# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>March 27, 2008 |
| v | No. 276351<br>Macomb Circuit Court |
| BENSON DARNELL JACKSON,<br><br>Defendant-Appellant. | LC No. 2006-003800-FH |

Before: Murray, P.J., and Bandstra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal conduct (CSC), MCL 750.520c(1)(f) (use of force or coercion to accomplish sexual contact and causing personal injury to the victim), aggravated domestic violence, MCL 750.81a(2), and assaulting, resisting, or obstructing a police officer, MCL 750.81d(1). He was sentenced to concurrent prison terms of 5-1/2 to 15 years for the second-degree CSC conviction, time served of 147 days for the aggravated domestic violence conviction, and 16 to 24 months for the assaulting, resisting or obstructing conviction. He appeals as of right. We affirm.

Defendant's convictions arise from an August 17, 2006, assault against his girlfriend in the apartment that the two shared. The victim testified that she left the apartment after an argument with defendant, but returned when defendant phoned her and stated that he was locked out of the apartment. When the victim returned, defendant was angry and accused the victim of cheating on him while she was gone. He then slapped her about the face, punched her with a fist, and dragged her into the bedroom. Defendant called the victim a "slut" and a "whore," told the victim that he was "going to finish off what the last guy started" and was "going to fuck her whether [she was] alive or dead," and threatened to kill her. The victim struggled with defendant as he pulled down her pants and touched her vagina with his hand. Defendant then dragged her to the living room, where she saw that a police vehicle was outside. Defendant fled when the victim yelled for help, but was arrested by the police. At trial, defendant admitted that he hit the victim and fled to avoid being arrested. Defendant also admitted touching the victim's vagina, but testified that he did so only in an attempt to determine whether she had sex with someone else.

On appeal, defendant argues that the evidence was insufficient to establish the sexual contact element of second-degree CSC. "The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would

warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The prosecution need only prove its own theory beyond a reasonable doubt in the face of any contradictory evidence the defendant may provide. *Id.* at 400.

At the time of the charged offense, MCL 750.520a(n)[1] defined "sexual contact," in part, as "the intentional touching of the victim's . . . intimate parts or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner . . . ." In this case, only the "sexual purpose" form of sexual contact was submitted to the jury in the trial court's instructions. Thus, the jury was required to find that defendant intentionally touched the victim's genital area or the clothing covering that area and that this was done "for sexual purposes or could reasonably be construed as having been done for sexual purposes."

The victim's testimony that defendant accused her of cheating on him and told her that he was "going to finish off what the last guy started," viewed in a light most favorable to the prosecution, was sufficient to enable the jury to find the requisite sexual purpose beyond a reasonable doubt. Because we must make credibility choices in support of the jury's verdict, we reject defendant's argument that the motivation for the touching described in his own trial testimony compels a contrary conclusion. *Nowack, supra* at 400. A victim's testimony need not be corroborated for a prosecution under MCL 750.520c. See MCL 750.520h.

Next, defendant argues that his second-degree CSC conviction should be reversed because the trial court abused its discretion in admitting four photographs of the victim's injuries. We disagree. Although MRE 403 permits a trial court to exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice, photographs properly may be admitted to corroborate a witness's testimony. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Here, the sole basis of defense counsel's initial motion in limine to exclude the photographs under MRE 403 was that defendant intended to admit causing the victim's aggravated injuries. Defense counsel made the motion without having reviewed the specific photographs that the prosecutor intended to introduce. The trial court denied the motion and later reiterated its decision when overruling defense counsel's objection to the admission of the photographs at trial, because the photographs depicted the bruises and marks on the victim's face and neck right after the incident. Considering that defendant was charged with second-degree CSC by engaging in sexual contact accomplished by force and coercion and causing personal injury, and that all elements of a charge are "in issue" when a defendant enters a plea of not guilty, we find no abuse of discretion in the trial court's ruling. *Mills, supra* at 69-71, 76.

Defendant next argues that the prosecutor engaged in misconduct by cross-examining him about being in the Macomb County Jail. Defendant argues that the prosecutor violated MRE

[1] MCL 750.520a was amended by 2006 PA 171, effective August 28, 2006, to redesignate the statutory definition of "sexual contact" from subsection (n) to subsection (o).

404(b) by not giving advance notice of an intent to introduce the evidence and that the only purpose of the prosecutor's cross-examination was to create unfair prejudice by showing his criminal propensity. As relief, defendant seeks reversal of his second-degree CSC conviction. After reviewing the record, we find no basis for the requested relief.

It was defendant who first introduced evidence of his prior jail stay by testifying on direct examination by defense counsel, "I ran away from the apartment because I've been at the Macomb County Jail before and I thought about it. I said, well, I just committed another Domestic Violence on my girlfriend and I don't want to go back." After defendant again volunteered information about his prior jail stay during cross-examination, the prosecutor asked, "What have you been in Macomb County Jail [sic] before." Defendant never answered the question because the trial court interrupted and disagreed with the prosecutor that defendant had opened the door to the question through his earlier testimony. The trial court also admonished the prosecutor for making her argument in the presence of the jury. Although defense counsel also objected in the presence of the jury, counsel did not claim that the prosecutor engaged in misconduct by violating MRE 404(b).

To properly preserve an issue of prosecutorial misconduct for appeal, a defendant must timely and specifically object. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Because defendant failed to specifically object on the basis that the prosecutor violated MRE 404(b), we limit our review of this issue to whether defendant has established a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). See also *Callon, supra* at 329, and *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). The test for prosecutorial misconduct is whether defendant was denied a fair trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Here, we conclude that defendant's reliance on MRE 404(b) is misplaced because it is not apparent that the prosecutor was attempting to introduce evidence of a character trait to prove that defendant acted in conformity therewith. A defendant's testimony can open the door to cross-examination on a matter without implicating MRE 404(b). See *People v Lukity*, 460 Mich 484, 498-499; 596 NW2d 607 (1999).

Further, the prosecution "is entitled to attempt to introduce evidence that [it] legitimately believes will be accepted by the court as long as that attempt does not prejudice the defendant." *Noble, supra* at 660-661. Prosecutorial misconduct cannot be predicated on a good-faith effort to admit evidence. *Id.* at 660. Considering defendant's direct examination testimony, defendant has not shown any evidence of bad faith. Although it may have been better for the prosecutor to make an offer of proof outside the presence of the jury, see MRE 103(c), the prosecutor's question added nothing to what had already been disclosed by defendant's own testimony on direct examination. Moreover, the trial court later instructed the jury that the lawyer's questions to witnesses and statements and arguments are not evidence. The instructions were sufficient to cure any prejudice. *Schutte, supra* at 721-722; *People v McCadney*, 111 Mich App 545, 551; 315 NW2d 175 (1981). Therefore, we find no outcome-determinative plain error. Defendant was not denied a fair trial.

Next, defendant seeks resentencing on the ground that the sentencing judge did not preside over the trial. We conclude that defendant waived this issue by not objecting at trial

when the presiding judge scheduled the case for sentencing before a different judge. See *People v Robinson*, 203 Mich App 196, 197-198; 511 NW2d 713 (1993). Furthermore, even if the issue was not waived, but rather only subject to forfeiture because defendant did not object at sentencing, *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), we would not order resentencing. The general rule that a defendant is entitled to be sentenced by the judge who presided at trial only applies if the trial judge is reasonably available. *Robinson, supra*; *People v Pierce*, 158 Mich App 113, 115; 404 NW2d 230 (1987). Here, the trial judge informed the prospective jurors at trial that he was a retired circuit court judge who was called back to try some jury trials. Although the judge did not explain his statement after the trial that sentencing would occur before a different judge, there is no indication in the record that the trial judge was reasonably available to sentence defendant. Under the circumstances, defendant has not established the requisite plain sentencing error. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *Carines, supra* at 763.

Finally, defendant challenges his second-degree CSC sentence on the ground that the sentencing court relied on facts not found by the jury to score the sentencing guidelines, contrary to *Blakey v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant preserved this issue at sentencing by objecting to a score of ten points for offense variable 4, MCL 777.34(1)(a) (psychological injury to the victim requiring professional treatment), based on *Blakely, supra*, and arguing that it affected the sentencing guidelines range. But as our Supreme Court determined in *People v Drohan*, 475 Mich 140, 162-164; 715 NW2d 778 (2006), and reaffirmed in *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007), *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Accordingly, we reject this claim of error.

We affirm.

/s/ Christopher M. Murray
/s/ Richard A. Bandstra
/s/ Karen M. Fort Hood