the variables used to score the guidelines. *People v Milbourn*, 435 Mich 630, 659-660; 461 NW2d 1 (1990). We believe that this is such a case. For example, as noted by the trial court, defendant's prior record score of eighty-five greatly exceeded the fifty points necessary to place him in the "D," or highest, level of prior record scores. In addition, the guidelines variables do not adequately cover the fact that defendant was previously convicted of a similar vile and violent sexual offense as opposed to some other type of "high severity felony conviction." See Michigan Sentencing Guidelines 2d 1988, p 41. Furthermore, as indicated by the presentence investigation report reviewed by the trial court prior to sentencing, while previously incarcerated, defendant was cited several times for misconduct - including sexual misconduct. While the trial court did consider defendant's age, on the basis of the sentencing transcript, we are of the opinion that defendant's age was properly considered by the trial court in a limited context and in conjunction with other permissible factors such as defendant's prior record and the corresponding guidelines prior record score, the brutality of the instant offense and the previous similar offense, the need to protect society, and defendant's prospects for

rehabilitation. See *People v Fleming*, 428 Mich 408, 423-424 n 17; 410 NW2d 266 (1987); *People v Carson*, 220 Mich App 662, 678; 560 NW2d 657 (1996). We find no abuse of discretion in the trial court's consideration of defendant's age. The key test is whether a sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines range, *Milbourn*, *supra* at 661. We find defendant's sentence to be proportionate.

Last, defendant requests a reduction in his minimum sentence. At sentencing, the trial court initially sentenced defendant to fifty to seventy years' imprisonment. After a brief discussion of the record, the trial court changed defendant's sentence to fifty to seventy-five years to conform with the two-thirds rule set forth in *People v Tanner*, 387 Mich 683; 199 NW2d 202 (1972). Defendant argues that the initial sentence was valid as to the maximum, and that the trial court could only correct the sentence by reducing the minimum sentence. If the initial sentence had been "imposed," defendant would be entitled to such relief. See MCR 6.429; *People v Thomas*, 447 Mich 390, 391-394; 523 NW2d 215 (1994). However, because the trial court immediately corrected the initial sentence at the same hearing before it was reduced to a written judgment, we do not consider the initial sentence to have been "imposed."

Affirmed.

/s/ Maureen Pulte Reilly
/s/ Harold Hood
/s/ William B. Murphy