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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN GREGORY ZERNEC,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 353490
Eaton Circuit Court
LC No. 19-020143-FH

Before: RICK, P.J., and O'BRIEN and CAMERON, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a), and fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(a). The trial court sentenced defendant to 75 months to 15 years' imprisonment for the CSC-III conviction, and 16 months to 2 years' imprisonment for the CSC-IV conviction. We affirm.

I. BACKGROUND

Complainant's mother had been involved with defendant, who was in his late 30s, since early 2016. In late 2017, when complainant was 14 years old, she was sitting next to defendant under a blanket on a couch while complainant, defendant, complainant's mother, and complainant's younger sister were watching a movie. According to complainant, during the movie, defendant reached down her pants and digitally penetrated her vagina, and also placed her hand in his underwear to grasp and manipulate his penis. These were the acts underlying the two CSC charges, but complainant also testified about other uncharged acts of sexual touching that occurred during a trip complainant, defendant, and complainant's family took to Chicago. Complainant disclosed all the instances of sexual abuse at a therapy session in February 2018, and reported the abuse to the police shortly thereafter.

Defendant was convicted and sentenced as previously stated, and now appeals as of right.

II. INSTRUCTION ON CSC-IV

On appeal, defendant first argues that the trial court erroneously instructed the jury on the elements of CSC-IV. We disagree.

This Court reviews de novo claims of instructional error. See *People v Perez*, 469 Mich 415, 418; 670 NW2d 655 (2003). This Court reviews for an abuse of discretion a trial court's "determination whether a jury instruction is applicable to the facts of the case." *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). The trial court does not abuse its discretion when it chooses an outcome within the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

A defendant has the right to "a properly instructed jury." *People v Mills*, 450 Mich 61, 80; 537 NW2d 909 (1995). "The trial court is required to instruct the jury with the law applicable to the case and fully and fairly present the case to the jury in an understandable manner." *Id*. Jury instructions are reviewed "in their entirety to determine if there is error requiring reversal." *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997). "Jury instructions must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence." *People v Kurr*, 253 Mich App 317, 328; 654 NW2d 651 (2002). There is no error where the instructions "fairly presented the issues to be tried and sufficiently protected the defendant's rights." *McFall*, 224 Mich App at 412-413.

At issue is the instruction concerning MCL 750.520e(1). That statute states that "[a] person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person" under certain circumstances. MCL 750.520e(1). Defendant was convicted under Subsection (a), which provides that a person is guilty of CSC-IV if he or she engages in sexual contact with a victim that is "at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person." The standard jury instruction for MCL 750.520e(1) reads, in relevant part, that to prove CSC-IV, the prosecutor must prove "that the defendant intentionally [touched (name complainant)'s/made (name complainant) touch (his/her)] [genital area/groin/inner thigh/buttock/(or) breast] or the clothing covering that area." M Crim JI 20.13.

The prosecution requested that the trial court modify the model instruction to include that defendant "allowed" complainant to touch him because the word "made" in the model instruction misleadingly implied that plaintiff had to prove that defendant used force. The trial court agreed that the modification was in order, and instructed the jury, in part, that to prove CSC-IV the prosecutor must demonstrate that "defendant intentionally made or allowed [complainant] to touch his genital area or the clothing covering that area," and "that this touching was done for sexual purposes or could be reasonably construed as having been done for sexual purposes."

Defendant argues that instructing the jury that it was a crime for defendant to "allow" sexual contact made it possible for him to be convicted on the basis of conduct that was not prohibited by the statute. We disagree. The statute provides that a person is guilty of CSC-IV if "he or she engages in sexual contact with another person" under certain circumstances. MCL 750.520e(1). "Sexual contact" is defined in relevant part as:

> the intentional touching of the victim's or *actor's intimate parts* or the intentional touching of the clothing covering the immediate area of the victim's or *actor's*

> *intimate parts*, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose[.] [MCL 750.520a(q) (emphasis added).]

This definition makes clear that a person "engages" in "sexual contact" not only when he or she touches a victim's intimate parts, but also when the victim touches the actor's intimate parts.

Defendant was charged under MCL 750.520e(1)(a), which makes it illegal to engage in sexual contact with a victim "at least 13 years of age but less than 16 years of age" when the actor is more than 5 years older than the victim. In contrast to Subsection (b),[1] whether the actor used force or coercion to accomplish the sexual contact is irrelevant for purposes of Subsection (a). Consent is likewise irrelevant because " 'a victim below the age of consent is conclusively presumed to be legally incapable of giving his or her consent to sexual intercourse.' " *People v Armstrong*, 490 Mich 281, 292 n 14; 806 NW2d 676 (2011), quoting *People v Cash*, 419 Mich 230, 247-248, 351 NW2d 822 (1984). The focus is whether intentional sexual contact occurred (which includes the victim touching the actor's intimate parts) and the respective ages of the victim and the actor. With this understanding of defendant's charge, the instruction that defendant intentionally "allowed" complainant to touch his genital area for sexual purposes was clearly consistent with MCL 750.520e(1)(a) and MCL 750.520a(q).

Further, the inclusion of "or allowed" in the instruction fit the evidence, because defendant said in his interview with the police that complainant had touched him, and complainant testified that defendant took her hand and put it on his penis inside his underwear and moved her hand up and down. Therefore, the instruction that defendant intentionally "allowed" complainant to touch his genital area for sexual purposes was consistent with the evidence presented at trial. See *Kurr*, 253 Mich App at 328.

For these reasons, the trial court did not abuse its discretion by instructing jurors that "defendant intentionally made or allowed [complainant] to touch his genital area," because the instruction was supported by the evidence and fairly covered the applicable law.

III. OTHER-ACTS EVIDENCE

Defendant argues that the trial court errantly allowed the admission of evidence of defendant's other sexual acts with complainant. Whether bad acts evidence was properly admitted is reviewed for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595(2005).

In addition to her testimony about the charged acts, complainant testified that, in the month before the charged acts took place, defendant had groped her breast and kissed her in a hotel room in Chicago, and groped her breast again on a bus on the way home. MCL 768.27a(1) provides in

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[1] MCL 750.520e(1)(b) provides, "A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if . . . [f]orce or coercion is used to accomplish the sexual contact."

relevant part that "in 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." Accordingly, "In cases involving the sexual abuse of minors, MCL 768.27a now allows the admission of other-acts evidence to demonstrate the likelihood of a defendant's criminal sexual behavior toward other minors." *People v Buie*, 298 Mich App 50, 71-72; 825 NW2d 361 (2012) (quotation marks and citation omitted).

Defendant argues that he was not timely given proper notice of the prosecution's intent to use the other-acts evidence. MCL 768.27a(1) provides in relevant part:

> 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.

The prosecution informed defendant of its intent to offer the other-acts evidence at a pretrial hearing, explaining that the evidence was previously disclosed to defendant as part of a police report given to defendant. Defendant objected, arguing that the notice was not timely filed because the pretrial hearing was only 11 days before trial and the police report disclosing the evidence—given to defendant months prior—was not sufficient to give defendant notice of the prosecution's intent to use the evidence. The trial court overruled defendant's objection.

On appeal, defendant argues that the prosecution "did not meet the 15-day notice requirement" in MCL 768.27a(1). Yet by its plain terms, MCL 768.27a(1) does not require 15-day notice; it requires that the prosecution "disclose the evidence to the defendant at least 15 days before the scheduled date of trial . . . ." Appearing to recognize the insufficiency of his argument, defendant contends that this Court's holding in *People v Gaines*, 306 Mich App 289, 302; 856 NW2d 222 (2014), that MCL 768.27a(1) "does not preclude a prosecutor from incorporating the disclosure of the evidence in the notice of intent by reference" is, in defendant's words, a "clear" holding that "there must be notice" provided to satisfy MCL 768.27a(1). Yet *Gaines* held no such thing. *Gaines* stated that "the statute only requires the prosecutor to 'disclose the evidence to the defendant at least 15 days' before trial," which did "not preclude a prosecutor from incorporating the disclosure of the evidence in the notice of intent by reference." *Gaines*, 306 Mich App at 302.

Further, and contrary to defendant's assertion, this Court in *Gaines* recognized that MCL 768.27a(1) by its plain terms "only requires the prosecutor to 'disclose the evidence to the defendant at least 15 days' before trial . . . ." *Gaines*, 306 Mich App at 302. The prosecution satisfied that requirement in this case by disclosing the evidence to defendant as part of a police report given to defendant more than 15 days before trial. Moreover, like in *Gaines*, "any error in

the prosecutor's disclosure was harmless because defendant does not allege that he was unaware of the other-acts evidence." *Id*.[2]

Defendant also challenges the use of the evidence of his other bad acts on the ground that the evidence was more prejudicial than probative.

Evidence that qualifies for admission under MCL 768.27a[3] may nonetheless be excluded under MRE 403 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.' " *People v Watkins,* 491 Mich 450, 481; 818 NW2d 296 (2012), quoting MRE 403. Unfair prejudice occurs when there is a tendency for the evidence "to be given undue or preemptive weight" by the jury, or when it "would be inequitable to allow use" of it. *People v Wilson*, 252 Mich App 390, 398; 652 NW2d 488 (2002). " 'Unfair prejudice' does not mean 'damaging.' " *Lewis v Legrow*, 258 Mich App 175, 199; 670 NW2d 675 (2003). Evidence that is unfairly prejudicial goes beyond the merits of the case to inject issues broader than the defendant's guilt or innocence, such as "bias, sympathy, anger, or shock." *McGhee*, 268 Mich App at 614.

In *Watkins,* 491 Mich at 487-488, our Supreme Court enumerated several considerations that might lead a trial court to exclude evidence as unfairly prejudicial under MRE 403:

> (1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony.

Evidence of defendant's kissing complainant and touching her breast in the hotel, before feeling her breast again on the train, was similar to the charged acts, and occurred close in time to

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[2] Defendant also argues that the prosecution failed to comply with the notice requirement of MRE 404(b)(2) that the prosecutor "provide written notice at least 14 days in advance of trial" to admit other-acts evidence. However, the prosecution's motion to admit this evidence was under MCL 768.27a, and MCL 768.27a controls over MRE 404(b) when "listed offenses" against minors are at issue. *People v Smith*, 282 Mich App 191, 203-204; 772 NW2d 428 (2009).

[3] Defendant does not contest that evidence of him twice groping complainant qualifies for admission under MCL 768.27a. Even if he did, such an argument would be without merit. MCL 768.27a(1) permits a prosecutor to introduce evidence of a defendant's commission of another listed offense against a minor in order to show the defendant's propensity to commit the charged crime, and thus the prosecutor may do so "without having to justify its admissibility under MRE 404(b)." *Buie*, 298 Mich App at 74. Listed offenses for this purpose "include the various forms of criminal sexual conduct." *People v Dobek*, 274 Mich App 58, 88 n 16; 732 NW2d 546 (2007). Thus, because defendant was on trial for criminal sexual conduct involving a minor, and the conduct of twice groping complainant's breast constituted CSC crimes, the evidence of his sexual misconduct against complainant was admissible pursuant to MCL 768.27a.

them with no intervening acts. Further, defendant confirmed complainant's report of inappropriate touching on the bus during his police interview.

We conclude that the trial court's decision to admit the challenged evidence was within the range of reasonable and principled outcomes. The evidence of defendant's previous misconduct had significant probative value because it demonstrated that defendant had engaged in behavior similar to the charged conduct and also strengthened complainant's credibility. In assessing prejudice versus probative value, "courts must weigh the propensity inference in favor of the evidence's probative value rather than its prejudicial effect." *Watkins*, 491 Mich at 487. See also *People v Duenaz*, 306 Mich App 85, 99; 854 NW2d 531 (2014). Defendant argues that the evidence was unfairly prejudicial because it influenced the jury's assessment of complainant's credibility. But "MCL 768.27a specifically *permits* the use of other-acts evidence to show a defendant's propensity to commit the charged crime" and "to bolster the complainant's credibility." *Watkins*, 491 Mich at 492 n 92. Although the evidence was somewhat prejudicial, it was not unfairly so, and the trial court did not abuse its discretion by granting plaintiff's motion.

IV. SENTENCING

Defendant argues that recordings of his phone calls from jail expressing his outrage at the verdict were impermissibly played at sentencing without the prosecutor's having first provided them to the defense. However, the trial court explicitly stated that "[t]he court's heard the recordings from the jail, they're in the record; however, this sentence will not be based on those records." The trial court elaborated that its sentence was primarily influenced by the harm that defendant had caused complainant, as demonstrated by her words and behavior, and by the contents of the Presentence Investigation Report.

Because there is "no general constitutional right to discovery in a criminal case," any error in failing to disclose evidence is subject to harmless error analysis. *People v Elston*, 462 Mich 751, 765-766; 614 NW2d 595 (2000). In *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987), this Court stated that the defendant was not entitled to relief when the prosecutor failed to disclose evidence of a letter the defendant had written because the defendant, as the author, "had knowledge of it independent of discovery." In this case, defendant knew the contents of his own telephone calls, and also that they were recorded, and so no surprise from use of the recordings at sentencing cost him any opportunity to challenge, mitigate, or otherwise explain the information thus revealed. Moreover, that any error in the matter was harmless was plainly shown by the trial court's statement that it would not rely on those recordings in determining defendant's sentence.

Affirmed.

/s/ Michelle M. Rick
/s/ Colleen A. O'Brien
/s/ Thomas C. Cameron