STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FELIX RINCON VALDEZ,

Defendant-Appellant.

UNPUBLISHED
December 14, 2006

No. 263352
Macomb Circuit Court
LC No. 2004-003149-FC

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced to concurrent prison terms of 120 to 240 months for each conviction. He appeals as of right. We affirm.

I. Facts

Defendant, aged 30 at the time of trial, was convicted of sexually assaulting his wife's friend's daughter, KT, who was seven years old at the time of trial. In August 2004, the victim's mother and defendant's wife went shopping, leaving KT with defendant, who was also caring for his three children, VW, MV, and AV. The victim testified that, while at the house, she played with defendant. At one point, defendant asked her if she would help him give his daughter's rabbit some water in the basement, and sent the other children to their room. In the basement, the victim did a handstand on a hamper, and defendant touched her "private part" underneath her underwear. The victim explained that defendant went "in" her private part with "[j]ust a half finger." The victim indicated that defendant had also touched her private part when they were in the living room and in AV's room. When the victim walked upstairs, her mother was outside the basement door. The victim's mother testified that, when she came in the house, defendant's three children were in the kitchen, and KT "came running up the stairs." In response to the victim's mother's questions about why defendant and KT were in the basement alone, defendant claimed that they were cleaning the rabbit's cage. On the way home, in response to the victim's mother's questions, KT disclosed that defendant had touched her "private parts" and that they had not cleaned the rabbit's cage.

In a statement to the police, defendant stated that he touched the victim in the living room and the basement. At trial, defendant denied having inappropriately touched KT. He maintained that his statement that he touched the victim had been misunderstood because of his limited

ability to speak and understand English. He explained that he touched the victim outside her clothes as she was doing a flip or getting in the hamper, but his hand did not go inside her pants.

II. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to sustain his convictions because the victim's reference to "private part" was vague and the prosecution presented no evidence of "exactly what physical movements by Defendant constituted penetration." We disagree.

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 any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and reasonable inferences arising from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Wolfe*, *supra* at 514. 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).

A person is guilty of criminal sexual conduct in the first degree if he engages in sexual penetration with another person who is under 13 years of age. MCL 750.520b(1)(a). "Sexual penetration" is defined to mean "sexual intercourse, . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." MCL 750.520a(o).

Although the victim did not use precise anatomical terms to describe the incidents, she testified that defendant touched her "in" her "private part" underneath her underwear. In response to "how much [defendant went] into [her] private part," the victim explained that he went "in [her] private part" with "half a finger." At trial, the victim stood up and pointed to the area that she referred to as her private part. She testified that she "[g]o[es] to the bathroom" with the part she pointed to, and that she wears underwear over that part. She later reiterated that the private part is the part that she normally "go[es] potty with."

This evidence, viewed in a light most favorable to the prosecution, was sufficient to permit a rational trier of fact to reasonably infer that defendant digitally penetrated the victim's genital opening.[1] The evidence was sufficient to sustain defendant's convictions.

III. Motion to Suppress Statement

[1] Even if there was insufficient evidence of vaginal penetration, an intrusion in the labia constitutes penetration of the female genital opening under MCL 750.520a(o). *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981). See also *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992) (the act of cunnilingus described by the victim involved penetration because she testified that the defendant touched the part of her body that she "[went] to the bathroom with").

Next, defendant argues that the trial court erred when it denied his motion to suppress his verbal statement to the police. Defendant argues that he was effectively in custody when he gave the statement, was not advised of his *Miranda*[2] rights, and his statement was involuntary. We disagree.

Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law that a court evaluates under the totality of the circumstances. *People v Cheatham*, 453 Mich 1, 27, 44; 551 NW2d 355 (1996). Deference is given to the trial court's assessment of the weight of the evidence and the credibility of the witnesses, and the trial court's findings of fact will not be disturbed unless they are clearly erroneous. *People v Howard*, 226 Mich App 528, 543; 575 NW2d 16 (1997). A finding is clearly erroneous if it leaves the reviewing court with a definite and firm conviction that a mistake has been made. *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

A. *Miranda* Warnings

"Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights." *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Here, there is no dispute that defendant did not receive *Miranda* warnings before he made his statement. However, "[i]t is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). A custodial interrogation is a questioning initiated by law enforcement officers after the accused has been taken in custody or otherwise deprived of his freedom of action in any significant way. *Id*. Whether an accused was in custody at the time of the interrogation depends on the totality of the circumstances, and the key question is whether the accused reasonably could have believed that he was not free to leave. *Id*.

> [T]he requirement of warnings [is not] to be imposed simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect. Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him "in custody." [*People v Mendez*, 225 Mich App 381, 384; 571 NW2d 528 (1997), quoting *Oregon v Mathiason*, 429 US 492, 495; 97 S Ct 711; 50 L Ed 2d 714 (1977).]

At an evidentiary hearing, defendant and the two officers involved in taking defendant's statement testified. The trial court also viewed a videotape of the interview. Detective Scott Matthew, one of the officers involved in taking defendant's statement, testified that he called defendant's house, spoke to defendant's wife, and told her that the police wished to speak with defendant. Defendant testified that he spoke to his wife at approximately 9:30 or 10:00 a.m. and, hours later, he "voluntarily" went to the police station. Both the officers and defendant testified that defendant was not under arrest at that time. Detective Matthew testified that he met defendant in a lobby, told him he was not under arrest, and stated that he was free to leave at any

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

time. He then walked defendant to a room "just off the lobby," located in an area "open to the public." Both officers explained that it was not necessary to pass any "security check points" to reach the room. During the 45-minute interview, the door of the interview room was never locked or closed. The officers and defendant testified that defendant was repeatedly told that he was free to leave at any time and that he was not under arrest. The trial court noted that the videotape showed that the officers repeatedly told defendant that he was free to leave at any time. Defendant testified that, despite what the officers told him, he did not believe he was free to leave because "[t]hey kept on talking." Under these circumstances, the trial court did not clearly err in finding that defendant was not in custody when he gave his statement. Consequently, *Miranda* warnings were not necessary.

B. Voluntariness

Whether a statement was voluntary is determined by examining police conduct, although whether it was made knowingly and intelligently depends in part on the defendant's capacity. *Howard*, *supra* at 538. The prosecutor must establish that a statement was voluntary by a preponderance of the evidence. *People v Abraham*, 234 Mich App 640, 645; 599 NW2d 736 (1999). In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court set forth the following nonexhaustive list of factors that a trial court should consider in determining whether a statement is voluntary:

> [T]he 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.

No single factor is conclusive. *Id.*; *People v Fike*, 228 Mich App 178, 181-182; 577 NW2d 903 (1998).

Viewing the totality of the circumstances, the trial court did not clearly err in finding that defendant's statement was voluntary. Defendant claims that his statement was involuntary because he did not fully understand English and because of the coercive and intimidating atmosphere. Defendant's English language comprehension skill is one factor among many that is evaluated as part of the "totality of the circumstances" when determining if defendant's statement was voluntary.

At the evidentiary hearing, defendant testified that he understands some English, but that the officers misunderstood him. He indicated that he understood all the questions, except those referring to the victim's private parts. Defendant indicated that he had been in the United States for nine years and admitted that, throughout this proceeding, he had spoken to numerous people in English, including his neighbors, the police, and his attorney. The officers testified that defendant appeared to "fully" understand, conversed "back and forth" in English, and responded

to their questions. In response to the officers' questions, defendant indicated that he has a driver's license and took the licensing exam in English. As noted, the trial court had an opportunity to view the videotape of the interview and to form an opinion regarding the level of defendant's understanding. The trial court indicated that it was "clear from the tape what [defendant] understood," and that "it's clear" that he "[u]nderstood exactly what was going on." As indicated previously, this Court defers to the "trial court's superior ability to view the evidence and witnesses . . . ." *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

With regard to other factors, there is no evidence that defendant was ill, intoxicated, deprived of sleep, food, or drink, or under the influence of drugs. The interview was conducted in the afternoon. It was not prolonged, lasting approximately 45 minutes. Further, the record shows that defendant was 30 years old, and there is no indication that defendant had learning disabilities or had been diagnosed with any psychological problems. Although defendant indicates that he "lacked the state of mind which could have enabled him to think freely and clearly," there is no indication that he was extremely distraught to the extent that he was not acting freely. Also, the record shows that defendant had previous experience with the police. Viewing the totality of the circumstances, we are not left with a firm and definite conviction that a mistake has been made.

IV. Sentencing

A. *Blakely v Washington*

Defendant argues that he must be resentenced because the trial court's factual findings supporting its scoring of certain offense variables (OV) contained in the sentencing guidelines were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

B. Scoring of Offense Variables

Defendant also summarily argues that the trial court abused its discretion in scoring OV 4, OV 10, and OV 13.[3] We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted).

[3] Defendant also challenges the scoring of OV 11, but he merely argues that the "facts were not the subject of any proofs at trial . . . ." This appears to be a *Blakely* challenge, which we have already addressed and rejected.

1. OV 4

MCL 777.34(1)(a) provides that ten points are scored for OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." The trial court's score of ten points is supported by the victim's impact statement, in which the victim's mother indicated that "this offense has greatly disturbed" the victim, who "has been in counseling and is displaying anti-social behavior."

2. OV 10

We also reject defendant's claim that the trial court improperly scored 15 points for OV 10. MCL 777.40(1)(a) directs a score of 15 points if "[p]redatory conduct was involved." "'Predatory conduct' means preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). There was evidence that, before the assault, defendant asked the victim to accompany him to the basement to clean a rabbit cage. Defendant simultaneously sent his children to their room. Defendant and the victim then went to the basement and he sexually assaulted her. This evidence indicates that defendant engaged in predatory conduct and supports the trial court's score of 15 points for OV 10.

3. OV 13

Defendant also challenges his score of 25 points for OV 13. MCL 777.43 instructs a court to score 25 points for OV 13 if "[t]he offense was part of a pattern of felonious criminal activity involving *3 or more* crimes against a person." MCL 777.43(1)(b) (emphasis added). Defendant acknowledges that he was originally charged with four offenses against the victim. Although the trial court dismissed one charge, three charges went to the jury for verdict. Defendant was convicted of two counts of first-degree CSC, and acquitted of one count of first-degree CSC. Contrary to defendant's argument, a crime need not have resulted in a conviction to count in the scoring of OV 13. MCL 777.43(2)(a). Consequently, the trial court properly scored 25 points for OV 13.

V. Other Acts Evidence

Defendant argues that his convictions should be reversed because evidence of an uncharged sexual incident involving another child, SP, was improperly admitted, contrary to MRE 404(b). We disagree.

SP, aged ten at the time of trial, testified that she lived next door to defendant and played with VW and MV. She further testified that, while at defendant's house in September 2004, defendant asked her to help him fix a vent in the bathroom and sent his daughters to clean their room. In the bathroom, defendant positioned her on his shoulders with her vagina facing him and her skirt over his head. She alleged that, as she twisted the vent, defendant used one hand to hold her and the other hand to push her bathing suit bottom to the side. Defendant then smelled her private area.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). If there is an underlying

question of law, such as whether admissibility is precluded by a rule of evidence, we review that question of law de novo. *Id.*

MRE 404(b) prohibits "evidence of other crimes, wrongs, or acts" to prove a defendant's character or propensity to commit the charged crime. MRE 404(b)(1). See also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). But other acts evidence is admissible under MRE 404(b) if it is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-498; 577 NW2d 673 (1998). In application, the admissibility of evidence under MRE 404(b) necessarily hinges on the relationship of the elements of the charge, the theories of admissibility, and the defenses asserted. *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

In this case, the prosecution offered the other acts evidence for a proper purpose under MRE 404(b), i.e., as evidence of an absence of mistake and as proof of a scheme or plan in doing an act. As our Supreme Court explained in *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000), "evidence of similar misconduct is logically relevant to show that the charged act occurred where the uncharged misconduct and the charged offense are sufficiently similar to support an inference that they are manifestations of a common plan, scheme, or system." See also *People v Hine*, 467 Mich 242, 251; 650 NW2d 659 (2002). The *Sabin* Court noted that "[g]eneral similarity between the charged and uncharged acts does not, however, by itself, establish a plan, scheme, or system used to commit the acts." *Sabin*, *supra* at 64. "For other acts evidence to be admissible there must be such a concurrence of common features that the uncharged and charged acts are naturally explained as individual manifestations of a general plan." *Hine*, *supra* at 251, citing *Sabin*, *supra* at 64-65. But "distinctive and unusual features are not required to establish the existence of a common design or plan. The evidence of uncharged acts needs only to support the inference that the defendant employed the common plan in committing the charged offense." *Hine*, *supra* at 252-253, citing *Sabin*, *supra* at 65-66.

Defendant failed to demonstrate that the trial court's evidentiary ruling was an abuse of discretion. The evidence was not offered to show that defendant had a bad character. Rather, it assisted the jury in weighing the witnesses' credibility, particularly after defendant stated that he accidentally touched the victim. This evidence was also probative of defendant's common scheme, plan, or system of taking advantage of similarly-situated children. With both victims, defendant befriended the children, sought their assistance in performing a household task, and gently and surreptitiously touched them in an inappropriate manner. Both the victim and SP were similar in age, the acts were close in time, and the offenses occurred in defendant's home. The commonality of the circumstances of the other acts evidence and the charged crimes are sufficiently similar that the jury could infer that defendant had a system of taking advantage of his relationship with young children to perpetrate sexual abuse, and that defendant's inappropriate touching of the victim in this case was not accidental.

Furthermore, contrary to defendant's claim, this evidence was not inadmissible simply because the nature of the evidence is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the evidence. See MRE 403. Although the acts described are serious and incriminating, these characteristics are inherent in the underlying crimes for which defendant was accused. The danger that MRE 404(b) seeks to avoid "is that of *unfair* prejudice, not

prejudice that stems only from the abhorrent nature of the crime itself." *Starr*, *supra* at 500. Moreover, the trial court gave a cautionary instruction to the jury concerning the proper use of the other acts evidence, thereby limiting the potential for unfair prejudice. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

VI. Cumulative Error Theory

We reject defendant's final argument that the cumulative effect of several errors deprived him of a fair trial. Because no cognizable errors warranting relief have been identified, reversal under the cumulative error theory is unwarranted. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra