STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 17, 2009
v	No. 281297 Branch Circuit Court
GERALD LEE LATTA, JR., Defendant-Appellant.	LC No. 06-038472-FC

Before: Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(g) (sexual penetration while causing personal injury and knowing or having reason to know that the victim was physically helpless), and contributing to the delinquency of a minor, MCL 750.145. He was sentenced to concurrent terms of 276 to 480 months' imprisonment for the first-degree CSC conviction and 90 days in jail for the contributing to the delinquency of a minor conviction. He appeals as of right. We affirm.

I. Basic Facts

The 42-year-old defendant was convicted of sexually abusing the 16-year-old victim on May 29, 2004. Defendant met the victim through his niece and worked on a church project with her. A week before the incident, defendant came to the victim's house and expressed a desire to be her boyfriend. On the day of the incident, defendant and the victim talked on the phone, and defendant came to the victim's house at about 2:30 p.m., with a bottle of Bacardi Gold rum. The victim testified that she and defendant drank the rum mixed with soda, played games, and did silly things. The victim began to feel "funny" and to go "in and out of it" because of the alcohol. She recalled that defendant pulled down her pants and digitally penetrated her vagina before putting his penis in her vagina. The victim did not recall defendant leaving and later woke up in her bedroom. She went to the bathroom and saw "spots of blood" when she wiped. The victim was scared and called her high school counselor. The counselor testified that the victim was crying and indicated that she saw blood in her vaginal area. The counselor called for assistance and remained on the phone until it arrived.

Paramedics testified that the victim was groggy, sleepy, and drowsy, and sitting on the floor "in a fetal position," rocking back and forth; she was crying and would not talk about what happened. When the victim's mother arrived, she talked to the victim and reported to the police

that the victim had been sexually assaulted. The victim was transported to the hospital and examined. Medical personnel observed a bruise on her back and one on her inner arm, which the victim testified she did not have before the incident. No injuries were found in the vagina area. In June 2004, the victim wrote a letter describing the events of May 29, 2004, and naming defendant as the perpetrator. Deoxyribonucleic acid (DNA) testing of semen taken from the victim's vaginal and anal areas on the day of the incident revealed the presence of DNA that matched a DNA sample taken from defendant. A fingerprint from a rum bottle found in a trash can in the victim's house matched defendant's fingerprint. The police also recovered tissue with droplets of blood from a bathroom trashcan on the day of the incident.

In an initial interview, defendant denied being at the victim's house and stated that because of a prior conviction, "he doesn't allow himself to be alone with young girls." At trial, defendant admitted having sex with the victim, but claimed that it was consensual. Defendant claimed that he and the victim were good friends and that she eventually began to flirt with him, ultimately inviting him to her home on two occasions. During the May 29, 2004, visit, they played games, drank rum and coke, conversed about the victim's family, and the victim told defendant that she wanted to have sex with him. Defendant stated that after he and the victim had consensual sex, he put on her pants, placed her in bed, cleaned up, threw away the rum bottle, and left. Other witnesses, including defendant's sister, a friend of defendant's niece, and defendant's niece, testified for the defense.

II. Sufficiency of the Evidence

Defendant argues that there was insufficient evidence to prove either the personal injury or mental incapacitation elements of the charged offense. We disagree. When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514. It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). "[A] reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

As applicable to this case, a "person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person" and "causes personal injury to the victim, and the actor knows or has reason to know that the victim is mentally incapable, mentally incapacitated, or physically helpless." MCL 750.520b(1)(g). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of a crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996).

"'Personal injury' means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ." MCL 750.520a(n). Viewed in the light most favorable to the prosecution, the evidence was sufficient to enable a jury to find the "personal injury" element beyond a reasonable doubt based on either mental

anguish or bodily injury. Mental anguish consists of "extreme or excruciating pain, distress, or suffering of the mind." *People v Petrella*, 424 Mich 221, 259; 380 NW2d 11 (1985). The counselor testified that immediately after the assault, the 16-year-old victim called her and was crying and could hardly speak. When the paramedics arrived, the victim was crying and "in a fetal position," rocking back and forth. When a paramedic tried to provide assistance, the victim lashed out and attempted to strike the paramedic. A police officer described the victim as "hysterical." The victim's mother described the victim as "out of it," nonsensical, could hardly speak, and "totally irrational, upset, freaking out." A police officer testified that the victim "crawled back into a shell" when he tried to question her at the hospital. The victim's mother testified that the victim was "scared to death to come home," afraid to be in the house, and afraid when the phone rang. The victim's aunt testified what when defendant tried to contact her, the victim "handed [her] the phone because she was scared," "started crying," and would "go and hide." The testimony was sufficient to enable a jury to reasonably infer that the victim experienced extreme distress or suffering of the mind.

In addition, the victim complained to an emergency room nurse that she had an injury to her lower back. The nurse testified that there were two areas of bruising on the victim's body, one "on the right side on her back, lower back near the waist area" that was "purple and red in color" and one on her "inner, upper arm" that was "the same purple-red color." The victim did not recall having any bruises before the assault. Bruises and tenderness are sufficient to sustain a first-degree criminal sexual conduct conviction under a theory of bodily injury. *People v Gwinn*, 111 Mich App 223, 239; 314 NW2d 562 (1981).

The evidence was also sufficient to establish that defendant sexually penetrated the victim with knowledge that she was "physically helpless." "'Physically helpless' means that a person is unconscious, asleep, or for any other reason is physically unable to communicate unwillingness to an act." MCL 750.520a(m). There was evidence that the victim became intermittently unconscious after drinking rum that was provided to her by defendant. The victim testified that immediately after drinking the alcohol, she began to feel "groggy, but kind of funny." She described waking up on the living room floor while going "in and out of it," later woke up in her bedroom, and had no recollection of defendant leaving. Defendant's own testimony that, after the sexual act, he dressed the victim, picked her up, and carried her into her bedroom also supports an inference that the victim was not fully conscious at the time. Also, emergency personnel who encountered the victim after the incident described her as groggy, lethargic, and "barely stay[ing] awake."

Deferring to the jury's finding of credibility and viewing the evidence in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction for first-degree CSC.

III. Admission of Prior Conviction

Defendant argues that the trial court abused its discretion in admitting evidence of his 1992 prior conviction for assault with intent to commit sexual penetration involving his minor niece. A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). If there is an underlying

question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *McDaniel, supra* at 412.

While defendant contends that the evidence was inadmissible because any probative value was substantially outweighed by the danger of unfair prejudice, he does not address the admissibility of the evidence under MCL 768.27a, which 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." A "[l]isted offense" is any offense defined in MCL 28.722(e). MCL 768.27a(2)(a). The sexual assaults at issue are "listed offenses" under MCL 28.722(e)(*x*), and thus MCL 768.27a is implicated. "When a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b)." *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007); see also *People v Watkins*, 277 Mich App 358, 364-365; 745 NW2d 149 (2007), lv gtd 480 Mich 1167 (2008), lv den – vacating order granting lv __ Mich __, issued December 17, 2008 (Docket No. 135787).

The evidence meets the minimum threshold for relevancy, MRE 401,[1] and defendant has not demonstrated that he was unfairly prejudiced by the evidence, MRE 403. The evidence assisted the jury in weighing the victim's credibility, particularly where defendant argued that the victim was not credible and that the sexual act was consensual. Furthermore, while the act described was serious and incriminating, such characteristics are inherent in sexual crimes involving minors. The danger that MRE 403 seeks to avoid is that of *unfair* prejudice, because, presumably, all evidence presented by the prosecution is prejudicial to the defendant to some degree. *People v Pickens*, 446 Mich 298, 336; 521 NW2d 797 (1994). The probative value of the evidence was not substantially outweighed by its prejudicial effect. Consequently, this issue does not warrant reversal.

IV. Effective Assistance of Counsel

Defendant further argues that he was denied the effective assistance of counsel at trial. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and the defendant bears a heavy burden of proving otherwise. *Pickens*, *supra* at 302-303; *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that it is

[1] MRE 401 defines "relevant evidence" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The relevancy "threshold is minimal: 'any' tendency is sufficient probative force." *People v Crawford*, 458 Mich 376, 390; 582 NW2d 785 (1998).

"reasonably probable that the results of the proceeding would have been different had it not been for counsel's error." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

A. Reference to Defendant's Incarceration

During the prosecutor's direct examination of a police officer, the following exchange occurred:

> *Q*. Did there come a point in time in which you received some further information regarding who the perpetrator of this sexual assault was?
>
> *A*. Right . . . the letter that the victim had written naming the perpetrator as Mr. Latta.
>
> *Q*. Based upon the information that you now had about a potential perpetrator, did you contact Mr. Latta?
>
> *A*. Yes. I went out to the place on Gerald Street, which is just probably a block, block-an-half from where the incident took place, and he wasn't there. *I later found out that he was at the Branch County Jail.* And I contacted him there in the - - at the Branch county jail and interviewed him there.
>
> *Q*. And, when you interviewed him, did you advise him of his what's known as Miranda Rights?
>
> *A*. Right. Right. [Emphasis added.]

Defendant correctly notes that a prosecutor may not indiscriminately introduce prior bad acts of a defendant. See MRE 404(b)(1). Here, however, the objectionable response was part of an unsolicited answer to an otherwise proper question regarding whether the officer contacted defendant. The question was not patently designed to elicit the improper testimony. Although defense counsel did not object to the testimony, defendant has not overcome the presumption that defense counsel's failure to object was reasonable trial strategy. Defense counsel reasonably may have determined that the reference was not particularly prejudicial because it was brief, isolated, and did not reveal any details of defendant's confinement and that an objection would only draw more attention to the testimony. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Furthermore, defense counsel chose to address the testimony during his subsequent direct examination of defendant, who explained that he was jailed briefly because of an "outstanding ticket," which he "paid," and then "got released." "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

B. Questioning Defendant about His Residence

Defendant contends that after defense counsel asked clarifying questions about his confinement, counsel's other questions caused him to testify that he lived in a mission:

Q. You were subsequently interviewed by another detective. Where were you living at that time?

A. Are you talking about Detective Nichols?

Q. In Coldwater.

A. Where in Coldwater?

Q. I - - for about a week, I was - - I went back to my wife for a short time. And it didn't work out, so I moved back to Coldwater. I was waiting for an apartment to open up that I was going to get. *So for about a week I stayed at the Mission*. [Emphasis added.]

It appears that defense counsel's questions were designed to highlight that defendant was no longer in jail when he was later interviewed. Furthermore, defendant has not explained how his testimony that he temporarily lived in a mission was prejudicial. Moreover, given the weight of the evidence presented at trial, no reasonable likelihood exists that the brief reference affected the outcome of the case. *Frazier*, *supra* at 243.

C. Injection of Religion

During the prosecutor's direct examination of the victim's mother, the following exchange occurred:

Q. Now, can you describe [the victim] for the jurors?

A. She's very quiet. Emotionally, she's a little younger. Quite naEve [sic]. Too trusting. Just very quiet, withdrawn girl. Spent a lot of time in her bedroom. Didn't really have a lot of relationships. Wasn't super inactive with people.

Q. Now, in general, how did [the victim] dress?

A. Oh, she always wore layer of clothes. Even in the summertime, it was undergarments, then it was tank tops, long-sleeved shorts and a sweater over that. Always layers.

Q. Would you characterize her as being somebody that was promiscuous?

A. Never. She visited her father in Florida, and would not even wear just a bathing suit on the beach. And that covered up, as well. *She's also very God fearing. She loves the church, believes in it. And that's more important that just loving it. She's really got the faith, so*.

Q. We've heard some . . . questions asked about thong underwear. Did [the victim] own any thong underwear that you knew of?

A. No. No. She - - she didn't even like regular bikini underwear[.] [Emphasis added.]

Defendant correctly notes that a prosecutor may not inquire about the religious beliefs of a witness or about the affect of the witness's beliefs on credibility. See MRE 610.[2] Here, however, defendant has not shown that defense counsel's failure to object to the victim's mother's testimony affected the outcome of the proceedings. Previous testimony established that both defendant and the victim were affiliated with a church and, therefore, the jury knew that the victim attended church before the victim's mother's testimony. Furthermore, the prosecutor did not deliberately question the victim's mother about the victim's religious beliefs, but only asked if the victim was promiscuous. Significantly, after the victim's mother's unsolicited religious reference, the prosecutor immediately redirected her testimony by specifically asking her about the victim's choice of underwear. See *People v Dobek*, 274 Mich App 58, 75; 732 NW2d 546 (2007) (reversal unwarranted where swift action to cut off improper religious testimony prevented any potential prejudice). Given these circumstances and the substance of the unchallenged evidence, there is no basis for concluding that there is a reasonable probability that, but for counsel's failure to object to the challenged testimony, the jury's verdict would have been different.

V. Sentence

A. Offense Variables

"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 "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

1. OV 3

Defendant argues that the trial court erred in scoring five points for OV 3 because bodily injury was an element of the offense.[3] MCL 777.33 relates to physical injury to a victim and provides that five points are to be scored if "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). The instructions state that five points may not be assessed if "bodily injury is an element of the sentencing offense." MCL 777.33(2)(d). Here, defendant was convicted of first-degree CSC, MCL 750.520b(1)(g), an element of which is "personal injury." As discussed previously, personal injury includes bodily injury, mental anguish, and other conditions listed in MCL 750.520a(n). Bodily injury and mental anguish are different aspects of the single element of personal injury and only one need be proven. *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996). There was sufficient evidence that the victim suffered both "mental anguish" and "bodily injury." Because only mental anguish was

[2] MRE 610 provides that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced."

[3] At sentencing, defendant argued only that the score of ten points was incorrect because there was no evidence of a bodily injury requiring medical treatment. In turn, the court scored only five points for OV 3.

needed to establish the "personal injury" element of the offense, it was not improper to score five points for OV 3 based on bodily injury.

2. OV 10

Defendant also argues that the trial court improperly scored 15 points for OV 10. MCL 777.40(1)(a) directs a score of 15 points if "[p]redatory conduct was involved." "'Predatory conduct' mean preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The trial court relied on the disparity in defendant's and the victim's ages, coupled with the fact that defendant "intentionally set out upon a course of grooming and preparing the victim for what later proved to be his advances and assault upon her." The 42-year-old defendant established a relationship with the 16-year-old victim through her church and his niece, who was the victim's best friend. The week before the incident, defendant went to the victim's home while her parents were out and asked to be her "boyfriend." On the day of the incident, defendant spoke with the victim on the phone, arranged to come to her house again while her parents were out, and brought alcohol for her to drink. After the victim consumed and was affected by the alcohol, defendant sexually assaulted her. Under these circumstances, the trial court did not abuse its discretion by assessing 15 points for OV 10.

3. OV 11

The trial court scored 50 points for OV 11. MCL 777.41(1)(a) directs a score of 50 points if "[t]wo or more criminal sexual penetrations occurred." In scoring OV 11, a trial court may "not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct 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). Only one sexual penetration was required to form the basis of the first-degree CSC conviction, but there was testimony that defendant engaged in oral, digital, and penile penetration of the victim's vagina during the incident.[4] The testimony was sufficient to support a finding that there were two criminal sexual penetrations in addition to the sentencing offense. Therefore, OV 11 was properly scored at 50 points.

B. Allocution

Defendant's last claim is that he is entitled to be resentenced because the trial court allowed the victim to make inflammatory and slanderous remarks, did not require the prosecutor to prove the victim's allegations by a preponderance of the evidence, and, as a result, sentenced defendant on the basis of the victim's inaccurate and unproven statements. We disagree.

When addressing the court at sentencing, the victim began by stating that "there is [sic] other families here" and that she was speaking for herself and for "other victims," who "cannot speak for themselves, whether it is because they are too young, handicapped or just too terrified

[4] In addition to the three penetrations, the trial court noted the evidence of "semen found in the rectum," but noted that there was no specific testimony regarding anal penetration.

to face him." The victim then discussed at length how the incident seriously affected her life. Near the end of her remarks, the victim referred to defendant as

> a habitual sex offender, with a history starting back when he was an adolescent, possibly before. He has proven that not even children in his own family is [sic] safe. He is a predator that gains the trust of an innocent child, uses it against them and steals their innocence away.

Contrary to what defendant asserts on appeal, he did not challenge the victim's reference to "other victims" during his allocution. Rather, defendant focused on his conduct in relation to the victim:

> I - - after that completely incriminating testimony from [the victim], I don't think there's much I really can say to help me out at this point in time.
>
> I would like to tell [the victim] that - -I am truly sorry, [the victim], for any - - I don't want to use the word "inconvenience" because that seems to pretty much make light of the situation, from where you're coming from.
>
> If I would have had any idea that this would have had the impact on you that you say it does I would have never, ever even stepped in your house for coffee, let alone anything else. And I do apologize for an inconvenience that I have cause[d] you.

The court asked defendant if he wished to address the court and, when doing so, he did not reference the victim's comments regarding "other victims:"

> Your honor, I - - my life was going quite well for me. I - - quite well. I - - as far as being a predator I never really saw myself that way. I - - it overwhelms me to hear the statements of slander. I - - that's it.

Furthermore, the trial court's remarks when imposing sentence do not indicate that the court considered the victim's "unsubstantiated allegations" or "emotional appeal" concerning "other victims." Rather, the court focused on defendant's predatory and manipulative conduct toward the victim:

> While it is really not for me to say whether your words just spoken are hollow or whether [the victim] should accept them as an apology, I will leave that to her sound discretion.
>
> The Court would only indicate to her that I believe that she is far stronger than she might perceive herself to be.
>
> Mr. Latta, I, as I said, sat through the trial. I heard the testimony. I've already indicated, as we've addressed the sentencing guidelines, my belief as well, slanderous or otherwise, that you, in fact, were a predator who set out to see how far you could take the circumstances with [the victim].

> Quite frankly, I was convinced, as, again, I believe the jury was, that there was no relationship other than the one conjured up in your imagination, one of manipulation and of a predatory nature.
>
> The harm and damage that was done I do not believe yet can be measured entirely. I do believe that under all the circumstances it is my responsibility to remove you from this community for a significant period of time.

Thus, the record does not support defendant's claim that the trial court sentenced him on the basis of any inaccurate or unsubstantiated statements made by the victim. Because defendant did not challenge the victim's remarks, there was no reason for the court to require the prosecutor to prove the allegations. Finally, although the court did not rely on the victim's statements regarding "other victims," defendant had a prior CSC conviction regarding his minor niece. Under the circumstances, defendant is not entitled to resentencing.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Stephen L. Borrello