

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM C. DIEFENBACH,

Defendant-Appellant.

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UNPUBLISHED

August 20, 1996

No. 176489

LC No. 93-124608-FC

Before: Bandstra, P.J., and Markman and M. D. Schwartz,\* JJ.

PER CURIAM.

Defendant appeals by right his 1993 jury trial convictions for first-degree murder, MCL 750.316; MSA 28.548, felony murder while in the perpetration or attempt to perpetrate first-degree criminal sexual conduct, MCL 750.316; MSA 28.548, first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), felony murder while in the perpetration or attempt to perpetrate breaking and entering an occupied dwelling with intent to commit criminal sexual conduct therein, MCL 750.316; MSA 28.548, and breaking and entering an occupied dwelling with intent to commit criminal sexual conduct therein, MCL 750.110; MSA 28.305. We affirm.

These convictions arise out of the murder of a woman who lived in the apartment next to defendant's apartment. The woman's son discovered her body. She was lying on her back with her legs spread apart, wearing only a shirt that was pushed up so that she was exposed from just above the breasts. An extension cord was knotted around her neck. The medical examiner concluded that she died of ligature strangulation. There were bruises on the woman's body, particularly on her neck, her chest, and her inner thighs. Her left hip was dislocated. There were tears in her genital area. No semen was found on her body or at the crime scene.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant confessed to murdering decedent. He admitted breaking into her apartment and strangling her with an electrical cord. He admitted that it took an extended period of time for her to die. He did not confess to performing any sexual acts on her or to removing her clothes.

On appeal, defendant first claims that the trial court erred in denying his motion for directed verdict with respect to counts II through V, all of which involve allegations of criminal sexual conduct. He argues that the trial court should have directed verdicts of acquittal on these counts because there was no evidence that defendant engaged in criminal sexual conduct with the woman before she died.

To review a trial court ruling on a motion for directed verdict, this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational factfinder could find the essential elements of the charged crimes were proven beyond a reasonable doubt. *People v Warren (After Remand)*, 200 Mich App 586, 588; 504 NW2d 907 (1993). "Circumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime." *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

The counts at issue involved charges of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), which states:

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exist:

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. . . .

Sexual penetration is defined in MCL 750.520a(1); MSA 28.788(1)(1):

"Sexual penetration" means 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.

This Court recently addressed the issue of whether criminal sexual conduct requires a living victim. In *People v Hutner*, 209 Mich App 280, 283; 530 NW2d 174 (1995), this Court held:

We conclude that the crime of criminal sexual conduct requires a live victim at the time of penetration.

It stated that a felony murder conviction may be sustained where the victim dies during the attempt to perpetrate the underlying crime. *Id.* at 284. In *Hutner*, it was undisputed that the victim died before penetration. *Id.* at 284. The *Hutner* Court vacated a felony murder conviction because it found insufficient evidence that the defendant killed the victim while committing or attempting to commit the underlying third-degree criminal sexual conduct offense. *Id.* at 285.

Here, there was evidence indicating sexual penetration using force and causing personal injury. The position of the woman's body with her legs spread apart and genitals exposed, the fresh bruises on her thighs, the dislocated hip and the vaginal tears demonstrate the use of force and the infliction of personal injury. This evidence was sufficient for a rational factfinder to find beyond a reasonable doubt that sexual penetration -- "intrusion, however slight" -- occurred here.

Evidence also indicated that the woman was alive at the time of the penetration. The medical examiner testified that the vaginal tears were bloodless. He testified that the lack of blood indicated that "the person *might have been dead* by the time this injury was inflicted." (Emphasis added.) But this scenario was only a possibility. If the woman was already dead, it would have been unnecessary for defendant to use much force to commit the sexual offense. The medical examiner testified that the dislocation of the woman's hip required a "forceful", "snappy movement" of the leg. The injuries suffered by the woman, especially the dislocated hip and bruises on her thighs, provided circumstantial evidence that force was used because the woman put up a fight. Thus, there was sufficient evidence for a reasonable factfinder to find beyond a reasonable doubt that the woman was still alive at the time of the sexual penetration. Accordingly, even under *Hutner*, the trial court appropriately denied defendant's motion for a directed verdict on this basis.<sup>1</sup>

Defendant next claims that he was denied a fair trial by the prosecutor's misinterpretation of evidence regarding whether defendant purposefully loosened and tightened the ligature in strangling the woman. Specifically, he contends that the medical examiner testified that "pin-point bleeds" on the woman's eyelids were the natural result of the human body's response to steady strangulation. When preserved, this Court reviews claims of prosecutorial misconduct by evaluating the prosecutor's remarks in context to determine if the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Here, defendant failed to object to preserve this issue by objecting to the prosecutor's comments below. This Court is precluded from review of prosecutorial misconduct allegations that were not objected to at trial unless the prejudicial effect could not have been cured by a jury instruction or failure to consider the issue would result in manifest injustice. *Id.*

The contested remarks relate to the medical examiner's testimony. He testified that "pin-point bleeds" on the woman's eyelids indicated "intermittent blood pressure being rendered by squeezing the neck." As defendant contends, the medical examiner testified that the human body's natural response to strangulation is for the neck muscles to contract in order to reestablish circulation. However, the prosecutor specifically asked if "intermittent pressure" meant that the ligature was "tightened and released and tightened and released"; the examiner answered, "Yeah." The prosecutor later asked, "Intermittently, on and off?" and the examiner answered, "Yes." This evidence supports the prosecutor's inference that defendant purposefully tightened and loosened the ligature. Accordingly, we find no impropriety in this line of argument by the prosecutor.

Defendant next claims that there was insufficient evidence of premeditation to support the first-degree murder conviction. In reviewing claims of insufficiency of the evidence to sustain a verdict, this Court views the evidence in the light most favorable to the prosecution to determine if a rational

factfinder could find the essential elements of the crime proven beyond a reasonable doubt. *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1992).

In *People v DeLisle*, 202 Mich App 658, 660; 509 NW2d 885 (1993), this Court stated:

First-degree murder is the intentional killing of another, done with premeditation and deliberation. The length of time necessary to "measure and evaluate a choice before it is made is incapable of precise determination"; all that is necessary is enough time to take a "second look" at the actions contemplated. Premeditation and deliberation may be inferred from the circumstances, including the defendant's behavior before and after the crime. [Citations omitted.]

Here, evidence indicated that defendant had the opportunity to take a second look at his contemplated actions. The woman was not a stranger to defendant. He lived next door to her and had told a coworker that he was attracted to the woman. Defendant entered the woman's apartment by prying away the molding from a door with a knife or screwdriver, breaking part of the plexiglass and reaching in to unlock the door. The medical examiner testified that the knot in the ligature was tied in advance of placing it around the woman's neck. He also testified that pressure was applied intermittently and that she could not have died instantaneously. In his confession to the police, defendant indicated that it took a long time for the woman to die. This evidence, particularly the evidence regarding the means of entry and manner of killing, provided sufficient evidence for a reasonable factfinder to find premeditation beyond a reasonable doubt.

Finally, defendant contends that trial court erroneously gave a "lying in wait" instruction when there was no evidence to support it. The trial transcript does not indicate that the trial court gave any such instruction. This claim of error is simply unsupported by the record.

Although not raised on appeal, we note that defendant's convictions for first-degree murder and two counts of felony murder arising from the death of a single individual violate the constitutional guarantees against double jeopardy. While the trial court did not sentence defendant on the two felony murder counts, it also did not vacate them. In *People v Passeno*, 195 Mich App 91, 95-96; 489 NW2d 152 (1992), this Court held:

Where a defendant is convicted of both first-degree murder and felony murder from the slaying of a single individual, the majority of reported cases hold that the conviction of first-degree murder must be affirmed, and the conviction of felony murder vacated. We believe that this is an appropriate remedy, given that first-degree murder requires proof of an element not required for felony murder. [Citations omitted.]

In accordance with *Passeno*, we remand this matter to the trial court for the explicit vacation of the two felony murder convictions which it appears to have implicitly vacated anyway.

For these reasons, we remand this matter to the trial court solely to vacate counts II and IV, the felony murder counts, and otherwise affirm the judgment of sentence.

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

/s/ Michael D. Schwartz

<sup>1</sup> While we affirm the trial court's denial of defendant's motion for directed verdict under the standard set forth in *Hutner*, we do not necessarily concur with the *Hutner* Court's holding that "the crime of criminal sexual conduct requires a live victim at the time of penetration." *Hutner*, supra at 283. This holding is based on the following premises discussed at 283-284:

Our statute . . . defines third-degree criminal sexual conduct as engaging in nonconsensual sexual penetration with another "person." Furthermore, a "victim" is a "person alleging to have been subjected to criminal sexual conduct." [MCL 750.520a(m); MSA 28.788(1)(m).] A dead body is not a person. It cannot allege anything. A dead body has no will to overcome. It does not have the same potential to suffer physically or mentally as a live or even an unconscious or dying victim.

In *Hutner*, it was undisputed that the victim was dead before the penetration. Here, there was sufficient evidence for a reasonable factfinder to find beyond a reasonable doubt that the woman was alive at the time of the penetration. However, we are concerned that closer cases will require inappropriately fine -- and irrelevant -- distinctions to be drawn regarding precisely when a victim has died and when penetration has occurred.

The inaptness of such distinctions is recognized in *Hutner* in the context of a felony murder charge based on an attempt to commit criminal sexual conduct. The *Hutner* Court specifically states that a felony murder conviction may be sustained "where the victim dies during the attempt to perpetrate the underlying crime." *Id.* at 284. This holding appears inconsistent with its rationale for the holding that criminal sexual conduct requires a live victim at the time of penetration. Neither a criminal sexual conduct "victim" killed before penetration nor a felony murder "victim" killed during a criminal sexual conduct attempt is capable of alleging anything, yet in the latter instance a felony murder conviction will continue to obtain under the *Hutner* court's reasoning.

Further, we believe that the statute's use of the word "alleging" is grammatically awkward and that, in all likelihood, it was the intention of the Legislature to use the word "alleged" instead. A person can be "alleged" to have been subjected to rape regardless of whether they are dead or alive at the time.

The *Hutner* Court cites anno: Fact that murder-rape victim was dead at time of penetration as affecting conviction for rape, 76 ALR4th 1147 for the proposition that other states have reached contrary

results on this issue. *Hutner*, at 283. Among the conflicting authorities cited there, some courts have found nothing in their criminal sexual conduct statutes to preclude application to dead victims. See *Lipham v State*, 364 SE2d 840 (Ga, 1988); *Smith v Commonwealth*, 722 SW2d 892 (Ky, 1987); *State v Brobeck*, 751 SW2d 828 (Tenn, 1988); *State v Irick*, 762 SW2d 121 (Tenn, 1988); *State v Whitsell*, 591 NE2d 265 (Ohio App, 1990). The *Lipham* Court held that the use of deadly force would satisfy a force requirement and that the rape of a dead victim would be against the victim's will. *Lipham*, supra. The *Brobeck* Court suggested that a live victim requirement would encourage rapists to kill their victims. *Brobeck*, supra.

We would find that the requirements of first-degree or third-degree criminal sexual conduct are satisfied when a person who is alive at the outset of a criminal assault is subjected to criminal penetration in the course of that assault; whether the victim died at the instant prior to the penetration or immediately after it commenced is irrelevant in terms of criminal culpability as well as in terms of the statute. Neither victim is able to "allege" anything when defendant is done with his criminal episode. We do not find it necessary in this case either to follow *Hutner*, or to seek a conflict panel, under Administrative Order No. 1996-4 because we find that the evidence is sufficient to sustain the finding that the victim here was alive at the time that she was raped.