STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2004
v	No. 244701 Genesee Circuit Court
REGINALD EUGENE BAYLOR, Defendant-Appellant.	LC No. 02-009540-FC

Before: O'Connell, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of two counts of armed robbery, MCL 750.529, two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b, one count of CSC II, MCL 750.520c, one count of assault with intent to commit sexual penetration, MCL 750.520g(1), one count of first-degree home invasion, MCL 750.110a(2), one count of carjacking, MCL 750.529a, one count of kidnapping, MCL 750.349, one count of felony-firearm, MCL 750.227b, and one count of possession of a firearm by a felon, MCL 750.224f. Defendant was sentenced as a third-offense habitual offender to 25 to 50 years' imprisonment on the first count of armed robbery, 20 to 40 years' imprisonment for first-degree home invasion, 40 to 60 years' imprisonment on the second count of armed robbery, 8 to 20 years' imprisonment for assault with intent to commit sexual penetration, 40 to 60 years' imprisonment for carjacking, 40 to 60 years' imprisonment for kidnapping, 10 to 30 years' imprisonment for CSC II, 25 to 50 years' imprisonment for the first count of CSC I, 4 to 10 years' imprisonment for possession of a firearm by a felon, and life imprisonment on the second count of CSC I, all to be served concurrently but consecutive to two years' imprisonment for felony-firearm. We affirm.

In this case, defendant donned a "Scream" mask and broke into the female victim's home with some accomplices. He forced the female victim away from her boyfriend at gunpoint, removed her to a secluded area while others guarded the boyfriend, fondled her breasts, forced her to undress, and penetrated her rectum with the barrel of his pistol and his finger. He also told her she was lucky that his penis "couldn't get hard." According to police, defendant was found with the victims' drivers licenses, stolen pay stubs, and over $1,000 in cash shortly after he fled the male victim's stolen car. The male victim was still locked in the trunk when police pulled up to the car.

Defendant first argues that while addressing the jury, the prosecutor improperly invoked the jury's sympathy by focusing on the terror the victims felt during this ordeal. We disagree.

Defendant failed to object to the prosecutor's conduct, so we will only review the issue for statements that were so prejudicial the court could not have cured the negative effect with a cautionary instruction or for a miscarriage of justice that would result if we declined to address it. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). "Appeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Nevertheless, the prosecutor in this case was required to prove either fear or force to sustain the armed robbery and CSC I convictions, so the fact that the victims suffered terror and intimidation was relevant. *People v Lawson*, 65 Mich App 562, 566; 237 NW2d 559 (1975); MCL 750.520b(1)(f)(i) and (ii). The record does not reflect that the prosecutor mischaracterized any of this evidence in his arguments, so we do not find that the prosecutor committed misconduct by emphasizing the victims' state of fear. *People v Bahoda*, 448 Mich 261, 284; 531 NW2d 659 (1995). Additionally, the trial court instructed the jurors not to let sympathy or prejudice influence their decision, and these cautions were sufficient to cure any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Therefore, we do not find any grounds for reversal based on the prosecutor's conduct at trial.

Defendant next argues that defense counsel was ineffective by failing to adequately prepare for trial. Specifically, he argues that defense counsel should have filed a more elaborate record request that would have revealed that the police did not have the culprit's coat, gun, or mask, and that the police had lost other inculpatory evidence found on defendant. To prevail on a claim of ineffective assistance of counsel, "a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Because of defendant's failure to preserve this issue, our review is limited to errors that appear in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Here, the record depicts defense counsel vehemently arguing that the absence of the crucial evidence created reasonable doubt. Therefore, the record reflects that defense counsel knew of these issues in time to prepare for trial, and we do not find any grounds for reversal based on defendant's argument to the contrary.

Defendant next argues that defense counsel's failure "to investigate and prepare" his alibi witness denied him a fair trial. Defendant acknowledges that the witness could not recall the exact date when he and defendant attended a rally together, and defense counsel refrained from calling the witness for that reason. However, because the witness's loss of memory was outside the scope of defense counsel's control, defendant's argument that counsel failed to "prepare" the witness fails to persuade us that counsel performed ineffectively. Similarly, we do not find any error in trial counsel's failure to object during the prosecutor's arguments, because the arguments were ultimately based on the case's extraordinary facts. Given our resolution of these ineffective assistance arguments, we reject defendant's contention that he suffered any cumulative effect from these alleged errors.

Defendant next argues that the police department's alleged gross negligence in losing exculpatory evidence denied him a fair trial. Loss of evidence is not a ground for reversal unless the defendant first demonstrates either "that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Here,

defendant argues that the missing items did not bear his fingerprints, so the items would have exculpated him. The evidentiary value of the absence of defendant's fingerprints is negligible, however, and any argument that they might contain other fingerprints would be speculative. Therefore, defendant has not shown that the evidence was exculpatory in nature, and he fails to demonstrate any bad faith by the police.

Defendant also argues that defense counsel failed to file a motion to dismiss based on the grossly negligent, if not intentional, loss of evidence. However, because defendant could not show any bad faith or the evidence's exculpatory value, trial counsel's motion would have been futile. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Also, because defendant failed to show that the evidence had any exculpatory value, we will not speculate about how the absence of this evidence may have hampered his defense.

Defendant next argues that the trial court erred in denying his motion in limine to suppress his prior convictions because the court incorrectly found that the charges of receiving and concealing contained the element of theft. We disagree. The convictions were admissible because they were "probative on the issue of defendant's veracity." *People v Clark*, 172 Mich App 407, 419; 432 NW2d 726 (1988). While it is unsettled whether receiving and concealing is a crime of theft or a crime of dishonesty, *People v Ferrier*, 463 Mich 1007; 624 NW2d 736 (2001) (Markman, J., dissenting), at least one of our prior decisions clearly classified receiving and concealing as a theft crime. *People v Dinsmore*, 166 Mich App 33, 42; 420 NW2d 167, rev'd on other grounds, 172 Mich. App 561 (1988). Therefore, the trial court took a conservative tack and balanced the convictions' probative value against their prejudicial effect to determine whether the convictions were admissible. MRE 609(a)(2). While the trial court's recorded findings regarding the relationship between the crimes and the probative value of the evidence was not exhaustive, the trial court fairly considered the standards in MRE 609 in light of the scant factual information counsel provided regarding the previous offenses. Therefore, we find no abuse of discretion in this case. In any event, we consider the circumstantial evidence overwhelming in this case, and would find any error in the analysis harmless. MRE 103.

Defendant next argues that life imprisonment for CSC I constitutes cruel and unusual punishment for a crime that did not result in serious injury or death. The Legislature specifically authorizes a life sentence for those convicted of CSC I. MCL 750.520b(2). Given the heinous nature of defendant's crime and his extensive criminal history, the life sentence is proportionate in this case. A proportionate sentence is not cruel and unusual punishment. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray