

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 27, 2011

v

EDWARD VINCENT WYNN,

Defendant-Appellant.

No. 297373
Genesee Circuit Court
LC No. 09-024999-FC

Before: SERVITTO, P.J., and MARKEY and K.F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right following his jury trial convictions for first-degree criminal sexual conduct, MCL 750.520b(1)(c) (sexual penetration during commission of a felony), and unlawful imprisonment, MCL 750.349b(1)(c). Defendant was sentenced as a fourth habitual offender, MCL 769.12, to 20 to 40 years' imprisonment. We affirm.

I. FACTS

Defendant and the victim were involved in a romantic relationship over a number of years. The relationship was volatile and at one point the victim had a personal protection order against defendant. On the night of the assault, the victim and a friend were at a bar when they encountered defendant. All three had been drinking and smoking marijuana. Although the victim asked defendant to leave them alone, he refused and got into the victim's car with them when they attempted to leave. At one point, the victim and her friend both jumped out of the car and began to run. Defendant caught the victim, dragged her back to the vehicle, drove her to his apartment complex, dragged her to his apartment, and sexually assaulted her.

II. ADMISSIBILITY OF EVIDENCE

Defendant first argues that the trial court abused its discretion when it permitted the prosecution to introduce evidence that a number of prescription drugs were found in defendant's apartment following his arrest. The prosecutor argued that the evidence was admissible to show that defendant failed to take the medications as recommended by the doctor, which was relevant in the jury's assessment of defendant's ability to perceive the events that occurred that night. We agree that admission of the evidence was an abuse of discretion. However, we find that the error was harmless.

This Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *People v Orr*, 275 Mich App 587, 588-589; 739 NW2d 385 (2007). But preserved claims of evidentiary error require reversal only if, after reviewing the entire record, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 488, 495-496; 596 NW2d 607 (1999).

At trial, the prosecutor presented evidence of numerous medications seized from defendant's apartment. In questioning defendant, the prosecutor also elicited evidence that he failed to take the medications as recommended by the doctor. However, the prosecutor failed to elicit any evidence about the effect of the medications on defendant's ability to perceive the events as they occurred that night. The prosecutor never presented testimony in the form of an expert who could have identified what the drugs were, what they were meant to treat, and how failing to take the drugs could affect an individual's ability to perceive events. Absent such a showing, evidence of defendant's prescription medications and his failure to take the medications was not relevant. "Relevant evidence" is "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." MRE 401. While a witness's credibility is always a material issue, *People v Layher*, 238 Mich App 573, 579-580; 607 NW2d 91 (1999), there was simply no evidence that defendant's failure to take the medication impacted his perception or credibility. The evidence made no fact of consequence in the case more or less probable and the trial court abused its discretion when it admitted the evidence.

Nonetheless, reversal is not warranted because the erroneous admission of the evidence was harmless. See *People v Smith*, 243 Mich App 657, 680; 625 NW2d 46 (2000). After a thorough review of the record, we hold that the error was not outcome determinative. The testimony regarding defendant's prescription medications was brief. The prosecutor did not highlight the evidence in his opening statement or closing arguments. Accordingly, it is unlikely that the jury gave this evidence any weight in deciding the critical facts of this case.

III. PRIOR BAD ACTS

Defendant next argues that the trial court erred when it allowed the prosecutor to introduce other acts of domestic violence by defendant against the victim. While this Court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion, we review de novo whether a rule or statute precludes admission of evidence as a matter of law. *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009).

When a criminal defendant is accused of "an offense involving domestic violence,"¹ a prosecutor, in accordance with MCL 768.27b, may introduce evidence of the defendant's

¹ Defendant was charged with criminal sexual conduct, an offense of domestic violence under MCL 768.27b. MCL 768.27b(5)(iii).

commission of other acts of domestic violence “for any purpose for which it is relevant, if it is not otherwise excluded under” MRE 403. MCL 768.27b(1). The relevant evidence of other acts of domestic violence may be used to prove any issue, including the character of the accused. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). In other words, under MCL 768.27b, other acts of domestic violence are admissible subject to MRE 403. *People v Cameron*, ___ Mich App ___; ___ NW2d ___ (Docket No. 293119, issued February, 15 2011), slip op at 6-7. Under MRE 403, a trial court may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice. *People v Vasher*, 449 Mich 494, 502; 537 NW2d 168 (1995). Undue prejudice refers to “an undue tendency to move the tribunal to decide on an improper basis.” *Vasher*, 449 Mich at 502.

In *Cameron*, this Court specifically addressed the admissibility of prior bad acts under both MCL 768.27b and MRE 403. *Cameron*, ___ Mich App at ___ (slip op at 7). To determine whether the prior bad acts evidence satisfies the “more probative than prejudicial” balancing test of MRE 403, the *Cameron* Court noted:

This Court must make two distinct inquiries under the MRE 403 balancing test. First, this Court must decide whether introduction of [the defendant’s] prior bad acts evidence at trial was unfairly prejudicial. Then, this Court must apply the MRE 403 balancing test and “weigh the probativity or relevance of the evidence” against the unfair prejudice. Upon completion of this second inquiry, this Court can determine whether the trial court abused its discretion in allowing [the defendant’s] prior bad acts into evidence. [*Cameron*, ___ Mich App at ___ (slip op at 7).]

Under the first inquiry, we hold that the trial court’s decision to allow evidence of defendant’s prior bad acts did not unfairly prejudice his trial. “The fact that evidence is prejudicial does not make its admission unfair. Unfair prejudice exists only where either a probability exists that evidence which is minimally damaging in logic will be weighed by the jurors substantially out of proportion to its logically damaging effect, or it would be inequitable to allow the proponent of the evidence to use it.” *People v Murphy (On Remand)*, 282 Mich App 571, 582-583; 766 NW2d 303 (2009). The *Cameron* Court emphasized that evidence is unfairly prejudicial if it has a tendency 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.” *Cameron*, ___ Mich App at ___ (slip op at 7), quoting *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995).

The prejudicial effect of defendant’s prior bad acts did not adversely affect his position by injecting considerations extraneous to the merits of the case. Defendant’s prior bad acts were not such that it would stir such passion so as to divert the jury from rational consideration of defendant’s guilt or innocence of the charged offenses. The victim testified to incidents of stalking and violence involving defendant; however, the testimony did not include gruesome details about the alleged domestic violence incidents. Moreover, the trial court minimized any prejudicial effect of the bad acts evidence. While instructing the jury, the trial court made clear that the issue in this case was whether defendant committed the charged offenses. It emphasized that defendant was not on trial for any of the alleged acts of domestic violence introduced by the

prosecutor. Thus, the trial court's instruction minimized any prejudicial repercussions accompanying defendant's bad acts evidence.

Under the second inquiry, we hold that any prejudicial effect of the evidence of defendant's prior bad acts did not substantially outweigh the probative value of the evidence. "A trial court admits relevant evidence to provide [the jury] with as much useful information as possible." *Cameron*, ___ Mich App at ___ (slip op at 8), citing *People v Hampton*, 407 Mich 354, 367; 285 NW2d 284 (1979). In *Cameron*, the Court noted that "prior bad acts evidence of domestic violence can be admitted at trial because a full and complete picture of defendant's history tends to shed light on the likelihood that a given crime was committed." *Cameron*, ___ Mich App at ___ (slip op at 6).

The evidence regarding defendant's prior bad acts was relevant because it had a tendency to make the existence of defendant's assault of the victim more probable than it would have without the evidence. The evidence was relevant and admissible to establish the victim's credibility. That is, the evidence was probative of whether the victim's account of the assault was reliable and credible. The evidence was also probative to negate his claim that the victim consented. While the prior bad acts evidence was certainly damaging, as is most evidence presented against a criminal defendant, it was by no means inflammatory, nor did it interfere with the jury's ability to logically weigh the evidence.

In sum, we hold that the admission of defendant's prior bad acts was proper. Under MCL 768.27b, the prior bad acts were relevant. Further, any prejudicial effect of the bad acts evidence did not substantially outweigh the probative value of the evidence, and the trial court did not abuse its discretion when it allowed defendant's prior bad acts to be introduced under MCL 768.27b.

IV. SUFFICIENCY OF EVIDENCE

Finally, framing his argument as a sufficiency of the evidence claim, defendant maintains that, according to the plain language of the criminal sexual conduct and unlawful imprisonment statutes, it is legally impossible to commit both offenses because each offense is a condition precedent to the other. We disagree.

A challenge to the sufficiency of the evidence is reviewed de novo and in a light most favorable to the prosecution to "determine if any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007), quoting *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748, amended 441 Mich 1201 (1992). "All conflicts with regard to the evidence must be resolved in favor of the prosecution. Circumstantial evidence and reasonable inferences drawn from it may be sufficient to prove the elements of the crime." *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Further, this Court reviews de novo issues of statutory interpretation. *People v Carlson*, 466 Mich 130, 136; 644 NW2d 704 (2002); *People v Krueger*, 466 Mich 50, 53; 643 NW2d 223 (2002).

