STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 13, 2011
v	No. 300060 Wayne Circuit Court
J.D. KIM-CORNEIL ROBINSON, Defendant-Appellant.	LC No. 09-024301-FC

Before: O'CONNELL, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

A jury convicted defendant of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), and three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age) and MCL 750.520b(1)(b) (victim between 13 and 16 years of age and actor is a member of same household or related to victim). The trial court sentenced defendant, as a third habitual offender, MCL 769.11, to concurrent sentences of 13 to 20 years' imprisonment for the assault with intent to commit criminal sexual conduct involving sexual penetration conviction and 30 to 45 years' imprisonment for each first-degree criminal sexual conduct conviction. Because defendant's evidentiary challenges lack merit, the evidence was sufficient to show that he engaged in sexual penetration as required under MCL 750.520b(1)(a), and he was properly scored 50 points for OV 7, we affirm.

Defendant first argues that the trial court erred by admitting under MCL 768.27a evidence of his prior criminal sexual conduct involving a minor. Defendant contends that MRE 404(b) controls over MCL 768.27a, and, therefore, the evidence was admissible only to show a common scheme or plan. Defendant further asserts that, because the trial court did not give the proper limiting instruction consistent with MRE 404(b), he is entitled to a new trial.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). However, when the decision "involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence," our review is de novo. *Id.* at 670-671. An abuse of discretion occurs if the trial court's decision falls outside the range of principled outcomes. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

MCL 768.27a provides, in relevant part:

> (1) [I]n 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. If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.
>
> (2) As used in this section:
>
> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
>
> (b) "Minor" means an individual less than 18 years of age.

In *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007), this Court held that MCL 768.27a allows the introduction of evidence involving a defendant's sexual offenses against minors without having to meet the standard of MRE 404(b). The Court cautioned, however, that "trial courts [should] take seriously their responsibility to weigh the probative value of the evidence against its undue prejudicial effect in each case before admitting the evidence." *Pattison*, 276 Mich App at 621. The Court referenced MRE 403, which provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Similarly, in *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2007), this Court held that MCL 768.27a and MRE 404(b) conflicted, in the context of that case, and that the statute, as a substantive rule of evidence, controlled. Thus, evidence may be admitted under the statute regardless of whether it is admissible under MRE 404(b). Defendant's argument that the court rule controls over the statute lacks merit.[1]

Under MCL 768.27a(1), "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." "A defendant's propensity to commit criminal sexual behavior can be relevant and admissible under the statutory rule to demonstrate the likelihood of the defendant committing

[1] We note that our Supreme Court has granted leave to decide whether MCL 768.27a and MRE 404(b) conflict and, if so, whether the statute or the rule of evidence controls, and whether the statute's failure to require that evidence admitted under the statute comply with MRE 403 violates a defendant's constitutional due process right to a fair trial. See *People v Watkins*, 489 Mich 863; 795 NW2d 147 (2011); *People v Pullen*, 489 Mich 864; 795 NW2d 147 (2011).

criminal sexual behavior toward another minor." *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008).

Here, defendant's prior convictions of first-degree criminal sexual conduct and second-degree criminal sexual conduct are listed offenses[2] that were committed against a minor when she was ten years old. Evidence involving the convictions and the previous victim's testimony regarding the incidents was relevant in showing the likelihood that defendant committed criminal sexual conduct with the victim here, another minor. See *Petri*, 279 Mich App at 411. The evidence was also relevant because it tended to show that it was more probable than not that the victim in this case was testifying truthfully. See *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53 (2010).

Moreover, the danger of unfair prejudice did not substantially outweigh the probative value of the evidence under MRE 403. Whether the victim was testifying truthfully had significant probative value because her credibility bore directly on whether defendant should be convicted of the crimes charged. See *Mann*, 288 Mich App at 118. In addition, the trial court instructed the jury that if it found that defendant committed the prior acts, it could consider the evidence in determining whether he committed the offenses for which he was currently on trial. The trial court also instructed the jurors, however, that they must not convict defendant based solely on their belief that he is guilty of other bad conduct and that if the evidence did not convince them beyond a reasonable doubt that defendant committed the offenses charged, they must find defendant not guilty. See *id.* Because the evidence was admissible under MCL 768.27a and the danger of unfair prejudice did not substantially outweigh its probative value under MRE 403, the trial court did not abuse its discretion by admitting the evidence.

Defendant next contends that the prosecution failed to present sufficient evidence to support his first-degree criminal sexual conduct conviction with respect to the first sexual assault, which occurred in December 2005 or January 2006. Specifically, defendant argues that the prosecution failed to prove penetration because the victim denied that defendant penetrated her vaginal area with his finger.

We review de novo challenges to the sufficiency of the evidence. *People v Bowman*, 254 Mich App 142, 151; 656 NW2d 835 (2002). We must determine whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that all the elements of the crime charged were proven beyond a reasonable doubt. *Id.*

To convict defendant of first-degree criminal sexual conduct under MCL 750.520b(1)(a), the prosecution was required to prove that he engaged in sexual penetration with the victim when she was under the age of 13. *People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321

[2] The applicable version of the statute is the version in effect in 2010 at the time that the trial court decided this case. See *People v Lee*, 489 Mich 289, 292 n 1; 803 NW2d 165 (2011). Under that version, MCL 750.520b and MCL 750.520c were "listed offenses" under MCL 28.722(e)(*x*).

(2009). Because it is undisputed that the victim was 12 years old at the time of the first incident, only the penetration element is at issue.

"'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). This Court has held that the female "genital opening" includes the labia majora. *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981). Thus, penetration of the vagina is not required for sexual penetration. See *id.* Further, in a prosecution under MCL 750.520b, the victim's testimony need not be corroborated. MCL 750.520h.

With regard to the first incident, the prosecution alleged that defendant placed his finger into the victim's genital opening. The victim testified as follows:

> *Q.* Will you describe for me what his hand was doing when it touched the top of your vagina?
>
> *A.* He just placed it there because I had moved it away.
>
> *Q.* What did you do when you moved it away?
>
> *A.* I moved his hand away.
>
> *Q.* And specifically, did his hand ever go into your vagina?
>
> *A.* No.
>
> *Q.* When you use the restroom, when you use the restroom to go pee, what do you do after you go pee?
>
> *A.* Wipe.
>
> *Q.* All right. Is that the same area of your body where his hand touched or a different area?
>
> *A.* A different area.
>
> *Q.* When you wipe your private area when you go to the bathroom, do you wipe between the outer lips of your private area?
>
> *A.* Yes.
>
> *Q.* Did he touch the --
>
> ***
>
> *Q.* (By the prosecutor) Can you tell me if he touched your private area within those outer lips where you wipe?

A. Yes.

Q. His finger went within those outer lips?

A. No.

Q. Can you be more specific about where his finger went?

A. His hand was just on top of my vagina.

Q. The same place you wipe, but within the outer lips?

A. Yes.

Although the victim testified that defendant's hand did not go into her vagina, penetration of the vagina is not required. See *Bristol*, 115 Mich App at 238. In response to whether defendant touched her within the outer lips of her vaginal area, the victim first answered no, but, after further questioning, answered yes. Based on her testimony, defendant argues that the victim denied penetration In reviewing the sufficiency of evidence, we must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). We must also "not interfere with the jury's role as the sole judge of the facts." *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005). Further, we must view the evidence in the light most favorable to the prosecution. *Bowman*, 254 Mich App at 151. Given that the victim testified that defendant touched her within the outer lips of her vaginal area, the evidence was sufficient for a rational trier of fact to find that the element of penetration was proven beyond a reasonable doubt.

Defendant next contends that the trial court erred by overruling defense counsel's objection to Dr. Gloria Chaney's testimony regarding statements that the victim's mother made to her concerning the reason for the victim's visit to the doctor. Defendant argues that the hearsay exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment, MRE 803(4), should be construed to require that statements be made by the actual patient if possible.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). MRE 802 provides that "hearsay is not admissible except as provided by these rules." MRE 803 lists several exceptions to the rule against hearsay, including MRE 803(4), which pertains to statements made for purposes of medical treatment or medical diagnosis in connection with treatment. Under this exception, "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment," are not excluded by the hearsay rule. MRE 803(4).

In *People v Yost*, 278 Mich App 341, 362 n 2; 749 NW2d 753 (2008), this Court noted in dictum that "MRE 803(4) is not limited to statements made by the person being diagnosed or treated." This Court cited *Merrow v Bofferding*, 458 Mich 617, 624, 628-630; 581 NW2d 696

(1998), as "upholding the admission of a statement in a patient's medical history regarding the cause of an injury even though the medical personnel could not identify the person who provided the history." *Yost*, 278 Mich App at 362 n 2.

We hold that statements made by a victim's parent for purposes of medical treatment or medical diagnosis in connection with treatment fall within MRE 803(4), so long as they are relevant and reliable. The language of MRE 803(4) does not require that the declarant be the patient or person diagnosed or treated. Moreover, the rationales for the hearsay exception are: "'(1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.'" *Merrow*, 458 Mich at 629, quoting *Solomon v Shuell*, 435 Mich 104, 119; 457 NW2d 669 (1990). Given a parent's motivation to speak truthfully in order to obtain proper medical care for his or her child, such statements are generally reliable.

Here, the victim's mother's statements to Dr. Chaney were medically relevant. Dr. Chaney testified that she needed to know the reason for the victim's visit in order to proceed with her examination. In addition, our Supreme Court has recognized that "[s]tatements made by sexual assault victims to medical health care providers identifying their assailants can . . . be admissible under the medical treatment exception to the hearsay rule if the court finds the statement sufficiently reliable to support that exception's rationale." *People v Meeboer*, 439 Mich 310, 330; 484 NW2d 621 (1992). Further, the victim's mother had an interest in telling Dr. Chaney the truth so that her daughter would receive proper medical care, and there is no indication that she had any improper motive. Therefore, her statements to Dr. Chaney regarding the reason for the victim's visit were admissible under MRE 803(4).

Finally, defendant contends that the trial court abused its discretion by assessing 50 points under Offense Variable (OV) 7 for conduct designed to substantially increase the fear and anxiety that the victim suffered during the offense. "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 Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence in support will be upheld." *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). We review de novo "any legal questions involving the interpretation or application of the statutory sentencing guidelines." *People v Kegler*, 268 Mich App 187, 190; 706 NW2d 744 (2005).

MCL 777.37(1)(a) directs sentencing courts to score 50 points under OV 7 if "[a] victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." In scoring 50 points under OV 7, the trial court stated:

> In reviewing the O.V. 7, in the definition under there, a young person such as [the victim] here, while being raped and crying for her mother, is then told by the Defendant that her mother was not there, and the Defendant laughing, that could certainly fall within the definition of conduct designed to substantially increase the fear and anxiety the victim suffered during the offense, the person she was asking for who could maybe help her, and then being told no, she's not here

and can't help you. So, I think that O.V. should be scored at fifty points based on the evidence that was adduced during the trial.

The trial court's scoring decision did not constitute an abuse of discretion. While being raped by defendant, the 14-year old victim started crying and calling for her mother. Defendant, the victim's uncle, laughed and told the victim that her mother was not there. Thus, the circumstances show that defendant engaged in conduct designed to substantially increase the fear and anxiety the victim suffered. Because there is record evidence to support the scoring of 50 points under OV 7, we uphold the trial court's scoring determination. See *Hornsby*, 251 Mich App at 468.

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Pat M. Donofrio