STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 22, 2011
v	No. 296546 Saginaw Circuit Court
KENDRICK DEON STANTON, Defendant-Appellant,	LC No. 08-031799-FC

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Defendant was convicted by a jury of torture, MCL 750.85, unlawful imprisonment, MCL 750.349b, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent prison terms of 375 months to 50 years for torture, 150 months to 30 years for unlawful imprisonment, and 43 months to 10 years for felon in possession. Defendant was also ordered to serve two years of imprisonment for felony-firearm, consecutive to his other sentences. He appeals by right. We affirm.

Defendant first argues that the trial court erred by refusing to admit evidence of the complainant's prior sexual history with his codefendants who were tried separately. Next, defendant argues that the trial court erred by admitting a statement of the complainant's mother during direct examination because it was inadmissible hearsay.

A trial court's decision to admit or exclude evidence will not be disturbed on appeal absent a clear abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A trial court abuses its discretion by choosing an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

On cross-examination, the complainant testified that she had previously had a sexual relationship with defendant that ended in 2008. Defense counsel then asked the complainant whether on "prior occasions . . . you consented to having sex with some of his friends?" The prosecutor objected, and the issue was argued outside the jury's presence. The court refused to allow defense counsel to ask the complainant about her prior sexual activity with codefendants. The court reasoned that although the alleged sexual assaults by the codefendants occurred at the same time as the actions underlying defendant's prosecution, the proposed testimony was not

part of the res gestae of defendant's case. But defense counsel was permitted to ask the complainant about what transpired between her and codefendants on the date in question.

On appeal, defendant argues that the evidence should not be excluded by the rape shield statute because evidence of complainant's prior relations with the codefendants was highly relevant to defendant's case. MCL 750.520j provides as follows:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
>
> (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

In support of his argument, defendant cites *People v Perkins*, 424 Mich 302, 307-308; 379 NW2d 390 (1986). In *Perkins*, the defendant sought to introduce evidence that, about a week before the alleged assault, he and the complainant had consensual sex during an evening in which they engaged in other activities (i.e., meeting at a bar for drinks, returning to his apartment for more drinks) that were similar to those they engaged in on the evening of the assault alleged in the case. *Id.* at 304. The circuit court ruled that the evidence was admissible because it was "material to the issue of consent and more probative than prejudicial." *Id.* at 305. In upholding the circuit court's decision, our Supreme Court held that

> [b]ecause the proposed testimony . . . related to sexual activity between the complainant and the defendant, the strong prohibitions on evidence of a complainant's past sexual activities, which we have discussed in several recent opinions, are not involved. As the statute indicates, we are faced with the more usual evidentiary issues of the materiality of the evidence to the issues in the case and the balancing of its probative value with the danger of unfair prejudice. [*Id.* at 307-308.]

The *Perkins* Court concluded that the trial court did not abuse its discretion resolving these evidentiary issues; consequently, the defendant's proposed testimony was not barred by MCL 750.520j. *Perkins*, 424 Mich at 308-309.

Here, by contrast, defendant's prior sexual history with the complainant was not at issue; neither party claimed that they had either consensual or coerced sexual relations on the night of the assault, and the complainant and defendant both admitted that they had engaged in sexual activity together in the past. The complainant did not accuse defendant of forcing her to have sex with him on the date of the assault, and defendant was acquitted of first-degree criminal sexual conduct (CSC I), MCL 750.520b, with which he was charged for allegedly penetrating the complainant with a broomstick. Defendant's semen or other source of DNA was not found on the complainant's underwear, so evidence to explain the source or origin of semen found as part of the CSC kit was not admissible under MCL 750.520j(1)(b).

Defendant argues that if all three men had been tried together, the evidence would have been admissible. Assuming that the court would have determined that any probative value of the testimony was not outweighed by any potential prejudice, defendant's argument fails to comprehend that the evidence would still have been irrelevant with respect to defendant. Indeed, it is likely that a request to instruct the jury limiting its consideration of the evidence would have been granted. The plain language of MCL 750.520j(1)(a) provides that "[e]vidence of the victim's past sexual conduct with *the actor*" is potentially admissible, and for purposes of this testimony, defendant is not "the actor." (Emphasis added.)

Defendant also does not demonstrate that the outcome of the other charges would have been different if he had been permitted to introduce evidence of the complainant's prior sexual behavior with codefendants. Defendant's broad assertion that the admission of this evidence might have thrown the complainant's credibility into question and ultimately altered the outcome of the case is entirely speculative.

Defendant's contention that certain testimony by the complainant's mother should have been excluded as inadmissible hearsay is also not persuasive. At trial, during the direct examination of the complainant's mother, the following exchange occurred between the witness and the prosecutor:

Q: What was [the complainant's] physical condition when you picked her up?

A: She was shaking and quiet.

Q: Did she tell you what happened to her?

A: At that time she just told me that she had gotten beat up.

Defense counsel objected to this testimony as hearsay, which was overruled by the trial court after it accepted the prosecutor's explanation that it was not being offered for the truth of the matter asserted. On appeal, defendant characterizes this portion of the witness's testimony as a prior consistent statement that was improperly used to bolster the complainant's credibility.

Under MRE 801(c), hearsay "is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." In response to defense counsel's objection, the prosecutor contended that he was "offering [the testimony] not for the truth of the matter asserted, but [because it] justifies this

witness's further actions and the phone calls that she made." This discussion and the court's ruling on the limited purpose for which the evidence was being offered was had in front of the jury. The prosecutor did not ask the witness to elaborate or give further details on her conversations with the complainant about the alleged attack. Moreover, because numerous other sources of evidence were presented corroborating the complainant's claim that she was assaulted by defendant, any error by the court in admitting this testimony was harmless, as it did not affect the outcome of the trial. MCL 769.26; MCR 2.613(A); *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003).

We affirm.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey