STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED December 4, 2007
v	No. 269887 St. Joseph Circuit Court
WARREN EDWARD ENGLISH, III, Defendant-Appellant/Cross-Appellee.	LC No. 05-013020-FH

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of criminal sexual conduct in the third degree. MCL 750.520d(1)(c). He was sentenced to serve twenty-one months to fifteen years in prison. Defendant appealed and during the pendency of the appeal, the trial court granted defendant's motion for new trial. The prosecutor cross appeals, arguing that the trial court erred in granting the new trial. We affirm in part and reverse in part.

We turn first to the issue raised by the prosecutor on cross appeal. The trial court granted defendant's motion for new trial based upon a failure of a juror to disclose during voir dire the fact that she herself had been the victim of criminal sexual conduct. The prosecutor argues that the trial court abused its discretion in granting the new trial. We agree.

We review the trial court's decision to grant a new trial for an abuse of discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999). An abuse of discretion exists if the reasons given by the trial court do not provide a legally recognized basis for relief.

At issue is a juror who was interviewed by a defense investigator after the trial and who revealed to the investigator that she had been sexually abused by a family member when she was eight years old. This juror, both by affidavit and in testimony at the subsequent hearing, stated that she remained open-minded throughout the trial and was fair and impartial. Defendant argued that, had the juror fully disclosed this information during voir dire, trial counsel would have sought to have her excused for cause and, if that had been denied, he would have exercised a peremptory challenge and excused her.

The trial court granted defendant's motion, relying on this Court's decision in *People v Manser*, 250 Mich App 21; 645 NW2d 65 (2002), and its conclusion that it would have

automatically granted a challenge for cause because the juror had been the victim of sexual abuse:

> And as a rule they're [criminal sexual conduct victims] all excused due to their prior experiences, because although they may be qualified as [a] juror and may feel that they'd be fair and impartial, it's felt that it would be better to have somebody without those experiences to sit on the jury. They're either usually excused for cause or by peremptory challenge.
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> Now that—so, for that reason, I would grant the Defendant's motion for a new trial because it was a criminal sexual conduct case; she'd been a prior victim of criminal sexual conduct; she knew it was important. She thought she'd answered it, but she hadn't. If she had answered, it, [defense counsel] or the Court, sua sponte, would have excused her for cause, or [defense counsel's] declaration is that he would have asked to have her excused, or would have used a peremptory.

The trial court's reliance on *Manser* is misplaced and the trial court's belief that a victim of sexual abuse should automatically be excused from sitting on a criminal sexual conduct jury is erroneous.

The *Manser* case involved charges of criminal sexual conduct with a victim under thirteen. During voir dire, the trial court inquired whether any of the potential jurors had been involved with any alleged criminal sexual assault or conduct. A number of jurors responded in the affirmative and were replaced. *Manser, supra* at 25. Nonetheless, "Juror H" failed to make any disclosure. During a lunch recess shortly after the jury was sworn, Juror H was brought back into the courtroom, where she disclosed that she had previously engaged in inappropriate behavior with a cousin while both were preteens. *Id.* at 25-26. The trial court denied the defendant's request to have Juror H excused. This Court reversed.

The case at bar is distinguishable from *Manser*. In *Manser*, broad questions were posed to the jury to which Juror H did not respond. Further, the problem was discovered "shortly after the voir dire was completed and only a few hours into the trial." *Id.* at 30. Moreover, the experiences of the juror in *Manser* were similar in nature to the charges: sexual activity with a preteen. In the case at bar, the juror's experience was very much different than the allegations against defendant. The juror in this case has disclosed that a family member molested her at age eight and defendant raped a seventeen-year-old acquaintance while she slept.

Rather than relying on *Manser*, the trial court should have relied upon this Court's earlier opinion in *People v Daoust*, 228 Mich App 1; 577 NW2d 179 (1998). In *Daoust*, a juror disclosed on the second day of trial that, during the testimony of the victim's mother, he realized that he had gone to school with the victim's mother. The juror assured the trial court that it would not affect his verdict. Defense counsel, conceding that there was no basis to challenge for cause, nevertheless argued that the juror should be removed because, had counsel known this, he would have exercised a peremptory challenge. *Id.* at 6.

This Court acknowledged that "a defendant is denied his right to an impartial jury when a juror removable for cause is allowed to serve on the jury." *Id.* at 8-9. This is true, in some circumstances, even if the information is not discovered until after the trial. *Id.* at 9. The Court, however, limited the circumstances under which the defendant is entitled to relief in such a situation:

> [W]e hold that when information potentially affecting a juror's ability to act impartially is discovered after the jury is sworn, the defendant is entitled to relief only if he can establish (1) that he was actually prejudiced by the presence of the juror in question or (2) that the juror was properly excusable for cause.

In so holding, the trial court rejected the argument that the defendant was entitled to relief upon a representation that he would have exercised a peremptory challenge if the challenge for cause would have been rejected. *Id.*

In the case at bar, defendant makes no showing that he was prejudiced by the presence of the challenged juror nor did the trial court make any such finding of prejudice. Rather, the trial court made a finding regarding the second prong, that the juror was properly excusable for cause. But the only basis for that finding was that all victims of sexual abuse would have been excused for cause, even if the trial court had to do so sua sponte. We find no basis in law for such an "automatic exclusion" rule. In this respect, we agree with the observations of Judge O'Connell in *People v Johnson*, 245 Mich App 243, 257 n 5; 631 NW2d 1 (2001), that "jurors with real life experiences, who acknowledge that they can be free of bias and prejudice, can and do make excellent jurors" and that "we will not presume that the juror's [past victimization] precluded her from rendering a fair and impartial verdict."

Indeed, we find it particularly disturbing that the trial court apparently casts a wide net and excludes all CSC victims from serving on juries where CSC is charged even where, as here, there is little similarity between the nature of the offense against the potential juror and that with which defendant is charged. Certainly a trial judge must be concerned with the potential bias of any potential juror who was the victim of a crime. And that concern is heightened as the facts of the juror's case come closer to the facts of the case to be tried. But that does not justify a policy of automatically excluding any juror who has been the victim of a crime or even of automatically excluding any juror who was the victim of a similar crime as that charged.

Because the trial court did not identify any proper basis for excluding the juror for cause, it erred in granting defendant's motion for new trial. Accordingly, we set aside the trial court's order granting a new trial and reinstate defendant's conviction and sentence. This conclusion necessitates our consideration of the issues raised by defendant on appeal.

Defendant first argues that the trial court erred by admitting evidence of a statement made by defendant two days prior to the assault that he intended to "rape [the victim] in the ass" while she was sleeping. Defendant argues that this evidence should have been excluded under MRE 404(b) as improper character evidence. We disagree. A statement is not a prior bad act subject to analysis under MRE 404(b). *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988). Rather, its admissibility is gauged by the traditional inquiries of relevance and prejudicial effect. *Id.* at 515. Accordingly, the trial court properly rejected defendant's argument under MRE 404(b).

Defendant next argues that the trial court erred in denying his request for a jury instruction that the prosecutor had to prove lack of consent. We review de novo claims of instructional error. *People v Fennell*, 260 Mich App 261, 264; 677 NW2d 66 (2004). But we review the trial court's determination whether an instruction is applicable to the facts of the case for an abuse of discretion. *People v McKinney*, 258 Mich App 157, 163; 670 NW2d 254 (2003).

The trial court properly denied the request because "lack of consent is not an element of the crime to be proven by the prosecution." *People v Waltonen*, 272 Mich App 678, 689 n 4; 728 NW2d 881 (2006). And this is particularly true in the case at bar because defendant was charged under MCL 750.520d(1)(c), that the victim was physically helpless, which meant that the prosecutor had to prove that the victim was "unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act." MCL 750.520a(l). In other words, in order to convict defendant, the prosecutor had to prove that the victim was unable to give consent to the act. Furthermore, because the prosecutor did not have to prove lack of consent, defendant's additional argument that there was insufficient evidence to establish lack of consent is similarly without merit.

Defendant next argues that the trial court erred in instructing the jury that intoxication was not a defense. The trial court gave CJI2d 6.01 because there was testimony regarding defendant's intoxication at the time of the offense and it wanted to "avoid any confusion on the part of the jurors" regarding whether defendant's intoxication relieved him of responsibility for his actions. Defendant concedes that voluntary intoxication is not a defense to third-degree criminal sexual conduct. Although defendant did not argue intoxication as a defense before the jury, we do not believe it was inappropriate for the trial court to be proactive in ensuring that the jury did not nevertheless improperly consider defendant's intoxication in this case. As for defendant's argument that the instruction may have confused the jury regarding the victim's intoxication and the effect that it may have had on her memory, the instruction given by the trial court clearly refers only to the defendant's intoxication and that it is not an excuse for the crime. Accordingly, there was no danger that it would confuse the jury regarding their assessment of the victim's intoxication and any effect it might have on her recollection of the events.

Defendant also argues that even if a single error does not merit a new trial, the cumulative effect of the errors requires a new trial. Because we have not found that any errors occurred, there cannot be an accumulation of errors that require reversal.

Defendant next argues that the sentencing guidelines were improperly scored. Specifically, defendant argues that the trial court incorrectly scored Offense Variable 11 at 25 points because defendant's performance of oral sex on the victim does not constitute penetration. We review a trial court's scoring decision for an abuse of discretion and a scoring decision will be upheld if there is any evidence in support of it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Twenty-five points for OV 11 is appropriate if there is a sexual penetration that occurs in addition to the one penetration that forms the basis for the conviction. MCL 777.41(2). Defendant's conviction was based upon an act of penile-vaginal penetration as testified to by the victim. The scoring of OV 11 was based upon defendant's admission that he performed oral sex on the victim. Defendant made that admission when interviewed by the police after the incident, at trial during his testimony, and during the presentence interview. Cunnilingus is, by definition,

sexual penetration. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). And "oral sex" is a common term used to refer to cunnilingus. Therefore, there was sufficient evidence to support the trial court's scoring of twenty-five points for OV 11.

Defendant also argues that his admission of performing oral sex on the victim should not have been considered in scoring OV 11 because, in the absence of any corroborating evidence, it violated the corpus delicti rule. We are not aware of any authority for the proposition that the corpus delicti rule applies to sentencing decisions. Furthermore, this Court has held that a defendant's admissions may be considered in reaching scoring decisions under the sentencing guidelines. *People v Ratkov (Aft Rem)*, 201 Mich App 123, 125; 505 NW2d 886 (1993).

Finally, defendant argues that Michigan's sentencing guidelines are unconstitutional under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant concedes, however, that controlling authority in Michigan holds that *Blakely* does not apply to the Michigan sentencing system, *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006), and that defendant is raising this issue merely to preserve it in the event that there is a favorable ruling in the federal courts on this point.

We reverse the trial court's grant of a new trial and affirm defendant's conviction and sentence.

Furthermore, defendant was released on bond pending this appeal. We order that that bond be revoked and that defendant is ordered to report forthwith to the St. Joseph County Sheriff to begin serving his sentence. Pursuant to MCR 7.215(F)(2), this portion of our opinion is to be given immediate effect upon the clerk's certification of this opinion and its service upon the parties.

/s/ David H. Sawyer
/s/ Michael J. Talbot