STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2011
v	No. 298176 Oakland Circuit Court
MICHAEL PAUL BERLANGA, Defendant-Appellant.	LC No. 2009-229512-FH

Before: SAWYER, P.J., and DONOFRIO and RONAYNE KRAUSE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(a), and three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 20 to 40 years for each conviction. He appeals as of right. We affirm.

Defendant was convicted of sexually assaulting his 13-year-old daughter, SB, and her 13-year-old friend, KS, in 2009. The prosecution presented evidence that in April 2009, defendant provided alcohol to four minors in his home, including the two victims and two 18-year-old males (defendant's son CB and his friend KP). When the girls became intoxicated, defendant carried KS, who had "blacked out," to SB's downstairs bedroom, where he digitally penetrated her. After SB came into the bedroom, defendant touched her breasts and vagina. There was also evidence of a separate incident in June 2009, in which defendant again touched SB's breasts while she was in her bedroom. The defense argued that neither victim's testimony was credible or consistent, that the victims were likely mistaken given their level of intoxication, and that they fabricated the stories as revenge for defendant's mistreatment of SB's mother.

I. PRIOR ACTS EVIDENCE

Defendant first argues that his convictions should be reversed because evidence of his sexual misconduct involving another minor was improperly admitted, contrary to MCL 768.27a and *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We disagree.

A trial court's decision to admit evidence is generally reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). A trial court abuses

its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). The question whether testimony violates a defendant's Sixth Amendment right of confrontation is a question of constitutional law that we review de novo. *People v Bryant*, 483 Mich 132, 138; 768 NW2d 65 (2009).

A. *Crawford v Washington*

The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." See *People v Buie*, 285 Mich App 401, 407-408, 775 NW2d 817 (2009). The constitutional right to confrontation is implicated only by the admission of hearsay statements that are testimonial. See *People v Taylor*, 482 Mich 368, 377; 759 NW2d 361 (2008). Pursuant to MRE 801(d)(2), however, a statement that is offered against a party and is the party's own statement is not hearsay. In this case, the evidence of defendant's prior sexual misconduct with another minor was established by defendant's own statements. Defendant admitted to a detective during a recorded police interview that "he had sex with a younger girl, and that he knew that she was too young, and that he didn't bother to find out how young she was." Defendant also admitted to his former neighbor that he "had been in relations with somebody that he didn't realize how young she was." Defendant had the opportunity to confront both the detective and the former neighbor at trial, and defendant's statements were admissible as admissions by a party-opponent under MRE 801(d)(2). Thus, they were not hearsay. Because defendant's own statements were not hearsay, the constitutional analysis of *Crawford*, 541 US 36, and its concerns about the right to confrontation are not applicable.

B. MCL 768.27a

MCL 768.27a(1) provides that "in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27a(2)(a) provides that a "listed offense" is an offense defined in section two of the Sex Offenders Registration Act, MCL 28.722. The offense at issue here involved defendant's engaging in sexual intercourse with a minor, which qualifies as a listed offense under MCL 28.722(e)(x). Further, the prior offense meets the minimum threshold for relevancy, MRE 401.[1] The evidence was relevant to assist the jury in weighing the victims' credibility, particularly where defendant argued that the victims were not credible and inconsistent, that they fabricated their story as revenge against defendant, and that the victims were intoxicated to the degree that they were likely mistaken about what happened. The evidence also showed a pattern of defendant's engaging in sexual contact with teenagers to whom he had access.

[1] Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Yost*, 278 Mich App at 355. Thus, "evidence is admissible if it is helpful in throwing light on any material point." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

Further, the probative value of the evidence was not substantially outweighed by its prejudicial effect. MRE 403 is not intended to exclude "damaging" evidence, as any relevant evidence will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), modified 450 Mich 1212 (1995). Instead, it "is only when the probative value is *substantially outweighed* by the danger of unfair prejudice that evidence is excluded." *Id.* (emphasis in original). Unfair prejudice exists where there is "a danger that marginally probative evidence will be given undue or pre-emptive weight by the jury" or "it would be inequitable to allow the proponent of the evidence to use it." *Id.* at 75-76; *People v McGuffey*, 251 Mich App 155, 163; 649 NW2d 801 (2002). Defendant has not demonstrated that he was unfairly prejudiced by the evidence. The prosecutor focused on the proper purpose for which the evidence was admissible. Moreover, in its final instructions, the trial court gave a cautionary instruction to the jury concerning the proper use of the evidence, thereby limiting the potential for unfair prejudice. Consequently, the trial court did not err in admitting the prior acts testimony.

II. ADMISSION OF HEARSAY EVIDENCE

Defendant also argues that he is entitled to reversal of his convictions because the trial court allowed an improper hearsay statement by KS, which was used to establish defendant's guilt. Specifically, KP was allowed to testify that on the day after the alleged assault, he heard KS say that she does not like to be touched when she is drunk.

We agree that KS's statement was inadmissible hearsay. Hearsay, which is a statement other than one made by the declarant while testifying at the trial or hearing offered to prove the truth of the matter asserted, is inadmissible at trial unless there is a specific exception allowing its introduction. See MRE 801, MRE 802, and *People v Ivers*, 459 Mich 320, 331; 587 NW2d 10 (1998). Contrary to what plaintiff now argues on appeal, the statement does not meet the criteria for admission as a prior consistent statement under MRE 801(d)(1)(B). See *People v Jones*, 240 Mich App 704, 706-707; 613 NW2d 411 (2000). Plaintiff has not identified any other applicable exception that would allow the statement's admission. Nonetheless, we agree with plaintiff that the erroneous admission of the statement was harmless.

When evidence is improperly admitted, the defendant bears the burden of establishing that the evidentiary error resulted in a miscarriage of justice. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). A preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *Id.* Defendant bears the burden of showing actual prejudice. *People v Pipes*, 475 Mich 267, 274; 715 NW2d 290 (2006). Here, the evidence was not particularly prejudicial because KS's general statement did not describe any particular touching that may have occurred, nor did it refer to defendant as having touched her. After examining the nature of the evidentiary error in light of the weight and strength of the untainted evidence, it is not more probable than not that error affected the outcome.

Defendant also asserts that the erroneous admission of the statement violated his right of confrontation, but he did not object to the evidence on that ground at trial. Therefore, the constitutional issue is unpreserved, *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003) (an objection on one ground is insufficient to preserve an appellate challenge based on a

different ground), and appellate relief is foreclosed unless defendant can establish a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). Here, defendant offers no explanation for how the statement violated his right of confrontation. Accordingly, he has failed establish a plain error in that regard and appellate relief is not warranted.

III. SCORING OF THE SENTENCING GUIDELINES

Defendant argues that he is entitled to resentencing because the trial court erroneously scored offense variables (OV) 3, 8, and 9 of the sentencing guidelines. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). A scoring decision "for which there is any evidence in support will be upheld." *Id.* (citation omitted). The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

A. OV 3

OV 3 is scored for physical injury to a victim, MCL 777.33(1)(e), and the court must "award the highest number of points possible under OV 3[.]" *People v Houston*, 473 Mich 399, 407; 702 NW2d 530 (2005). Defendant received five points for OV 3 because "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). In *Endres*, 269 Mich App at 417-418, this Court stated that a five-point score would have been proper where "the victim experienced rectal pain as a result of defendant's assaults," but for the fact that "there was no record evidence to support the score." In this case, KS's trial testimony supported the five-point score. KS testified that she suffered pain during the sexual assault, and that her vagina was really sore when she woke up later. While at Care House, KS explained that defendant's penetration of her vagina was so painful that she believed that defendant had actually used his penis and that she was no longer a virgin. On these facts, it was not an abuse of discretion to find that the minor victim, who was vaginally penetrated against her will and experienced pain as a result of the assault, suffered bodily injury for purposes of OV 3.

B. OV 8

Fifteen points should be scored for OV 8 if "[a] victim was asported to another place of greater danger or to a situation of greater danger[.]" MCL 777.38(1)(a). Otherwise, OV 8 is to be scored at zero points. MCL 777.38(1)(b). Asportation involves movement in furtherance of the crime that is not incidental. *People v Spanke*, 254 Mich App 642, 647–648; 658 NW2d 504 (2003).

In scoring this variable at 15 points, the trial court found as follows:

> [W]ith respect to OV-8 and the scoring of fifteen points, the court is not going to change that scoring of that variable due to the fact that the defendant was basically responsible for, in a sense, immobilizing one of the victims in that she was not able to—to walk on her own, and also that by taking her downstairs where the—where the crime occurred that he did remove her from other people

that were in the home and who may have prevented any injuries from occurring to the victim.

Evidence was presented at trial that defendant moved KS from the kitchen to SB's downstairs bedroom. To permit a 15-point score for OV 8 based on this movement, the bedroom must have constituted a place or situation "of greater danger" than the kitchen. This Court has held that a victim is asported to a place or situation involving greater danger when moved away from the presence or observation of others. See *People v Steele*, 283 Mich App 472, 491; 769 NW2d 256 (2009). SB testified that both she and KS were heading to her bedroom. SB and KP testified that defendant carried KS because she was too drunk to walk and had blacked out. Although this is a close question, moving KS from the kitchen at that point arguably moved her away from KP's presence and into a place of greater danger. In sum, there is some evidence to supporta score of 15 points for OV 8 and we are not persuaded that the trial court abused its discretion.

C. OV 9

OV 9 is scored at 10 points if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). Each person placed in danger of injury is to be counted as a victim. MCL 777.39(2)(a). In *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008), our Supreme Court explained that "when scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed (or, at the most, during the same criminal transaction) should be considered." *Id.* at 350.

The trial court properly scored 10 points for OV 9 because the record supports a finding that, in addition to KS, at least one other victim, SB, was placed in danger of physical injury. In § III(A), *supra*, we rejected defendant's argument that KS did not suffer an injury. Although defendant contends that "there was no testimony that [SB] suffered any pain at all," OV 9 does not require an actual injury to another person. Rather, points may be scored where there is evidence that others who were present were *placed in danger of* a physical injury. See *People v Waclawski*, 286 Mich App 634, 684; 780 NW3d 321 (2009). SB was in the bedroom during defendant's sexual assault of KS and, given that defendant also had sexual contact with SB during the same criminal transaction, the evidence supports the trial court's finding that SB was also placed in danger of physical injury. Because there were two persons placed in danger of injury, OV 9 was properly scored at 10 points.

Affirmed.

/s/ David H. Sawyer
/s/ Pat M. Donofrio
/s/ Amy Ronayne Krause