STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 12, 2012
v	No. 300879 Kalkaska Circuit Court
PAUL LEON JOHNSON, Defendant-Appellant.	LC No. 10-003190-FC

Before: MURPHY, C.J., and FITZGERALD and METER, JJ.

PER CURIAM.

Defendant was convicted after a jury trial of one count of first-degree criminal sexual conduct (CSC 1), MCL 750.520b(1)(a) (victim under 13 years of age). He was sentenced to 2 ½ to 20 years' imprisonment. Defendant appeals as of right. We affirm.

On November 23, 2007, nine-year-old S.H. visited his sister, Elizabeth, at the Johnson Adult Foster Care Home near Kalkaska. During his visit, S.H. played videogames with several other individuals, including defendant. At some point in the early evening, S.H. and defendant were alone in defendant's bedroom. Defendant threatened S.H. that he would punch him if S.H. did not perform fellatio on defendant. S.H., being much smaller and younger, was afraid of defendant, and complied with the threat. Elizabeth entered the bedroom to find S.H. on his knees leaning over defendant, who was sprawled on his bed. According to Elizabeth, S.H. blurted out that defendant made him perform oral sex. In a subsequent interview with police, defendant stated that he asked S.H. to perform fellatio on defendant and that S,H. did so. Defendant also provided a written statement acknowledging that S.H. performed oral sex on defendant.

Defendant first argues that there was insufficient evidence to support the conviction. Defendant, pointing to conflicting evidence, maintains that S.H.'s testimony, as well as Elizabeth's testimony, lacked credibility and reliability. Defendant also contends that there was insufficient evidence to establish the corpus delicti of the charge.

We review claims of insufficient evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). 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, 515-516; 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 the evidence or the credibility of witnesses. *Id.* at 514-515. Circumstantial evidence and reasonable inferences that arise from such evidence can constitute satisfactory proof of the elements of the crime. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). All conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Defendant's arguments that focus on S.H. and Elizabeth's credibility and reliability lack merit, where those matters, as well as the weight to be given to the testimony by S.H. and Elizabeth, were for the jury to assess, not this Court, and any conflicts in their testimony must be resolved in favor of the prosecution. Defendant is not arguing that S.H. and Elizabeth failed to provide testimony that supported the elements of CSC 1. Indeed, the testimony by S.H. and Elizabeth, defendant's written inculpatory statement, and the testimony by police regarding defendant's admission that he received fellatio from S.H., provided more than sufficient evidence for a rational trier of fact to find that defendant engaged in sexual penetration[1] with a person under 13 years of age. MCL 750.520b(1)(a).

With respect to the corpus delicti component of defendant's sufficiency argument, he maintains that his own statements should have been excluded under the corpus delicti rule in order to satisfy his due process rights.

In a corpus delicti challenge, we review the trial court's decision for an abuse of discretion. *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002). "The corpus delicti rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury and criminal agency as the source of the injury before such statements may be admitted as evidence." *Id.* "The rule exists to prevent the use of a confession to convict someone of a crime that did not occur. Once it is established that a crime occurred, the defendant's statement may be introduced to establish the degree of guilt." *People v King*, 271 Mich App 235, 241; 721 NW2d 271 (2006).

In this case, both S.H. and Elizabeth presented significant testimonial evidence establishing the required elements of the CSC 1 charge against defendant. Therefore, the trial court did not abuse its discretion in finding that the corpus delicti rule had been satisfied and that defendant's statements could be admitted into evidence.

Defendant next argues that newly discovered evidence of perjury by Elizabeth entitles him to a new trial. Elizabeth had testified at trial that defendant sexually molested her young daughter, and there was also evidence that defendant admitted to police that he had touched the child inappropriately. The prosecution presented this prior bad acts evidence against defendant after the trial court deemed it admissible. At the sentencing, a female cousin of Elizabeth's took the stand after the court became concerned with defendant's assertion that Elizabeth conceded to the cousin that she had lied at trial. The cousin testified that Elizabeth told her that something

[1] "Sexual penetration," as defined in MCL 750.520a(r), includes "fellatio," and the "emission of semen is not required."

had indeed happened between defendant and S.H., which is not beneficial testimony for defendant. The cousin then indicated that Elizabeth told her that Elizabeth's former boyfriend "was molesting [Elizabeth's daughter] at the same time." This does not constitute testimony that Elizabeth said that defendant did not sexually molest her daughter. In fact, it suggests that Elizabeth's daughter was being molested by both defendant and her former boyfriend. Moreover, the cousin then testified that Elizabeth's claim that her former boyfriend molested Elizabeth's daughter was untrue.

In order to be entitled to a new trial based on newly discovered evidence, a defendant must demonstrate that "(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (quotation marks and citation omitted).

The evidence was not newly discovered, given that defendant explained at sentencing that his counsel was unaware of the information because defendant forgot to tell him about it, as he was scared and confused. Using reasonable diligence, defendant could have produced the cousin's testimony at trial. Finally, the cousin's testimony would not have produced a different result in a retrial. The testimony is not helpful to defendant; it would actually be damaging to his defense. Further, in any retrial, there would still be S.H.'s testimony and evidence that defendant admitted committing a CSC 1 in regard to S.H. and admitted to sexually molesting Elizabeth's daughter. The evidence that defendant committed CSC 1 was overwhelming. A new trial is entirely unwarranted.

Defendant next argues that he received ineffective assistance of counsel necessitating a new trial where counsel did not move to suppress his inculpatory statements, which defendant claims amounted to involuntary confessions. Associated with this argument is defendant's contention that counsel failed to investigate and adequately explore defendant's limited mental capacity in relationship to making a constitutionally sound confession. Defendant faults counsel for not demanding a forensic examination to determine whether defendant was even competent to stand trial.

Defendant failed to preserve this issue by not raising it in the trial court in connection with a motion for new trial or evidentiary hearing. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000). Thus, we review this claim for errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001), our Supreme Court, addressing the basic principles governing a claim of ineffective assistance of counsel, stated:

> To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not

> performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag,* 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that his statements were involuntary, given the totality of the circumstances. In *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988), our Supreme Court stated:

> The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired. The line of demarcation is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession.
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> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [Citations and internal quotation marks omitted.]

Here, in relationship to the factors, defendant notes that the second interview was held in a small office with a uniformed and armed officer, that the record is replete with references to defendant's limited mental capabilities, including his past enrollment in special education classes, that he was nervous and scared, that he had no previous experience dealing with the police, that he was eager to please authority figures, and that it is unlikely that defendant understood his constitutional *Miranda*[2] rights.

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

While we recognize that defendant was a few years older at trial, his testimony simply belies the whole thrust of his argument that the incuplatory statements were involuntary due to mental infirmities. The trial transcript clearly reflects that defendant understood the questions posed to him, that he answered the questions appropriately, that he had a good recollection of persons, places, and events, that he was definitive regarding what occurred, that he explained away his incriminating statements, that he was somewhat articulate, and that defendant handled aggressive questioning by the prosecutor fairly well given the circumstances.[3]

With respect to the suggestion of police coercion, defendant voluntarily went to the Grayling State Police Laboratory where he wrote his confession, spending a total of two hours at the facility. Defendant spent approximately an hour and a half with Trooper McCloughan and was given time to write his statement while the officer was out of the room. In addition, defendant's mother consented to the interview at the police laboratory and accompanied him to the facility. Defendant was free to leave at any time. Given the circumstances, there was no atmosphere of police coercion. Moreover, defendant repeatedly testified that he made the incriminating statements, which were not true, because he was nervous and that his nervousness was due to the fact that he was in an unfamiliar environment or setting. He never asserted that he made the incriminating statements because of any police coercion, nor did he claim that the statements resulted from any mental deficiencies or eagerness to please authority figures. Furthermore, nervousness by itself does not support a finding that the statements were involuntary.

Finally, with respect to the claim that defendant most likely did not understand his *Miranda* rights, there is no support in the record. Defendant voluntarily went to the Grayling State Police Laboratory and readily admitted at trial that he wanted to take a polygraph test. There is no dispute that defendant received the appropriate *Miranda* warnings and, further, the written warnings were initialed by defendant and his mother. On consideration of the existing record, including defendant's trial testimony, there is no reason to believe that he did not understand his constitutional rights.

Under the totality of circumstances, defendant's statements were voluntary, and any motion to suppress would have been futile; therefore, counsel was not ineffective. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Finally, defendant argues that the "other acts" evidence involving the alleged molestation of Elizabeth's daughter should not have been admitted under MRE 404(b)(1) or MCL 768.27a, where its probative value was substantially outweighed by the risk of unfair prejudice to defendant, MRE 403. We disagree.

In general, this Court reviews a trial court's decision regarding the admissibility of other acts evidence for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785

[3] According to an "Individualized Education Program" report on defendant dated 2/5/2010, he was assessed as having "average intellectual ability," while noting that "[i]t is nearly impossible [for him] to keep up with school work and learning new concepts with such poor attendance."

(1998). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, e.g., whether a rule of evidence or statute precludes admissibility of the evidence." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Questions of law are reviewed de novo. *Id.*

In *People v Pattison*, 276 Mich App 613, 618-620; 741 NW2d 558 (2007), this Court observed:

> 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). In many cases, it allows evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted in this limited context.
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> Finally, defendant points to the language of MCL 768.27a, which provides that evidence of prior sexual assault against a minor "may be considered for its bearing on any matter to which it is relevant," and argues that the evidence presented is not truly relevant to whether the alleged acts occurred. However, our cases have never suggested that a defendant's criminal history and propensity for committing a particular type of crime is irrelevant to a similar charge. On the contrary, it is because of the human instinct to focus exclusively on the relevance of such evidence that the judiciary has traditionally limited its presentation to juries. In cases involving the sexual abuse of minors, MCL 768.27a now allows the admission of other-acts evidence to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors.

Here, we find the evidence admissible under MCL 768.27a; therefore, we need not address MRE 404(b). The evidence regarding the sexual molestation of Elizabeth's daughter was relevant to show defendant's propensity to engage in sexual acts with persons younger and smaller than himself in secretive fashion. *Pattison* expresses that an analysis under MRE 403 must still be performed with respect to admissibility under MCL 768.27a. *Pattison*, 276 Mich App at 621. Even where relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." MRE 403. "Unfair prejudice" means "there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398.

Defendant argues that the trial court erred in not considering whether the probative value of the other acts evidence was substantially outweighed by the risk of unfair prejudice to defendant under MRE 403. Although the record does not reveal that the trial court weighed the probative value of the evidence and risk of prejudice, there is no indication that MRE 403 was not considered by the court in ruling on admissibility, and we presume that the trial judge knows the law. *People v Garfield*, 166 Mich App 66, 79; 420 NW2d 124 (1988). Furthermore, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Given the testimony by S.H. and Elizabeth, along with defendant's incriminating

statements effectively confessing guilt, we cannot conclude that the other acts evidence was given undue or preemptive weight by the jury. Indeed, even if inadmissible, any presumed error was harmless and not outcome determinative. *Lukity*, 460 Mich at 495, citing MCL 769.26.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter