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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAVANTE ADDARYL JOHNSON,

Defendant-Appellant.

UNPUBLISHED
June 24, 2021

No. 352616
Macomb Circuit Court
LC No. 2019-001632-FH

Before: K. F. KELLY, P.J., and SHAPIRO and SWARTZLE, JJ.

PER CURIAM.

Defendant appeals his conviction following a jury trial of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(b) (force or coercion). He was sentenced as a fourth-offense habitual offender, MCL 769.12, to serve a prison term of 1 to 15 years. We affirm.

I. BACKGROUND

Defendant is an inmate at Macomb Correctional Facility. The complainant, Phyliss Elward, was an employee of a private company providing food services to the prison. On April 26, 2018, defendant was working in the dining area and Elward was supervising the inmates working in the kitchen. Elward testified that she was moving some pans in the food service area when defendant walked behind her and rubbed his hand across her "left butt check." She testified that she was surprised and that there was a "two-foot rule" prohibiting contact between inmates and employees. Elward moved her hand to push defendant's away as he continued walking by her. Elward then informed her supervisor of the incident. Elward testified that when she came back into the kitchen she saw defendant looking at her with a smirk or a smile on his face while holding his erect penis through his clothing. Elward further explained that defendant had opened up the white jumpsuit that he wore for work and that she could see the outline of his erection through his underneath clothing. At trial, security-camera footage of the kitchen from the time in question was played for the jury.

Elward reported the touching and defendant's subsequent behavior to Corrections Officer David Olojo, who was working in the food service area that day. Olojo testified that he had previously warned Elward about defendant because, a few days prior to the touching, Olojo had

observed defendant "stalking" Elward. Olojo explained that defendant was gazing at Elward with his hand inside his white jumpsuit. Olojo did not issue defendant a ticket because defendant could have been "scratching himself or whatever," and instead told defendant to move from the area, which he did.

Defendant was charged with CSC-IV and indecent exposure, MCL 750.335a(2)(a). Defendant moved for a directed verdict at the close of the prosecution's proofs. Given Elward's testimony that she did not actually see defendant's penis in the flesh, the trial court granted defendant's motion for a directed verdict as to the charge of indecent exposure, but the court denied the motion as to the CSC-IV charge. The defense presented no witnesses, and the jury found defendant guilty of CSC-IV.

II. ANALYSIS

A. SUFFICIENCY OF THE EVIDENCE

Defendant first argues that his CSC-IV conviction was not supported by sufficient evidence.[1]

MCL 750.520e, the statute defining CSC-IV, provides in relevant part:

> (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:
>
> * * *
>
> (b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:
>
> * * *
>
> (*v*) When the actor achieves the sexual contact through concealment or by the element of surprise. [MCL 750.520e(1)(b)(*v*).]

" 'Sexual contact' includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual

[1] We review de novo a defendant's challenge to the sufficiency of the evidence. *People v Perry*, 317 Mich App 589, 599; 895 NW2d 216 (2016). The evidence is reviewed in a light most favorable to the prosecution to determine whether a rational trier of fact could find the essential elements of the crime were proven beyond a reasonable doubt. *Id.* "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999) (quotation marks and citation omitted).

arousal or gratification, [or] done for a sexual purpose . . . ." MCL 750.520a(q). " 'Intimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(f).

Contrary to defendant's argument, there was ample circumstantial evidence that his touching of Elward's buttocks was intentional. While the witnesses who worked at the prison testified variously to a "two-foot rule," a "three-yard rule," or a "reactionary gap," they all agreed that inmates were not allowed to touch employees. Elward acknowledged that sometimes accidental contact with inmates occurs while working in the kitchen, but if that happens the inmate "jump back[s]" and apologizes. She added that such contact is considered a "very big deal." In this case, however, defendant did not apologize for the contact with Elward or acknowledge it, but instead kept walking. This strongly suggests that the touching was intentional. Accordingly, there was sufficient evidence for the jury to infer that the touching was intentional rather than accidental.

Defendant also argues that there was insufficient evidence that the touch was done for a sexual purpose or that it could be reasonably construed as having a sexual purpose. Under the circumstances of this case, it is difficult to conceive why defendant would have intentionally rubbed his hand against Elward's buttocks if not for a sexual purpose. That the touch was done for a sexual purpose is bolstered by Elward's testimony that, after she reported the touching, defendant was looking at her while smirking or smiling and holding his erect penis through his clothing. Defendant suggests that Elward was mistaken about seeing an erection and that his clothing could have been bunched up or contained items. But Elward repeatedly testified that she saw the outline of an erection, and it was the jury's role to make credibility determinations. *People v Petrosky*, 286 Mich 397, 400; 282 NW2d 191 (1938). Given defendant's apparent arousal while smirking or smiling at Elward shortly after the touching, the jury could reasonably infer that defendant's contact with Elward's buttocks was done for a sexual purpose or could reasonably be construed as having been done for a sexual purpose.

Defendant also argues that there was insufficient evidence presented that any contact was achieved through the use of force or coercion. MCL 750.520e(1)(b) provides five nonexclusive circumstances that constitute force or coercion, including "[w]hen the actor achieves the sexual contact through concealment or by the element of surprise." MCL 750.520e(1)(b)(*v*). In this case, Elward was preoccupied when defendant came behind her and touched her buttocks. Elward testified that "[i]t was a surprise, kind of shocking" because that "shouldn't happen . . ." This was sufficient evidence that defendant accomplished the unwanted touched through the element of surprise.

Defendant does not address whether the evidence established force or coercion through surprise under MCL 750.520e(1)(b)(*v*). Instead, he relies on caselaw where the defendant's actions did not implicate any of the nonexclusive examples of force or coercion listed in the statute and the question was whether the evidence nonetheless established force or coercion. See *People v McGill*, 131 Mich App 465, 472; 346 NW2d 572 (1984); *People v Patterson*, 428 Mich 502, 516; 410 NW2d 733 (1987). However, because one of the examples listed in MCL 750.520e(1)(b) was applicable in this case, we need not address whether defendant's conduct otherwise constituted force or coercion.

B. MRE 404(B)

Defendant next argues that Olojo impermissibly testified to other-acts evidence governed by MRE 404(b).[2]

"MRE 404 governs the admissibility of other-acts evidence. The general rule under MRE 404(b) is that evidence of other crimes, wrongs, or acts is inadmissible to prove a propensity to commit such acts." *People v Denson*, 500 Mich 385, 397; 920 NW2d 306 (2017). MRE 404(b) states in part:

> (1) 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.

As an initial matter, it is unclear whether Olojo's testimony that defendant was "stalking" Elward and gazing at her with his hand inside his jumpsuit constitutes other-acts evidence. However, assuming for purposes of this appeal that Olojo's testimony was evidence of a prior bad act, reversal is not required.

First, we conclude that Olojo's testimony was substantively admissible. "MRE 404(b) does not prohibit all other-acts evidence that may . . . give rise to an inference about the defendant's character, but only that which is relevant solely to the defendant's character or criminal propensity." *People v Jackson*, 498 Mich 246, 276; 869 NW2d 253 (2015) (quotation marks and citation omitted). "[O]ther-acts evidence is admissible if (1) it is offered for a proper purpose, (2) it is relevant, and (3) its probative value is not substantially outweighed by its potential for unfair prejudice." *People v Henry*, 315 Mich App 130, 140-141; 889 NW2d 1 (2016).

Olojo's testimony of the prior incident was relevant to whether defendant's touching of Elward was done for a sexual purpose or could reasonably be construed as having been done for a sexual purpose. Specifically, the prior incident suggested defendant's attraction to Elward, and if the jury inferred that defendant was attracted to Elward, it is more likely that the touching was done for a sexual purpose. See MRE 401 (" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See MRE 403(b). The evidence was not unduly suggestive of defendant's character because it was not

[2] Because defendant did not object to this testimony at trial, our review is for plain error affecting substantial rights. See *Carines*, 460 Mich at 763. To show that a defendant's substantial rights were affected, there generally must be "a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

relied on to show that he was the type of person who would commit a crime of the type charged. Rather, the prior incident pertained specifically to his interest in Elward.

If Olojo's testimony was other-acts evidence, the prosecutor's failure to provide notice as required by MRE 404(b)(2) would be plain error. However, defendant does not argue that he was prejudiced by the lack of opportunity to present pretrial arguments against the evidence's admission. Nor does he explain how he would have approached trial differently had he known that evidence of the prior incident would be introduced. Under these circumstances, the lack of notice can be considered harmless. See *Jackson*, 498 Mich at 270-271 (holding that the lack of notice was harmless when the MRE 404(b) evidence was substantively admissible and the defendant did not demonstrate prejudice from the lack of notice).

Even if the evidence should have been excluded, it is not likely that the jury would have reached a different result. Because the security footage established that a touching occurred, this case turned on whether the touching was done for a sexual purpose or could reasonably be construed as having been done for a sexual purpose. Although the prior incident was relevant to that question, the touching itself and Elward's testimony that defendant was smirking or smiling at her shortly after the touching while holding his erect penis was by itself strong evidence that there was an intentional touching for a sexual purpose.

Defendant alternatively argues that his trial counsel was ineffective was failing to object to Olojo's testimony.[3] To prevail on a claim of ineffective assistance of counsel, a defendant must establish that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). For the reasons discussed, defendant does not establish a reasonable probability that defense counsel's decision not to object to Olojo's testimony, even if objectively unreasonable, affected the outcome at trial. The evidence was substantively admissible under MRE 404(b) and ample other evidence was properly admitted showing that defendant acted with a sexual purpose.

C. PROSECUTORIAL MISCONDUCT

Lastly, defendant argues that the prosecutor improperly shifted the burden of proof during rebuttal argument when he told the jury that defendant had subpoena power and could have called witnesses.[4]

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[3] Because the trial court did not hold an evidentiary hearing regarding defendant's claim of ineffective assistance of counsel, our review is limited to errors apparent on the record. See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

[4] "Claims of prosecutorial misconduct are generally reviewed de novo to determine whether the defendant was denied a fair trial." *People v Dunigan*, 299 Mich App 579, 588; 831 NW2d 243 (2013). Because this issue was not properly preserved with an objection and a contemporaneous

"Given that a prosecutor's role and responsibility is to seek justice and not merely convict, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Claims of prosecutorial misconduct are decided on a case-by-case basis, "with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Atkins*, 259 Mich App 545, 562; 675 NW2d 863 (2003). "A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010). However, as the Supreme Court explained in *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995):

> [W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof. [See also *People v Reid*, 233 Mich App 457, 478; 592 NW2d 767 (1999).]

In her closing statement, defense counsel criticized the investigation of the incident, including that other inmates present in the kitchen were not interviewed. Defense counsel then highlighted the lack of witnesses at trial: "Where are all the witnesses? . . . It's the burden of proof of the People to bring the witnesses here to testify and establish beyond a reasonable doubt that my client Savante Johnson did anything wrong." In rebuttal, the prosecutor stated in relevant part:

> Why weren't the other inmates interviewed, well, inmates don't always want to say what happened. I would say that it's a rarity that they want to say [what] happen[ed], but—and remember I'm not burden shifting. It's my burn. [Defense counsel] has subpoena power. She can subpoena witnesses. She could have subpoenaed any one of those people in that room to come and testify.

At that point, defense counsel objected and asked to approach. A brief bench conference was held, after which the prosecutor continued with his rebuttal argument without any further comment regarding witnesses that were not called.

As noted, it is well settled that when a defendant offers an alternate theory or version of events "the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *Fields*, 450 Mich at 116. This includes comments on the defendant's failure to call corroborating witnesses. See *id*. at 115. This case is slightly different, however, in that the defense was not offering an alternative theory of the case. Rather, the defense was criticizing the investigation of the incident and the prosecutor's decision to not call additional witnesses. In

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request for a curative jury instruction, our review is for plain error affecting substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

general, however, the prosecutor may respond to defense's counsel's arguments. See e.g., *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996) ("[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument."). In this case, the prosecutor's argument was a fair response to defense counsel's argument. If the prosecutor did not respond, the jury may have been left to wonder if the prosecutor was hiding something or if other witnesses would have had information beneficial to the defense. Thus, the prosecutor's comments fairly informed the jury that defendant could also call witnesses and so the prosecutor's decision to not call or interview other witnesses did not preclude the defense from presenting potentially favorable evidence. When viewed in context, the argument was proper.

Even if the prosecutor's comments were erroneous, they were not outcome-determinative. The case primarily concerned whether defendant touched Elward's buttocks for a sexual purpose, and Elward's testimony about the incident was the best evidence. Whether other witnesses could have provided probative testimony was speculative, and so any improper comment by the prosecutor on this matter did not deny defendant a fair trial. Further, the jury was given the standard instruction that it was the prosecutor's burden to prove the elements of the offense beyond a reasonable doubt and that defendant was presumed innocent. Jurors are presumed to follow instructions, *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011), and so the instruction in this case cured any minimal prejudice that defendant may have incurred.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Brock A. Swartzle