# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 18, 2008 |
| v | No. 276816<br>Muskegon Circuit Court |
| EARNEST LAMONT WARREN,<br><br>Defendant-Appellant. | LC No. 06-053122-FC |

Before: Meter, P.J., and Hoekstra and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a bench trial of first-degree criminal sexual conduct (CSC 1), MCL 750.520b(1)(c), and assault with assault with intent to do great bodily harm, MCL 750.84. Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 30 to 75 years' imprisonment for his CSC 1 conviction and to 20 to 75 years' imprisonment for his assault conviction. We affirm.

On March 31, 2006, the victim, Desiree Rose, received her monthly social security check, and she obtained a fifth of rum, $35 worth of marijuana, and $100 worth of crack cocaine for a weekend of partying. The victim and a friend smoked all of the crack cocaine at a crack house in Muskegon, Michigan. The victim then walked to her sister's nearby residence, where she smoked some marijuana and shared her rum with her sister. Next, the victim went a short distance to another friend's residence, where she was introduced to defendant. At some point in the late evening, the owner of that residence asked the victim and defendant to leave. The victim now needed somewhere to spend the night, and defendant invited her to a nearby abandoned house, where they could continue to party into the early morning hours. At trial, defendant testified that they made a sex-for-drugs agreement.

At the abandoned house, defendant led the victim to a second-floor bedroom without furniture, but with some bedding strewn across the floor. They shared a small quantity of crack cocaine and marijuana. Defendant then departed to obtain more intoxicants, while the victim fell asleep. Defendant returned with alcohol, which they both consumed. Defendant departed again, and he next returned with a quantity of crack cocaine. However, at this point, the victim indicated that she no longer wanted to have sexual relations with defendant, but she still wanted the crack cocaine. The victim, nevertheless, completely undressed in front of defendant, although she covered herself with a sheet. The relationship deteriorated after the victim smoked some of the crack cocaine without defendant's permission. A melee ensued in the bedroom,

where defendant beat the victim severely, hitting her six or seven times in her face. The victim fought back, trying to push defendant out of a window, but she was ultimately rendered unconscious. When she regained consciousness, she was lying on her back, and defendant had his shirt off, his pants down, and his legs straddling one of her legs. While defendant's exposed penis was not inside of her body, the victim believed that a sexual penetration occurred because of the sensation she felt inside her vagina.

Defendant challenges the sufficiency of the evidence presented at trial for his CSC 1 conviction, arguing that the prosecution did not prove the element of "penetration" beyond a reasonable doubt. We disagree.

In an appeal challenging the sufficiency of the evidence presented to sustain a conviction, this Court views the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). The prosecution may offer circumstantial evidence and reasonable inferences as proof of the elements of a crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

To convict a defendant under MCL 750.520b(1)(c), "the prosecution must prove two elements: (1) a sexual penetration (2) that occurs during the commission of another felony." *People v Wilkens*, 267 Mich App 728, 737; 705 NW2d 728 (2005). MCL 750.520a(r) defines "sexual penetration" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

In the instant case, the victim was rendered unconscious as she attempted to defend herself from defendant's blows during their altercation. When she regained consciousness, defendant's penis was not inside of her body, but on her leg. However, the victim believed that defendant sexually penetrated her, because she felt a sensation in her vagina and it felt as if she had had sexual intercourse. After the attack, the victim was treated at the emergency room at Hackley Hospital in Muskegon. Her pelvic examination revealed three areas of bruising to her posterior fourchette. The emergency room physician testified that this type of bruising does not occur in typical sexual intercourse and that such bruising was indicia of sexual assault. While a forensic scientist later failed to find any of defendant's pubic hair, semen, or other DNA in the samples contained in the victim's CSC kit, a sheet collected at the crime scene contained blood matching the victim's DNA and semen matching defendant's DNA.

To the extent that the trial court found it necessary to infer sexual penetration, as we noted earlier, "[c]ircumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime." *People v Akins*, 259 Mich App 545, 554; 675 NW2d 863 (2003). Significantly, "[i]t is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). On the record before us, a reasonable inference could be drawn that a sexual penetration occurred based on the testimony of the victim, the emergency room physician, and the forensic scientist. See *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992) (a trier of fact may make reasonable inferences from the facts, if supported by direct or circumstantial evidence). While defendant ultimately argues on appeal that the trial court should have afforded more

weight to his trial testimony, this argument entirely lacks merit. In a bench trial, "[s]pecial regard will be given to the trial court's opportunity to judge the credibility of the witnesses and its decision will be affirmed where there is sufficient evidence to support the court's findings." *People v Cyr*, 113 Mich App 213, 222; 317 NW2d 857 (1982). The trial court specifically found that defendant lacked credibility.

Viewed in the light most favorable to the prosecution, we conclude that the evidence was sufficient to enable the trier of fact to find beyond a reasonable doubt that defendant sexually penetrated the victim. *Jaffray*, *supra* at 296; *Wilkens*, *supra* at 737.

Next, defendant asserts that the trial court used a legally incorrect definition of "great bodily harm" when deciding the case, enabling the prosecution to use a lower standard to prove assault with intent to do great bodily harm. Defendant argues not only that the trial court applied an incorrect definition of great bodily harm, but also that, if the correct definition had been used, the prosecution failed to satisfy that element to sustain defendant's conviction of assault with intent to do great bodily harm less than murder. We disagree.

Initially, we note that, in arguing that the trial court used an incorrect standard, defendant relies on the former version of CJI2d 17.7(4), which provided that "[g]reat bodily harm means a physical injury that could seriously and permanently harm the health or function of the body." CJI2d 17.7(4) no longer reflects the standard argued by defendant; it was changed, after the date of defendant's trial, to eliminate the word "permanently." Moreover, "[t]he Criminal Jury Instructions are not officially sanctioned by the Supreme Court." *People v Stephan*, 241 Mich App 482, 495; 616 NW2d 188 (2000). "Where a Criminal Jury Instruction does not accurately state the law, it will be disavowed by the courts." *Id.* Thus, we do not look to the cited standard instruction to decide the issue in this case.

The offense of assault with intent to do great bodily harm less than murder is a specific intent crime, consisting of the following elements: (1) an attempt or threat with force or violence to do corporal harm to another, i.e., an assault, and (2) an intent to do great bodily harm. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). "This Court has defined the intent to do great bodily harm as 'an intent to do serious injury of an aggravated nature.'" *Id.*, quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

In the instant case, the trial court concluded that defendant committed the offense of assault with intent to do great bodily harm less than murder, inferring defendant's intent from the nature of the victim's injuries. At trial, the victim testified that defendant hit her in the face six or seven times. Defendant also admitted to hitting the victim a number of times at trial and in a jailhouse audiorecording. In that audiorecording, he also admitted that she was severely injured, believing that her jaw had to be "rewired." A responding police officer found the victim lying on a couch with blood all over her face, hands, and clothing. The medical witnesses testified that the victim sustained the following injuries: her left eye was completely swollen shut, and she had moderate swelling of her right eye, two lacerations on her forehead, bruises on her face and arms, pain and tenderness in her upper chest, and multiple bruises on both knees. The victim was beaten so severely that she sustained bilateral orbital floor fractures in both eyes.

On the record, there is no indication that the trial court did not follow the correct statement of the law concerning the offense of assault with intent to do great bodily harm. Also,

we presume that the trial court, sitting as trier of fact in this bench trial, knew the law and considered only the evidence properly before it. *Dep't of Human Services v Nierescher*, 277 Mich App 71, 84; 744 NW2d 1 (2007). Further, we conclude that the trial court's findings of fact with respect to this element were not clearly erroneous. The aforementioned testimony and evidence were sufficient to give rise to an inference of the necessary intent; indeed, "[a]n intent to harm the victim can be inferred from [a] defendant's conduct." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). The record supports the trial court's conclusion that defendant intended to do great bodily harm, where defendant repeatedly hit the victim in her face, causing swelling and bilateral orbital floor fractures in both eyes, as well as other injuries; it is a reasonable inference that defendant intended to do serious injury of an aggravated nature. *Brown*, *supra* at 147.

Defendant next contends that the trial court abused its discretion by admitting irrelevant, improper, and unduly prejudicial rebuttal evidence. "Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). Because defendant did not object at trial to the testimony, this Court's review is limited to whether the alleged, unpreserved error affected his substantial rights. *People v Rice*, 235 Mich App 429, 442; 597 NW2d 843 (1999).

Generally, rebuttal evidence is properly admitted to explain, contradict, or otherwise refute an opponent's evidence. *Figgures*, *supra* at 399. A party may not introduce evidence during rebuttal unless it properly responds to evidence introduced or a theory developed by the opponent. *Id*. Rebuttal testimony on collateral issues is generally improper. *People v Richardson*, 139 Mich App 622, 628; 362 NW2d 853 (1984). However, "a party may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness' statements." *People v Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003); see also *People v Vasher*, 449 Mich 494; 537 NW2d 168 (1995).

In the instant case, defendant argues that the trial court improperly admitted rebuttal testimony from a police detective, which amounted to an attack on defendant's credibility. The rebuttal evidence, however, followed defendant's case-in-chief, during which defendant testified. Throughout the cross-examination of defendant, the prosecution attacked defendant's credibility, focusing on defendant's statements to the police during an interview following the incident. At trial, defendant testified during cross-examination that he initially denied to the police that he knew anything about the incident in question. Defendant then testified that he later changed his story while talking to the police, and admitted that he was present at the residence of the victim's friend and that he left that residence with the victim. Defendant then told the police that another African-American male joined them as they left that residence, and the victim and that male went on their way without defendant. Defendant finally testified that he eventually told the police everything, including that he and the victim went to the abandoned house.

The prosecution subsequently recalled a police detective, who interviewed defendant, as a rebuttal witness. Importantly, the detective contradicted defendant's trial testimony that he ultimately told the police that he took the victim to the abandoned house.

A witness's credibility is always significant. *People v Layher*, 238 Mich App 573, 580; 607 NW2d 91 (1999). Again, the prosecution "may introduce rebuttal evidence to contradict the answers elicited from a witness on cross-examination regarding matters germane to the issue if the rebuttal evidence is narrowly focused on refuting the witness' statements." *Spanke*, *supra* at 644-645. In the instant case, that is exactly what the prosecution did by recalling the detective as a rebuttal witness, and that rebuttal testimony was limited to defendant's statement and to specifically refuting defendant's testimony that he told the police everything, i.e., that he went to the abandoned house with the victim and that she was injured from running into the walls. The issue was germane to the question of guilt or innocence because it related to defendant's being forthcoming or not forthcoming about having taken the victim to the abandoned house. See *People v Lester*, 232 Mich App 262, 274-275; 591 NW2d 267 (1998) (discussing *Vasher*, *supra*). We, therefore, cannot conclude that the admission of the testimony constituted plain error.

Defendant next argues that the sentencing court erroneously scored offense variable (OV) 7 at 50 points, and OV 11 at 25 points. Significantly, a trial court's scoring decision will be upheld if there is any evidence in the record to support it. *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

First, defendant challenges the trial court's OV 7 scoring of 50 points, reflecting that "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). At trial, the victim testified that defendant hit her in the face six or seven times. At trial, and in a jailhouse audiorecording played at trial, defendant admitted to hitting the victim a number of times, and he also admitted that the victim was severely injured, believing that her jaw had to be "rewired." In the jailhouse recording, defendant also expressed a lamentation that he should not have beat the victim to "that" extent and that he had never done anything like that in the past. The record revealed how the police found the victim, and the extent of her injuries. As noted previously, the victim was beaten so severely that she sustained bilateral orbital floor fractures in both eyes. Also, the emergency room physician testified that "[i]t takes a lot of trauma" to cause such bilateral orbital floor fractures.

"Brutality" is not defined in the statute, but *Random House Webster's College Dictionary* (1997) defines it as "the quality of being brutal," and it defines "brutal" as "savage; cruel; inhuman" or "harsh; severe." Defendant's severe beating of the victim, which caused bilateral orbital floor fractures in both of her eyes, falls within any reasonable understanding of excessively brutal conduct. Thus, the record supports a score of 50 points for OV 7, *Kegler*, *supra* at 190.

Next, defendant challenges the trial court's OV 11 scoring of 25 points, reflecting that "[o]ne criminal sexual penetration occurred." MCL 777.41(1)(b). Under MCL 777.41(2)(c), "[p]oints should not be scored, however, for the one penetration underlying a CSC 1 conviction." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004). Sexual penetration is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). Additionally, MCL 777.41(2)(a) requires the non-offense penetration to arise out of the sentencing offense. "Arise out of" has been described as "at the same place, under the same set of circumstances, and during

the same course of conduct . . . ." *People v Mutchie*, 251 Mich App 273, 277; 650 NW2d 733 (2002).

As noted earlier, there was sufficient evidence that at least one penile/vaginal penetration occurred beyond a reasonable doubt. However, we further find that the whole record supports at least one additional penetration that could be scored under MCL 777.41.

The emergency room physician testified that there was significant trauma to the victim's vaginal area, and he found that there were three distinct areas of bruising. The victim also testified that her "butt" or "bottom" was injured during the incident, but it was unclear whether that injury was a result of the physical altercation or the sexual assault. However, the PSIR provides more context and some record support that another penetration occurred:

> [The victim] stated the suspect fondled her and forced her to have intercourse with him while she was standing. Her comments to the nurse were that most of it happened while she was standing. The nurse asked the victim if she thought the suspect had done anything to her anally. She advised she thought he did.

On this record, we conclude that there is a reasonable inference that more than one sexual penetration occurred. The emergency room physician testified that there was significant trauma to the genital area. Additionally, the victim testified that her "butt" or "bottom" was injured during the incident, and, according to the PSIR, the victim told a nurse that she believed that an anal penetration occurred. While the emergency room physician agreed that her rectal area appeared normal, the sexual penetration need be only "however slight." MCL 750.520a(r). There is evidence in the record to support the OV 11 score. *Kegler, supra* at 190. Again, a trial court's scoring decision will be upheld if there is any evidence in the record to support it. *Kegler*, *supra* at 190.

Finally, we reject defendant's argument that he must be resentenced for his assault conviction because no sentencing guidelines were prepared for that conviction and because his sentence for that conviction therefore amounts to an unlawful departure. Defendant was convicted of multiple offenses; thus, the trial court was required to score each offense, "subject to [MCL 771.14] . . . ." MCL 777.21(2). Because defendant received concurrent sentences, the trial court was not required to provide a recommended minimum sentence range for each conviction for which a consecutive sentence (not applicable here) was authorized, MCL 771.14(2)(e)(i), but instead was only required to prepare the recommended minimum sentence range for the crime having the highest crime class. MCL 771.14(2)(e)(ii). CSC 1 is a class A felony, MCL 777.16y, while assault with intent to do great bodily harm is a class D felony, MCL 777.16d. Thus, for sentencing on defendant's multiple convictions with concurrent sentences, the guidelines were properly prepared. *People v Mack*, 265 Mich App 122, 128; 695 NW2d 342 (2005).

Affirmed.

/s/ Patrick M. Meter
/s/ Joel P. Hoekstra
/s/ Deborah A. Servitto