STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RALPH DOUGLASS TUCKER,

Defendant-Appellant.

UNPUBLISHED
February 18, 2021

No. 351334
Wayne Circuit Court
LC No. 18-006369-01-FC

Before: MURRAY, C.J., and JANSEN and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions of two counts of first-degree criminal sexual conduct (CSC-I) (sexual penetration during the commission of a felony), MCL 750.520b(1)(c). Defendant was sentenced to 16 to 35 years' imprisonment for each count of CSC-I. We affirm.

I. BACKGROUND

On August 24, 1999, defendant gave TT a ride to her home after she missed the bus. As they were driving to TT's home, TT asked defendant if he knew anywhere that she could purchase marijuana. Defendant said he did and drove to his friend's apartment. Defendant parked in the parking lot of the apartment complex. According to defendant, he exited the car and purchased marijuana for himself and TT from his friend. Defendant and TT sat in his car, talked, and smoked some of the marijuana together. Defendant asked TT if they could have intercourse and TT initially said no, but she continued to allow defendant to touch her. Defendant and TT had consensual intercourse and he drove her home afterward.

According to TT, defendant did not get out of the car to go purchase the marijuana when they arrived at the apartment complex. Rather, defendant parked the car and demanded that she take off her clothes because they were going to have sex. TT told defendant that she was not going to have sex with him and defendant told TT "[e]ither you gon' give it to me or I'm gon' take it." TT feared that he would beat her if she did not comply. TT also believed that she did not have any other option than to comply with defendant's demand because the passenger side door did not have an interior door handle and she could not get out of defendant's car. TT took her pants off and

defendant reclined the front bench seat of his car. Defendant got on top of TT and penetrated her vagina with his penis. After defendant ejaculated, TT began to put her pants back on and asked if she could go home. Defendant told TT not to put her pants back on because she could only go home after they had sex again. TT took her pants off again because she was afraid that defendant would kill her if she did not comply, and defendant vaginally penetrated TT again with his penis. Defendant drove TT home after he was finished.

When TT arrived home, she contacted the police and went to Detroit Receiving Hospital where a sexual assault kit was performed. The sexual assault kit was entered into the Detroit Police Department's property room on November 7, 1999, and remained there untested until 2014. In 2014, TT's sexual assault kit was tested for DNA. The DNA obtained from TT's sexual assault kit matched DNA that had been collected from four other sexual assault kits and entered into the criminal DNA database, the Combined DNA Index System (CODIS). Michigan State Police Detective Regina Swift (Swift), a cold case detective assigned to the sexual assault kit take force, was assigned to this case in April 2018, and defendant was identified as a suspect thereafter. Swift obtained a buccal swab from defendant and it was determined that defendant's DNA matched the DNA collected from TT's sexual assault kit and the four other sexual assault kits. On June 28, 2018, defendant was arrested. The prosecution filed a pretrial notice of intent and motion under MRE 404(b) to have evidence of the other sexual assaults admitted at defendant's trial that was granted without objection from defendant. Defendant was convicted of two counts of CSC-I involving TT after a five-day bench trial.

Defendant argues on appeal that he was denied a fair trial because other-acts evidence was erroneously admitted to demonstrate a common plan or scheme, there was insufficient evidence presented to support his convictions, and the trial court erred by denying his motion to suppress his statement to the police.

II. OTHER-ACTS EVIDENCE

Defendant argues that it was an abuse of discretion for the trial court to permit the prosecution to offer other-acts evidence that defendant sexually assaulted TB in 1999, CB in 2000, KC in 2002, and ID in 2002, to show a common scheme or plan. Defendant argues that the other-acts evidence did not demonstrate a common scheme or plan because CB and TB testified that defendant threatened them with a dangerous weapon, but defendant did not threaten TT with a dangerous weapon. We disagree and note that defendant does not address the admissibility of the other-acts evidence under MCL 768.27b.

"To preserve an evidentiary issue for review, a party opposing the admission of the evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant did not object to the admission of the other-acts evidence prior to or at trial. The trial court addressed the prosecution's notice of intent to introduce other-acts evidence under MRE 404(b) at the pretrial hearing held on February 11, 2019. Defense counsel stated that he received the prosecution's notice of intent to introduce other-acts evidence, but did not object to the admission of the other-acts evidence in light of the law regarding other-acts evidence and the circumstances of this case. Defense counsel also did not object to the admission of the other-acts evidence under MCL 768.27b. The trial court noted that it appreciated defendant's position and permitted the prosecution to introduce the other-

acts evidence under MRE 404(b). The trial court did not address the admissibility of the other-acts evidence under MCL 768.27b. Therefore, this issue is arguably waived but, at a minimum, not preserved because defendant did not object to the admission of the other-acts evidence under MRE 404(b) or MCL 768.27b.

Regardless, unpreserved claims of error are reviewed for plain error affecting a defendant's substantial rights. *People v Caddell*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 343750 and 343993); slip op at 14. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e. clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceeding." *Id*. Even if all three requirements are met, reversal is only warranted when the plain error resulted in an innocent defendant's conviction, or it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *People v Moorer*, 262 Mich App 64, 68; 683 NW2d 736 (2004).

Generally, in a criminal trial, the prosecution is precluded from introducing "evidence of other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). The purpose of this rule is to avoid the danger of a conviction based on a defendant's history of misconduct. *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). However, other-acts evidence "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." MRE 404(b)(2); *Waclawski*, 286 Mich App at 671.

In the context of sexual assault, the admissibility of other acts of sexual assault is governed by MCL 768.27b, and when MCL 768.27b applies, it supersedes MRE 404(b). *People v Watkins*, 491 Mich 450, 476-477; 818 NW2d 296 (2012). MCL 768.27b(1) provides, in relevant part, that, "in a criminal action in which the defendant is accused of an offense involving domestic violence or sexual assault, evidence of the defendant's commission of other acts of domestic violence or sexual assault is admissible for any purpose for which it is relevant, if it is not otherwise excluded under [MRE 403]." Sexual assault includes a violation of MCL 750.520b. MCL 768.27b(6)(c); MCL 28.722(w)(*iii*). This Court has interpreted MCL 768.27b to mean that, despite the general prohibition against using other-acts evidence to show a defendant's character or propensity, MCL 768.27b allows for the admission of "evidence of the defendant's commission of other acts of domestic violence or sexual assault . . . for any purpose for which it is relevant," including for character and propensity purposes. *People v Railer*, 288 Mich App 213, 220; 792 NW2d 776 (2010). Evidence is relevant if it has "any tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401.

Importantly, however, MCL 768.27b still remains subject to MRE 403. *Watkins*, 491 Mich at 455-456. MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *People v Cameron*, 291 Mich App 599, 610-611; 806 NW2d 371 (2011). For the purposes of MRE 403, "undue prejudice" exists when there is a danger that "marginally probative evidence will be given undue or preemptive weight by the jury" or

when there is a "tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *Id*. at 611.

The Michigan Supreme Court has stated that "[i]f the prosecution creates a theory of relevance based on the alleged similarity between defendant's other acts and the charged offense, we require a 'striking similarity' between the two acts to find the other act admissible." *People v Denson*, 500 Mich 385, 403; 902 NW2d 306 (2017). The incidents involving CB, ID, KC, and TB were strikingly similar to defendant's sexual assault of TT. Defendant picked TT, ID, KC, and TB up in his car, brought them to a dark parking lot of an apartment complex, and sexually assaulted them in his car. Defendant smoked marijuana with TT, ID, and KC before sexually assaulting them. Defendant brought CB, ID, KC, and TB to the same apartment complex which he referred to as his "rendezvous spot," and explained that he would bring women there because it was safe and private. Defendant explained, however, that he brought TT to a different apartment complex than CB, ID, KC, and TB because they were going to the apartment of defendant's friend for a "different purpose." After sexually assaulting TT, ID, and KC, defendant dropped the victims off. Defendant did not have a close relationship to any of these victims, initiated the encounters with them because he thought they "looked nice," and only briefly spoke to them before sexually assaulting them. Accordingly, the trial court did not err by allowing the other-acts evidence to be admitted to demonstrate a common plan or scheme, in addition to showing identity, state of mind, lack of innocent intent, and the absence of a mistake or accident.

Furthermore, and regardless of whether the other-acts evidence was admissible under MRE 404(b), the trial court did not err by admitting the evidence because the evidence was admissible under MCL 768.27b. Defendant was charged with two counts of CSC-I. The other-acts evidence regarded defendant's commission of other-acts of sexual assault. The evidence was relevant to demonstrate that defendant had a propensity to sexually assault women and acted upon that urge repeatedly. Therefore, on this basis, the trial court did not err by concluding that the other-acts evidence was relevant to demonstrate defendant's propensity, identity, intent, a common plan, and lack of an accident.

Otherwise, the evidence was not unduly prejudicial to warrant its exclusion under MRE 403. The evidence did not interject "considerations extraneous to the merits" of the issues at trial or encourage the court to render its decision based on "bias, sympathy, or shock." *Cameron*, 291 Mich App at 611 (quotation marks and citations omitted). As will be discussed in more detail below, sufficient evidence was presented to support defendant's convictions independent of the other-acts evidence. Additionally, the danger of unfair prejudice imposed by other-acts evidence was low because defendant was tried before a judge, not a jury, and this Court presumes "that the trial court, well-versed in the rules of evidence, acted consistently with its duty and did not use the evidence to draw any improper inferences." *People v Hawkins*, 245 Mich App 439, 452; 628 NW2d 105 (2001). Therefore, the trial court did not err by allowing the admission of the other-acts evidence because the other-acts evidence was admissible under MCL 768.27b, relevant, and its probative value was not substantially outweighed by undue prejudice. Moreover, defendant failed to make any argument regarding how, absent the other-acts evidence, the outcome of trial would have been different.

III. SUFFICIENCY OF THE EVIDENCE

Defendant argues that insufficient evidence was presented to support his two CSC-I convictions. We disagree.

This Court reviews a challenge to the sufficiency of the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). To determine whether there was sufficient evidence presented to support a conviction, this Court considers whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012). This standard of review is deferential and the evidence is to be viewed in the light most favorable to the prosecution. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). Furthermore, circumstantial evidence and all reasonable inferences drawn therefrom can constitute sufficient proof of the elements of a crime. *Id*.

To sustain a CSC-I conviction under MCL 750.520b(1)(c), the prosecution must establish beyond a reasonable doubt "that (1) sexual penetration occurred and (2) it occurred 'under circumstances involving the commission of any other felony.' " *People v Lockett*, 295 Mich App 165, 174-175; 814 NW2d 295 (2012), quoting MCL 750.520b(1)(c). Defendant was charged with sexually penetrating TT during the commission of a kidnapping. "Sexual penetration" means "sexual intercourse, cunnalingus, fellatio, anal 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, but emission of semen is not required." MCL 750.520(r). A kidnapping occurs when, in relevant part, a person "knowingly restrains another person with the intent to . . . [e]ngage in criminal sexual penetration or criminal sexual conduct prohibited under [MCL 750.520a *et seq*.] with that person." MCL 750.349(1)(c); *People v Anderson*, 331 Mich App 552, ___; ___ NW2d ___ (2020) (Docket No. 345601); slip op at 2-3. To "restrain" means to "restrict a person's movement or to confine the person so as to interfere with that person's liberty without that person's consent or without legal authority." MCL 750.349(2); *Anderson*, 331 Mich App at __; slip op at 3.

TT testified defendant drove her to his friend's apartment to purchase marijuana and parked among the cars in the dark parking lot. Defendant demanded that she take her pants off because they were going to have sex. When TT told defendant that she would not take her pants off, defendant threatened TT and told her "[e]ither you gon' give it to me or I'm gon' take it." TT testified that she believed that she did not have any other option besides to take her pants off because she could not get out of defendant's car and she believed defendant would beat if her she did not comply with him. Defendant got on top of TT and penetrated her vagina with his penis. After ejaculating, TT began to put her pants on and asked defendant if she could go home. Defendant told TT not to put her pants on and that he would take her home after they had sex again. TT believed that defendant would kill her if she did not have sex with him. TT took her pants off again and defendant penetrated TT's vagina with his penis for a second time. After defendant was finished, defendant took TT home and had to open the passenger side door from the exterior because there was no interior door handle.

The evidence demonstrated that TT spoke to the police the night of the assault and informed the police that she had been sexually assaulted. TT also went to the hospital the night of the assault, stated that she had been sexually assaulted, and a sexual assault kit was performed. Defendant's DNA was collected from TT's vaginal swab and underwear which was obtained just hours after the assault. Therefore, viewed in the light most favorable to the prosecution, sufficient evidence

was presented to prove that defendant sexually penetrated TT during the commission of a kidnapping.

Defendant also argues that his counsel should have reviewed the medical records because they may have supported his version of the events. However, Doctor Philip Lewalski, a former emergency physician at Detroit Receiving Hospital, explained that TT's medical records from 1999 were not available at the time of trial because of the hospital's document retention policy. Therefore, the records which defendant argues his trial counsel should have reviewed were unavailable and it is unclear how the records would have overcome the evidence that defendant sexually penetrated TT during the commission of a kidnapping.

IV. VOLUNTARY STATEMENT

Defendant argues that the trial court erred by denying his motion to suppress his statement to Swift and Michigan State Police Detective Mark Farrah (Farrah) because his statement was involuntary. Defendant argues that his statement was involuntary because he had taken prescription medications before the interview that made him groggy and tired. We disagree.

"This Court reviews for clear error a trial court's factual findings in a ruling on a motion to suppress evidence." *People v Clark*, 330 Mich App 392, 415; 948 NW2d 604 (2019). "A trial court's factual findings are clearly erroneous when this Court is left with a definite and firm conviction that the trial court made a mistake." *Id*. "The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only when there has been an abuse of discretion." *Id*. (quotation marks and citations omitted). "A trial court abuses its discretion when it selects an outcome that falls outside the range of reasonable and principled outcomes." *Id*. This Court reviews de novo a trial court's ruling on a motion to suppress to the extent that it "involves an interpretation of the law or the application of a constitutional standard to uncontested facts." *People v Tanner*, 496 Mich 199, 206; 853 NW2d 653 (2014).

Both the state and federal constitutions guarantee the right against self-incrimination. US Const, Am V; Const 1963, art 1, § 17. "It is well established that voluntary statements to the police are admissible, while involuntary statements to the police are inadmissible." *People v Posey*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 345491 and 351834); slip op at 13. A confession is admissible if the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily given. *People v Shipley*, 256 Mich App 367, 373-374; 662 NW2d 856 (2003). To determine whether a statement is voluntary, courts examine a variety of factors including the following:

> the 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. [*Posey*, ___ Mich App at ___; slip op at 13, quoting *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988).]

Swift and Farrah interviewed defendant the morning of his arrest at the Wayne County Jail. The interview was not recorded because the interview room was not equipped with audio or visual recording, and Swift's recording equipment malfunctioned. Before the interview, defendant took his prescribed diabetes medication, pain medication, and anti-seizure medication. Defendant had been taking diabetes and anti-seizure medications daily since 2006, and pain medication daily since April 2018. He was also a dialysis patient. Defendant walked into the interview room unassisted and casually spoke with the detectives before he was read his *Miranda*[1] rights. While speaking with defendant, Swift noticed that defendant's arm was swollen and asked him about his arm. Defendant explained that he had lymphedema because of his diabetes.

Swift, Farrah, and defendant each testified that, before the interview began, Swift read defendant his *Miranda* rights line by line. Swift and Farrah testified that defendant initialed each clause on a standard *Miranda* rights form indicating that he had been advised of that right and understood that right, checked the waiver box on the form, and signed the end of the form. Defendant testified that he did not have his glasses and could not read the *Miranda* rights form, but that he heard Swift read him his *Miranda* rights, recognized that they were his *Miranda* rights, and understood what his rights entailed. Defendant testified, however, that while he initialed some parts of the *Miranda* rights form, not all of the initials were his handwriting and he did not check the waiver box.

Defendant, Swift, and Farrah each testified that after defendant was advised of his *Miranda* rights and signed the *Miranda* rights form, defendant spoke to the police about the incidents which led to his arrest, and never asked to end the interview, for a break, or for an attorney. While there was no evidence presented that the detectives specifically asked defendant if he was under the influence, Swift and Farrah both testified that defendant did not appear to be under the influence because he was able to effectively communicate with them throughout the interview. Defendant never stated, during the hour-long interview, that he needed assistance, a break, was having a diabetic attack, or was not be feeling well. Defendant was able to recall specific details about his life in 1999 and denied the allegations against him. Defendant never indicated that he was feeling groggy or tired because of his medications. This Court has concluded that the use of pain medication is not significant if the defendant was alert, responsive, and articulate during the interview. *Posey*, ___ Mich App at ___; slip op at 13. Additionally, defendant testified that he believed speaking to the detectives was the best thing that he could do for himself at the time. Therefore, when considering the totality of the circumstances, it was not an abuse of discretion for the trial court to conclude that defendant's statement was admissible because defendant voluntarily, intelligently, and knowingly waived his *Miranda* rights and spoke to the detectives.

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

Affirmed.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Cynthia Diane Stephens