

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID CARL JOHNSON,

Defendant-Appellant.

UNPUBLISHED

September 16, 2003

No. 240493

Kalamazoo Circuit Court

LC No. 00-001068-FC

Before: Whitbeck, C.J., and O'Connell and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree home invasion, MCL 750.110a(2); first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c); and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(c). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant asserts on appeal that the trial court erroneously permitted the prosecution to elicit testimony from Christine Hatfield explaining why she did not physically resist defendant. We disagree. A trial court's evidentiary rulings are reviewed for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000). Reversal is not required for an evidentiary error unless the defendant establishes that, more probably than not, it resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

At trial, the prosecution questioned Ms. Hatfield regarding why she did not try to resist defendant. Ms. Hatfield stated that she was scared to resist because she had been molested when she was thirteen and knew that she could get hurt. When asked if she had sustained any injuries from her previous experience, Ms. Hatfield stated that she was shot in the back of the head with a BB gun after reporting the incident to the police. The trial court overruled defendant's objection to the relevancy of this line of questioning.

Evidence is relevant if it has a "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Without addressing whether the evidence in question was sufficiently relevant, we find that defendant has failed to establish that any error in its admission was outcome determinative. *Lukity, supra* at 495-496. Defendant admitted to sexual penetration of Ms. Hatfield. He further admitted during an interview with police that Ms. Hatfield said "no"

before any penetration occurred and that he held her arms down. On this record, we conclude that any error concerning the admission of the disputed evidence was harmless.

Defendant also contends that there was insufficient evidence to sustain his conviction for CSC I. Specifically, defendant asserts that there was no connection between the sexual penetration in the vehicle and the home invasion. We disagree. In reviewing a sufficiency of the evidence claim, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).

To establish a violation of CSC I, the prosecution needed to prove that defendant engaged in sexual penetration with Ms. Hatfield and that this occurred under circumstances involving the commission of any other felony. MCL 750.520b(1)(c). There was testimony that defendant entered Ms. Hatfield's home without permission. Defendant then proceeded to Ms. Hatfield's bedroom and woke her up by placing his hand inside her underwear and rubbing her vagina. Ms. Hatfield testified that she quickly put some shorts on and went outside hoping that defendant would leave. After she stepped outside, however, Ms. Hatfield claimed that defendant grabbed her arm and took her to his vehicle. She stated that defendant told her several times in the vehicle that he wanted to have sex. Ms. Hatfield testified that she refused because he was her ex-husband's friend. Despite her protests, Ms. Hatfield asserted that defendant touched her vaginal area with his fingers, pulled her pants down, and penetrated her with his penis.

There is no requirement that the sexual offense and the other felony occur at the same time to establish CSC I. *People v Jones*, 144 Mich App 1, 4; 373 NW2d 226 (1985). In *Jones*, *supra*, this Court specifically concluded that the Legislature did not narrowly define the coincident or sequence of the sexual act and the other felony. Rather, "[the Legislature] chose to address the increased risks to, and the debasing indignities inflicted upon, victims by the combination of sexual offenses and other felonies by treating the sexual acts as major offenses when they occur 'under circumstances involving the commission of any other felony.'" *Id.* at 4, quoting MCL 750.520b(1)(c). Here, defendant was able to sexually assault Ms. Hatfield because he committed the home invasion. There was sufficient evidence for a rational fact-finder to convict defendant of CSC I.

Affirmed.

/s/ William C. Whitbeck

/s/ Peter D. O'Connell

/s/ Jessica R. Cooper