STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 18, 2013
v	No. 308954 Kalamazoo Circuit Court
LUSTER RAY NELSON, II, Defendant-Appellant.	LC No. 2011-001062-FH

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions for assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g, second-degree criminal sexual conduct, MCL 750.520c(1)(f) (actor causes personal injury), and interference with electronic communications, MCL 750.540(5)(a). We affirm.

The complainant in this case had invited defendant to his home to smoke marijuana. Once inside, defendant partially removed the complainant's pants and attempted to sexually assault him. When the complainant resisted, defendant punched him and knocked him to the floor. After the assault, defendant sent the complainant dozens of text messages and left him several voicemail messages. Defendant testified at trial and acknowledged assaulting the complainant, but denied sexually assaulting him. Instead, defendant claimed that the complainant had attempted to sexually assault him.

On appeal, defendant first argues that the trial court abused its discretion when it permitted the complainant to give an opinion regarding the contents of a voicemail message from defendant after the assault. The prosecutor played the voicemail message for the jury at trial, but the recording was apparently garbled. Over defendant's objection, the complainant, who had heard the message before trial, testified as to what defendant said in the message. Defendant contends that the complainant, a lay witness, should not have been permitted to offer his opinion as to what defendant said in the message.

A trial court's evidentiary rulings "will not be disturbed absent an abuse of [ ] discretion." *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). "An abuse of discretion occurs [ ] when the trial court chooses an outcome falling outside [a] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). This Court will not reverse a conviction because of a trial court's evidentiary ruling unless "it is more probable than not that

the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). See also MCL 769.26.

We find that the trial court did not abuse its discretion when it permitted the complainant to testify regarding the contents of the voicemail message. Contrary to defendant's assertions, the complainant did not offer his opinion as to what was in the voicemail message, nor was he asked to offer his opinion. Rather, based on his personal knowledge, i.e., his prior experience listening to the voicemail, the complainant testified as to what defendant said in the voicemail. The complainant's testimony was permissible, because defendant's statements in the voicemail were admissible as party admissions under MRE 801(d)(2)(A). Moreover, defendant is not entitled to relief because, even if he could establish error, he cannot demonstrate that the error was outcome determinative. *Lukity*, 460 Mich at 596. The voicemail recording at issue only demonstrated that defendant went to the complainant's townhouse and that he brought marijuana with him. These facts were not in dispute, as defendant himself testified to these facts.

Next, defendant argues that the trial court abused its discretion when it permitted Kayla Giampaolo, one of the complainant's roommates, to testify concerning a statement the complainant made on the night of the assault. The complainant met with Giampaolo on the night of the assault at her place of employment and told her what happened. Giampaolo testified that when she saw the complainant that evening, "he comes up there and tells me that he had just been attacked. And he was freaking out, shaking . . . ." Defendant argues that the first part of Giampaolo's statement, "he comes up there and tells me that he had just been attacked," was inadmissible hearsay. Assuming without deciding that the statement was inadmissible, we decline to grant defendant relief because he fails to demonstrate that it was more likely than not that any error was outcome determinative. *Lukity*, 460 Mich at 596. The complainant's assertion that he had just been attacked was uncontroverted at trial; defendant admitted that he assaulted the complainant. Significantly, the complainant's statement to Giampaolo contained no indication as to whether he had been sexually assaulted. Therefore, the complainant's statement did not provide evidence of a matter that was in dispute, and the statement was cumulative to properly admitted evidence. Defendant is not entitled to relief. See *People v McRunels*, 237 Mich App 168, 185; 603 NW2d 95 (1999) (an evidentiary error can be rendered harmless where the erroneously admitted evidence is cumulative to properly admitted evidence).

Next, defendant argues that the trial court abused its discretion when it prevented him from inquiring into an alleged inconsistent statement made by the complainant to Officer Shawn Poole, a part-time security guard at Giampaolo's workplace. Poole spoke with the complainant on the night of the assault, and the complainant told Poole about what happened. The record contains no details concerning what the complainant told Poole. On cross-examination of Poole, defendant's trial counsel attempted to ask Poole what Poole told Detective Kristin Cole about the assault. The trial court sustained the prosecution's objection that any response from Poole would contain inadmissible hearsay. Defendant argues that he sought to impeach the complainant's testimony through Poole's out-of-court statements to Cole pursuant to MRE 613, and that he did not offer Poole's testimony for the truth of the matter asserted in the out-of-court statements. He argues that the trial court abused its discretion by preventing him from questioning Poole about the statements. He also argues that he was denied his constitutional right to present a defense.

MRE 613 allows a party to impeach a witness with the witness's prior statement. Here, defendant's trial counsel sought to use extrinsic evidence, i.e., Poole's testimony, to impeach the complainant regarding an alleged prior statement. MRE 613(b) provides in pertinent part that "[e]xtrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require." A witness may be impeached with a prior inconsistent statement, and the statement need not satisfy a hearsay exception or exclusion if the statement is only offered for impeachment purposes. *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995).

Defendant is not entitled to relief on this claim. First, defendant's argument is without merit because defendant attempted to impeach the complainant's trial testimony with a statement made by Poole to Cole and not with the complainant's own statement. MRE 613(b) declares that a witness can be impeached by his or her own statement. Here, defendant's trial counsel expressly asked Poole what *he* told Cole and not what the complainant told Poole. Thus, impeachment under MRE 613(b) was improper. Second, defendant's claim is without merit because his trial counsel sought to impeach the complainant through extrinsic evidence – Poole's testimony – but did not follow the procedures set forth in MRE 613(b) for doing so. MRE 613(b) requires that a witness who is impeached by extrinsic evidence of a prior inconsistent statement must be "afforded an opportunity to explain or deny the same . . . ." Here, the complainant was never asked about any inconsistent statements that he allegedly gave to Poole. He was simply asked if he spoke to Poole about what happened. Defendant's evidentiary claim is meritless. Furthermore, because the trial court did not abuse its discretion in excluding the evidence, we find that the trial court did not deny defendant his right to present a defense. See *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008).

Next, defendant argues that the trial court abused its discretion by excluding the proposed testimony of Officer Aaron Wiedbrauk. In his proposed testimony, Wiedbrauk stated that he met with defendant a few weeks after the assault, and that defendant claimed he was receiving harassing telephone calls from the complainant. Defendant told Wiedbrauk he was the victim of a sexual assault perpetrated by the complainant. Wiedbrauk did not investigate the matter, but passed it along to Det. Cole. After the prosecution's objection, the trial court struck Wiedbrauk's testimony and instructed the jury not to consider the testimony. Defendant argues that the trial court abused its discretion, and that it prevented him from pursuing a theory of defense that he was the real sexual assault victim. He also argues that the trial court's evidentiary ruling denied him his constitutional right to present a defense. Defendant preserved his evidentiary issue by objecting at trial. *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010). His constitutional claim is unpreserved, though, because he did not object on these grounds at trial. See *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), ("[a]n objection based on one ground is usually considered insufficient to preserve an appellate attack based on a different ground."). We review the trial court's evidentiary ruling for an abuse of discretion, *McDaniel*, 469 Mich at 412, and his unpreserved constitutional claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Assuming without deciding that the trial court abused its discretion by excluding Wiedbrauk's testimony, we decline to grant defendant relief because he fails to establish that it was "more probable than not that the error was outcome determinative." *Lukity*, 460 Mich at

496. The exclusion of Wiedbrauk's testimony was not outcome determinative because the proposed testimony was cumulative to properly admitted evidence. Indeed, defendant testified that he received harassing telephone calls from the complainant after the incident occurred. Additionally, Cole testified that defendant told her that he received harassing telephone calls from the complainant after the incident and that she did not conduct further inquiry into the matter. Thus, Wiedbrauk's proposed testimony was cumulative to properly admitted evidence, and the exclusion of the testimony did not affect the outcome below. See *McRunels*, 237 Mich App at 185. Consequently, there is no merit to defendant's claim that the exclusion of Wiedbrauk's proposed testimony prevented him from positing his theory of defense that he, not the complainant, was the real victim of a sexual assault. Likewise, because defendant was not prejudiced by the trial court's evidentiary ruling, he is not entitled to relief on his unpreserved claim that he was denied his right to present a defense. *Carines*, 460 Mich at 764-765.

Finally, defendant argues that the trial court erred by refusing to instruct the jury on the offense of assault as a necessarily lesser included offense of assault with intent to commit criminal sexual conduct involving penetration. Defendant preserved this issue by raising it before deliberations began. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657; 620 NW2d 19 (2000). "We review de novo a trial court's ruling on a necessarily included lesser offense instruction." *People v Walls*, 265 Mich App 642, 644; 697 NW2d 535 (2005).

"[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it." *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002). Thus, in order to establish that he was entitled to an assault instruction, defendant must first establish that assault is a necessarily lesser included offense of assault with intent to commit CSC involving penetration. See *Walls*, 265 Mich App at 644-645. "A lesser offense is necessarily included in the greater offense when the elements necessary for the commission of the lesser offense are subsumed within the elements necessary for the commission of the greater offense." *People v Wilder*, 485 Mich 35, 41; 780 NW2d 265 (2010). See also *People v Apgar*, 264 Mich App 321, 326; 690 NW2d 312 (2004) ("A necessarily included lesser offense is an offense in which all its elements are included in the elements of the greater offense such that it would be impossible to commit the greater offense without first having committed the lesser offense.").

The prosecution concedes that the trial court erred in its reasons for refusing the instruction. The elements of assault with intent to commit CSC involving penetration are: "(1) an assault, and (2) an intent to commit CSC involving sexual penetration." *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004). Meanwhile, "[a]n assault is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *Id.* at 628 (quotation omitted). In light of the elements of the respective offenses, assault is a necessarily lesser included offense of assault with intent to commit CSC involving penetration because it is impossible to commit assault with intent to commit CSC involving penetration without first committing the offense of assault. See *Apgar*, 264 Mich App at 326.

Moreover, we find that the trial court erred in denying defendant's request for an instruction on assault because the greater offense, assault with intent to commit CSC, involved a

disputed factual element that the lesser did not – intent to commit CSC involving penetration. See *Cornell*, 466 Mich at 361 (holding that the trial court erred when it failed to instruct the jury on the lesser offense when the greater offense required the jury to find a disputed factual element that was not part of the lesser offense). Here, the factual element differentiating the greater and lesser offense was the intent to commit CSC involving sexual penetration. This element was disputed at trial by defendant's testimony that he merely assaulted the complainant and that he never sexually assaulted the complainant. Indeed, defendant freely admitted that he assaulted the complainant; he only denied *sexually* assaulting the complainant. Because there was disputed evidence on the element differentiating the greater offense from the lesser offense, i.e., defendant's intent to commit CSC involving penetration, the trial court abused its discretion when it refused to grant defendant's request for an assault instruction. See *id.*

However, defendant is not entitled to relief simply because the trial court erred by failing to give the requested instruction because the failure to give a requested instruction on a lesser included offense can be harmless. *People v Gillis*, 474 Mich 105, 140 n 18; 712 NW2d 419 (2006); *Cornell*, 466 Mich at 361-363. The validity of the jury's verdict is presumed, and the defendant bears the burden of demonstrating that "it is more probable than not that the error was outcome determinative." *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000) (quotation omitted). "Stated another way, the analysis focuses on whether the error undermined reliability in the verdict." *Cornell*, 466 Mich at 364. "Therefore, to prevail, defendant must demonstrate that it is more probable than not that the failure to give the requested lesser included misdemeanor instruction undermined reliability in the verdict." *Id.* "[T]he reliability of the verdict is undermined when the evidence 'clearly' supports the lesser included instruction, but the instruction is not given. In other words, it is only when there is substantial evidence to support the requested instruction that an appellate court should reverse the conviction." *Id.* at 365. A reviewing court looks at the "entire cause" in analyzing whether there was substantial evidence to support the requested instruction. *Id.* at 365.

We find that the trial court's error in refusing to instruct on the lesser included offense was harmless because the evidence produced at trial did not clearly support the lesser included offense of assault. Although defendant denied at trial that he sexually assaulted the complainant, the evidence produced at trial strongly rebutted his assertions. For instance, after the assault, defendant sent the complainant dozens of text messages, many of which were sexual in nature. Some of the text messages also included an apology from defendant about what happened. In addition to the text messages, the complainant's injuries were inconsistent with defendant's testimony that he assaulted, but did not sexually assault, the complainant. Although defendant admitted assaulting the complainant, he only admitted to hitting the complainant in the throat, punching him in the chest, and throwing him against a wall. The complainant's injuries on his hips and buttocks contradicted defendant's version of the assault. Further, defendant's testimony at trial concerning the circumstances of the assault was inconsistent with some of his earlier statements to law enforcement officers. For example, when defendant spoke with Det. Cole, he denied that the incident with the complainant involved drugs or was related to a drug deal where the complainant refused to pay him. At trial, however, defendant testified at length that he went to the complainant's house to sell him marijuana and cocaine and testified that he initially became upset with the complainant because the complainant refused to pay the agreed upon price for the drugs. Consequently, we find that defendant failed to satisfy his burden of establishing that the evidence "clearly" supported the lesser included offense of assault. The trial court's

error in refusing to instruct on the lesser included offense does not require reversal. See *Cornell*, 466 Mich at 366-367.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

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SHAPIRO, J. (*concurring*).

I concur in the result only.

/s/ Douglas B. Shapiro