STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 13, 2009
v	No. 284222 Arenac Circuit Court
DAVID PAUL SPRESNY, Defendant-Appellant.	LC No. 07-003306-FC

Before: Owens, P.J., and Talbot and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a) [sexual penetration with a person at least 13 but under 16 years of age], as a lesser offense of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b).[1] Defendant was sentenced to a prison term of 40 to 180 months. We affirm.

Defendant was one of two paramedics who responded to the scene of an accident at a lakefront beach. Complainant fell and was knocked unconscious after she was picked up and dropped by a friend. The paramedics strapped complainant to a backboard and she was transported by ambulance to a hospital. Defendant rode with complainant in the back of the ambulance while her father and the other paramedic rode up front. Complainant alleged that defendant digitally penetrated her three times while en route to the hospital.

The police interview with defendant was recorded on DVDs, which were admitted at trial. Defendant contends that the court erred in admitting this evidence because he was not advised of his *Miranda*[2] rights at the time of the interview, that the resulting admissions were not voluntarily made, and that admission of the evidence violated MRE 401 and 403. We conclude that defendant affirmatively waived this issue when his counsel agreed that the DVDs would be admitted at trial.

[1] Defendant was found not guilty of two other charges of CSC I, or in the alternative CSC III, as well as of a fourth charge of second-degree criminal sexual conduct, MCL 750.520c(1)(b).

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Further, we see no error requiring reversal of the conviction. Viewing the circumstances of the interview, it is clear that defendant was not in custody. The evidence shows that defendant was informed at the beginning of the interview that he was free to leave and knew the door was unlocked. There was no point during the exchange where defendant was told he could not leave or where his actions were restricted because of the way the interview was progressing. In fact, defendant left the room on two separate occasions to take breaks during the interview. Ultimately, defendant terminated the interview by walking out the door and was not impeded or kept from leaving. The attempt to obtain an admission cannot by itself transform an interrogation into a custodial situation given that this is the obvious goal of such an interview. Therefore, based on the circumstances, defendant was not in custody because a reasonable person in defendant's position would realize that he was free to leave. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999).

Defendant also argues that even if *Miranda* was not violated, his admissions were not voluntary. Defendant's concession that the statements made were admissions as opposed to a confession is significant. "An admission of fact is distinguished from a confession of guilt by the fact that an admission, in the absence of proof of facts in addition to those admitted by the defendant, does not show guilt." *People v Gist*, 190 Mich App 670, 671-672; 476 NW2d 485 (1991). In count I through III, the jury was given the option of convicting defendant of CSC I or CSC III, both general intent crimes. *People v Langworthy*, 416 Mich 630, 645; 331 NW2d 171 (1982); *People v Corbiere*, 220 Mich App 260, 266; 559 NW2d 666 (1996). In count IV, defendant was charged with CSC II. CSC II is also a general intent crime, although the jury was additionally charged with finding that defendant touched complainant's breasts "for sexual purposes, or could reasonably be construed as having been done for sexual purposes." In these circumstances, defendant correctly characterizes his repeated assertions that any touching was inadvertent and unintentional as admissions. "[W]here the defendant's statements were admissions of fact, rather than a confession of guilt, no finding of voluntariness is necessary." *Gist, supra* at 671.

We also conclude that admission of the evidence is in keeping with the proper application of the rules of evidence, because the evidence is clearly relevant. MRE 401. However, defendant contends that the interrogation video was unfairly prejudicial, MRE 403, because it showed defendant admitting that he accidentally penetrated a young girl in an inherently implausible fashion. The evidence, while clearly prejudicial, is not unfair since defendant is responsible for creating the implausible explanation. For the same reasons we also reject defendant's assertion that counsel rendered ineffective assistance by failing to object to the admission of the DVDs. "To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel's performance fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008), citing *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), and *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Moreover, the evidence supports a finding that defendant's inculpatory statements during the interview were voluntarily given. The acknowledged misrepresentations of the physical evidence by the interrogating officer were not so extreme to render defendant's statements involuntary. *People v Hicks*, 185 Mich App 107, 113; 460 NW2d 569 (1990). The officer also

feigned befriending defendant, including attempting to empathize with the supposed temptations of the situation, and portraying his inquiry as an effort to keep this matter in perspective and not have defendant's reputation ruined. However, such assurances are not likely to induce a false confession. *People v Utter*, 217 Mich 74, 80; 185 NW 830 (1921), overruled in part on other grounds *People v Jones*, 395 Mich 379; 236 NW2d 461 (1975). There is also no evidence that defendant was of an age, educational or intelligence level that would interfere with his ability to voluntarily make a statement about the events at issue. See generally *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Although the interview was not brief, the length of the interrogation was not oppressive, particularly in light of the fact that defendant could and did leave at will, thereby rendering the length of the interrogation under defendant's control to a significant extent. There was also no evidence that defendant was in a physically compromised condition. *Id.* As such, it has not been shown that defendant's will was overcome and his capacity for self-determination impaired.

Defendant also argues that the trial court erred when it failed to sua sponte instruct on accidental or inadvertent touching. However, defense counsel's responses to the court when asked about the instructions given waived the issue. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Defendant attempts to circumvent this procedural roadblock by also arguing that counsel's actions amounted to ineffective assistance. However, an instruction on inadvertent touching would have contradicted the defense theory that no penetration actually occurred. While defendant could have argued inconsistent theories, the trial court cannot be faulted for failing to interject an issue that was not presented and that would have contradicted the defense presented. Because the instructions fairly represented the issues actually tried, *People v Clark*, 274 Mich App 248, 255-256; 732 NW2d 605 (2007), counsel cannot be faulted. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Additionally, defendant argues that defense counsel was ineffective in failing to object to the prosecutor's interjection of an unnecessary and improper characterization of defendant during direct examination of the officer who conducted the recorded interview. In context, however, it is clear that the person referenced in the questioning was the officer himself, not defendant. Thus, there was no basis for counsel to object regarding prosecutorial misconduct. *Ackerman*, *supra* at 455.

Defendant's argument that defense counsel was ineffective in failing to move for a new trial based on a verdict that was against the great weight of the evidence is also without merit. The evidence adduced included conflicting testimony by the parties and medical evidence that could support either party's position. The issue of the how defendant's admission was obtained was thoroughly examined. Considering the evidence in support of conviction, particularly the complainant's testimony, and deferring to "the jury's role of determining the weight of the evidence or the credibility of the witnesses," *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003), it cannot be said that the evidence "preponderates so heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand," *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998).

Finally, defendant argues that the trial court erred in taking into account the alleged penetrations underlying two of the dismissed charges when scoring offense variable (OV) 11. "A sentencing court has discretion in determining the number of points to be scored [under the

relevant offense variables], provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

In accordance with MCL 777.41(1)(a), OV 11 is scored at 50 points where there are "two or more criminal sexual penetrations" that arise out of the sentencing offense. However, a trial court is instructed to "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). We have held that a trial court can make a factual determination, for sentencing purposes, based on a preponderance of the evidence even where the fact was not established at trial beyond a reasonable doubt. *People v Ratkov* (*After Remand*), 201 Mich App 123, 125-126; 505 NW2d 886 (1993). Consequently, a jury acquittal based on a lack of proof beyond a reasonable doubt is not conclusive of whether a sentencing court will consider the same conduct in determining a sentence based on a preponderance of the evidence. *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991). Therefore, the trial court did not abuse its discretion in scoring OV 11 based on the alleged penetrations underlying two of the dismissed counts. *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005).

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher