STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN GRADY HARDMAN,

Defendant-Appellant.

UNPUBLISHED
December 19, 2000

No. 221311
Jackson Circuit Court
LC No. 98-091065-FC

Before: O'Connell, P.J., and Zahra and B.B. MacKenzie*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1); MSA 28.788(2)(1), and first-degree home invasion, MCL 750.110a(2); MSA 28.305(a)(2). The trial court sentenced defendant to concurrent terms of 25 to 40 years' imprisonment for the CSC I conviction and 10 to 20 years' imprisonment for the home invasion conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair trial because he was handcuffed and in belly chains during jury voir dire. A decision to shackle a defendant during court proceedings is reviewed for an abuse of discretion under a totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). Such action by the trial court generally is not permitted absent a record that establishes the defendant was prone to escape, could possibly injure other persons inside the courtroom, or that such action was necessary to maintain an orderly trial. See *People v Dunn*, 446 Mich 409, 425-426; 521 NW2d 255 (1994).

Defendant asserts that inasmuch as the record lacks support as to any of the foregoing circumstances, his conviction must be reversed. We disagree. Any deficiencies of the record in relation to this matter result from defendant's failure to raise an objection to his alleged shackling. Therefore, we decline to afford defendant the requested relief. See *People v Solomon(Amended Opinion)*, 220 Mich App 527, 531-532; 560 NW2d 651 (1996).

II

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

Defendant next argues that the prosecutor engaged in misconduct during the course of closing arguments. Defendant failed to object to the prosecutor's argument. Therefore, defendant must show a plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 761-764, 774; 597 NW2d 130 (1999). We cannot reverse a conviction on the basis of a forfeited error unless the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*.

Defendant claims that the prosecutor mischaracterized testimony, which she later used to impeach the credibility of defendant and bolster that of the complainant. We conclude that defendant has not shown plain error. The trial court explicitly instructed that the attorneys' statements and arguments are not evidence. Any prejudice resulting from the prosecutor's comments that was not cured by the trial court's general instruction, could have been cured by additional cautionary instructions had such instructions been requested by defendant. See *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991).

Moreover, we do not share defendant's characterization of the prosecutor's statement concerning the importance of the DNA evidence in establishing witness credibility as impermissible vouching for the testimony of the complainant. The challenged remark in this case was not a statement as to the prosecutor's personal belief in the credibility of the complainant, but rather a statement that the facts and evidence demonstrated the witness was credible. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). We therefore find no error in the challenged statement.

Defendant asserts that the prosecutor improperly appealed to the sympathies of jurors by stating during her rebuttal closing argument that the complainant was being "violated" a second time as a result of the trial process. Defendant further argues that the prosecutor denied him a fair trial when she urged the jurors to reward the complainant's efforts in testifying at trial by returning a verdict of guilty. Arguments which are little more than an appeal to the jury's sympathy for the victim are improper. *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988). A prosecutor's closing argument must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353-354; 492 NW2d 810 (1992). However, otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

Here, a portion of the prosecutor's argument cited by defendant was a response to defense counsel's attack, during his own closing statement, on the credibility of the complainant's version of the assault. Specifically, counsel for defendant argued that the complainant engaged in consensual intercourse with defendant in her boyfriend's room, but that when defendant passed out and she was unable to awaken him so that he could leave, she fabricated the rape claim in order to avoid having her infidelity discovered should her boyfriend return home before she was able to remove defendant from the bedroom. In making the challenged remarks, the prosecutor was arguing simply that in light of all that the complainant had been required to endure in order to bring her testimony to the jury, counsel's theory that her version of events had been fabricated to avoid her boyfriend discovering that she had been unfaithful, was itself not credible.

To the extent that the remainder of the prosecutor's remarks in this regard were improper, we conclude that they were not so inflammatory that a curative instruction would not have prevented prejudice to defendant. *Crawford, supra*. A timely requested curative instruction would have averted any resulting prejudice. See *Swartz, supra* at 372-373 (finding that a request of the jury not to forget that the victim had to "bare her soul," although improper, could have been cured by timely objection and instruction).

III

Defendant next argues that the provisions of the criminal sexual conduct statute under which he was charged, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c) and MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), are unconstitutionally vague. Under the Michigan and United States Constitutions, this Court reviews de novo a claim that a statute is void-for-vagueness. *People v Hubbard (After Remand)*, 217 Mich App 459, 484; 552 NW2d 493 (1996). A statute may be challenged for vagueness on three grounds: "(1) it does not provide fair notice of the conduct proscribed; (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed; and (3) its coverage is overly broad and impinges on First Amendment freedoms." *Id*.

Defendant argues that the CSC I statute is overly broad because it allows a person to be convicted of criminal sexual conduct for engaging in consensual sexual penetration with a legally consenting adult, thereby impinging on that person's right of free association as guaranteed by the First Amendment.

The CSC I statute provides in relevant part:

> A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * *
>
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.
>
> * * *
>
> (e) The actor is armed with a weapon or any article used or fashioned in a manner to lead the victim to reasonably believe it to be a weapon. [MCL 750.520b(1)(c) and (e); MSA 28.788(2)(1)(c) and (e).]

Statutes are presumed constitutional and are so construed unless their unconstitutionality is clearly apparent. *People v Wilson*, 230 Mich App 590, 593-594; 585 NW2d 24 (1998). In order for a statute to be found unconstitutionally overbroad, its overbreadth must be real and substantial as judged in relation to the legitimate sweep of the challenged law. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). This Court has long held that consent to an act of sexual penetration is a defense to a CSC I charge. See *People v Hearn*, 100

Mich App 749, 754-755; 300 NW2d 396 (1980). Thus, criminal responsibility under the circumstances suggested by defendant simply does not exist. See, e.g., *Jensen*, *supra* at 448-449; see also *People v Khan*, 80 Mich App 605, 619 n 5; 264 NW2d 360 (1978) (recognizing that the statute "impliedly comprehends that a willing, noncoerced act of sexual intimacy or intercourse between persons of sufficient age . . . is not criminal sexual conduct").

We similarly reject defendant's assertion that the statute improperly allows for unlimited discretion in its application by not requiring a finding of moral culpability. Defendant's argument in this regard in premised upon the flawed notion that the statute creates an irrebuttable presumption that innocent, consensual sexual penetration will be afforded criminal status solely upon a showing that such penetration occurred during the commission of another felony, MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), or in the presence of a weapon, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). However, as explained above, a person charged under such circumstances has a complete defense to the charged crime, i.e., consent, which, when proven, will implicitly include a finding of no moral culpability on the part of the actors. *Hearn*, *supra* at 754. Therefore, defendant's constitutional challenge on this ground is equally without merit.

IV

Defendant next argues that the trial court's instructions to the jury concerning the elements of the crimes were inadequate to protect his constitutional right to due process. Defendant did not object to the jury instructions given at trial on this basis and, therefore, has not preserved this issue for appeal. *People v Cross*, 202 Mich App 138, 148; 508 NW2d 144 (1993). This Court reviews unpreserved claims of instructional error for plain error that affected substantial rights. *People v Snider*, 239 Mich App 393, 420; 608 NW2d 502 (2000), citing *Carines*, *supra*. We review jury instructions in their entirety to determine whether error requiring reversal exists. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998).

Defendant contends that inasmuch as the crimes of CSC I and first-degree home invasion require proof of the other as an element of the offense, the trial court erred in failing to provide as part of the instructions on these offenses, a complete restatement of the elements of the other. We disagree. The court fully instructed the jury as to the elements of each of the crimes that would have to be proven in order to support a conviction under the facts of this case. Although the instructions as to each individual offense did not include a restatement of the elements of the other, when viewed as a whole, the trial court's instructions adequately informed the jury of the law applicable to the case and protected defendant's rights. Therefore, we conclude that no error requiring reversal exists.

V

Last, defendant argues that he was denied his constitutional right to due process when the trial court refused his request to instruct the jury on the defense of consent in relation to the CSC I offense. We agree that such an instruction should have been given. *Daoust*, *supra*; see *Hearn*, *supra*. However, we find that this error does not require reversal of defendant's convictions.

The trial court has a duty to instruct the jury with respect to the law applicable to the case. MCL 768.29; MSA 28.1052. "[I]nstructions must include all elements of the charged offense and must not exclude material issues, defenses, and theories, if there is evidence to support them." *People v Caulley*, 197 Mich App 177, 184; 494 NW2d 853 (1992). In this case, defendant himself offered evidence in support of the consent instruction when he testified that the sex acts were mutually consented to by himself and the complainant. Moreover, that these acts were consensual represented a large portion of defense counsel's theory of the case as presented to the jury during closing argument.

However, even assuming that this error is of constitutional magnitude, it does not entitle defendant to relief because it was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994). A "nonstructural" constitutional error that occurs during the presentation of a case to the jury does not require reversal if the reviewing court is satisfied the error was harmless beyond a reasonable doubt. *Id*. In reaching this determination, the error is to be assessed in the context of the evidence admitted at trial, to determine whether, absent the error, there is a "reasonable possibility" that the jury would have acquitted. See *People v Whitehead*, 238 Mich App 1, 9; 604 NW2d 737 (1999).

In this case, the complainant testified at trial that while she was pregnant, defendant, who was a stranger to her, sexually penetrated her at knife point and without consent after entering her home uninvited during the early morning hours. Consistent with this testimony police found a knife lying on the floor near the complainant's bed, which neither the complainant nor her boyfriend's roommate could identify as belonging inside the house. The roommate also testified that following the assault the complainant came to his room hysterically shouting that she had just been raped, and that later that morning he noticed damage to the front door of the home which was consistent with a break-in. In addition to this evidence, the parties stipulated to the admission of DNA tests which found a match between defendant's blood and semen found in the complainant's vagina.

Defendant acknowledged that he entered the house sometime after midnight and without permission. He testified that after finding the complainant lying in her bed, the two engaged in an act of consensual intercourse within ten minutes of meeting each other and while the complainant's five-year-old nephew slept beside them. Despite these claims by defendant, we are not convinced that when considered in the full context of the evidence presented at trial, there is a reasonable possibility the jury would have acquitted defendant absent the trial court's instructional error.

Affirmed.

/s/ Peter D. O'Connell
/s/ Brian K. Zahra
/s/ Barbara B. MacKenzie