STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHESTER L. SCHIMBERG,

Defendant-Appellant.

UNPUBLISHED
August 9, 1996

No. 141130
LC No. 90-61562-FC

Before: Hoekstra, P.J., and Michael J. Kelley, and Graves,*JJ.

PER CURIAM.

Defendant was convicted by a jury of breaking and entering an occupied dwelling with intent to commit criminal sexual conduct (CSC), MCL 750.110; MSA 28.305, and of two counts of criminal sexual conduct, first degree (CSC I), MCL 750.520b(1)(c); MSA 28.788(2). He was sentenced to concurrent sentences of six to fifteen years imprisonment for his breaking and entering an occupied dwelling with intent to commit CSC conviction and to sentences of thirty to sixty years and life imprisonment for his two CSC I convictions. Defendant now appeals as of right. We affirm.

The victim, a married woman, awoke to find a strange man standing over her bed. The man forced her to lie in bed with a pillow over her head and submit to vaginal and anal penetration. He then tied her hands behind her back and left her lying on the floor of her bedroom when he departed.

I

Defendant first argues that there was insufficient evidence of his identity to support his conviction, primarily because the victim never saw her assailant's face, because the victim testified that there was only one rapist and because police serology tests established that defendant was incapable of secreting all of the blood group substances found in semen stains on the victim's clothes. We disagree. Viewing the evidence in the light most favorable to the prosecution, *People v Hurst*, 205 Mich App 634, 640; 517 NW2d 858 (1994), we find sufficient evidence of defendant's identity in the victim's

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

testimony that defendant fit the general outline, race, hair and build features she was able to observe in her rapist, coupled with police testimony that defendant's fingerprints were found on a pack of cigarettes, an MCI card and a tube of lipstick taken from the victim's house and abandoned elsewhere in the neighborhood as well as on a flashlight left lying on the hall floor of the victim's home and on the telephone that her rapist pulled from the wall immediately after raping her. This evidence was buttressed by the testimony of the victim and her husband that neither of them knew defendant and that defendant had never been in their home before. Regarding defendant's serology test argument, we note that "it is unnecessary for the prosecutor to negate every reasonable theory consistent with the defendant's innocence. It is sufficient if the prosecution proves its own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant may provide." *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991).

II

Defendant next argues that the prosecutor committed misconduct by not informing a police laboratory technician that there was only one rapist, allowing her to mislead the jury by testifying that defendant could have been one of multiple contributors to the semen stains found on the victim's clothing. We dismiss this argument as unpreserved because plaintiff cites no authority for it and we are able to find none supporting the concept that a prosecutor has an affirmative duty to inform a witness of a complaining witnesses' interpretation of her case before trial. *People v DiVietri*, 206 Mich App 61, 65; 520 NW2d 643 (1994). We also note that defendant's counsel, in his closing argument, raised the possibility that there could have been a second person present during the rape.

III

Defendant next argues that the trial court erred in denying his motion for DNA testing at public expense because requiring him to pay for such testing discriminates against him on the basis of poverty and therefore violates his right to equal protection of the law. We disagree. Plaintiff relies on two cases, *Griffin v Illinois*, 351 US 12; 76 S Ct 585; 100 L Ed 891 (1956) and *People v Cross*, 30 Mich App 326; 186 NW2d 398 (1971), both of which dealt with an indigent defendant's right to a free transcript for use in preparing his appeal. Defendant's situation is distinguishable from that in *Griffin* and *Cross*. The right to a transcript is a basic right, going to the heart of the right to an appeal. *Cross*, *supra*, 30 Mich App 334-335. Defendant points to no authority declaring access to DNA testing to likewise constitute such a basic right. *Griffin* and *Cross* cannot be construed as holding that a court must provide any and all legal and technical services free to indigent defendants. The DNA test results were presented to the trial court at post conviction hearings and defendants interpretation of said results was correctly found to be erroneous. The trial court did not err in denying relief on the basis of test results.

IV

Defendant next argues that the trial court improperly instructed the jury on the elements of CSC I because it did not require an element of force or coercion and the statutory language on which its instructions were based should be interpreted to require such an element. We disagree. We find that the language of MCL 750.520b(1)(c); MSA 28.788(2), is clear and by its plain meaning does not require an element of force or coercion. *People v Cannon*, 206 Mich App 653, 655; 522 NW2d 716 (1994). For this reason also, defendant's argument that the ambiguity in this statutory scheme should be resolved in his favor is inapposite. Defendant further argues that this statute should be construed so as to avoid an absurd or unreasonable result. Upon review of the record, we find that no absurd or unreasonable result was reached here and that defendant's level of culpability matched the severity of his charge.

V

Defendant's argument that double jeopardy principles were violated by his conviction of both CSC in the course of a breaking and entering and breaking and entering with intent to commit CSC was rejected by this Court in *People v White*, 168 Mich App 596, 599-603; 425 NW2d 193 (1988). In *White*, we held that a simultaneous conviction of these two crimes does not violate principles of double jeopardy; we will not now alter that decision.

Defendant also argues that his conviction for breaking and entering with intent to commit criminal sexual conduct would have been merely a conviction for trespassing but for his conviction of CSC. Defendant further argues that likewise his conviction for CSC I would have been merely a conviction for CSC III but for his conviction for breaking and entering with intent to commit criminal sexual conduct. Defendant argues that these two offenses were impermissibly allowed to enhance each other in a circular fashion, violating the prohibition against double jeopardy. Defendant cites no authority for this argument, and it is therefore abandoned on appeal. *DiVietri*, *supra*, 206 Mich App 65. Even if this court were to review defendant's claim, it is without merit. We reject defendants argument.

VI

Defendant next argues that he was rendered ineffective assistance of counsel by various acts and omissions of his trial attorney. We disagree. Upon careful review of the instances of alleged error, we find that trial counsel's actions did not constitute unprofessional error or deprive defendant of the substantial defense of misidentification. *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994); *People v Lavearn*, 201 Mich App 679, 683; 506 NW2d 909 (1993), rev'd on other grounds 448 Mich 207; 528 NW2d 721 (1995).

VII

Defendant next argues that his two CSC I sentences are disproportionate to the offense and to the offender. We dismiss this argument as unpreserved for appeal because defendant's sentences were

within the sentencing guidelines range and defendant did not argue at sentencing that his sentences were disproportionate on any ground. *People v Sharp*, 192 Mich App 501, 506; 481 NW2d 773 (1992).

VIII

Defendant finally argues that his two CSC I sentences combined a high determinate minimum sentence (thirty years) with a life sentence, in violation of MCL 769.9(2); MSA 28.1081. We disagree. The language of this statute by its plain meaning only applies to the punishment parameters of a single sentence, standing alone. This Court has determined that this statutory language is unambiguous. *People v Holcomb*, 47 Mich App 573, 590; 209 NW2d 701 (1973), rev'd on other grounds, 395 Mich 326; 235 NW2d 343 (1975). Therefore we will apply it as written, *Cannon*, *supra*, 206 Mich App 655, and deny defendant's claim that his two sentences constructively amount to one sentence for the purposes of MCL 769.9(2); MSA 28.1081.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Kelly
/s/ James M. Graves, Jr.