

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 14, 2013

v

JUSTIN MICHAEL WENTZEL,

Defendant-Appellant.

No. 311284
Allegan Circuit Court
LC No. 11-017275-FH

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

PER CURIAM.

A jury convicted defendant of stalking a minor, MCL 750.411h(2)(b), and accosting a child for immoral purposes, MCL 750.145a. The trial court sentenced defendant to concurrent sentences of twelve months in jail for each conviction and placed defendant on probation for five years. Defendant appeals as of right. We affirm.

FACTS

The minor in this case, C.F., met defendant when he was either eight or nine years old and defendant was between 20 and 22 years old. The two became close and defendant started spending time at C.F.'s home, eventually spending three to four nights a week there. He initially slept on the couch or on the floor in C.F.'s room, but then started sleeping with C.F. in C.F.'s bed or on the floor. C.F. explained they slept on their sides, with C.F. facing away from defendant and defendant cuddling close to C.F. and wrapping his arms around C.F.'s chest with his body pressed against C.F.'s body. C.F.'s mother attempted to limit defendant and C.F. sleeping together, but her boundaries were not followed.

C.F. woke up one night and felt defendant's erect penis against his butt. He told his mother's partner, A.B., and at the time he was upset and crying and asked to have less contact with defendant and to not have defendant sleep over. Defendant did not sleep over for about three weeks, but then resumed when C.F. asked if he could spend time with defendant. At trial, C.F. testified that he had felt defendant's erection when they were sleeping together more than once and felt it when he was sitting in defendant's lap about eight to ten times. C.F. explained it made him feel "freaked out." A.B.'s daughter observed defendant touching and rubbing C.F.'s butt while they wrestled. Defendant also took C.F. on outings, was physically affectionate with C.F., and gave C.F. gifts including cellular telephones and a computer.

C.F.'s mother unsuccessfully attempted to limit contact between defendant and C.F. by imposing a curfew and telling defendant that C.F. needed to spend time with other people. In March 2011, C.F.'s mother enforced no contact between defendant and C.F., although C.F. testified that during this time defendant still texted him. In March 2011, A.B. and C.F. and other children were waiting in A.B.'s van for C.F.'s mother to leave her apartment so they could go on an outing. While they were waiting, defendant approached C.F.'s mother in her apartment and asked why he could not see C.F. C.F.'s mother asked defendant to leave. He went to the van, got in the front seat, was yelling and agitated, and demanded that C.F. sit in his lap. Defendant held C.F. closely in his lap and would not let him go for several minutes.

In an interview with Detective Chris Koster, defendant admitted that he got erections while sleeping with C.F. about 10 to 20 times, but he did not intend for it to happen and nothing sexual happened. He also admitted he got erections while holding C.F. in his lap more than five times.

Thomas Cottrell, an expert in the dynamics of sexual assault, testified that grooming is a process by which an assailant prepares a child to be sexually assaulted by earning the trust of the child, gaining access to the child, and isolating the child. The assailant may provide gifts or become the child's "best buddy." The assailant also attempts to normalize sexual touch.

I

Defendant first argues there was insufficient evidence to support the convictions. Claims of insufficient evidence are reviewed de novo. *People v Harverson*, 291 Mich App 171, 177; 804 NW2d 757 (2010). On review, we "must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992) (citations omitted). Additionally, we "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).

To establish the offense of stalking a minor, it must be proven that the victim was under 18 years old and defendant was more than five years older than the victim, there were two or more acts of unconsented contact that actually caused emotional distress to the victim (made the victim feel terrorized, frightened, intimidated, threatened, harassed, or molested), and the contact would cause a reasonable person such distress. MCL 750.411h; see, e.g., *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 723; 691 NW2d 1 (2005). In this case, there is no dispute concerning the ages of C.F. and defendant. There were multiple instances of unconsented contact because defendant repeatedly had an erection while sleeping with C.F. or having C.F. in his lap. The contact was unconsented because C.F. asked not to see defendant as much, felt "freaked out," and his mother attempted to limit contact by drawing boundaries. The evidence also established the contact would make a reasonable person feel frightened or molested because defendant touched C.F. with his erect penis. There was evidence that defendant's touching of C.F. with his erect penis made C.F. feel frightened and prompted him to ask not to see defendant as much. Given that all reasonable inferences are made in favor of the jury's verdict, a rational jury could determine beyond a reasonable doubt that defendant stalked C.F. *Wolfe*, 440 Mich at 514-515.

There was also sufficient evidence to establish defendant committed the crime of accosting a minor. Defendant committed this crime if he encouraged C.F. to commit an immoral act, submit to an act of intercourse or an act of gross indecency, or any other act of depravity or delinquency. MCL 750.145a; *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011). In this case, there was evidence defendant engaged in grooming behavior and that, generally, such behavior was to prepare a child for sexual assault. The evidence was sufficient to allow a rational jury to conclude beyond a reasonable doubt that defendant encouraged C.F. to commit an immoral act. *Wolfe*, 440 Mich at 516.

II

Next, defendant argues he was denied effective assistance of counsel because trial counsel did not move for directed verdict and did not move to suppress a particular statement defendant made in his interview with Detective Koster. This unpreserved issue is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish a claim of ineffective assistance of counsel, a defendant “must show that his attorney’s representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial.” *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (citations omitted). To show prejudice, defendant must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Toma*, 462 Mich at 302-303 (quotation and citation omitted). “[D]efense counsel is not required to make frivolous or meritless motions or objections.” *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (citations omitted).

When considering “a motion for a directed verdict of acquittal, a trial court must consider the evidence presented by the prosecution to the time the motion is made and in a light most favorable to the prosecution, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.” *People v Riley*, 468 Mich 135, 139-140; 659 NW2d 611 (2003) (citation omitted). As described above, in this case there was sufficient evidence to establish beyond a reasonable doubt that defendant committed the crimes of stalking a minor and accosting a minor for immoral purposes. Thus, a motion for directed verdict would have been futile and a claim of ineffective assistance of counsel cannot be based on the failure to raise a futile motion. *Knapp*, 244 Mich App at 386.

Defendant was also charged with second-degree criminal sexual conduct with a person under 13 years old, MCL 750.520c(1)(a), and assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g, for which the jury returned verdicts of not guilty. A motion for directed verdict with regard to these charges would have been futile as well. Second-degree criminal sexual conduct requires a showing beyond a reasonable doubt that there was sexual contact and that the victim was under 13 years of age. MCL 750.520c. “Sexual contact” includes “the intentional touching of . . . the actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the . . . actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification . . .” MCL 750.520a(q). Intent can be proven through minimal circumstantial evidence. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008) (citations omitted). In this case, there was evidence defendant touched C.F. with his erect penis on multiple occasions. Based on the

contact, and the repeated nature of it, a rational jury could conclude all the elements of this charge were proven beyond a reasonable doubt. *Riley*, 468 Mich at 139-140.

Assault with intent to commit second-degree criminal sexual conduct requires a showing of an assault and the intent to commit second-degree criminal sexual conduct. MCL 750.520g; MCL 750.520c; see, e.g., *People v Evans*, 173 Mich App 631, 634; 434 NW2d 452 (1988). There was sufficient evidence of intent to commit second-degree criminal sexual conduct based on defendant's continued touching of C.F. with his erect penis even after he knew he was likely to have erections when with C.F. Again, intent can be proven through only minimal circumstantial evidence. *Kanaan*, 278 Mich App at 622. Regarding an assault, one can occur when there is "an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004) (quotation omitted). "[A] battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *Id.* (quotation omitted). The prosecutor's theory in this case was that defendant committed a battery by touching C.F. with his erect penis. Viewed in the light most favorable to the prosecution, the evidence was sufficient to allow a rational jury to find the essential elements of the crime were proven beyond a reasonable doubt. *Riley*, 468 Mich at 139-140. Thus, defendant was not deprived effective assistance of counsel by counsel's failure to move for a directed verdict. *Knapp*, 244 Mich App at 386.

Next, defendant argues trial counsel was ineffective when he did not move to suppress a statement made by defendant during his interview with Detective Koster that referred to the death of a woman in a car accident. He simply states the challenged statement involves an unrelated criminal charge, was irrelevant under MRE 402, was purely prejudicial under MRE 403, and was inadmissible under MRE 404(b). Defendant provides no reasoning regarding this argument. A defendant may not merely announce his position and leave it to this Court to rationalize his claims. *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009). When an appellant fails to properly address the merits of his assertion of error, the issue is abandoned. *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004). Accordingly, we will not address this argument.

III

Defendant argues that the trial court abused its discretion by denying defendant's motion to suppress defendant's statements about his own prior sexual abuse as a child and about an incident at a summer camp made during his interview with Detective Koster. This argument was preserved on MRE 402 grounds and is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

All relevant evidence is admissible unless otherwise provided. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable that it would be without the evidence." MRE 401. MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice"

Defendant argues statements regarding his sexual abuse by his cousins were irrelevant and prejudicial and should not have been admitted. We agree. This evidence had no tendency to make the existence of any fact at issue more or less probable. Thus, it was irrelevant pursuant to MRE 401. Further, the evidence was prejudicial because, as the detective stated in the interview, defendant's relationship with C.F. could have been similar to a "continuation" of the abuse of his cousins. Thus, because the statements were irrelevant, had no probative value, and carried a significant danger of unfair prejudice, i.e. that defendant was likely to be an abuser because he was abused, they were inadmissible pursuant to MRE 402 and MRE 403 and the trial court abused its discretion in admitting them. *Katt*, 468 Mich at 278. Similarly, defendant argues that statements regarding an incident at a summer camp, where defendant was present when ten year old boys were running around naked, were also inadmissible. These statements were also irrelevant because they had no tendency to make the existence of any fact in this case more or less probable. MRE 401. The evidence was prejudicial because it portrayed defendant in the context of naked ten year old boys. Because the statements were irrelevant, had no probative value, and carried with them the danger of unfair prejudice, they were inadmissible pursuant to MRE 402 and MRE 403 and the trial court abused its discretion in admitting them. *Id.*

If evidence is admitted in error, "[t]he effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). "Evidentiary errors are nonconstitutional." *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). A preserved, nonconstitutional error "is not a ground for reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at 495-496 (quotation omitted). In this case, there was substantial untainted evidence of defendant's guilt, particularly the testimony of C.F. regarding contact with defendant's erect penis on multiple occasions and the nature of their relationship. Additionally, both A.B. and C.F.'s mother testified as to defendant's grooming behavior, and Cottrell testified that grooming behavior generally was preparation for sexual abuse. C.F.'s mother testified regarding her unsuccessful attempts to establish boundaries with defendant and his continued contact with C.F. On this basis, the errors of admitting the challenged statements are not grounds for reversal because it does not "affirmatively appear that it is more probable than not that the error was outcome determinative." *Id.* at 495-496.

Defendant also raises the unpreserved argument that the evidence should not have been admitted on the basis of MRE 404(b). Because the evidence was barred by MRE 402 and 403, consideration of which is part of the MRE 404(b) analysis, we will not further consider defendant's MRE 404(b) argument.

IV

Finally, defendant argues the trial court erred in scoring Offense Variable (OV) 10, MCL 777.40, and OV 13, MCL 777.43. However, because defendant completed his jail sentence on April 30, 2013, we are unable to provide a remedy for the alleged error and the issue is moot. *People v Tombs*, 260 Mich App 201, 220; 679 NW2d 77 (2003).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Jane M. Beckering