STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OTIS JEFFERSON CLARK,

Defendant-Appellant.

UNPUBLISHED
November 12, 1999

No. 212072
Kalamazoo Circuit Court
LC No. A90 1462 FC

Before: McDonald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

On May 31, 1991, a Kalamazoo County jury convicted defendant of (1) two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), (2) one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), (3) one count of extortion, MCL 750.213; MSA 28.410, and (4) one count of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279. Kalamazoo Circuit Judge William G. Schma subsequently sentenced defendant to 25 to 50 years in prison for each of the first-degree criminal sexual conduct convictions, 10 to 15 years for the second-degree criminal sexual conduct conviction, 10 to 20 years for the extortion conviction, and 5 to 10 years for the assault conviction. On May 7, 1997, this Court vacated defendant's convictions on the basis that defendant was tried and convicted by a jury drawn from a venire that "unconstitutionally underrepresented the African American Community in Kalamazoo County" and remanded the case for a new trial.

On October 30, 1997, a second Kalamazoo County jury convicted defendant of (1) one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), (2) one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and (3) one count of extortion, MCL 750.213; MSA 28.410, and simultaneously acquitted defendant of (1) one count first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and (2) one count of assault with intent to commit great bodily harm less than murder, MCL 750.84; MSA 28.279. Judge Schma subsequently sentenced defendant to 30 to 50 years for the first-degree criminal sexual conduct conviction, 10 to 15 years for the second-degree criminal sexual conduct conviction, and 13-

1/3 years for the extortion conviction, with 2,532 days' credit given for time served. Defendant appeals as of right from his convictions and sentences. We affirm.

The first issue is whether the trial court erred when it declined to take judicial notice of the procedure utilized at the 1990 preliminary examination and instruct the jury that the victim thereby testified in open court. We review this issue for abuse of discretion. MRE 201(c). As a general rule, relevant evidence is admissible and irrelevant evidence is inadmissible. MRE 402. Evidence is relevant if it has any tendency to make the existence of a material fact more or less probable than it would be without the evidence. MRE 401. Even if relevant, however, the trial court may choose to exclude evidence if its probative value is substantially outweighed by the danger of misleading the jury. MRE 403.

Defendant maintains that the trial court should have informed the jury that the victim testified in open court to clarify whether it could consider her prior inconsistent statements as substantive evidence. We find, however, that the trial court properly instructed the jury, "if the [prior] inconsistent statement was given under oath . . . at another hearing . . ., it may be considered as proof of the facts in that statements." Cf. MRE 801(d)(1)(A), and *People v Chavies*, 234 Mich App 274, 281; 593 NW2d 655 (1999). We further find that the victim expressly testified that her prior inconsistent statements were given under oath at the preliminary examination. The relevant issue was not whether the victim testified in open court, but rather, whether she testified under oath. Accordingly, we conclude that the trial court did not abuse its discretion when it declined to take judicial notice of the procedure utilized at the 1990 preliminary examination and instruct the jury that the victim thereby testified in open court.[1]

The second issue is whether the trial court erred when it sentenced defendant to 30 to 50 years in prison for first-degree criminal sexual conduct and 13-1/3 to 20 years in prison for extortion. We review this issue for abuse of discretion. *People v Lyons* (*After Remand*), 222 Mich App 319, 323; 564 NW2d 114 (1997). When the same judge twice sentences the same defendant, and the second sentence is longer than the first, there is a presumption that the increase was the product of vindictiveness. *Id*. That presumption may be overcome if the trial court enunciates reasons for doing so at resentencing. *Id*.

In the instant case, the trial court stated that it increased defendant's sentences because of the impact of defendant's conduct on the victim, because of defendant's lack of remorse, and because of defendant's low potential for rehabilitation. Accordingly, the presumption that the increases in defendant's sentences were the product of vindictiveness is overcome.

Defendant maintains that the trial court improperly considered the impact of defendant's conduct on the victim. According to defendant, the information on which the court relied was neither new nor sufficient to overcome the presumption of vindictiveness. We conclude that the record does not support defendant's claim. When the trial court sentenced defendant in 1991, it considered, in relevant part, the impact of defendant's conduct on the victim, and noted that "[she will] suffer for the rest of her life" and "[she] needs ongoing treatment." Although phrased absolutely, the trial court's predictions were, by their very nature, speculative. The trial court could not have known the precise extent to which the victim would suffer.

When the trial court sentenced defendant in 1997, it again considered, in relevant part, the impact of defendant's conduct on the victim and noted, "it's a horrible disaster." In reaching its conclusion, the trial court relied on evidence that the victim now distrusts men (including her husband), recoils from intimacy, experiences flashbacks and nightmares, suffers depression and anxiety, and needs psychotropic medications. The speculative became concrete. The trial court learned the precise extent to which the victim had suffered. The traumatic impact of defendant's crimes on his victim, ten years after he committed them, is more than sufficient to overcome the presumption that the increase in defendant's sentences was the product of vindictiveness.

Defendant also maintains that the trial court improperly considered defendant's lack of remorse. According to defendant, "it is impermissible for a trial judge to base the sentence on defendant's refusal to admit guilt, *or to show remorse where the defense was a denial of the charged offense*" (emphasis added). We conclude that the law does not support defendant's claim. In *People v Houston*, 448 Mich 312, 317; 532 NW2d 508 (1995), a jury convicted the defendant of first-degree criminal sexual conduct for having forcible intercourse with his fourteen-year-old cousin. The defendant "never admitted his guilt, contending that the victim fabricated the offense for reasons known only to herself." *Id*., 317. The trial court subsequently sentenced the defendant to twenty-five to fifty years in prison, citing, in relevant part, "the defendant's absolute lack of regard for the victim and lack of remorse for the crime." *Id*., 318. On appeal, our Supreme Court held,

> the judge [considered] "defendant's absolute lack of remorse and low potential for rehabilitation." *Both factors are legitimate considerations in determining a sentence*. See *People v Wesley*, 428 Mich 708; 411 NW2d 159 (1987) (lack of remorse); *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972) (potential for rehabilitation). [*Houston*, *supra*, 323 (emphasis added).]

Accordingly, we conclude that the trial court did not abuse its discretion when it sentenced defendant to 30 to 50 years in prison for first-degree criminal sexual conduct and 13-1/3 to 20 years in prison for extortion.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Michael R. Smolenski

[1] We note that even if we were to have found that the trial court did abuse its discretion, we would have also found that the error was harmless. The record shows that the only substantive value of Melissa's prior inconsistent statements was as evidence of defendant's guilt. For example, the victim testified during the preliminary examination that the first time defendant fondled her, he removed her dress before he did so. The victim then testified at trial that the first time defendant fondled her, he slid his hand under her dress to do so. After examining the entire cause, we find it does not affirmatively appear that it is more probable than not that had the jury believed the victim's earlier testimony instead of her trial

testimony it would have changed the outcome. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).