STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

GABRIEL ANTONIO ALFARO,

Defendant-Appellant.

UNPUBLISHED
September 16, 2014

Nos. 316827, 316829
Wayne Circuit Court
LC Nos. 12-010423-FC,
12-010424-FC

Before: HOEKSTRA, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

In these consolidated appeals, defendant appeals as of right from his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b), and one count each of second-degree CSC, MCL 750.520c(1)(b), delivery of less than 50 grams of cocaine to a minor, MCL 333.7410(1), and third-degree child abuse, MCL 750.136b. Defendant was sentenced to consecutive terms of 10 to 40 years' imprisonment for the first-degree CSC convictions, to be served concurrently with terms of 10 to 15 years' imprisonment for the second-degree CSC conviction, 10 to 40 years' imprisonment for the delivery of cocaine to a minor conviction, and one to two years' imprisonment for the third-degree child abuse conviction. We affirm.

This case arose from a July 26, 2012 altercation between defendant and his then 14-year-old daughter, who is the complainant in this case. According to complainant, the altercation began while complainant, who had a driving permit, was driving defendant to a store. Complainant testified that defendant became upset with her when she parked too far from the store, yelled at her, and hit her with the back of his hand. Complainant got out of the car and walked toward the store. Defendant drove to where she was and got out of the vehicle. Defendant grabbed her by the hair and pulled her into the passenger seat. When they arrived home, defendant pushed her against the side of the house and hit her again. Complainant testified that the incident continued after they went inside the home, with defendant punching complainant on her head while she covered her face with a pillow. At some point, complainant ran to a friend's house, where her aunt later picked her up. Thereafter, complainant revealed that defendant had raped her when she was in the ninth grade. Complainant further revealed that defendant had provided her with cocaine and that she had snorted the cocaine with defendant. Defendant, who testified at trial, denied sexually assaulting complainant, providing her with cocaine, or using cocaine with her. Defendant further denied physically assaulting complainant

on July 26, 2012, testifying that he became upset with complainant because she was driving erratically and he was concerned that she was high on drugs. Defendant testified that he threatened to have complainant drug tested the next day and argued that she fabricated the allegations against him to avoid being tested for drugs.

Defendant first argues on appeal that the trial court erred in allowing the prosecutor to question him regarding prior Children's Protective Services (CPS) reports and investigations. Defendant contends that the use of the reports and investigations during cross-examination was improper under MRE 404(b). We disagree.

We review for an abuse of discretion a trial court's decision whether to admit or exclude evidence. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). An abuse of discretion exists only if the trial court chooses a result that falls "outside the range of principled outcomes." *Id*. We review de novo any preliminary questions of law involved in the decision to admit the evidence. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004). 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. An error is not grounds for reversal "unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *People v Williams*, 483 Mich 226, 243; 769 NW2d 605 (2009).

Generally, "evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." MRE 404(a). Where relevant, however, evidence of a person's "other crimes, wrongs or acts" may be admissible for another purpose. MRE 404(b)(1) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To determine whether "other acts" evidence is admissible, "the trial court must determine (1) whether the evidence is offered for a proper purpose under MRE 404(b), (2) whether the evidence is relevant under MRE 401 and MRE 402, and (3) whether the probative value of the evidence is substantially outweighed by unfair prejudice under MRE 403." *People v Roscoe*, 303 Mich App 633, 645-646; 846 NW2d 402 (2014), citing *People v VanderVliet*, 444 Mich 52, 74–75; 508 NW2d 114 (1993). "At its essence, MRE 404(b) is a rule of inclusion, allowing relevant other acts evidence as long as it is not being admitted solely to demonstrate criminal propensity." *People v Martzke*, 251 Mich App 282, 289; 651 NW2d 490 (2002).

Defendant argues that MRE 404(b) prohibited the use of the prior CPS reports and investigations on cross-examination. However, MRE 404(b) limits the admission of "other acts" evidence to substantive purposes, but does not apply to impeachment evidence. See *People v Haines*, 105 Mich App 213, 216 n 1; 306 NW2d 455 (1981). Before trial, the trial court ruled

that evidence regarding defendant's history with CPS was inadmissible except for impeachment purposes. At defendant's trial, the evidence at issue was not admitted for its substance, but was only used to impeach defendant's testimony that he never used cocaine with his daughter, that he did not have a cocaine problem, that he never admitted to using cocaine as recently as July 4, 2012, and that he did not have an alcohol abuse problem. After defendant's denials, he was questioned by the prosecutor regarding admissions defendant had made to CPS that he had used cocaine several times in 2012, including July 4, 2012,[1] and regarding his alcohol use.[2] Although the evidence was ruled inadmissible pursuant to MRE 404(b) in plaintiff's case-in-chief, it can be properly admitted for the purpose of impeaching defendant's credibility. See *People v Harris*, 113 Mich App 333, 337; 317 NW2d 615 (1982). Because the evidence was admitted only for impeachment purposes, MRE 404(b) did not bar its admission and the trial court properly overruled defendant's objection on the basis of MRE 404(b).

Furthermore, we disagree with defendant's argument that the impeachment evidence was substantially more prejudicial than probative under MRE 403. Evidence is unfairly prejudicial when "there exists a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury," or where "it would be inequitable to allow the proponent of the evidence to use it." *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995). The evidence was probative of defendant's credibility regarding his drug and alcohol use around the time of the allegations, which was relevant to the charged crimes. Defendant has not shown that the evidence was inadmissible under MRE 403.

Defendant next argues that the trial court erred in excluding, on the basis of MRE 803A, a DVD recording of complainant's Kids Talk interview for the purpose of impeaching Officer Scott Lavis's testimony that complainant disclosed penetration during the interview. We agree that the trial court erred in excluding the recording on the basis of MRE 803A but conclude that the error was harmless. Again, we review preliminary questions regarding the admissibility of evidence de novo. *Matuszak*, 263 Mich App at 47. The trial court's ultimate decision to admit or exclude evidence is reviewed for an abuse of discretion. *Feezel*, 486 Mich at 192.

Under certain conditions, MRE 803A provides a hearsay exception for a child's statement about a sexual act but applies only if the child was under the age of 10 when the statement was made. MRE 803A(1). Complainant in this case was not under the age of 10 at the time of the Kids Talk interview. Thus, MRE 803A was not applicable to the facts of this case

---

[1] Specifically, defendant told CPS that he had used cocaine ("relapsed") on New Year's Eve 2011 and 2012, and at trial, defendant admitted that he told CPS that he used cocaine on those dates. At trial, defendant denied that he told CPS that he used cocaine on July 4, 2012. However, defendant testified that he actually used cocaine ("relapsed") on June 30, 2012. He was also questioned regarding an admission to CPS that he was using drugs and drunk around the time of August 16, 2012, and that he took complainant to a friend's house.

[2] A 2009 CPS report indicated that while defendant told CPS he only drank on Fridays, the author of the report smelled alcohol on his breath during the interview.

and the trial court erred in excluding the recording on that basis. However, we conclude that the error was harmless because complainant testified that she did not disclose "penetration" at the Kids Talk interview because she was "too embarrassed and ashamed of it." In addition, Officer Lavis explained that his testimony that complainant disclosed penetration at the interview was based on the legal definition of penetration rather than the commonly used definition. Under these circumstances, we cannot conclude that the exclusion of the evidence was outcome determinative. *Williams*, 483 Mich at 243.

Defendant next argues that the trial court erred in admitting testimony of two of complainant's friends, A.H and C.B., regarding statements complainant made to them disclosing sexual abuse by defendant. Defendant contends that the testimony was inadmissible hearsay. While we conclude that the admission of A.H.'s testimony regarding complainant's disclosures was properly admitted under MRE 801(d)(1)(B), we conclude that the admission of C.B.'s testimony was improper but resulted in only harmless error.

Under MRE 801(d)(1)(B), a prior consistent statement is admissible through a third party if:

> (1) The declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement was made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000).]

Defendant contends that complainant fabricated sexual abuse allegations against him because, during the July 26, 2012 incident, defendant threatened to have her drug tested the next day. A. H. testified, however, that complainant disclosed the sexual abuse to her in May or June of their ninth grade year, before defendant threatened on July 26, 2012, to have complainant drug tested. Because complainant's disclosure to A.H. occurred before the alleged motive to fabricate arose, A.H.'s testimony was admissible as a prior consistent statement under MRE 801(d)(1)(B).

Complainant's disclosures to C.B., however, were made on July 26, 2012, after defendant threatened to drug test her and, therefore, after the alleged motive to fabricate arose. Therefore, C.B.'s testimony regarding complainant's disclosures was not admissible under MRE 801(d)(1)(B) and were inadmissible hearsay. Having reviewed the entire record, however, in light of A.H.'s testimony regarding complainant's disclosures and other evidence of defendant's guilt, we cannot conclude that it is "more probable than not" that the admission of C.B.'s testimony was outcome determinative. *Williams*, 483 Mich at 243. We therefore conclude that the admission of C.B.'s testimony regarding complainant's disclosure of sexual abuse was harmless error.

Defendant next argues that the trial court erred in imposing a sentence for the second-degree CSC conviction that exceeded the guidelines recommendation without articulating a substantial and compelling reason for the upward departure. Defendant received multiple concurrent convictions, and a presentence report was prepared only for his convictions of first-

degree criminal sexual conduct, which were defendant's most severe offenses and his highest crime class felony convictions. For sentencing on multiple concurrent convictions the sentencing guidelines are not applicable to the lower class offense and, therefore, a minimum sentence range need not be determined for the lower class offense. MCL 771.14(2)(e)(*ii*) and (*iii*); *People v Mack*, 265 Mich App 122, 127-130; 695 NW2d 342 (2005). Because the sentencing guidelines were not applicable to the lower class second-degree CSC conviction, the trial court was not required to articulate its reasons for departing from a sentence range calculated under the guidelines for the concurrent second-degree CSC conviction.[3] Accordingly, defendant has shown no error in his sentence for second-degree CSC that would require resentencing.

Finally, defendant argues that the trial court erred in assessing points for OV 3 and OV 4. We disagree. When reviewing a scoring issue, the trial court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). The court's application of the facts to the statutory scoring conditions is a question of statutory interpretation that is reviewed de novo on appeal. *Id.*

Defendant contends that OV 3 should have been scored at zero, rather than five, points. Five points should be assessed for OV 3 if "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). Pain generally indicates that a bodily injury occurred. See *People v Endres*, 269 Mich App 414, 417-418; 711 NW2d 398 (2006). Complainant's testimony that she experienced soreness after the sexual assault was sufficient to support the scoring of five points for OV 3.

Defendant further asserts that OV 4 should have been scored at zero, rather than 10, points. Defendant approved the scoring of OV 4 at 10 points at sentencing, so this issue is waived. The intentional relinquishment of a known right constitutes waiver that extinguishes the error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Despite defendant's waiver, we further hold that OV 4 was properly scored at 10 points. 10 points should be assessed for OV 4 if serious psychological injury occurred to a victim that "may require professional treatment." MCL 777.34(2). "In making this determination, the fact that treatment has not been sought is not conclusive." *Id.* There must be some evidence of psychological injury on the record to justify a score of 10 points for OV 4. *People v Lockett*, 295 Mich App 165, 183; 814 NW2d 295 (2012). "The trial court may rely on reasonable inferences arising from the record evidence to sustain the scoring of an offense variable." *People v Earl*, 297 Mich App 104, 109; 822 NW2d 271 (2012). Complainant testified that the sexual assault by

---

[3] Defendant supports his argument by stating that the trial court, defendant, and the prosecution agreed that the guideline range for second-degree CSC was 43 to 86 months. However, this conversation took place in reference to the prosecution's request for consecutive sentences. The trial court made the second-degree CSC conviction concurrent to defendant's first-degree CSC convictions.

defendant caused her shame and embarrassment. She further testified that she cried herself to sleep after the incident and that she later told defendant she had been scared during the incident. In addition, A.H. testified that when the complainant told her about the rape, the complainant was crying, upset, and scared that she was pregnant. This evidence was sufficient to support a score of 10 points for OV 4. See *People v Williams*, 298 Mich App 121, 124; 825 NW2d 671 (2012) (concluding that a victim impact statement indicating that the victim felt angry, hurt, violated, and frightened was sufficient to justify scoring 10 points for OV 4).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood