

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 14, 2012

v

FRANK ARTHUR CROWELL,
Defendant-Appellant.

No. 305466
Saginaw Circuit Court
LC No. 10-034594-FC

Before: SAAD, P.J., and SAWYER and CAVANAGH, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of five counts of first-degree criminal sexual conduct causing personal injury (CSC I), MCL 750.520b(1)(f), and one count of domestic violence, MCL 750.81(2). He was sentenced as a second offense habitual offender, MCL 769.10, to concurrent terms of 356 months to 50 years' imprisonment for each count of CSC I, and received credit for time served for his domestic-violence conviction. We affirm.

Defendant and complainant met in December 2009 and began a dating relationship shortly after. Complainant testified that she had a consensual sexual relationship with defendant until he became very controlling and began to sexually abuse her. Complainant testified about different incidents where she was physically forced to engage in oral and anal sex with defendant. She testified that defendant would grab her, hold her down, and violently spank her.

Defendant argues that the trial court erred by admitting into evidence video recordings from a cell phone that was searched without a warrant. The cell phone was in defendant's property at the Saginaw County Jail. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Farquharson*, 274 Mich App 268, 271; 731 NW2d 797 (2007). "An abuse of discretion occurs . . . when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). In addition, this issue requires us to review whether a valid consent was given to search the cell phone, which is a question of fact, and we "will not reverse a trial court's finding concerning consent unless it is clearly erroneous." *People v Wagner*, 114 Mich App 541, 547; 320 NW2d 251 (1982).

"The United States Constitution and the Michigan Constitution guarantee the right of persons to be secure against unreasonable searches and seizures." *People v Jenkins*, 472 Mich

26, 31; 691 NW2d 759 (2005), citing US Const, Am IV; Const 1963, art 1, § 11. When analyzing whether the search violated defendant's Fourth Amendment rights, the main focus is "whether defendant had a legitimate expectation of privacy in the place searched." *Wagner*, 114 Mich App at 547. "Searches and seizures conducted without a warrant are unreasonable per se, subject to several specifically established and well-delineated exceptions." *People v Borchard-Ruhland*, 460 Mich 278, 293-294; 597 NW2d 1 (1999). One such exception is a valid consent to search. *Wagner*, 114 Mich App at 548. "A search is also valid if the permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to, the premises or things sought to be inspected." *Id.* However, the person consenting has to have more than a mere property interest in the thing searched. *Id.*, citing *United States v Matlock*, 415 US 164, 172; 94 S Ct 988; 39 L Ed 2d 242 (1974).

Common authority . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched. [*Matlock*, 415 US at 171, n 7.]

"In Michigan, there is no Fourth Amendment violation where police officers conduct a search pursuant to the consent of a third party whom the officers reasonably believe to have common authority over the premises." *People v Goforth*, 222 Mich App 306, 315; 564 NW2d 526 (1997).

Saginaw Township Police Department Detective Chad Brooks testified that complainant gave him permission to look at the SD card that was in the cell phone. He testified that complainant told him that the cell phone was hers and she paid the bill, and she gave him a "full bill" that contained her name, account number, and the telephone number for the cell phone. In light of these circumstances, it was reasonable for Brooks to believe that complainant had common authority over the cell phone.

Complainant testified on the second day of trial that defendant used his cell phone to take photographs and videos of her when he forced her to smoke cocaine. However, she was uncertain whether defendant recorded their sexual activities. Although defendant used the cell phone, complainant testified that he obtained the cell phone from Sprint, under her name, and she paid the bill. This evidence, and Brooks's testimony, indicates that complainant had common authority to consent to the search of the cell phone; therefore, a search warrant was not required. Accordingly, defendant assumed the risk that complainant could permit an inspection of the cell phone.

Additionally, defendant argues that the prosecution denied him a fair trial by introducing video recordings from the cell phone in violation of the discovery demand. We disagree. Generally, a trial court's decision to admit evidence that violated a discovery requirement is reviewed for an abuse of discretion. MCR 6.201(J); *People v Jackson*, 292 Mich App 583, 591; 808 NW2d 541 (2011). However, because defendant failed to properly preserve this issue by specifically raising the issue of a possible discovery violation, we will review it for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

“Defendants have a due process right to obtain evidence in the possession of the prosecutor if it is favorable to the accused and material to guilt or punishment.” *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). However, criminal defendants do not have a general constitutional right to discovery. *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000). Accordingly, it is a nonconstitutional error to admit evidence in violation of a discovery request that is not “favorable to the accused.” *Id.* at 765-766 n 6.

MCR 6.201(A)(6) makes it mandatory, upon request, for a party to provide the other party with “a description of and an opportunity to inspect any tangible physical evidence that the party may introduce at trial.”

If a party fails to comply with this rule, the court, in its discretion, may order the party to provide the discovery or permit the inspection of materials not previously disclosed, grant a continuance, prohibit the party from introducing in evidence the material not disclosed, or enter such other order as it deems just under the circumstances. [MCR 6.201(J).]

“When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance.” *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

Here, any error resulting from the trial court’s decision to admit the recordings is nonconstitutional because the evidence is not favorable to the accused. Therefore, to constitute a due process violation, defendant would have to show that the prosecution acted in bad faith by withholding the evidence. See *People v Hanks*, 276 Mich App 91, 95; 740 NW2d 530 (2007).

Although MCR 6.201(A)(6) makes it mandatory for the prosecutor to comply with defendant’s discovery request by providing a description of the evidence he intends to use at trial beforehand, he cannot do so when the evidence is discovered during trial. The record does not indicate that the prosecutor knew of the cell phone and video recordings before trial and intentionally avoided gathering the evidence or withheld it. In fact, defendant admits that there is no evidence that the prosecutor intentionally suppressed the evidence.

Defendant argues that if the prosecutor or police had more thoroughly interviewed complainant they would have learned of the video recordings before the trial. However, although complainant testified she knew defendant had recorded her using cocaine, she was unaware whether he recorded their sexual activities, and she had not seen any of the videos. Further, as the trial court noted, defendant would clearly have known about the videos having recorded them. See *People v Taylor*, 159 Mich App 468; 406 NW2d 859 (1987) (finding “that defendant was entitled to no remedy for the prosecutor’s nondisclosure of the letter in question since the defendant, having written it himself, had knowledge of it independent of discovery.”). “The purpose of broad discovery is “to promote the fullest possible presentation of the facts, minimize opportunities for falsification of evidence, and eliminate the vestiges of trial by combat.” *State v Tune*, 13 NJ 203, 210 (98 A2d 881, 884 [1953]), Mr. Justice Vanderbilt quoting 60 Yale LJ 626.” *People v Johnson*, 356 Mich 619, 621-622 n *; 97 NW2d 739 (1959). Defendant’s knowledge of the videos eliminated any possibility that he could be ambushed at trial.

Defendant also argues that the video recordings were unfairly prejudicial to him. However, any prejudice stemming from the videos was due to its strong confirmation of the charges.

Defendant also argues that there was insufficient evidence to convict him of CSC I because the element of force was not proven beyond a reasonable doubt. Again, we disagree. We review sufficiency-of-the-evidence claims de novo, *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001), with an eye toward determining whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt, *People v Wolfe*, 440 Mich 508, 515-514; 489 NW2d 748 (1992).¹ In doing so, all evidence must be viewed in a light most favorable to the prosecution. *People v Railer*, 288 Mich App 213, 216; 792 NW2d 776 (2010). We defer to the fact-finder's weighing of the evidence and assessment of the credibility of the witnesses. *Wolfe*, 440 Mich at 514.

MCL 750.520b(1)(f) provides:

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

* * *

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

(ii) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute these threats.

(iii) When the actor coerces the victim to submit by threatening to retaliate in the future against the victim, or any other person, and the victim believes that the actor has the ability to execute this threat. As used in this subdivision, "to retaliate" includes threats of physical punishment, kidnapping, or extortion.

(iv) When the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.

¹ Amended on other grounds 441 Mich 1201 (1992).

(v) When the actor, through concealment or by the element of surprise, is able to overcome the victim.

“Force or coercion is not limited to physical violence but is instead determined in light of all the circumstances.” *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992). Here, complainant testified to various instances where defendant used force or coercion. She specifically stated that defendant forced her to perform oral sex on him by grabbing her hair and moving her head up and down. She testified that on one occasion she tried to push defendant away but he grabbed her and forced her down. She testified that he pushed her hard and would spank her. Complainant also testified that the day before officers responded to reports of a sexual assault, defendant raped her anally after first trying to physically force her to perform oral sex. Photographs of bruises on complainant’s arms, which she testified happened when defendant grabbed her, were taken by the police. Moreover, complainant testified that defendant told her he would rape her girls if she did not do the activities he wanted her to do. She stated she felt like she did not have any other options. This evidence was supported by videos of sexual encounters between defendant and complainant discovered on a cell phone. In light of all the circumstances, the element of force was proven beyond a reasonable doubt.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Mark J. Cavanagh