STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAIME JOZEF GONZALEZ,

Defendant-Appellant.

UNPUBLISHED
November 17, 2022

No. 354251
Ottawa Circuit Court
LC No. 18-042653-FC

Before: GLEICHER, C.J., and SERVITTO and YATES, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial on three counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(a) (sexual penetration of a person under 13 years of age). The trial court sentenced defendant to 25 to 75 years' imprisonment for each of the counts, to be served concurrently. For the reasons stated in this opinion, we affirm.

I. FACTUAL BACKGROUND

Defendant was convicted of sexually assaulting his daughter, AG, between June 2016 and June 2018, when AG was between six and eight years old. At trial, AG testified regarding several instances of sexual abuse by defendant. She also testified that she was sexually assaulted by her older brother, JG, sometimes while defendant was present. JG testified about being sexually abused by defendant himself, and he testified about engaging in sexual acts with AG at defendant's insistence. Defendant testified on his own behalf and denied any wrongdoing. Before and during trial, defendant made numerous challenges to evidence offered by the prosecution and sought to admit various items of evidence that he thought would aid in his defense, which we shall discuss later in this opinion as they become relevant. In the end, the jury found defendant guilty on three counts of CSC-I as charged. Defendant now appeals his convictions.

II. LEGAL ANALYSIS

Defendant identifies several issues on appeal relating to rulings made by the trial court on evidentiary matters, so our task is to review each of the trial court's challenged rulings to admit or exclude evidence for an abuse of discretion. *People v Roscoe*, 303 Mich App 633, 640; 846 NW2d

402 (2014). A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes. *People v Clark*, 330 Mich App 392, 415; 948 NW2d 604 (2019). To the extent that defendant contends that the exclusion of the evidence violated his constitutional right of confrontation, constitutional issues are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). With these standards of review in mind, we shall deal with each claim of error in turn.

A. COMPLAINANT'S PRIOR ALLEGATIONS OF ABUSE

Defendant first argues that the trial court erred by not allowing him to question AG at trial about prior allegations of sexual abuse she made against a family friend. We disagree. The trial court considered the admissibility of the evidence after considering defendant's offer of proof at an *in camera* hearing. The court determined that the evidence was not admissible under the rape-shield statute, MCL 750.520j, and that defendant had not shown that exclusion of the evidence would violate his constitutional right of confrontation because he had not demonstrated that AG's allegations of sexual abuse by another party were false.

The rape-shield statute, MCL 750.520j, provides in pertinent part:

> (1) 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 sexual conduct shall not be admitted under [MCL 750.520b to MCL 750.520g] 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.

In *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984), our Supreme Court held that under certain circumstances a victim's prior sexual history may be relevant and its admission may be required to preserve a defendant's constitutional right to confrontation. One such instance occurs when "the complainant has made false accusations of rape in the past." *Id.* In *People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991), we cited *Hackett* and acknowledged that the rape-shield statute will not "preclude [the] introduction of evidence to show that a victim has made prior false accusations of rape." This Court explained:

> 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 to confrontation. [*Williams*, 191 Mich App at 272.]

In *Hackett*, 421 Mich at 349, our Supreme Court noted that the admission of such evidence remains "entrusted to the sound discretion of the trial court" and explained the procedure that trial courts should follow in determining the admissibility of evidence regarding a complainant's prior sexual conduct, reinforcing that the procedure is set forth in the rape-shield statute itself:

> The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is

> sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions. [*Husty v United States*, 282 US 694; 51 S Ct 240; 75 L Ed 629 (1931)]. Moreover, the trial court continues to possess the discretionary power to exclude relevant evidence offered for any purpose where its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury. See MRE 403; *People v DerMartzex*, 390 Mich 410; 415; 213 NW2d 97 (1973); *People v Oliphant*, 399 Mich 472, 489-490; 250 NW2d 433 (1976). We again emphasize that in ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation. [*Id.* at 350-351.]

The trial court did not abuse its discretion by excluding evidence about AG's references to sexual abuse by a family friend. The admissibility of the evidence hinged upon whether defendant could make a sufficient showing that AG's rape allegations were false. In *Williams*, the defendant wanted to introduce evidence that the victim previously accused an uncle of sexual abuse, but this Court determined that the defendant had no concrete evidence that the prior accusation was false. See *Williams*, 191 Mich App at 273-274. The defendant had "no idea whether the prior accusation was true or false and no basis for believing that the prior accusation was false[,]" *id.*, but wanted to question witnesses "in hopes that their answers would reveal that the prior accusation was false." *Id*. at 273. We held that the trial court did not err by excluding the evidence. See *id.* at 274. Here, defense counsel relied upon documentation indicating that AG told her then-foster mother that a family friend had sexually assaulted her "over a hundred-plus times," that the then-foster mother reported the allegation to law enforcement or Children's Protective Services (CPS), that a forensic interview of AG did not substantiate those allegations, and that a CPS investigation of the family friend also did not substantiate the allegations. Defendant argued that AG essentially recanted the allegations during her forensic interview, but a transcript of that interview was never presented to the trial court. The court was only informed that, when asked about the allegations, AG responded, "I don't know" or "I don't remember." Her responses do not establish that AG's prior allegations were shown to be false. Similarly, the failure of a CPS investigation to substantiate the allegations does not establish that AG's allegations were proven false. The trial court essentially found that defendant had not made a sufficient showing of the relevancy of the proposed evidence because he had not established that the allegations were in fact made, or that they were in fact false. See *Hackett*, 421 Mich at 350. Because defendant was unable to demonstrate the falsity of AG's prior allegations, the trial court did not abuse its discretion by barring any references to the allegations at defendant's trial.

B. EVIDENCE OF POTENTIAL PUNISHMENT AVOIDED

Defendant next insists that the trial court abused its discretion by barring cross-examination of JG about the potential penalties for crimes JG avoided as part of his immunity agreements with the Oceana and Ottawa County prosecutors. We disagree. In *People v Willis*, 322 Mich App 579, 590; 914 NW2d 384 (2018), this Court stated that, although a criminal defendant's right to confront his accusers is protected by the right of cross-examination, which is grounded in the Confrontation Clause of the Sixth Amendment to the United States Constitution, the "court has latitude to impose reasonable limits on cross-examination[.]" To be sure, "the credibility of a witness is an issue 'of the utmost importance' in every case[,]" *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990), and "evidence of a witness' bias or interest in a case is highly relevant to his credibility." *Id.* Accordingly, a defendant is " 'entitled to have the jury consider *any fact* which might have influenced an informant's testimony.' " *Id.* But the "disclosure requirement may be considered satisfied where the 'jury [is] made well aware' of such facts 'by means of . . . *thorough and probing cross-examination* by defense counsel.' " *Id.* at 152-153.

In the instant case, the trial court ruled that the jury could be informed that JG was granted immunity in Oceana and Ottawa counties, and defendant's attorney was permitted to question JG about the substance of the immunity agreements. Defendant complains that he was not permitted to question JG about the potential punishment for the crimes that he avoided, but as the trial court observed, JG was never charged with those crimes in either Oceana or Ottawa County and, without knowing what charges JG faced, it was impossible to reliably determine what potential punishment JG avoided. The trial court appropriately permitted the jury to be made aware of the immunity agreements under which JG testified, thereby allowing defendant to confront the witness regarding a key influence that could have affected his credibility. Accordingly, under these circumstances, defendant's right of confrontation was not violated, and the trial court did not abuse its discretion when it did not allow inquiry into speculative and potential punishments for crimes with which JG was never charged.

C. HEARSAY EXCEPTION FOR MEDICAL TREATMENT OR DIAGNOSIS

Defendant next asserts that the trial court committed an abuse of its discretion by admitting statements that AG made to Julie Mascorro, a sexual-assault nurse examiner, under the exception to the hearsay rule for statements made for medical treatment or diagnosis. We disagree. Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted. MRE 801(c). Hearsay is generally not admissible at trial unless a specific exception permits its introduction. MRE 802. Pursuant to MRE 803(4), there is a hearsay exception for "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment." The rationale supporting the admission of statements under MRE 803(4) is "(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992); accord *People v Shaw*, 315 Mich App 668, 674; 892 NW2d 15 (2016).

In *People v Mahone*, 294 Mich App 208, 214-215; 816 NW2d 436 (2011), we ruled that "[s]tatements made for the purpose of medical treatment are admissible pursuant to MRE 803(4) if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive proper medical care." We noted that:

> This is true irrespective of whether the declarant sustained any immediately apparent physical injury. *People v Garland*, 286 Mich App 1, 8-10; 777 NW2d 732 (2009). Particularly in cases of sexual assault, in which the injuries might be latent, such as contracting sexually transmitted diseases or psychological in nature, and thus not necessarily physically manifested at all, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment. *Id*. at 9-10; *People v McElhaney*, 215 Mich App 269, 282-283, 545 NW2d 18 (1996). [*Mahone*, 294 Mich App at 215.]

The trial court did not abuse its discretion by admitting AG's statements to Mascorro under MRE 803(4). Mascorro testified that she explained to AG that the purpose of the examination was to do a check-up of her whole body. AG confirmed her understanding that the examination was for a medical purpose by reporting that she was there because she had an infection in her private parts and that the medication she was using was not helping her. This understanding supports the trial court's determination that AG had a self-interested motivation to speak the truth. Mascorro explained the examination room to AG and assisted the physician in collecting specimens during the examination. Mascorro testified that her focus when speaking to AG was the medical diagnosis and treatment of AG. There is no indication that Mascorro asked AG any leading questions about defendant or his conduct with AG. Under these circumstances, we conclude that the trial court did not abuse its discretion by deeming AG's statements to Mascorro admissible under MRE 803(4).

D. OTHER-ACTS EVIDENCE

Defendant next argues that the trial court abused its discretion by admitting JG's testimony about defendant's other acts of sexual abuse and domestic violence against JG under MCL 768.27a and MCL 768.27b. We disagree.

MCL 768.27a provides, in pertinent part:

> (1) Notwithstanding [MCL 768.27], 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.
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> * * *
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> (2) As used in this section:
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> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age.

Similarly, at the time the offenses were committed, MCL 768.27b provided, in pertinent part:

> (1) Except as provided in subsection (4), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other acts of domestic violence is admissible for any purpose for which it is relevant, if it is not otherwise excluded under Michigan rule of evidence 403.

Defendant does not dispute that JG's testimony regarding defendant's other acts of sexual abuse and domestic violence qualified for admission under these rules, but he asserts that the trial court abused its discretion by not excluding the testimony under MRE 403. In *People v Watkins*, 491 Mich 450, 481; 818 NW2d 296 (2012), our Supreme Court explained that evidence otherwise admissible under MCL 768.27a "may nonetheless be excluded under MRE 403 if 'its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.' " The Supreme Court also explained, however, that MRE 403 should be applied in a manner that permits the propensity inference to be weighed "in favor of the evidence's probative value rather than its prejudicial effect." *Watkins*, 491 Mich at 487. The *Watkins* Court further stated:

> This does not mean, however, that other-acts evidence admissible under MCL 768.27a may never be excluded under MRE 403 as overly prejudicial. There are several considerations that may lead a court to exclude such evidence. These considerations include (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony. This list of considerations is meant to be illustrative rather than exhaustive. [*Watkins*, 491 Mich at 487-488.]

Defendant asserts that the other acts discussed at trial were dissimilar to his alleged sexual abuse of AG because his alleged acts against JG involved only oral sex, whereas his alleged acts against AG included vaginal and anal sex. But AG also testified that defendant made her perform oral sex on him, and defendant overlooks that the sexual abuse otherwise took place under highly similar circumstances. Significantly, both AG and JG were defendant's own children. They both stated that the sexual abuse occurred when defendant was home alone with them while their mother was at work, and they both testified that defendant coerced them into engaging in the sexual acts by threatening to hit them if they did not comply. AG testified that she kept silent about the abuse because she was afraid of getting in trouble. Accordingly, contrary to defendant's contention, any dissimilarity between the other acts and the charged crime did not weigh against admission of the other-acts evidence.

Defendant also characterizes JG's testimony as unreliable. "[T]he lack of reliability of the evidence supporting the occurrence of the other acts" is a factor that may weigh against admission. *Watkins*, 491 Mich at 487. Defendant notes that JG was considered a suspect in the sexual assault

of AG. As a result, the police interrogated JG and presented him with three options before he was permitted to leave: (1) JG's sexual assault of AG was the result of JG and AG experimenting; (2) defendant manipulated JG into sexually assaulting AG; or (3) JG sexually assaulted AG of his own volition. Defendant also points out that it was approximately a year after JG's initial interrogation that he divulged that he was sexually abused by defendant. Nonetheless, the trial court, which was in the unique position to observe JG's testimony, did not find the testimony unreliable to the extent that its probative value was substantially outweighed by the danger of unfair prejudice. Indeed, the trial court noted that JG furnished a detailed recollection of the sexual abuse that showed great "humiliation" and "mortification" in recounting the sexual abuse. We must defer to the trial court's "superior position to evaluate the credibility of witnesses who testified before it." *People v White*, 331 Mich App 144, 150; 951 NW2d 106 (2020). Moreover, JG's testimony was consistent with accounts that AG had already provided. For these reasons, after reviewing the record and the trial court's decision addressing the admissibility of JG's testimony, we are satisfied that the trial court appropriately considered the *Watkins* factors and that its decision to admit the other-acts evidence in light of those factors did not fall outside the range of reasonable and principled outcomes. Thus, the trial court did not abuse its discretion by admitting JG's testimony.

E. TENDER-YEARS EXCEPTION TO THE HEARSAY RULE

In his final claim of error, defendant contends that the trial court abused its discretion by admitting AG's statements to her grandmother under the tender-years exception to the hearsay rule set forth in MRE 803A. We disagree. According to MRE 803A:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
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> (1) the declarant was under the age of ten when the statement was made;
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> (2) *the statement is shown to have been spontaneous and without indication of manufacture*;
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> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
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> (4) the statement is introduced through the testimony of someone other than the declarant.
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> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. [Emphasis added.]

In *People v Gursky*, 486 Mich 596, 615; 786 NW2d 579 (2010), our Supreme Court held that when determining whether a statement was made spontaneously, trial courts must review "the totality of the circumstances surrounding the statement." Additionally, the Court instructed "that MRE 803A generally requires the declarant-victim to initiate *the subject of sexual abuse*." *Gursky*, 486 Mich at 613. The Court further stated:

> The question of spontaneity, at its essence, asks whether the statement is the creation of the child or another. There is certainly no doubt that the types of "impulsive" or "non sequitur" statements described above should be considered spontaneous for the purposes of MRE 803A because they result from the declarant's "natural impulse or tendency" or are "unplanned" and made "without effort or premeditation," as a common definition of spontaneity provides. Such statements are quintessentially the "creation" of the child-declarant, and are thus certainly admissible under MRE 803A, assuming they meet the rule's other requirements. [*Id*. at 613-614.]

The thrust of defendant's argument on appeal is that AG's statements to her grandmother were not "sufficiently spontaneous." Defendant contends that AG's statements followed logically from her grandmother's questions, but the record does not support defendant's contention. On the contrary, AG's grandmother testified that as she and AG were making puppy chow in June 2018, AG, of her own volition, broached the subject of "humping" and described that defendant had been "humping" her. In other words, AG spontaneously started the conversation without any indication that AG's grandmother prompted AG's statements or influenced them with leading questions. The record does not support defendant's contention that AG's grandmother initiated the questioning.

Defendant also asserts that AG did not make the statements immediately after the alleged abuse and there was no reasonable excuse for her delay in reporting the allegations. As the trial court recognized, AG waited approximately four months after she was removed from defendant's care to disclose the sexual abuse to her grandmother. But defendant was still visiting AG during that four-month period. In addition, as the trial court acknowledged, the record contained evidence that the children were subjected to extreme physical abuse while living with defendant and their mother. Hence, the trial court did not abuse its discretion by finding that AG's four-month delay in disclosure was reasonable in light of her evidence of her well-grounded fear of defendant. See *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996) (trial court did not err by finding victim's statements spontaneous pursuant to MRE 803A after "eight- or nine-month delay" because of "victim's well-grounded fear of defendant"). Therefore, the trial court did not abuse its discretion by admitting AG's statements to her grandmother under the tender-years exception to the rule against hearsay.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Deborah A. Servitto
/s/ Christopher P. Yates