STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PERRY FREEMAN,

Defendant-Appellant.

UNPUBLISHED
July 19, 1996

No. 159170
LC No. 92-003610

Before: White, P.J., and Holbrook, Jr. and P.D. Schaefer,* JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and felonious assault, MCL 750.82; MSA 28.277. He was sentenced to concurrent terms of 33 1/3 to 50 years and 15 months to 4 years. He appeals of right, asserting prosecutorial misconduct in argument, instructional error, insufficiency of the evidence, and an abuse of discretion in sentencing. We affirm as to the first-degree criminal sexual conduct conviction and reverse and remand for new trial as to the felonious assault conviction..

Defendant first argues that the prosecutor committed reversible error by denigrating defense counsel in rebuttal argument. Defendant did not object to the prosecutor's comments at trial and did not request a curative instruction. Review is therefore foreclosed unless the prejudicial effect of the remarks is so great that no objection or instruction could have cured the prejudice, or manifest injustice would result from failure to review the misconduct. *People v. Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (l994). We conclude that while the prosecutor's references to defense counsel and his role were improper, defendant was not deprived of a fair trial. The comments were limited, and a timely objection and instruction would have cured any prejudice.

II

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

Defendant next argues that the court reversibly erred by refusing to instruct the jury on the intent element of aiding and abetting as related to the first-degree criminal sexual conduct charge. Defendant was not charged with aiding and abetting and did not request this instruction. His codefendant was charged with aiding and abetting, and the court denied the codefendant's request for an instruction regarding the intent necessary for aiding and abetting.

Defendant argues that because the offense with which he was charged, first-degree criminal sexual conduct, has as a distinguishing element the requirement that the actor be aided and abetted by one or more other persons, the court committed reversible error by failing to instruct on the intent necessary to aid and abet. We do not find this argument persuasive.

In instructing the jury regarding first-degree criminal sexual conduct, the court told the jury that the prosecutor was required to prove beyond a reasonable doubt that before or during the alleged sexual act defendant was assisted by another person who either did something or gave encouragement to assist the commission of the crime. The court further explained that as to the codefendant, even if he knew that the crimes were planned or were being committed, the fact that he was present when they were committed is not enough to prove that he assisted in committing them. We conclude that as to defendant, the court's instructions adequately informed the jury regarding the aiding and abetting element of first-degree criminal sexual conduct.[1]

III

Defendant next contends that the court erred in failing to instruct the jury sua sponte that it must unanimously agree on which act committed by defendant constituted a felonious assault. We agree, believing this case to be controlled by *People v. Cooks* 446 Mich 503; 521 NW2d 275 (l994) and *People v Yarger* 193 Mich App 532, 485 NW2 119 (l992). In the instant case, the alternative acts potentially constituting the felonious assault are materially distinct -- the alleged throwing of a beer bottle down the stairs at the complainant, and the alleged threatening the complainant with a cigarette on the bed—and there is reason to believe the jurors might have disagreed about the factual basis of defendant's guilt. *Cooks, supra* at 524. While there was sufficient testimony to support a verdict of guilty on either theory, the testimony was not overwhelming as to either assault. It is quite possible that the jury found defendant guilty on the basis that some jurors believed he threw a bottle at complainant's head and some believed he threatened her with a cigarette, but all believed he did one or the other. Under the circumstances, we conclude that defendant's failure to request the instruction is not fatal to his appeal. *Yarger, supra.*

IV

As indicated above, we conclude that there was sufficient evidence to support defendant's conviction of felonious assault. Defendant's relief is therefore limited to a new trial on this count, not a directed verdict. Viewing the evidence in the light most favorable to the prosecution, we conclude a rational trier of fact could find that defendant committed an assault with a dangerous weapon. The

complainant's testimony provided a sufficient basis from which to infer that defendant threw a beer bottle at her head. Further, although there was no direct testimony that the cigarette was lit at the time defendant allegedly threatened to burn the complainant, the jury could infer from the complainant's testimony that she was "fixing to smoke [a] cigarette," that defendant told her to "give it up or I am going to burn you," and that defendant took the cigarette from her hand and asked if she wanted some fire, that the cigarette was lit.

V

Lastly, we reject defendant's argument that his sentence is disproportionate. Defendant was sentenced within the guidelines range of twenty to forty years and his sentence is presumed to be proportionate. *People v Broden* 428 Mich 343,354-355; 408 Nw2d 789 (l987). Defendant has presented no unusual circumstances to overcome the presumption of proportionality, and we conclude the sentence is proportionate to the offense and the offender.

Defendant's conviction of and sentence for first-degree criminal sexual conduct is affirmed. Defendant's conviction of felonious assault is vacated and the case is remanded for retrial of that charge.

/s/ Helene N. White
/s/ Donald E. Holbrook, Jr.
/s/ Philip D. Schaefer

[1] We note that even if the trial court had reversibly erred, defendant would not necessarily be entitled to a new trial. The prosecutor would be entitled to opt for entry of a judgment of conviction of third-degree criminal sexual conduct.