STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2008
v	No. 276999 Oakland Circuit Court
SHANE TIMOTHY WESLEY, Defendant-Appellant.	LC No. 2006-208479-FH

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b), and was sentenced to concurrent prison terms of 5 to 15 years. He appeals as of right and we affirm.

I. Basic Facts

Defendant was convicted of sexually assaulting his younger sister. Defendant's and the victim's parents were divorced. The victim and a younger brother resided with the mother and defendant resided with the father. In 2005, the then 16-year-old victim and her younger brother visited their father over the Thanksgiving holiday. The victim explained that, because her father lived in a one-bedroom trailer, her father and her younger brother slept in the bedroom, she slept on a living room couch, and defendant slept on the living room floor. The victim testified that on Thanksgiving night she awoke to defendant "touching [her] under her clothes" with his hand. She explained that defendant's finger went "inside" her vagina and that the incident lasted for a "medium" amount of time. The victim asked defendant to stop, defendant "eventually" stopped, and they fell asleep. About an hour later, the victim again "woke to [defendant] touching [her] vagina" and his finger again went "inside" her vagina. According to the victim, defendant repeated the "same" acts on the following night. The victim did not initially disclose the incidents, but told her mother a week later when her mother mentioned that defendant was coming to live with them. The victim had not initially intended to disclose the incidents because the situation "was scary," because she was related to defendant, and because she presumed that defendant would deny any wrongdoing.

The victim testified that although the last incident between her and defendant occurred in November 2005, defendant had regularly touched her vagina from ages seven to sixteen. She stated that defendant "sometimes" "use[d] his mouth . . . to do oral things" and "sometimes it

was just his hands." She recalled that defendant had used his mouth five to ten times. According to the victim, defendant also kissed her on the mouth.

The victim's mother testified that the victim called her numerous times during the Thanksgiving weekend, crying and requesting to come home. Because of the court-ordered visitation, however, the mother was unable to assist the victim. The victim's mother confirmed that the victim disclosed the incidents after she mentioned the possibility of defendant coming to live with them. The victim's father testified that he spoke with defendant regarding the victim's accusations. Defendant allegedly said that the victim was making a "bigger deal" of "this" than it really was, and that "kids do things like this all the time just being curious."

In an interview with the police, defendant denied any inappropriate touching except for one instance of a mutual touching that occurred years in the past. Regarding the recent allegations, defendant claimed that he could not remember anything, noting that he had a "horrible memory." He acknowledged that the victim had no reason to lie. Defendant testified at trial and denied any wrongdoing. The defense argued that the victim was not credible, and that she and her mother had fabricated the allegations.

II. MCL 768.27a

Defendant first argues that the trial court erred by allowing testimony under MCL 768.27a[1] regarding other uncharged sexual incidents between the victim and himself. He contends that the alleged incidents occurred before the effective date of the statute and that the statute was therefore an unconstitutional ex post facto law as applied to him. Because defendant did not raise this constitutional issue below, we review this unpreserved claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 762-764, 763-764; 597 NW2d 130 (1999).

This Court rejected an identical argument in *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007), concluding that MCL 768.27a is not an unconstitutional ex post facto law because the statute does not alter "the standard for obtaining a conviction against [a] defendant[.]" *Id.* at 619. The trial court's reliance on the statute in this case was not plain error.

III. The Rape-Shield Statute

Defendant next argues that the trial court erred by relying on MCL 750.520j[2] to preclude testimony that the victim had previously made false accusations of sexual conduct. We disagree.

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[1] MCL 768.27a, which took effect on January 1, 2006, provides in relevant part that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant."

[2] MCL 750.520j provides in relevant part:

> Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's

(continued…)

We review the trial court's decision to preclude evidence under the rape-shield statute for an abuse of discretion. *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). Likewise, the scope of cross-examination on matters of credibility is left to the sound discretion of the trial court. *People v Von Everett*, 156 Mich App 615, 623; 402 NW2d 773 (1986).

The purpose of the rape-shield statute is to exclude evidence of a victim's prior sexual assault where the defendant seeks to use the evidence to establish that the victim was promiscuous, or to establish other character traits about the victim. *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991). However,

> the rape-shield statute does not preclude introduction of evidence to show that a victim has made prior false accusations of rape. Such false accusations are relevant in subsequent prosecutions based upon the victim's accusations because the fact that the victim has made prior false accusations of rape directly bears on the victim's credibility and the credibility of the victim's accusations in the subsequent case, and preclusion of such evidence would unconstitutionally abridge the defendant's right of confrontation. [*Id*.]

Here, defendant sought to cross-examine the victim to determine if she had made prior false allegations of rape against their mother's boyfriend.[3] We agree with defendant that information that the victim had made prior false accusations would have been material and relevant to the victim's credibility and the credibility of her accusations in this case.

However, defendant failed to make the requisite offer of proof to justify introduction of the proposed evidence. In order for a victim's prior false accusations of rape to be admitted, a defendant must follow the procedures set forth in MCL 750.520j, which requires that the defendant initially make an offer of proof with regard to the proposed evidence and demonstrate its relevance. *Williams*, *supra* at 273. "If necessary, the trial court should conduct an evidentiary hearing in camera to determine the admissibility of the evidence, and at the hearing, the trial court has the responsibility of restricting the scope of cross-examination to prevent questions that would harass, annoy, or humiliate the victim and to guard against fishing expeditions." *Id*. If a defendant cannot make a sufficient offer of proof, he is not entitled to reversal on the ground that his cross-examination was improperly limited with respect to false accusations. *Id.*

(…continued)

> sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

[3] At a motion hearing, the trial court summarily denied defendant's request. Although there was a discussion "in chambers," no remarks were placed on the record.

Here, defendant failed to offer any competent evidence to establish that the victim made prior *false* allegations of rape. Defense counsel sought to question the victim under oath concerning the alleged falsity of any prior allegations. In his brief on appeal, defendant acknowledges that "the present record does not contain an offer of proof as to the information trial counsel was anticipating by his question." Further, defendant submitted a judgment of sentence, showing that the victim's mother's boyfriend had been previously convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(a). Defendant confirmed that the victim in this case had been the complainant in that case. This evidence clearly undermined defendant's claim that the victim's prior allegation of rape was *false*.

In short, "if defendant had evidence of a prior false allegation, that [evidence] could be presented to the court. But defendant was not entitled to have the court conduct a trial within the trial to determine whether there was a prior accusation and whether that prior accusation was true or false." *Williams*, *supra* at 274. Under the circumstances, the trial court did not abuse its discretion by excluding the evidence.

IV. Scoring of Offense Variables

Defendant further argues that the trial court abused its discretion by improperly scoring offense variables 11 and 13. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision need only be supported by a preponderance of the evidence. See *People v Drohan*, 475 Mich 140, 142-143; 715 NW2d 778 (2006).

A. OV 11

MCL 777.41(1)(a) allows a score of 50 points if "[t]wo or more criminal sexual penetrations occurred." In scoring OV 11, a trial court may not count a sexual penetration that formed the basis of the conviction when that offense is itself "the sentencing offense." MCL 777.41(2)(c). All other "sexual penetrations of the victim by the offender arising out of the sentencing offense" should be scored. MCL 777.41(2)(a). In this case, the sentencing offenses are defendant's two convictions of CSC II for engaging in sexual contact with the victim. The trial court relied on the victim's testimony in scoring OV 11 at 50 points. The victim testified that during each episode of sexual contact, defendant digitally penetrated her vagina as well. Defendant argues that this evidence is insufficient to support 50 points for OV 11 because the jury did not find him guilty of third-degree CSC and therefore "found no penetrations." However, because a different burden of proof applies to the scoring of the guidelines than to the ascertainment of a defendant's guilt, "the scoring of the guidelines need not be consistent with the jury verdict . . . ." *People v Perez*, 255 Mich App 703, 712; 662 NW2d 446 (2003), aff'd in part and vacated in part on other grounds 469 Mich 415 (2003). "'[S]ituations may arise wherein although the fact finder declined to find a fact proven beyond a reasonable doubt for purposes of conviction, the same fact may be found by a preponderance of the evidence for purposes of sentencing.'" *Id*. at 713. Because the victim's testimony was sufficient to support a finding that two criminal sexual penetrations occurred, OV 11 was properly scored at 50 points.

B. OV 13

MCL 777.43 permits the court to score 25 points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). Defendant acknowledges that he was convicted of two offenses against the victim. In scoring OV 13, the trial court relied on the victim's testimony that defendant had repeatedly sexually assaulted her when she visited her father for the past nine years. The victim explained that similar acts occurred regularly, that defendant used his mouth to touch her vagina five to ten times, and that he also used his hands to touch her vagina. The victim also testified that, on the night following the two charged assaults, defendant again digitally penetrated her vagina. Contrary to defendant's argument, a crime need not have resulted in a conviction in order to be considered in the scoring of OV 13. MCL 777.43(2)(a). Consequently, the trial court properly scored 25 points for OV 13.

V. Defendant's Supplemental Brief

In a supplemental brief filed *in propria persona*, defendant argues that his CSC II convictions must be vacated because the trial court erred by instructing the jury on CSC II as a lesser included offense of third-degree criminal sexual conduct (CSC III). Defendant is entitled to no relief on this issue.

Defendant correctly argues that MCL 768.32 only permits instruction on necessarily included lesser offenses, not cognate lesser offenses. *People v Reese*, 466 Mich 440, 446; 647 NW2d 498 (2002); see also *People v Cornell*, 466 Mich 335, 357-358; 646 NW2d 127 (2002). But even if CSC II is only a cognate lesser offense of CSC III, defendant is not entitled to reversal of his convictions. Defendant specifically requested that the jury be instructed on CSC II and approved the verdict form that listed CSC II as a lesser offense of CSC III. Moreover, defense counsel expressed satisfaction with the court's instructions. It is well settled that a party cannot request a certain action of the trial court and then argue on appeal that the resultant action was error. *People v Aldrich*, 246 Mich App 101, 111; 631 NW2d 67 (2001). Defendant has waived any issue on appeal regarding the trial court's instruction on CSC II, and any error in this regard has been extinguished. *People v Carter*, 462 Mich 206, 215-219; 612 NW2d 144 (2000).

Affirmed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis