STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 29, 2008
v	No. 275904 Alger Circuit Court
BRIAN KEITH MELLON, Defendant-Appellant.	LC No. 06-001742-FH

Before: Servitto, P.J., and Cavanagh and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of assault with intent to commit second-degree criminal sexual conduct (CSC), MCL 750.520g(2), gross indecency, MCL 750.338b, and fourth-degree CSC, MCL 750.520e(1)(a). He was sentenced to concurrent prison terms of 2 to 7-1/2 years for the assault and gross indecency convictions, and two to three years for the fourth-degree CSC conviction. He appeals as of right. We affirm.

Defendant's convictions arise from acts of sexual misconduct involving a single victim in Alger County. Defendant was charged with assault with intent to commit second-degree CSC based on two different alternative theories, one in which he tried to remove the victim's swimsuit and the other in which he ripped the victim's brassiere. Defendant was additionally charged with gross indecency for masturbating in front of the victim while she was in a sauna with defendant. Finally, defendant was charged with fourth-degree CSC for grabbing the victim's breast as she was driving. At trial, the prosecution also presented evidence of other sexual acts committed by defendant against the victim in Menominee County and against another woman, R.E. Defendant was convicted of all three charges.

Defendant first argues that the trial court violated MRE 404(b)(1) when it admitted evidence of his other sexual acts against the victim that occurred in Menominee County, and evidence of a prior sexual act against R.E. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Any preliminary questions of law are reviewed de novo. *Id.*

Initially, we conclude that defendant waived any claim of error relating to the evidence of his other sexual acts against the victim in Menominee County. Defendant's attorney conceded on the record at a hearing on October 20, 2006, that the victim's testimony concerning these other acts was admissible under MRE 404(b)(1). A defendant may not claim error on appeal

based on something his attorney deemed proper at trial because to do so would allow him to harbor error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Accordingly, we limit our review of this issue to the evidence that defendant engaged in a prior act of oral sex with R.E.

MRE 404(b) prohibits evidence of other bad acts by a defendant when offered to prove the character of a person in order to show action in conformity therewith. The logic behind this rule is that a jury may not convict a defendant because it believes he is a bad person. *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998). But evidence of other crimes, wrongs, or acts is admissible under MRE 404(b)(1) if it is (1) offered for a proper purpose, i.e., not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice under MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). The trial court, upon request, may provide a limiting instruction under MRE 105. *Id*. at 75; see, also, *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

The other acts evidence was offered in this case to prove defendant's intent, i.e., to show that defendant intended to engage in sexual contact for a sexual purpose, and to show that defendant used a plan, system, or characteristic scheme for initiating sexual contact with teenage girls. Thus, the evidence was offered for proper purposes under MRE 404(b)(1).

Defendant argues that the evidence involving R.E. was too dissimilar to the charged conduct to be admissible under MRE 404(b)(1), because the prior act involved oral sex and was consensual. R.E. denied, however, that the conduct was consensual. Further, even though the nature of the sexual act differed, there were enough similarities to admit R.E.'s testimony under MRE 404(b)(1). R.E., like the victim in this case, was a teenager at the time of the sexual misconduct, whereas defendant was a much older adult. Further, R.E. testified that the prior act, like the charged conduct in this case, occurred quickly and unexpectedly, and during a seemingly innocuous social encounter. The similarities between the charged conduct and the conduct involving R.E. were probative of defendant's plan or scheme to spontaneously act out sexually toward young teenage girls until they resisted. Although the prior act involving R.E. occurred 14 or 15 years before the charged conduct in this case, it was the similarity in the ages of the victims and the circumstances surrounding the charged and uncharged incidents that made R.E.'s testimony admissible in this case.

We disagree with defendant that the challenged evidence should have been excluded under MRE 403, because its probative value was substantially outweighed by the danger of unfair prejudice. As this Court explained in *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995), unfair prejudice

> does not mean "damaging"; any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when marginally relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow use of such evidence. . . . Assessing probative value against prejudicial effect requires a balancing of several factors, including the time necessary to present the evidence and the potential for delay; whether the evidence is cumulative; how directly the evidence tends to prove the fact in support of which it is offered; how important the fact sought to be proved is; the potential for

> confusion; and whether the fact can be proved another way with fewer harmful collateral effects. [Citations omitted.]

Defendant's argument ignores the similarities between R.E.'s experience and the victim's testimony. Further, we are not persuaded that the evidence of other uncharged acts was likely to confuse the jury. The trial court gave a cautionary instruction informing the jury that defendant was not on trial for the other alleged acts, and that the jury could consider such evidence only for certain, limited purposes. Given this instruction, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, and the trial court's decision to allow the evidence was not an abuse of discretion.

Next, defendant argues that there was insufficient evidence for the jury to convict him of assault with intent to commit second-degree CSC. In determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

The elements of assault with intent to commit second-degree CSC are as follows:

> (1) There must be an assault. (2) There must be a sexual purpose. . . . When the act involves contact, defendant must have intended to do the act for the purpose of sexual arousal or sexual gratification. (3) . . . . When the act involves contact, defendant must have specifically intended to touch the complainant's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas, or defendant must have specifically intended to have the complainant touch such area on him. (4) There must be some aggravating circumstances, e.g., the use of force or coercion. An actual touching is not required. [*People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982).]

See, also, *People v Lasky*, 157 Mich App 265, 269-270; 403 NW2d 117 (1987).

In this case, the prosecution argued two separate theories in support of a conviction of assault with intent to commit second-degree CSC: (1) an incident in which defendant pulled down the victim's swimsuit bottom; and (2) an incident in which defendant grabbed at and ripped the victim's brassiere.[1] Regarding the swimsuit incident, the victim testified that she was in a sauna with defendant when he forcibly pulled down her swimsuit bottom, exposing her genital area, and asked, "[W]hat color is it?" Regarding the brassiere incident, the victim testified that she was wearing a t-shirt when defendant reached over and grabbed her brassiere, ripping it in the middle. Defendant does not dispute that there was sufficient evidence to satisfy the assault element with respect to each incident. His argument focuses on the remaining three elements. Defendant argues that the evidence failed to show that he assaulted the victim with the

[1] The jury was instructed that it had to unanimously agree on which incident formed the basis for any conviction.

intent to touch her genital area or breasts, or for the purpose of sexual arousal or gratification. We disagree.

The victim testified regarding two separate, uncharged incidents in Menominee County. She testified that defendant walked in on her while she was in a bedroom and forcibly removed her shorts and underwear. Later that night, the victim was sleeping on a couch when defendant poked her in the crotch through her clothing and began groping her. Defendant then masturbated and ejaculated into a napkin. This evidence was sufficient to enable the jury to infer that defendant similarly intended to touch the victim's genital area and breasts during the respective swimsuit and brassiere incidents, and that defendant engaged in that conduct for the purpose of sexual arousal or gratification.

The final element is proof of an aggravating circumstance, consisting of one of the circumstances listed in the second-degree CSC statute, MCL 750.520c(1)(a) through (l). The applicable circumstance in this case is subsection (f), "[t]he actor causes personal injury to the victim and force or coercion is used to accomplish the sexual contact." For purposes of assault with intent to commit second-degree CSC, however, it is not necessary to prove a completed act. Rather, it is sufficient if "the actor intended to do an act which would have caused personal injury to the victim and the actor intended to use force or coercion to accomplish the sexual contact." *Lasky*, *supra* at 271. Thus, contrary to what defendant argues, an actual injury is not required.

Viewed in a light most favorable to the prosecution, the evidence supported an inference that defendant forcibly removed the victim's swimsuit bottom and forcibly ripped her brassiere. Although there was no evidence of personal injury associated with either incident, an actual injury was not required. Rather, the forceful nature of defendant's conduct was sufficient to enable the jury to infer that defendant intended an act which would have caused a personal injury. Accordingly, the evidence was sufficient to support defendant's conviction of assault with intent to commit second-degree CSC.[2]

Next, defendant argues that he is entitled to be resentenced because the trial court erred in scoring offense variables (OV) 10 and 13 of the sentencing guidelines. We disagree. A trial 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). "Scoring decisions for which there is any evidence in support will be upheld." *Id*.

The trial court scored ten points for OV 10, which is proper if the offender "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The term "exploit" is

[2] Although defendant also argues that the evidence failed to establish beyond a reasonable doubt that the victim was less than 16 years old when the charged conduct was committed, see MCL 750.520c(1)(b), the prosecution did not rely on the victim's age as an aggravating factor. Therefore, the victim's age was immaterial to the assault with intent to commit second-degree CSC charge.

defined to mean "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). Although defendant correctly observes that the mere existence of one or more of the statutory factors does not automatically equate with victim vulnerability, MCL 777.40(2), the evidence supported a ten-point score in this case. The evidence showed that defendant was a close family friend, who the victim viewed as an uncle. She referred to him as "Uncle Brian." The victim also testified that she did not disclose defendant's inappropriate conduct earlier because she did not want to upset her family, who loved defendant. This evidence supports the trial court's determination that defendant exploited a domestic relationship and the victim's youth.

The trial court scored 25 points for OV 13, which is proper 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). In scoring this variable, "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a); see, also, *People v Francisco*, 474 Mich 82, 87; 711 NW2d 44 (2006), and *People v Wilkens*, 267 Mich App 728, 743-744; 705 NW2d 728 (2005).

The victim's testimony at trial showed that, in addition to the sentencing offense, defendant committed at least two other sexual offenses against her in Menominee County. The trial court properly could consider those offenses, regardless of whether they resulted in a conviction. MCL 777.43(2)(a). Accordingly, the trial court did not err in scoring 25 points for OV 13.

Affirmed.

/s/ Deborah A. Servitto
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly