STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFONZO HERNANDEZ-ORTA,

Defendant-Appellant.

UNPUBLISHED
August 22, 1997

No. 194907
Clinton Circuit Court
LC No. 95-005901-FC

Before: Hood, P.J., and McDonald and Young, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct ("CSC I"), MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), for which defendant was sentenced to ten to twenty years' imprisonment. Defendant now appeals as of right, and we affirm.

Defendant first argues the trial court abused its discretion when it excluded from evidence a DNA report prepared by defendant's forensic expert. The report set forth the results of comparison DNA tests done on defendant's blood, the victim's blood, and vaginal samples taken from the victim after the rape. "The decision whether to admit evidence rests within the sound discretion of the trial court and will not be set aside on appeal absent an abuse of discretion." *People v Long Realty, Inc*, 199 Mich App 461, 466; 502 NW2d 337 (1993). "An abuse of discretion exists when the court's decision is so grossly violative of fact and logic that it evidences perversity of will, defiance of judgment, and the exercise of passion or bias." *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The DNA testing method used on the genetic samples was the polymerase chain reaction ("PCR") method. In *People v Lee*, 212 Mich App 228, 282-283; 537 NW2d 233 (1995), this Court held "that trial courts in Michigan may take judicial notice of the reliability of . . . the PCR method." However, even though the PCR method is acknowledged as credible and reliable, that does not mean results obtained pursuant to PCR testing must be entered into evidence. As with all evidence, PCR test results must be relevant in order to be admitted into evidence at trial. The report indicated defendant's DNA was not detected in the nonsperm vaginal sample, and that results obtained for the sperm sample

failed "to meet reporting standards." Because these results are at best equivocal, the report does not "make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401. Therefore, the trial court did not abuse its discretion when excluding the report from evidence.

Defendant's second argument also centers on the excluded defense report. Defendant asserts his constitutionally protected right to compulsory process was violated when the trial court denied his motion for funds to conduct a telephonic deposition of his forensic expert who prepared the report. On appeal, the trial court's ruling on defendant's request for the funds is reviewed for an abuse of discretion. See *In re Klevorn*, 185 Mich App 672, 678; 463 NW2d 175 (1990).

In *People v Loyer*, 169 Mich App 105, 112-113; 425 NW2d 714 (1988), a panel of this Court observed that both the United States and Michigan Constitutions guarantee the right of compulsory process to a defendant in a criminal prosecution. "However," it noted, "a criminal defendant's right to compulsory process is not absolute." *Id*. at 112. Defendant needed to establish to the satisfaction of the trial court that the witness he wanted to depose was a material witness without whose testimony defendant could not safely proceed. MCL 775.15; MSA 28.1252. Defendant failed to meet this burden. When excluding the DNA report prepared by defendant's expert, the trial court also excluded any and all evidence related to semen testing done by the prosecution. Thus, any potential prejudice to defendant was eliminated. The exclusion of all evidence related to DNA testing assured that defendant could safely proceed to trial without the telephonic deposition.

Third, defendant argues the prosecution failed to establish all the elements of the crime because there was insufficient evidence to support a finding the victim had suffered mental anguish as a result of the rape. We are unconvinced by defendant's argument. In order to convict defendant of CSC I, the prosecution had to prove that: (1) defendant's penis penetrated the victim's vagina or anus; (2) "defendant caused personal injury to" the victim; and (3) "defendant used force or coercion to commit the sexual act." CJI2d 20.1(2)(a), 20.9(1) and (5). Defendant's argument is focused solely on the personal injury element of the crime. "Personal injury means bodily injury, disfigurement, chronic pain, pregnancy, disease, loss or impairment of sexual or reproductive organ, or mental anguish." CJI2d 20.9(2). Mental anguish is, therefore, but one of several ways to establish that the victim of a CSC I assault sustained a personal injury. At trial, the prosecution argued that the victim had suffered both mental anguish and bodily injury as a result of the attack, and the jury was instructed that it could find defendant guilty if it believed that the victim had sustained either form of personal injury.

While we agree with defendant that there was insufficient evidence to support a finding that the victim suffered mental anguish, we also observe that there was more than enough to support a finding of bodily injury. When reviewing a claim of insufficient evidence, an appellate court must determine "whether, after viewing the evidence in light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979). The emergency room physician who treated the victim testified that the victim had several linear abrasions on her left inner thigh, as well as an abrasion between her vagina and rectum. The doctor testified that these abrasions were of recent origin. Given that "evidence of even insubstantial physical injuries is sufficient to support a conviction for

criminal sexual conduct in the first degree," *People v Himmelein*, 177 Mich App 365, 378; 442 NW2d 667 (1989), and viewing this evidence in a light most favorable to the prosecution, we conclude that any rational trier of fact could have been persuaded beyond a reasonable doubt that defendant had inflicted a bodily injury, and therefore a personal injury, on the victim.

We note that this analysis is unaffected by the fact the jury returned a general verdict of guilty. Defendant's challenge is to the sufficiency of the evidence. Under the appropriate standard of review we need only be persuaded that "*any* rational trier of fact could have found [that] the essential *elements* of the crime" were proven beyond a reasonable doubt. Thus, we are not required to determine exactly what these particular jurors concluded regarding alternate theories concerning an element of the crime. As a panel of this Court observed in *People v Reese*, 114 Mich App 644; 319 NW2d 610 (1982):

> Mental anguish is only one example of personal injury under the statute, which also includes "bodily injury." There was sufficient evidence produced during trial to support a conclusion that the defendant intended to inflict bodily injury . . . . [The facts of the case support] . . . the position of the prosecution that personal injury was intended, *whether it be mental anguish or bodily injury*. [*Id*. at 647 (finding that the jury instructions were not misleading) (emphasis added).]

Finally, defendant argues the facts in evidence do not support the offense score assessed under the sentencing guidelines. "[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Mitchell*, 454 Mich 145, 177; 560 nw2d 600 (1997). Because we find none of the factual predicates underlying the scores are either wholly unsupported or materially false, and because defendant does not argue his sentence is disproportionate, we find no merit to defendant's argument.

We affirm.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Robert P. Young, Jr.