

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LLOYD JENKINS, JR.,

Defendant-Appellant.

UNPUBLISHED

May 8, 1998

No. 199308

Kent Circuit Court

LC No. 95-000552-FH

Before: Corrigan, C.J., and Hoekstra and Young, Jr., JJ.

PER CURIAM.

Defendant appeals by right his conviction following a bench trial of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1); MSA 28.788(7)(1). The trial court sentenced defendant as an habitual offender, second offense, to a term of imprisonment of five to fifteen years. We affirm, but remand for correction of defendant's presentence investigation report.

I

Defendant first argues that the prosecutor failed to present sufficient evidence to support his conviction. We disagree. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). The elements of assault with intent to commit criminal sexual conduct involving penetration are: (1) an assault; (2) the intent to commit an act involving some sexually improper intent or purpose; (3) the intent to commit a sexual act involving penetration, *i.e.*, the intended sexual act must involve actual entry of another person's genital or anal opening or some oral sexual act; and (4) the existence of aggravating circumstances, *e.g.*, the use of force or coercion. *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). The trier of fact may infer intent from all the facts and circumstances of a given case. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987); see *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Minimal circumstantial evidence is sufficient to illustrate the requisite intent because proving an actor's state of mind is difficult. *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984).

We reject defendant's argument that the prosecutor failed to present sufficient evidence to establish defendant's intent to engage forcibly in an act of sexual penetration. The prosecutor presented sufficient evidence to support his theory that defendant drugged the victim and then attempted to engage in sexual penetration while the victim was under the influence of the drugs. The victim testified regarding two incidents that revealed defendant's intent in this case. The victim testified that while he and defendant were roommates in October 1994, defendant served him a beverage following their workout at a gym. The victim fell asleep upon their return home. He awoke dizzy, light-headed, and uncoordinated. The victim had never before experienced these symptoms, and visited the doctor the next day. The symptoms had, however, dissipated by that time.

The victim experienced a similar episode in early December 1994. Defendant woke the victim during the night of December 7 to give him a drink containing "headache powders." The victim awoke the next morning with a pronounced vertigo sensation, much like the one he had experienced in October. The victim experienced blackouts, dizziness, blurred vision, and slurred speech. Defendant drove the victim to the doctor that morning, and the doctor scheduled the victim for a CAT scan that evening. Defendant and the victim then returned to their apartment. The victim testified that he and defendant sat on their couch upon their return to the apartment, whereupon defendant inserted a pornographic videotape into the VCR. The victim, feeling very dizzy and "out of it," thought that defendant's conduct was very strange. Defendant then placed his hand on the victim's groin. The victim responded by pushing away defendant's hand. Defendant then propositioned the victim for oral sex, saying that he "would do it to [him]. It would be [their] little secret, and that's as far as it would have to go." Defendant stood up and put his hands on the victim's shoulders to prevent him from leaving the couch, but the victim wrestled himself free and fled to his bedroom. As the victim departed, he heard defendant say something like "you are tougher than I thought."

The victim's girlfriend corroborated his testimony. She testified that the victim called her on the evening of October 27, 1994, to inform her that he felt unsteady and was experiencing double vision. The victim called her again on the morning of December 8, 1994. She could hardly recognize the victim's voice because of his slurred speech, but he complained of the same symptoms he had experienced in October. The victim's condition had improved by the time she spoke to him that afternoon, but he was still experiencing dizziness, unsteadiness, and blurred vision. The girlfriend spoke to the victim again later that evening. The victim related during this conversation that defendant had played a pornographic videotape, touched the victim's groin, and propositioned him for oral sex. The victim also stated that he had to wrest himself from defendant's grasp.

Additional evidence also established defendant's intent to commit penetration during the December assault. A witness testified that during his friendship with defendant in 1990 and 1991, he experienced episodes in which he felt groggy and unstable, had "tunnel vision," and lost consciousness. He stated that defendant had given him a beverage before these incidents and performed oral sex on him without his consent on at least two occasions. The witness testified that he was too weak to move and could not think clearly during the assaults. The final incident involving defendant occurred in December 1991 during a trip to Naperville, Illinois. The witness testified that he felt groggy when they arrived in Naperville and defendant checked them into a motel. Defendant would not allow him to leave

the room and then videotaped the ensuing assault. The videotape of the incident showed defendant undressing the witness as he faded in and out of consciousness, fondling his genitals, and performing fellatio on him.

Viewing the evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could find that defendant used force to assault the victim while intending to commit sexual penetration. We reject defendant's assertion that the victim and his girlfriend were not credible witnesses. The determination of witness credibility is for the trier of fact, not this Court. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). We also reject defendant's argument that the victim's symptoms could have been caused by ingesting an excessive amount of dietary supplements. The prosecution need not negate every theory of innocence, but must only prove its own theory beyond a reasonable doubt. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). In any event, a physician refuted defendant's theory by testifying that the victim would have to consume an enormous amount of dietary supplements to produce the symptoms he experienced.

Defendant further argues that the prosecutor failed to prove that he possessed drugs and the victim ingested drugs that caused his symptoms. Again, we disagree. Although the prosecutor could not offer direct evidence that defendant drugged the victim because the victim's doctors did not test for the presence of drugs, he presented evidence that defendant had access to medication that could produce the victim's symptoms. Defendant informed the victim that his brother-in-law, a physician, possessed samples of prescription medication in his home. Moreover, a physician testified that he prescribed the tranquilizer Lorazepam for defendant on December 30, 1991, a drug that could cause fatigue, disorientation, vertigo, loss of muscle coordination, and blackouts. Further, defendant admitted to a friend that he attempted suicide by overdosing on drugs in January 1995. The friend testified that the drugs caused defendant's speech to become slurred. A reasonable trier of fact could find from this and other evidence that defendant drugged his victim to lower his resistance to the planned sexual assault.

II

Defendant next argues that the trial court abused its discretion in admitting the videotape of defendant sexually assaulting his previous victim. We disagree. This Court reviews the trial court's evidentiary rulings for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995). A trial court abuses its discretion only if an unprejudiced person, considering the facts on which the trial court acted, would say that no justification or excuse for the ruling existed. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

Defendant contends that the trial court abused its discretion in admitting the evidence under MRE 404(b) because the danger of unfair prejudice outweighed its probative value. Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if (1) the prosecutor offers it for a purpose other than to prove the defendant's propensity to commit the crime, (2) the evidence is relevant, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993), modified 445 Mich 1205

(1994). In this case, the court admitted the videotape and the accompanying testimony to show defendant's intent to sexually penetrate the victim.

The trial court did not abuse its discretion in admitting the videotape under MRE 404(b) as evidence of defendant's intent. The evidence was also admissible to show the existence of a plan or scheme pursuant to which defendant drugged his victims in order to sexually assault them. MRE 404(b). Further, the probative value of the evidence outweighed any danger of unfair prejudice. The witness had difficulty remembering much of the assault because defendant had drugged him to overcome his resistance. The videotape filled in these gaps in the witness' testimony. Regarding the possibility of prejudice, the trial court remarked as follows:

Under the circumstances, having handled as many cases as I have involving allegations of criminal sexual conduct, I don't think I am going to find that inflammatory in the sense that jurors who don't have any experience with cases of this kind or of this kind in general might.

The trial judge, sitting as the trier of fact in this case, is presumed to consider the evidence for its proper purpose. See *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

III

Finally, the trial court should have redacted information from defendant's presentence investigation report before forwarding it to the Department of Corrections. The trial court must strike all inaccurate or irrelevant information from the report. MCL 771.14(5); MSA 28.1144(5); *People v Taylor*, 146 Mich App 203, 205-206; 380 NW2d 47 (1985). Defendant requested that the court strike the following sentence from the report: "There may be additional charges from another victim." The court deemed this statement speculative and drew a line through the sentence. An additional notation in the margin appears to say "strike this." The language, however, is still visible in the report. Because the court must sufficiently redact the report to prevent future readers from discerning the stricken information, we remand for the administrative task of correcting the presentence report and transmitting a corrected copy to the Department of Corrections.

Affirmed, but remanded for correction of presentence report. We do not retain jurisdiction.

/s/ Maura D. Corrigan
/s/ Joel P. Hoekstra
/s/ Robert P. Young, Jr.