We hold that there was sufficient evidence for a reasonable jury to convict defendant of first-degree criminal sexual conduct predicated on unlawful imprisonment. We also hold that

there was sufficient evidence for a reasonable jury to convict defendant of unlawful imprisonment. This Court’s goal in construing a statute is “to ascertain and give effect to the intent of the Legislature.” *People v Pasha*, 466 Mich 378, 382; 645 NW2d 275 (2002). “If the statute’s language is clear and unambiguous, we assume that the Legislature intended its plain meaning and we enforce the statute as written.” *People v Weeder*, 469 Mich 493, 497; 674 NW2d 372 (2004). Accordingly, when statutory language is unambiguous, judicial construction is not required or permitted. *Weeder*, 469 Mich at 497.

The two statutes involved are MCL 750.349b and MCL 750.520b. MCL 750.349b provides, in pertinent part:

(1) A person commits the crime of unlawful imprisonment if he or she knowingly restrains another person under any of the following circumstances:

* * *

(c) The person was restrained to facilitate the commission of another felony or to facilitate flight after commission of another felony.

MCL 750.520b provides:

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

* * *

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

Under the plain language of the statutes, a defendant can be charged with first-degree criminal sexual conduct predicated on unlawful imprisonment.

A defendant commits the crime of first-degree criminal sexual conduct if he “engages in sexual penetration with another person,” and the sexual penetration occurred “during circumstances involving the commission of [the unlawful imprisonment].” MCL 750.520b(1)(c). The predicated felony charged, unlawful imprisonment, is committed when a defendant knowingly restrains another person to “facilitate the commission of [first-degree criminal sexual conduct].” MCL 750.349b(1)(c). Defendant incorrectly argues that the completion of first-degree criminal sexual conduct is a condition precedent to the crime of unlawful imprisonment under MCL 750.349b(1)(c).

As noted above, the first-degree criminal sexual conduct statute punishes the act of sexual penetration when it “occurs under circumstances *involving* the commission of any other felony.” MCL 750.520b(1)(c) (emphasis added). The plain and unambiguous language of the statute requires proof that the underlying felony, i.e., unlawful imprisonment, was being committed. The key language here is “*involving* the commission of any other felony.” MCL 750.520b(1)(c) (emphasis added). “Involving” means “to include as a necessary circumstance, condition, or

consequence.” *Random House Webster’s College Dictionary* (2d ed, 1997), p 689.² Thus, in this case, the commission of the “other felony” – unlawful imprisonment of a person – is a “necessary circumstance or condition” to the offense of first-degree criminal sexual conduct. In other words, a jury must find that all the elements of unlawful imprisonment were proven, beyond a reasonable doubt, to find a defendant guilty of first-degree criminal sexual conduct predicated on the unlawful imprisonment of a person. However, contrary to defendant’s claim, the prosecutor does not have to prove all the elements of criminal sexual conduct beyond a reasonable doubt to establish a charge of unlawful imprisonment.

The plain and unambiguous language of the unlawful imprisonment statute does not require proof that the underlying felony was actually committed. The language of the statute requires the prosecutor to prove that a defendant knowingly restrained another person to “facilitate the commission of another felony.” Defendant correctly points out that the key language of the statute is “*facilitate* the commission of another felony.” “Facilitate” means “to make easier or less difficult.” *Random House Webster’s College Dictionary* (2d ed, 1997), p 466. The language does not require the prosecutor to prove that another felony was actually committed.³ The underlying felony in this case, first-degree criminal sexual conduct, is not a necessary circumstance or condition to unlawful imprisonment. Instead, the inquiry for the jury is whether defendant restrained another person to “facilitate” or make easier the commission of another felony.⁴ The word “facilitate” implies that the restraining of a person is done in

² “When considering a word or phrase that has not been given prior legal meaning, resort to a lay dictionary such as *Webster’s* is appropriate.” *Citizens Ins Co v Pro-Seal Service Group, Inc*, 477 Mich 75, 84; 730 NW2d 682 (2007), quoting *Greene v AP Products, Ltd*, 475 Mich 502, 510; 717 NW2d 855 (2006).

³ We find further support for our conclusion in the standard jury instructions for the offenses. The jury instructions for first-degree criminal sexual conduct, CJI2d 20.1 and CJI2d 20.5, require that the jury be instructed on all the elements of the felony. That is, it requires that the prosecutor prove beyond a reasonable doubt all the elements of the underlying felony. Conversely, the jury instructions for unlawful imprisonment, CJI2d 19.8, do not require that the jury be instructed on the elements of the underlying felony. Instead, the jury instructions identify the elements of unlawful imprisonment. Thus, as evidenced by the jury instructions, to find someone guilty of unlawful imprisonment, the prosecutor does not have to prove beyond a reasonable doubt all the elements of another felony in this case criminal sexual conduct.

⁴ In his brief on appeal, defendant reduced his argument to a mathematical equation. Defendant argued:

Put simply, if “A” is unlawful imprisonment, “B” is first[-]degree criminal sexual conduct, “C” is knowing restraint, and “D” is sexual penetration, then the trial set up the following formulas: $A = C + B$ and $B = A + D$. With positive values, these formulas cannot coexist. In the instant case, the prosecution could have charged attempted CSC 1 or only CSC 3, or attempted unlawful imprisonment. Charging the completed offenses where each is a condition precedent of the other means there is no offense. [Defendant’s Brief on Appeal, p 37.]

preparation to commit the other felony. We note that a defendant could take preparatory steps to make the commission of a felony easier but never actually complete the felony. Accordingly, defendant's argument, that "[w]here involvement of each crime is a condition precedent of the other, it is impossible to commit either," is without merit.

Next, we address defendant's cursory argument that there was insufficient evidence to convict him of unlawful imprisonment and first-degree criminal sexual conduct. Defendant was charged with unlawful imprisonment based on restraint to facilitate the commission of a separate felony, contrary to MCL 750.349b(1)(c). Under the statute, a person who knowingly restrains another person "to facilitate the commission of another felony" is guilty of unlawful confinement. MCL 750.349b(1)(c). The statute also provides:

"Restrain" means to forcibly restrict a person's movements or to forcibly confine the person so as to interfere with that person's liberty without that person's consent or without lawful authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts. [MCL 750.349b(3)(a).]

The victim testified that defendant grabbed her and dragged her towards her vehicle. She asserted that he forced her into the front passenger seat, and he drove the vehicle. The victim attempted to escape, but defendant tightly held onto her arm preventing her from escaping the moving vehicle. Later that night, defendant drove the victim to his apartment. The victim testified that he pulled her out of the vehicle and dragged her inside his apartment building, up three flights of stairs, and into his apartment. The victim yelled and asked defendant to let her go. The victim testified that defendant told her to shut up and covered her mouth to prevent her from yelling. Defendant then closed and locked the apartment door. Although defendant's testimony seriously conflicts with the victim's testimony, all conflicts in the evidence are resolved in favor of the prosecution. *People v Unger (On Remand)*, 278 Mich App 210, 222; 749 NW2d 272 (2008). Further, this Court will not "interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *Unger*, 278 Mich App at 222. Therefore, this evidence, when viewed in the light most favorable to the prosecution, was sufficient to allow the jury to find that the victim's movements were forcibly restricted and she was held against her will, which interfered with her freedom of movement.

It is also sufficient for a reasonable jury to infer that defendant restrained the victim to facilitate the commission of the separate felony, i.e., criminal sexual conduct. That is, if a victim's movements are restricted or a victim is confined, a sexual assault is made easier or less difficult to perpetrate. There can be less concern that the victim would escape or that a third party would interfere or impede the assault. Thus, a jury can infer that by restraining a victim,

Defendant's mathematical equation is faulty. Unlawful imprisonment requires the jury to find beyond a reasonable doubt that defendant knowingly restrained another person to "facilitate the commission of another felony," in this case to facilitate the commission of criminal sexual conduct. Contrary to defendant's equation, unlawful imprisonment does not require the jury to find beyond a reasonable doubt that defendant knowingly restrained another person and actually committed first-degree criminal sexual conduct.

there are fewer factors that may hinder a perpetrator's act, thereby facilitating the commission of the sexual assault. Given the victim's testimony that defendant sexually assaulted her in the apartment, it was reasonable for the jury to infer that defendant restrained the victim to facilitate the commission of criminal sexual conduct. In sum, there was sufficient evidence to convict defendant of unlawful imprisonment.

Defendant was also charged with first-degree criminal sexual conduct based sexual penetration that occurred under circumstances involving the commission of any felony, contrary to MCL 750.520b(1)(c). Accordingly, the elements of first-degree criminal sexual conduct are that (1) a person engages in sexual penetration with another person, and (2) that the sexual penetration occurs under circumstances involving the commission of any other felony. MCL 750.520b(1)(c). Here, both the victim and defendant testified that there was sexual penetration. Accordingly, there was sufficient evidence for a jury to find that defendant engaged in sexual penetration with the victim. There was also sufficient evidence that the sexual penetration occurred under circumstances involving the commission of any other felony, i.e., unlawful imprisonment. As discussed above, the prosecution presented sufficient evidence to prove the elements of unlawful imprisonment. When viewed in the light most favorable to the prosecution, there was sufficient evidence to support defendant's convictions of first-degree criminal sexual conduct and unlawful imprisonment.

Affirmed.

/s/ Deborah A. Servitto
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly