STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2013
v	No. 312680 Shiawassee Circuit Court
STEPHEN JOHN KARES, Defendant-Appellant.	LC No. 12-003104-FC

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion). He was sentenced as a fourth-offense habitual offender, MCL 769.12, to 300 to 700 months in prison. We affirm.

I. FACTUAL BACKGROUND

Defendant knew the 16 year old victim because he dated her mother, and the victim had been over to his apartment on a number of occasions. On the day of the assault, defendant texted the victim and offered to pay her money if she would clean his horse saddle. Later that day, defendant texted the victim that he would be home soon, he bought her a pack of cigarettes (as he had done in the past), and he purchased a gift for her from Goodwill.

The victim asked a friend to drive her to defendant's apartment. When she arrived, defendant showed her the saddle, but said that she did not need to clean it right away. The victim and defendant were talking and smoking a cigarette in the living room when he offered to help her get emancipated, which is something they had talked about before. Defendant also gave her the gift from Goodwill, which was a pair of earrings.

The victim cleaned the saddle, and defendant eventually went into his bedroom. Defendant then asked the victim if a pair of pants in the bedroom were hers, which prompted the victim to walk toward the bedroom. Defendant then told the victim that they needed to talk, and closed the bedroom door. He then caressed her face, and the victim told him no. Because the victim began to whimper and shake, defendant said "stop, don't make me hurt you." Defendant then kissed the victim and said "what do you think I'm doing this for? What do you think I'm doing all this for you for?" The victim knew that he was referring to the emancipation offer and the purchase of cigarettes.

Defendant told the victim to walk over by the bed and take her clothes off, which she did. He then grabbed a camera, took his pants off, and told the victim to lie down on the bed. When she complied, he opened her legs, spread open her vaginal area to take a picture, and told her that if she told anyone he would distribute the photographs everywhere. He then ordered her to sit up, and forced her to perform oral sex on him. He next ordered her to lie down on the bed, and he inserted his penis into her vagina.

Defendant eventually stood up and put his pants back on. The victim got dressed but did not run because she was afraid he would catch her. Defendant said that he thought she would be more into it, and asked if she had sex before. They eventually proceeded back into the living room, and the food defendant ordered earlier arrived. While the victim went back to cleaning the saddle, she felt threatened because defendant told her that he did not want the police showing up at his door. The victim's friend arrived to pick her up, and the victim told defendant not to worry that she would not tell.

However, after driving away, the victim told her friend, and eventually her mother, that defendant raped her. She had a rape kit examination performed, and a sexual-assault nurse testified that the victim relayed to her what happened. Thus, the nurse conducted a full body assessment of the victim, including a detailed genital assessment. She obtained a urine sample to check for infection or prior pregnancy, and provided the victim with medications to prevent pregnancy and infection. The nurse testified that near the victim's anus she observed a half-millimeter tear that could be consistent with forced or consensual sexual contact. She also collected various samples, including a sample of a white substance at the victim's cervix and a vaginal swab. An employee at the Michigan State Police Forensic Science Division testified that the anal and cervical swabs were tested and resulted in a match to defendant's DNA.[1]

Defendant testified at trial, and while he admitted that the victim came over to his apartment to clean the saddle, he claimed that no sexual contact occurred, and he did not know why the victim accused him of such. He testified that he had sexual intercourse with a different woman three or four days before, and had disposed of a vaginal condom in the trash. The jury found defendant guilty of third-degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion). Defendant now appeals.

II. HEARSAY

A. Standard of Review

Defendant first contends the trial court erred in admitting testimony from the sexual-assault nurse recounting the victim's reported history. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App

[1] Defendant questioned the prosecution's witnesses regarding the nurse's report, which did not show a check mark that anal swabs or vaginal smears were collected.

210, 217; 749 NW2d 272 (2008). "Preliminary questions of law, including whether a rule of evidence precludes the admission of evidence, are reviewed de novo." *Burns*, 494 Mich at 110. However, "[a] preserved error in the admission of evidence does not warrant 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." *Id.* (quotation marks and citation omitted).

B. Analysis

Defendant claims that the nurse's testimony was inadmissible hearsay, which affected the outcome of the trial. "Hearsay evidence is inadmissible unless it fits within an exception to the hearsay rule." *People v McDade*, 301 Mich App 343, 353; 836 NW2d 266 (2013). One such exception is MRE 803(4), which excludes from the general hearsay rule "[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." In other words, "[s]tatements made for the purpose of medical treatment are admissible pursuant to MRE 803(4) if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive proper medical care." *People v Mahone*, 294 Mich App 208, 214-215; 816 NW2d 436 (2011).

In the instant case, the sexual-assault nurse testified regarding her treatment of the victim soon after the assault, and the victim's report of the incident. Defendant argues that the nurse's testimony should have been excluded as hearsay because it involved statements made for the purpose of collecting evidence in a criminal prosecution, not for medical treatment. This argument is meritless for several reasons. First, the nurse specifically testified that her primary duties were medical diagnosis and treatment, not the collection of evidence. Moreover, only a statement offered to prove the truth of the matter asserted is hearsay. MRE 801(c). Here, the testimony was offered to describe the process of the medical examination and the routine gathering of information necessary for such an examination. The nurse refrained from even identifying defendant as the man the victim said raped her.

Further, even if the nurse's testimony was hearsay, it was for the purpose of medical treatment under MRE 803(4). The victim's account of the sexual assault was "reasonably necessary for diagnosis and treatment" because it determined the type of examination and course of treatment that was most appropriate. *Mahone*, 294 Mich App at 214-215. Based on the victim's statements, the nurse conducted a full body exam, gave her medications to prevent infections as well as pregnancy, and detailed instructions for follow-up procedures for infections they could not prevent and testing after the victim left the hospital. As this Court has recognized, a sexual assault can result in injuries that are not readily apparent, such as sexually transmitted diseases or psychological injury, and "a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment." *Mahone*, 294 Mich App at 215; see also *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996) ("Sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment."). The victim also had a self-interested motivation to be truthful in order to receive the proper medical care. *Mahone*, 294 Mich App at 214-215. Thus, the trial court did not err in admitting the nurse's testimony.

III. SENTENCING

A. Standard of Review

Next, defendant challenges the scoring of Offense Variables (OVs) 8, 10, and 3. "Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). However, "[w]hether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id.*

However, in regard to OV 3, defendant failed to object to the trial court's scoring of this variable. "An unpreserved objection to the scoring of offense variables is reviewed for plain error." *People v Odom*, 276 Mich App 407, 411; 740 NW2d 557 (2007). Thus, an error must have occurred, it must be plain, and it must affect substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

B. OV 8

Defendant first contends that the trial court erroneously scored OV 8 at 15 points. A score of 15 points under OV 8 is justified when "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Asportation must involve some movement of the victim that "is not merely incidental" to the commission of the underlying offense. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). However, asportation does not require the use of force. *People v Steele*, 283 Mich App 472, 490; 769 NW2d 256 (2009); *People v Cox*, 268 Mich App 440, 454; 709 NW2d 152 (2005).

In the instant case, the trial court assessed 15 points because defendant moved the victim to a more dangerous place in order to victimize her, noting that defendant enticed the victim to his apartment and then his bedroom. Defendant, however, argues that there was no evidence of any movement of the victim that was not merely incidental to the sexual assault. To support his argument he cites *People v Thompson*, 488 Mich 888; 788 NW2d 677 (2010), a Supreme Court order of remand based on its finding that the victim's movement to the bedroom where the sexual assault occurred was merely incidental to the crime.

Yet, what defendant's argument overlooks is that in this case, it was not just a matter of moving the victim into the bedroom. Instead, defendant first lured the victim to his apartment, where they were alone, based on promises to pay her for cleaning a saddle, a gift from Goodwill, and cigarettes. The victim was likely not in danger of defendant's aggression while at her friend's house, which is where she was when defendant contacted her. Thus, in using promises to entice her to come to his apartment, the "victim was asported to another place of greater danger." MCL 777.38(1)(a); see *Spanke*, 254 Mich App at 648 (upholding a score of 15 points under OV 8 when "[t]he victims were moved, even if voluntarily, to defendant's home where the criminal acts occurred. The victims were without doubt asported to another place or situation of greater danger, because the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others.");

see also *Steele*, 283 Mich App at 491 (upholding a score of 15 points under OV 8 when defendant took the victim to more isolated locations, which were "places or situations of greater danger because they are places where others were less likely to see defendant committing crimes.").

Moreover, once defendant had the victim in his apartment, he invited her into his bedroom, closed the door, forced her to lie down on the bed, and then assaulted her. This further increased the probability that defendant's sexual assault would go undetected and uninterrupted. Because luring the victim to these places was not merely incidental to the assault, we agree that OV 8 was properly scored at 15 points.

C. OV 10

Defendant next argues that the trial court erroneously scored OV 10 at 15 points. OV 10 is for the exploitation of a vulnerable victim, and it prescribes a score of 15 points for "predatory conduct." MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purposes of victimization." MCL 777.40(3)(a). Defendant admits that he could have been assessed 10 points under OV 10 based on exploitation of the victim's youth, MCL 777.40(1)(b), but asserts that the trial court erred in scoring 15 points for predatory conduct because any preoffense conduct was nothing more than mere planning.

Predatory conduct is "only those forms of preoffense conduct that are commonly understood as being predatory in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection." *People v Huston*, 489 Mich 451, 462; 802 NW2d 261 (2011) (quotation marks and citation omitted). Further, predatory conduct is conduct that is "directed at a victim before the offense was committed" and for the primary purpose of victimization. *People v Cannon*, 481 Mich 152, 160-161; 749 NW2d 257 (2008) (quotation marks omitted). The relevant questions are whether the offender engaged in conduct before the commission of the offense, was such conduct directed at a specific victim who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation, and whether victimization was the offender's primary purpose for engaging in the conduct. *Cannon*, 481 Mich at 162.

In this case, defendant argues that his conduct was not predatory because there was no clear indication of when he decided to commit the alleged sexual assault. However, the evidence demonstrated that defendant established a relationship with the victim, who was the 16 year-old daughter of a girlfriend. The victim was in need of money, and defendant enticed her to his apartment with the offer of money in exchange for her cleaning his saddle. He provided her with gifts of earrings and cigarettes, and even offered to help her become legally emancipated from her mother. After conditioning her with his overtures of friendship and understanding, and making her feel indebted to him through gifts, defendant then sexually assaulted the victim.

Essentially, defendant engaged in a course of predatory conduct that made "the victim an easier target for the sexual assault." *Cannon*, 481 Mich at 161. This Court has recognized that a relevant consideration under OV 10 is gifts offered to young victims, as a young victim can be "vulnerable to the temptation of defendant's gifts and susceptible to physical restraint[.]" *People*

v Johnson, 298 Mich App 128, 133; 826 NW2d 170 (2012). Moreover, the victim testified that defendant admitted that the gifts and the offer to help with the emancipation had been designed with the sexual assault in mind, as he asked: "what do you think I'm doing this for? What do you think I'm doing all this for you for?"

Thus, the evidence demonstrated that defendant did not spontaneously commit the assault, but developed that intention over time, and acted accordingly. Therefore, we find that the trial court properly scored OV 10 at 15 points for defendant's predatory conduct.

D. OV 3

Lastly, defendant argues that the trial court erred in scoring OV 3 at 10 points for "bodily injury requiring medical treatment [that] occurred to a victim." MCL 777.33(1)(d). However, defendant failed to challenge the scoring of OV 3 below, and raises it for the first time on appeal. See *Kimble*, 470 Mich at 311 (an issue must be "raised at sentencing, in a motion for resentencing, or in a motion to remand."). Moreover, the trial court's ruling was not plain error. The sexual-assault nurse reported a half-millimeter tear near the victim's anus, which could have been from forced sexual contact. Further, the victim was given medication to prevent or diminish the impact of infection, such as sexually transmitted diseases that may have been introduced during the sexual assault. In light of the fact that such treatment was considered necessary by the medical staff, we do not find that the trial court plainly erred in finding that a score of 10 points for bodily injury requiring medical attention was warranted.[2]

IV. CONCLUSION

The trial court did not err in allowing testimony from the sexual-assault nurse regarding the victim's statements for purposes of medical treatment. Furthermore, because the trial court properly scored OV 8, 10, and 3, resentencing is not required. We affirm.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan

[2] Furthermore, even if OV 3 was scored at 0 points, that does not alter defendant's sentencing range. "Where a scoring error does not alter the appropriate guidelines range, resentencing is not required." *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).