

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ALAN CANALES,

Defendant-Appellant.

UNPUBLISHED

September 14, 2004

No. 249783

Kent Circuit Court

LC No. 02-002955-FH

Before: Griffin, P.J., and Zahra and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b). Defendant was sentenced to 2-1/2 years to fifteen years' imprisonment. We affirm defendant's convictions and sentences, but remand for correction of the judgment of sentence.

I. Facts and Proceedings

During the 1997 – 1998 school year, the victim was a sixteen-year-old high school student at Pine Street Creative Arts Academy (“Academy.”) The victim had been abandoned by her parents and lived on her own since she was thirteen years old.¹ Defendant was a teacher at the Academy and the victim was a student in his physical education class. While the victim was in defendant's class he began to show her special attention, giving her his home telephone number and encouraging her to call him if she needed anything. Defendant occasionally gave the victim rides to her place of employment. During one of these rides, defendant asked the victim to join the girls' soccer team that he was coaching at a local high school. The victim joined the soccer team and defendant also occasionally gave her rides “home” from practice.

One evening, in the fall of 1997, after an argument with her boyfriend, the victim telephoned defendant, requesting that he pick her up and take her to a friend's house. Defendant agreed to pick her up. However, no one was at the location where the victim wished to be taken,

¹ The victim purposefully did not seek assistance from state agencies or school authorities because she was fearful of being placed in a foster home by Child Protective Services. She received assistance from the generosity of neighbors and persons in the community who provided her with employment and a place to sleep.

so defendant brought the victim to his marital home, where he performed oral sex on her. The victim and defendant showered together the next morning before he drove her back home. On another afternoon, while the victim was walking to work, defendant gave her a ride and took her to his rented apartment.² Defendant performed oral sex on the victim at the apartment. The victim never reported these encounters. Eventually, the relationship subsided, and for approximately five years, defendant and the victim had no contact.

In 2002, the victim participated in marriage counseling for her upcoming wedding. As the result of one of the counseling sessions, the victim decided that she had an obligation to report defendant's conduct to law enforcement authorities. On January 28, 2002, the victim gave a report to the Kent County Sheriff's Department. The detective assigned to the case telephoned defendant at his marital home and left a message that he wished to speak to defendant regarding a former student. On January 29, 2002, defendant returned the telephone call and agreed to meet the detective at the sheriff's department during defendant's lunch hour the next day. On January 30, 2002, at approximately 11:30 a.m., defendant arrived at the sheriff's department and at 11:48 a.m., the detective escorted defendant to an interview room. The detective advised defendant that he was not under arrest, but wished to ask him some questions. The detective did not read defendant his *Miranda*³ rights nor did he inform defendant that he was free to leave. During the interview, defendant admitted he knew the victim. Defendant also admitted he had performed oral sex on the victim at his home and rented apartment. The interview lasted approximately one hour and, at 12:50 p.m., the interview concluded after defendant indicated that he needed to return to work.

On February 8, 2002, a complaint and warrant was issued for defendant's arrest. After defendant was arraigned and bound over, he filed a motion to suppress the statements he made to the detective during his interview on the grounds that he gave the statement involuntarily and the detective failed to give him his *Miranda* rights before conducting a "custodial interrogation."

A *Walker*⁴ hearing was held on February 5, 2003. Defendant testified that the detective persisted in asking him questions despite defendant's effort to end the interview so he could return to work to teach a scheduled class. Defendant further testified that he did not believe he was free to leave, both because the interview was being conducted in a closed, sterile interview room that was located in a "restricted area" rather than in an office, and because the detective conducting the interview was armed. However, defendant admitted that he was generally aware of his *Miranda* rights. At the conclusion of the testimony, defendant requested suppression of the statements as being involuntary and coerced. The trial court denied defendant's motion, recognizing that defendant's argument had potential merit because police officers receive training in interviews. However, the trial court determined it was a matter of credibility when the detective and defendant's testimony conflicted regarding whether defendant was informed that he was free to leave and not under arrest. The trial court determined that it did not believe

² Defendant and his wife separated for a short period of time and he rented a separate apartment.

³ *Miranda v Arizona*, 384 US 436; S Ct 1602; 16 L Ed 2d 694 (1966).

⁴ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

defendant or the detective was lying; however, it was likely that defendant, in his nervousness, forgot that he was free to leave. The trial court also concluded that, under the totality of the circumstances, defendant's statement to the detective was made voluntarily. The trial court noted that defendant received a message to call the detective and that defendant voluntarily scheduled the interview at the sheriff's department for the next day, and that there was no testimony that defendant received a threatening message from the detective instructing him to immediately come to the sheriff's department. The trial court also determined that the evidence did not support a finding of coercion, concluding that it was not unreasonable for the detective to be armed or for the interview to occur in a private room in light of the sensitivity of the charges. The trial court also considered that defendant was not restricted in any way, and he was closest to the door to the interview room. The trial court further concluded that because defendant had a master's degree in education, he was less likely to be intimidated than a less educated suspect placed in similar circumstances. Ultimately, the trial court determined that defendant was not in custody because he was not under arrest and knew he would be leaving (and was able to leave) after the interview concluded.

Defendant's theory of the case at trial was that he was an upstanding member of the community who was the victim of fabricated charges brought by a former student with known difficulties. Defendant further challenged the veracity and motives of the detective, asserting that the detective's testimony that defendant admitted having oral sex with the victim should not be believed because the detective did not tape record the interview and had subsequently destroyed his notes from the interview. Defendant presented several character witnesses from the community. Defendant's wife also testified on his behalf to support the defense theory that the charges were fabricated. She testified that she stayed in the marital home every night during the Fall of 1997, and thus, it was impossible for defendant to have brought the victim to the marital home for an overnight stay and perform oral sex on the victim. She also testified that the Academy was an alternative school for at-risk students and the victim repeatedly telephoned her and defendant's home. Defendant testified that he and the victim only had a student-teacher relationship. He denied showing any special attention to the victim or engaging in any sexually inappropriate behavior with her. Defendant acknowledged that he occasionally gave the victim rides, but only to provide her transportation to and from soccer practice. Defendant further denied that the detective had told him either that he was not under arrest or that he was free to leave, and testified that he was nervous and intimidated by the detective at the interview; however, he never admitted to having any sexual contact with the victim. Defendant was convicted as charged. Defendant now appeals.

II. Standards of Review

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made, *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will, a defiance of judgment, or the exercise of passion or bias, *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). An error in the admission or exclusion of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice. MCR 2.613(A); MCL 769.26; *Craig v Oakwood*

Hosp, ___ Mich ___ ; ___ NW2d ___ (Docket Nos. 1405, 121407-09, 121419, issued 7/31/04) slip op, p 13. To warrant reversal, a defendant must show that, after an examination of the entire cause, it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Whether a person is in custody, and thus, entitled to *Miranda* warnings before being interrogated by law enforcement officers, is a mixed question of law and fact which must be answered independently by the reviewing court after a de novo review of the record. *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997). To determine whether a defendant was “in custody,” at the time of the interrogation, we look to the totality of the circumstances, with the key question being whether the defendant reasonably believed that he was not free to leave. *Id.* at 382-383.

III. Analysis

A.

Defendant first argues that the trial court improperly allowed the prosecution, in two separate instances, to question the detective regarding statements made by defendant at the *Walker* hearing. Assuming without deciding that defendant’s argument is correct, we find no error requiring reversal. To preserve an evidentiary issue, the defendant must make a timely objection and assert the same challenge he asserts on appeal. *People v Kimble*, 470 Mich 305, 309; ___ NW2d ___ (2004). At trial, defendant challenged the first instance of alleged improper questioning of the detective by the prosecution on hearsay grounds. On appeal, defendant asserts a different claim of error, contending that his testimony at the *Walker* hearing cannot be substantively used against him at trial. Because defendant did not object at trial on the same grounds he now asserts on appeal, this issue is unpreserved. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Accordingly, we consider the first instance that defendant cites as improper questioning by the prosecution as unpreserved constitutional error, which we review for plain error that affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In Michigan, when a defendant seeks suppression of a statement as involuntary, he may take the stand and testify for the limited purpose of making a record of his version of the facts and circumstances under which the statement was obtained without waiving his right to decline to testify at trial nor any other right stemming from his choice not to testify. *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965). “This right to [testify at a *Walker* hearing without waiving the right to testify at trial] derives from the prohibition in the Fifth Amendment of the United States Constitution against compelling a person in a criminal case to be a witness against himself; our Michigan counterpart is in Const 1963, art 1, § 17.” *People v Manning*, 243 Mich App 615, 625; 624 NW2d 746 (2000). Defendant contends that the prosecution erred in asking questions to the detective regarding defendant’s *Walker* hearing testimony, referencing defendant’s testimony that he said he was familiar with his *Miranda* rights and that he said he did not need to invoke the right to remain silent or have an attorney present during questioning because he had no reason not to cooperate. Assuming without deciding that such references were error, any such error was not outcome determinative because defendant’s testimony duplicated the detective’s testimony on these points. Specifically,

defendant testified that he was familiar with his “Miranda rights,” and that he did not need to invoke the right to remain silent or to have an attorney present during his interview with the detective because he had “no reason not to cooperate.” Once defendant took the stand, he waived his Fifth Amendment rights that protected against comment on his *Walker* hearing testimony. *Walker, supra* at 109. Thus, there is no plain error requiring reversal.

Defendant next claims that the prosecution erred by referring to defendant’s *Walker* hearing testimony, that defendant preferred the detective not interview him at his home or the school where he taught, after defendant’s cross-examination of the detective was critical of the detective’s decision to interview defendant at the sheriff’s department rather than at his home or school. We disagree.

In *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995), the Michigan Supreme Court stated:

[T]he nature and type of comment allowed [by the prosecution] is dictated by the defense asserted, and the defendant’s decision regarding whether to testify. *When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant’s theory or evidence.* [*Fields, supra* at 116, citing *United States v Robinson*, 485 US 25, 31; 108 S Ct 864; 99 L Ed 2d 23 (1988) (holding that when the prosecutor’s statement that the defendant could have explained his story to the jury was made in response to the comments made by defense counsel, the prosecutor’s statements did not infringe the defendant’s Fifth Amendment rights) (emphasis added).]

We find the fair response doctrine is applicable in the present case. During defense counsel’s cross-examination of the detective, counsel attacked the motives and intent of the detective and suggested to the jury by his questions that defendant went to the sheriff’s department for his interview involuntarily. The prosecution’s reference to defendant’s *Walker* hearing testimony during the questioning of the detective on redirect examination was in direct response to defense counsel’s questions and were intended to show that the impression of the facts left by defense counsel’s questions was directly contradicted by defendant’s own testimony. Because a defendant may not use the protections of the Fifth Amendment under the guise of legitimate cross-examination “to convert into a sword that cuts back on the area of legitimate comment by the prosecutor on the weaknesses in the defense case,” *Fields, supra* at 109, we find no error here.

Even if the prosecution’s questions were error, the prosecution has established that any such error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994). Where preserved constitutional error occurs, it is harmless if the benefiting party demonstrates on appeal that no reasonable possibility exists that the evidence complained of might have contributed to the conviction. *People v Smith (On Remand)*, 249 Mich App 728, 730; 643 NW2d 607 (2002). Here, the evidence was harmless because defendant, at trial, testified on cross-examination that affirmatively scheduled the interview away from the school premises and he agreed to be interviewed at the sheriff’s department because he would have been reluctant to have the detective conduct the interview while his wife was present. Because defendant’s testimony concerning the scheduling of the interview location duplicated that of the detective, any error in admitting defendant’s *Walker*

hearing testimony about the scheduling of the interview was harmless beyond a reasonable doubt, and there is no reasonable possibility that the reference to defendant's preference regarding the location of the interview might have contributed to the conviction. *Smith, supra* at 730.

B.

Defendant next argues that the trial court erred by failing to suppress his statements to the detective during the interview. Specifically, defendant asserts his interview was a custodial interrogation, and that his statement was inadmissible because he was not given his *Miranda* rights by the detective before he gave his statement. We disagree.

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly and intelligently waived his Fifth Amendment rights. *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). However, *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken into custody or otherwise deprived of his freedom of action in any significant way. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Whether an accused was in custody depends on the totality of the circumstances. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998). The key question is whether the accused could reasonably believe that he was not free to leave. *Id.*

Here, the totality of the circumstances establishes that defendant was not in custody. He voluntarily appeared at the sheriff's department for questioning at a time of his choosing, and thus, he was free to leave at any time. Indeed, defendant *waited* in the receptionist area approximately fifteen minutes for the detective to greet him because he arrived early for the interview. During the interview, defendant was not placed in handcuffs and he was advised that he was not under arrest. Significantly, the interview lasted approximately one hour and defendant left the facility to return to the Academy after the interview was concluded.

The fact that the interview was conducted by an armed detective, in a "closed" and "stark" interview room located in a restricted area, is insufficient to establish a custodial interrogation. Defendant admitted at the *Walker* hearing that he would not have preferred for the interview to have occurred at his place of employment, his home, or in an environment where other persons were present. Additionally, the detective testified that he was uncertain whether he was armed because his habit was to lock his weapon in his police vehicle when he was in the sheriff's department. Further, defendant was aware the detective was a police officer and as such, defendant admitted that he would expect the detective to be armed, although defendant later admitted that the detective never exhibited a weapon. We note the trial court's erroneous finding that the interview occurred while the door to the room remained opened. However, other evidence supported the trial court's conclusion that defendant's ability to leave was not restricted. The record establishes that the door to the interview room was unlocked, and the placement of the chairs and table in the room was situated so defendant was positioned closest to the door; therefore, defendant's access to the door was not blocked or hindered.

Finally, we reject, as subjective, defendant's contention that he was in custody because the detective spoke very loudly and his body language intimated that defendant was under arrest.

“The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned.” *Zahn, supra* at 449. In sum, our objective review of the record does not support a conclusion that defendant was in custody. Therefore, *Miranda* warnings were not required, and the trial court did not err in admitting the statement. *Zahn, supra* at 449.

C.

In defendant’s final claim of error, he asserts that the trial court improperly admitted two photographs. The first was a photograph of the members of the local high school girls’ soccer team, one of whom was the victim, and the second was a separate photograph of the victim. Defendant argues that, because he stipulated the victim was a member of the soccer team while he was the coach, the admission of these photographs was prejudicial, irrelevant and designed to invoke the sympathy of the jury. The trial court determined the photographs were not prejudicial and admissible because they were relevant on the issue of the victim’s age, maturity and appearance at the time the offenses occurred. We reject defendant’s claim of error.

The decision to admit or exclude photographs is within the sole discretion of the trial court. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995) (citations omitted). Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. *Id.* Simply because a defendant stipulates a fact does not alter the prosecution’s burden to prove every element of a crime beyond a reasonable doubt. *Id.* at 69-70. The proper inquiry is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. *Id.* at 76.

In the instant case, defendant pleaded not guilty to the charged offenses. Accordingly, all elements of the criminal offense were “in issue.” *Mills, supra* at 69-70. To convict defendant of third-degree CSC, the prosecution had to establish that defendant engaged in sexual penetration, accomplished through the use of force or coercion. *People v Petrella*, 424 Mich 221, 239; 380 NW2d 11 (1985). For purposes of MCL 750.520d(1)(b); coercion may be actual, as where physical force is used to compel one to act against one’s will, or constructive, as where one is constrained by subjugation to do what his free will would refuse. *People v Premo*, 213 Mich App 406, 410-411; 540 NW2d 715 (1995) (defendant’s actions as a teacher constituted coercion because defendant was in a position of authority over his student victims). “The existence of force or coercion is to be determined in light of all the circumstances and is not limited to acts of physical violence.” *Id.* at 410.

Because the prosecution proceeded under a theory that defendant coerced the victim in his capacity as her teacher and coach, the photograph of the victim as a member of the soccer team was relevant to establish his authority and power to coerce the victim. MRE 401. We also find that the individual picture of the victim was relevant. First, as the trial court properly concluded, the alleged crimes occurred five years earlier and the victim’s appearance may have changed in the interim. Further, the victim had testified that, when he was initially befriending her, defendant had told her that she was “beautiful.” Because defendant denied making the statement at trial, the jury heard conflicting testimony. “If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact.” *Mills, supra* at 72. As such, we conclude that the individual photograph of the victim was probative and material on the issue of

her physical appearance and potentially corroborated her claims that defendant believed she was attractive five years earlier. “Photographs may also be used to corroborate a witness testimony.” *Id.* at 76.

Accordingly, we conclude the relevancy of the photographs was not substantially outweighed by the danger of unfair prejudice. The photographs were not graphic, inflammatory or alterations but, rather, accurate factual representations of the victim’s appearance and the student-teacher relationship between the victim and defendant at the time of the offense. The trial court did not abuse its discretion in admitting the photographs.

IV. Conclusion

We affirm defendant’s convictions and sentences, but remand for correction of the judgment of sentence to properly reflect defendant’s two CSC convictions, under MCL 750.520d(1)(b).⁵ We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ Kurtis T. Wilder

/s/ Brian K. Zahra

⁵ Defendant’s judgment of sentence reflects his original charges of one count of third-degree CSC, under MCL 750.520d(1)(a), and one count of third-degree CSC, under MCL 750.520d(1)(b). In an amended information, defendant was charged with two counts of third-degree CSC under MCL 750.520d(1)(b).