STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 15, 2011
v KIMEON TYRONE BOLDEN, Defendant-Appellant.	No. 298770 Kalamazoo Circuit Court LC No. 2009-000702-FC

Before: JANSEN, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b), for which he was sentenced to concurrent prison terms of 9 to 30 years. We affirm.

Defendant worked in a home for troubled youth where he held a supervisory position. It was the prosecutor's theory that defendant used his position of authority to coerce one of the 14-year-old residents at the home for troubled youths to have sexual relations with him, in violation of MCL 750.520b(1)(b)(*iii*).

As this Court explained in *People v Reid*, 233 Mich App 457, 467; 592 NW2d 767 (1999), the prosecution must prove the following four elements to secure a conviction of CSC I under MCL 750.520b(1)(b)(*iii*):

> (1) the defendant sexually penetrated another person (the complainant), at a time when (2) the complainant was at least thirteen, but less than sixteen, years old, (3) the defendant was in a position of authority over the complainant, and (4) the defendant used this authority to coerce the complainant to submit to the sexual penetration.

Defendant challenges only the last element, arguing that no reasonable jury could have concluded that he used his position of authority to coerce the victim to engage in sexual penetration. We disagree.

We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that all essential elements of the offense were proven

beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant takes too narrow a view of coercion. Coercion may take many forms; it "'may be actual, direct, or positive, as where physical force is used to compel act against one's will, or implied, legal or constructive, as where one party is constrained by subjugation to other to do what his free will would refuse.'" *People v Premo*, 213 Mich App 406, 410-411; 540 NW2d 715 (1995), quoting Black's Law Dictionary (5th ed). Notably, coercion need not consist of actual physical violence or even overt threats. *Premo*, 213 Mich App at 411; see also *People v Regts*, 219 Mich App 294, 296; 555 NW2d 896 (1996); *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992). Instead, the existence of coercion is "to be determined in light of all the circumstances[.]" *Premo*, 213 Mich App at 410. Coercion can exist where those with authority exploit the "'special vulnerability'" of those under their control. *Reid*, 233 Mich App at 472.

Turning to the present case, the evidence established that defendant, a staff member with authority to unilaterally subject the residents to punishment, used his authority to coerce the 14-year-old victim to comply with his sexual demands. Defendant twice initiated sexual contact when the victim was isolated and alone. He preyed upon the victim's confessed weakness—an inability to say "no." Defendant acted in these instances not as a peer, but as a "mentor," a person in a position of trust and power. While defendant made no specific threats, a reasonable jury could have concluded that overt threats were unnecessary. After all, as noted, defendant wielded considerable power over his victim, including the authority to unilaterally initiate disciplinary measures. Defendant's commands carried with them potential consequences for disobedience. Defendant's power and control placed the victim in a special position of vulnerability—a position defendant exploited. We conclude that a rational jury could have found beyond a reasonable doubt that defendant used his authority to coerce the victim to submit to sexual penetration within the meaning of MCL 750.520b(1)(b)(*iii*). See *Reid*, 233 Mich App at 472.

Defendant also argues that the circuit court violated his constitutional rights to confront the witnesses against him and to due process of law when it precluded him from cross-examining the victim regarding the victim's past sexual acts. We disagree.

Before trial, defendant argued that cross-examination concerning the victim's past sexual acts would show the victim's tendency to lie and to extrapolate from his prior experiences to formulate new sexual fantasies. Defendant suggested that the victim had extensive sexual knowledge and that the victim used this knowledge to fabricate a lie about the alleged sexual encounters. The circuit court ruled that, pursuant to MCL 750.520j and MRE 404(a)(3), defendant would not be permitted to cross-examine the victim at trial concerning his past sexual experiences with other people.

On appeal, defendant argues that cross-examination concerning the victim's past sexual experiences with other people would have shown the victim's bias and the existence of a motive to falsely accuse defendant. But these are not the precise reasons for which defendant sought to cross-examine the victim in the court below. Because defendant now offers a materially different reason for his desire to cross-examine the victim than he offered in the court below, this issue is unpreserved for appellate review. *People v Hackett*, 421 Mich 338, 352; 365 NW2d 120

(1984). Unpreserved constitutional claims are reviewed for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"The right to confront and cross-examine is not without limits." *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). On its face, MCL 750.520j does not violate a defendant's right to confront the witnesses against him. *Hackett*, 421 Mich at 344. Only when a victim's prior sexual conduct is relevant and its exclusion would "unduly infringe on the defendant's constitutional right to confrontation" should it be admitted. *Id.* at 351. For example, a victim's sexual conduct might be relevant if (1) it is probative of an ulterior motive for making a false charge, (2) the victim has made previous false accusations of rape, or (3) the victim's sexual conduct illustrates bias. *Id.* at 348.

When a defendant seeks to introduce evidence concerning a victim's past sexual acts, the defendant must "make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted." *Id.* at 350. Unless there is a "sufficient showing of relevancy in the defendant's offer of proof," the circuit court must deny the defendant's motion. *Id.* Moreover, even if the proposed evidence would be relevant, the circuit court may exclude it if "its probative value is substantially outweighed by the risks of unfair prejudice, confusion of issues, or misleading the jury." *Id.* at 351; see also MRE 403.

Defendant suggests that it was the victim who actually initiated the sexual acts at issue in this case. Defendant argues that cross-examination concerning the victim's prior sexual conduct would have shown the jury that the victim had (1) an ulterior motive to deny initiating the misconduct, and (2) an ulterior motive to wrongfully accuse defendant of initiating the misconduct. Defendant asserts that, because the victim already had a record of past sexual misconduct when he entered the home for troubled youths, any additional misconduct by the victim would have subjected him to increased disciplined. Thus, defendant contends, the victim necessarily would have been motivated to falsely accuse him in order to avoid further punishment.

This argument is unavailing. Even without hearing any evidence of the victim's past sexual acts, any reasonable juror would have known that the victim, as a resident at a home for troubled youths, was subject to increased discipline for sexual misconduct. It follows that any reasonable juror would have also been aware of the victim's motive to lie about being coerced. The jury did not need to hear any testimony concerning the victim's past sexual acts in order to realize that the victim had a motive to falsely accuse defendant.

We fully acknowledge that evidence of a victim's prior sexual conduct may be relevant if it is probative of an ulterior motive for making a false charge. *Hackett*, 421 Mich at 348. However, in this case any such evidence would have contributed little, if at all, to the jury's understanding of the victim's already-apparent motivation to lie. Accordingly, any cross-examination concerning the victim's past sexual conduct would have had limited relevance in this case, and would have constituted the needless presentation of unnecessary information. Nor are we persuaded that evidence of the victim's past sexual acts would have been probative of the victim's "bias," as defendant asserts on appeal. On the record before us, we simply cannot conclude that the circuit court's decision to exclude evidence of the victim's past sexual conduct

unduly infringed on defendant's constitutional rights.[1] *Id.* at 351. We perceive no plain error in the circuit court's decision to exclude this evidence under MCL 750.520j.

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Douglas B. Shapiro

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[1] To the extent that defendant sought to present evidence of the victim's past sexual acts to show that the victim consented to or initiated the sexual contact at issue, we note that the victim's past sexual experiences with other people had no relevance to the question whether he consented to sex with defendant. See *Hackett*, 421 Mich at 352-354.