STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 2001
v	No. 217125 Wayne Circuit Court
WILLIE B. SUMRALL, Defendant-Appellant.	LC No. 98-005472

Before: Doctoroff, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d; MSA 28.788(4), and one count of felonious assault, MCL 750.82; MSA 28.277. The trial court sentenced him to ten to fifteen years' imprisonment for each of the CSC III convictions and to one to four years' imprisonment for the felonious assault conviction. We affirm.

The prosecutor charged defendant with six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2). The charges were based on three alleged instances of penetration, each supported by two different aggravating circumstances under MCL 750.520b; MSA 28.788(2): sexual penetration occurring during a home invasion, see MCL 750.520b(1)(c); MSA 28.788(2)(1)(c), and sexual penetration while armed. See MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). Defendant contends that instead of being charged with six counts of CSC I, he should have been charged with only three counts of CSC I, each supported by two alternate theories. We agree. This issue involves the interpretation of the CSC I statute and is therefore reviewed de novo. See *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998).

Despite the fact that a sexual penetration is accompanied by more than one aggravating circumstance enumerated in the CSC I statute, for trial purposes each sexual penetration can give rise to only one criminal charge. *People v Johnson*, 406 Mich 320, 331; 279 NW2d 534 (1979). Accordingly, only three counts of CSC I, predicated on alternative aggravating circumstances, should have been brought in the instant case. See *id*.

Nevertheless, a defendant should not be granted a new trial on the basis of misdirection of the jury unless it appears after the examination of the entire record that the error resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096. We can discern no miscarriage of justice

here. Indeed, the jury acquitted defendant on all counts of CSC I and convicted him instead on three counts of CSC III, and defendant does not contend that the charges of which he was convicted were improperly submitted to the jury.

Defendant suggests that a miscarriage of justice does exist here because the jury might have engaged in a compromise in convicting him of three counts of CSC III. He apparently believes that the existence of six separate CSC I charges, as opposed to three CSC I charges supported by alternative theories, led the jurors to compromise by convicting him of three counts of CSC III. We disagree. Indeed, we cannot discern how the erroneous charges could have caused any more potential for compromise than the proper charges. There are simply no "sufficiently persuasive indicia of jury compromise" arising from the erroneous charges here to warrant reversal. See *People v Graves*, 458 Mich 476, 487-488; 581 NW2d 229 (1998). Nor, contrary to defendant's contention, is there "clear record evidence of unresolved jury confusion" about the charges so as to warrant reversal. See *id*. The error in the CSC I jury instructions was harmless.

Next, defendant claims that the prosecutor committed misconduct requiring reversal by stating in closing argument that the victim's trauma continued to "haunt her every day of her life" and that "rape is not just a violation of the body, it's a violation of her mind." We review alleged prosecutorial misconduct to determine whether the defendant was denied a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

We disagree with defendant's contention that the prosecutor's statements denied defendant a fair trial. Indeed, the statements were reasonable inferences based on the evidence presented at trial. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The evidence indicated that defendant intended to inflict, and that the victim did suffer, some psychological trauma. Defendant told the victim he wanted her to feel like an animal, and the victim testified that she felt humiliated after the assault. Further, it is a simple matter of common sense that the type of assault that occurred in this case will have long-lasting psychological effects on the victim. The prosecutor's statements were reasonable inferences based on the evidence produced at trial, and they did not improperly appeal to the jurors' sympathy or deny defendant a fair trial.

Defendant contends that the prosecutor committed misconduct requiring reversal in making two additional statements. However, defendant did not object to these additional statements below on the grounds asserted on appeal. Accordingly, appellate review is foreclosed unless the prejudicial effect of the remarks was so great that it amounted to a miscarriage of justice and could not have been remedied by appropriate curative instructions. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). We have reviewed defendant's allegations and find that any prejudice arising from these statements indeed could have been cured by appropriate curative instructions. Reversal is unwarranted.

Next, defendant claims that the trial court improperly precluded defense counsel from commenting during closing argument about the prosecutor's failure to present any physical evidence, such as blood tissue, DNA, photographs, or clothing. We review the trial court's

decisions in matters of trial conduct for an abuse of discretion. See, e.g., *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988).

The trial court's discretion and power in matters of trial conduct is wide. *Id.* The court must limit the argument of counsel to relevant and material matters. MCL 768.29; MSA 28.1052. In the case at bar, identity was not at issue, inasmuch as defendant acknowledged engaging in the sexual acts but claimed they were consensual. Thus, blood tissue and DNA evidence was not relevant or material, and the trial court properly limited defense counsel's argument in that regard.

We agree with defendant, however, that photographs and the victim's clothing would arguably have been relevant and material. Accordingly, the trial court should have allowed defense counsel to comment on the lack of clothing and photographs. Nevertheless, we do not believe that it is more probable than not that the trial court's error was outcome-determinative. *People v Lukity*, 460 Mich 484, 496-497; 596 NW2d 607 (1999). Indeed, the jury could surmise for themselves that there was not much evidence of a struggle or of physical injury to the victim.[1] The trial court's preclusion of defense counsel's comments emphasizing this lack of evidence during closing arguments therefore did not likely affect the outcome of the case, especially given the strong evidence of defendant's guilt. This issue does not require reversal.[2]

Finally, defendant claims that his CSC III sentences violate the principle of proportionality. We review a trial court's sentencing decisions for an abuse of discretion. *Fetterley, supra* at 525.

We disagree that defendant's sentences violate the principle of proportionality. First, the sentences fell within the relevant guidelines range and are therefore presumed to be neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Further, the offenses involved brutal threats and were dehumanizing and painful in nature. Finally, while these were defendant's first felony convictions, he had accumulated eleven misdemeanor convictions over the previous nine years, including assault, trespass, resisting arrest, larceny, and solicitation of prostitution. In light of these circumstances, we are not persuaded that defendant has overcome the presumption that his sentences are proportionate. No abuse of discretion occurred.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter

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[1] We note that the victim herself did not testify to much of a struggle; she was overcome more by defendant's threats of violence than by actual physical force.

[2] Nor, contrary to defendant's argument, is reversal warranted by the cumulative effect of the claimed errors at trial.