STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 23, 2008
v	No. 280601 Dickinson Circuit Court
PHILLIP GREGORY BAL, Defendant-Appellant.	LC No. 06-003660-FC

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(c), and first-degree home invasion, MCL 750.110a(2)(b). The trial court sentenced defendant to concurrent prison terms of 11 to 20 years for each conviction. For the reasons set forth below, we affirm.

I. Sufficiency of the Evidence

Defendant contends that the prosecutor presented insufficient evidence to support the jury's verdict, or alternatively, that the verdict was against the great weight of the evidence. To evaluate the sufficiency of the evidence, we review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could convict defendant on every element of the crime proven beyond a reasonable doubt. *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985); see also *People v Hampton*, 407 Mich 354, 368; 285 NW2d 284 (1979). The resolution of credibility disputes is within the exclusive province of the trier of fact. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990).

Conversely, a new trial may be granted where the verdict is against the great weight of the evidence, but only when the evidence preponderates so heavily against the verdict that a serious miscarriage of justice would result if the verdict is allowed to stand. *People v Lemmon*, 456 Mich 625, 635, 642; 576 NW2d 129 (1998). Absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of a witness's credibility for the constitutionally guaranteed jury determination of the credibility of witnesses. *Id*. at 642, 647. This Court "review[s] for abuse of discretion a trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence." *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008), lv pending.

Here, the victim's testimony established that defendant entered her home without permission, while the victim and her children were present, and that he sexually penetrated her without her consent. Thus, viewed in a light most favorable to the prosecution, the evidence is sufficient to enable the jury to find that the prosecutor proved all the elements of first-degree CSC, MCL 750.520b(1)(c), and first-degree home invasion, MCL 750.110a(2)(b) beyond a reasonable doubt. Contrary to defendant's argument on appeal, the victim's credibility cannot be considered in evaluating the sufficiency of the evidence.

With respect to defendant's claim challenging the great weight of the evidence, defendant has failed to show that the evidence preponderates heavily against the verdict, or that the victim's testimony was impeached to the extent that it was deprived of all probative value that the jury could not believe it. The trial court did not abuse its discretion when it denied defendant's motion for a new trial based on the great weight of the evidence.

II. Other Acts Evidence

Defendant also maintains, erroneously, that the trial court erred because it permitted two witnesses to testify regarding other bad acts allegedly committed by defendant against them.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

The prosecutor offered the testimony of two women to show that the charged sexual offense was part of a common scheme or plan in committing acts of forced sexual contact. This is a proper, noncharacter purpose under MRE 404(b)(1). See *People v Drohan*, 264 Mich App 77, 85-87; 689 NW2d 750 (2004). Like the charged offense in this case, the other incidents involved defendant approaching women—whom he had met or known previously—in bars, making sexual remarks toward them, pushing them against a wall, and then making or attempting forced sexual contact against their will. In each case, defendant also attempted to find out where the women lived in order to continue his sexual pursuit. The other incidents were sufficiently similar to the charged offense to support an inference that defendant committed the charged offense using the same design, method, or plan that he used in the uncharged acts. *People v Sabin (After Remand)*, 463 Mich 43, 56-57, 60; 614 NW2d 888 (2000); *Drohan*, *supra* at 86-87. This evidence is also relevant to show defendant's intent, and to disprove his defenses such as the victim's alleged consent or misunderstanding.[1] The trial court did not abuse its discretion in allowing the evidence at trial.

III. Expert Testimony

Defendant complains that the trial court erred by allowing a limited license social worker to testify concerning delays in reporting a sexual assault. In *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780 n 46; 685 NW2d 391 (2004), our Supreme Court adopted the requirements of *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469

[1] The evidence, while damaging, was not unfairly prejudicial or inflammatory, *Sabin*, *supra* at 55-56, and any prejudicial effect was minimized by the trial court's cautionary instruction.

(1993), with regard to the reliability of expert testimony. Under *Daubert* and MRE 702, a trial court has an obligation to evaluate the reliability of expert testimony before allowing its admissibility, i.e., to determine "whether the opinion is rationally derived from a sound foundation," *Unger*, *supra* at 217 (citations omitted), but "a party may waive any claim of error by failing to call this gatekeeping obligation to the court's attention." *Craig v Oakwood Hosp*, 471 Mich 67, 82; 684 NW2d 296 (2004).

Here, though defendant objected to the expert testimony at trial, he did not raise the issue of whether the evidence was reliable within the meaning of MRE 702. Rather, defendant argued that expert testimony was not necessary, that the witness's opinions were based on the facts of this case rather than independent studies, and that the witness was effectively vouching for the victim's credibility. Thus, defendant waived any issue concerning whether the trial court properly carried out its gatekeeping function under MRE 702.

Nonetheless, the record discloses that the witness is sufficiently qualified as an expert by her education and experience in counseling sexual assault victims, and her testimony is admissible to explain behavior that a jury might otherwise misinterpret. *People v Lukity*, 460 Mich 484, 500-502; 596 NW2d 607 (1999); *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995); *People v Daoust*, 228 Mich App 1, 9-11; 577 NW2d 179 (1998); *People v Wilson*, 194 Mich App 599, 604-605; 487 NW2d 822 (1992). There is no reason to believe that she failed to reliably apply principles and methods governing therapeutic observations, such that her conclusions could be deemed unreliable.

IV. Evidence of the Victim's Conduct

Defendant asserts that the trial court erred by excluding evidence concerning the victim's behavior on the night of the offense. The rape-shield statute, MCL 750.520j, "bars, with two narrow exceptions, evidence of *all* sexual activity by the complainant not incident to the alleged rape." *People v Adair*, 452 Mich 473, 478; 550 NW2d 505 (1996) (internal quotations and citations omitted) (emphasis in the original). "A complainant's sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant." *Id*. at 481. "More importantly, a witness' sexual history is usually irrelevant as impeachment evidence because it has no bearing on [her] character for truthfulness." *Id*.

Here, defendant sought to introduce evidence of the victim's sexual flirtations with another man to show that "she was *a bit loose* that night at this party" and that "this spills over to [defendant's] contact with her as well." In *People v Ivers*, 459 Mich 320, 328-329; 587 NW2d 10 (1998), our Supreme Court held that sexual *statements* that "do not *amount* to or *reference* specific conduct" are *not* excluded by the rape-shield statute. (Emphasis added.) Therefore, here, the flattering statements the victim allegedly made to the other man—that he was attractive and in good shape for his age—would *not* be excluded by the rape-shield statute. However, the trial court did not err in finding that the victim's flirtatious statements to the other man were not relevant to her credibility, or to show that she consented to sexual activity with defendant. Thus, the trial court did not err in excluding the statements.

Defendant also proffered evidence that the victim rubbed the other man's bare chest and was "hitting on [him]." This evidence involved the victim's sexual "conduct," not simply her statements. Further, the evidence does not involve sexual conduct with defendant, nor was it

offered to show the origin of semen, pregnancy, or disease. Accordingly, the evidence is barred by the rape-shield statute, and is not covered by either of its exceptions. The trial court did not abuse its discretion by excluding it.

V. Sentence

Defendant claims that the trial court erred in its scoring of offense variables ("OV") 4, 10, and 13.[2]

Points should be scored for OV 4, MCL 777.34, based on the psychological injury to the victim. In her impact statement, the victim described the effects of the sexual assault and explained that she obtained counseling. The victim's counselor also explained that the counseling was primarily related to issues involving the sexual assault. In light of this information, the trial court correctly scored OV 4 at ten points.

With respect to OV 10, MCL 777.40 (exploitation of a vulnerable victim), the evidence showed that defendant is six feet, four inches tall, weighs approximately 290 pounds, and is trained as a police officer. The victim testified that defendant was able to use his size and strength to overpower her. This evidence supports the trial court's five-point score for OV 10.

OV 13, MCL 777.43, relates to a continuing pattern of criminal behavior. The evidence of defendant's assaults against two other women showed that the present offense is part of a pattern of felonious activity involving at least three crimes against a person, committed during a time span of less than five years.[3]

Defendant also says that he should not have been sentenced near the high end of the sentencing guidelines range of 81 to 135 months. A minimum sentence falling within the guidelines range "shall" be affirmed on appeal unless the guidelines were misscored or the court relied on inaccurate information. MCL 769.34(10); *Libbett*, *supra* at 363-364. Because defendant's 11-year minimum sentence falls within the guidelines range and defendant has not established a scoring error or shown that the court relied on inaccurate information at sentencing, we affirm his sentence.

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[2] Application of the legislative sentencing guidelines is a question of law to be reviewed de novo on appeal. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). "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). This Court reviews a trial court's scoring decisions to determine whether the court properly exercised its discretion and whether the record evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

[3] To the extent defendant takes issue with the fairness or wisdom of the statute, his arguments must be addressed to the Legislature. See *Oakland Co Bd of Co Rd Comm'rs v Michigan Prop & Cas Guaranty Ass'n*, 456 Mich 590, 613; 575 NW2d 751 (1998); see also *People v Lee*, 233 Mich App 403, 408; 592 NW2d 779 (1999).

VI. Polygraph Examination

Defendant argues that the prosecutor violated his right to a polygraph examination under MCL 776.21(5). The record shows that, though defendant requested a polygraph examination, defendant either insisted on dismissal of the charges against him if he passed the test, or, as defendant asserts, he refused to answer questions concerning his alleged assaults against two other women. Clearly, defendant is not entitled to impose conditions on how the examination is to be conducted. *People v Manser*, 250 Mich App 21, 31-32; 645 NW2d 65 (2002). Thus, by insisting on preconditions, defendant refused to take the polygraph examination, the police did not refuse to make one available. Therefore, defendant's rights under the statute were not violated.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Jane M. Beckering