STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 314102 Kent Circuit Court
JON ERIC JUNGKIND, Defendant-Appellant.	LC No. 12-000388-FH

Before: MURPHY, C.J., and SHAPIRO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals from his jury trial conviction of one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(e)(*i*) (sexual penetration with an individual at least 16 years of age but less than 18 years of age and who is a student at public or nonpublic school by an individual who is a teacher, substitute teacher, or administrator of that public or nonpublic school, school district, or intermediate school district). He was sentenced to 40 months to 15 years in prison. For the reasons set forth below, we affirm defendant's conviction and sentence.

Complainant testified that she was a high school student and defendant was her teacher during the 2010-2011 school year. Over the course of the summer of 2011, complainant and defendant became increasingly close, to the point where the traditional teacher/student relationship "was not there anymore at all." They spent considerable time together, including in public and alone at defendant's home (where defendant allowed her to consume alcohol), went to movies, restaurants and other events, and communicated extensively over the telephone, email and via private messaging on Facebook. Complainant testified that at some point either in late July or early August of 2011, she was at defendant's home when the two began discussing the fact that complainant had a "crush" on defendant. The conversation turned to the topic of sex, and ultimately complainant and defendant engaged in sexual intercourse. Complainant was 17 years old at the time.

Complainant testified that after her sexual encounter with defendant, she became concerned that she might be pregnant. She expressed this concern to defendant, who then purchased several pregnancy tests for complainant, which, she testified, positively indicated that she was pregnant. Complainant testified that she then asked defendant to help her obtain an abortion. Defendant located and purchased, from an out-of-country market, "Misoprostol," a medication used to terminate pregnancy. Complainant testified that defendant received the

medication at his home and brought it to her; she subsequently took it, resulting in an abortion. She revealed the situation to a friend, who later notified the school principal. Complainant acknowledged that she initially denied the relationship, but later admitted that she did in fact engage in sexual intercourse with defendant.

At trial, the prosecution presented a copy of the Facebook messages between defendant and complainant. Although these messages did not specifically reference a sexual relationship between the two, they nonetheless substantiated that the two had more than a traditional teacher/student relationship. The prosecution also presented a copy of complainant's text message conversations with her friend, in which there were specific references to complainant engaging in sexual intercourse with defendant and to complainant thereafter procuring an abortion. Finally, the prosecution introduced a credit card statement and receipt found in defendant's home which showed a purchase on August 15, 2011 from "International Drug Mart" for a product called "Misoprostol."

Defendant testified that he had a close relationship with complainant and spent considerable time with her during the summer of 2011. He loved her as a good friend and denied that their relationship was sexual or otherwise romantic. He also admitted purchasing the abortion medication for complainant because she came to him in confidence and he wanted to help her, but he also claimed that he never actually gave complainant the medication because she refused to tell her parents that she was pregnant. Defendant repeatedly denied having sex with complainant. Nonetheless, he was convicted.

On appeal, defendant first argues that the trial court erred by allowing, over objection, evidence regarding complainant's alleged pregnancy or alleged abortion because such evidence was unfairly prejudicial.

We review a trial court's decision whether to admit evidence for an abuse of discretion, but review preliminary questions of law, such as whether a rule of evidence precludes admissibility, de novo. See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Duncan*, 494 Mich 713, 722-723; 835 NW2d 399 (2013).

Defendant concedes that the challenged evidence was relevant. Evidence of complainant's pregnancy and subsequent abortion were material because they were "related to" establishing an element of the offense, namely whether defendant engaged in an act of sexual penetration with complainant. MCL 750.520d(1)(e)(*i*). Defendant placed that element at issue by his plea of not guilty and by his denials during trial. See *People v Crawford*, 458 Mich 376, 389; 582 NW2d 785 (1998). At the motion hearing regarding the abortion-related evidence, defendant stated that he intended to argue that there was no medical evidence that complainant was ever pregnant and, therefore, her entire story lacked credibility. See *People v Mills*, 450 Mich 61, 69; 537 NW2d 909 (1995). Thus, the evidence that defendant obtained the abortion pills for complainant was relevant for the purposes not only of demonstrating complainant's credibility, but for establishing that defendant believed complainant was pregnant and that it was likely he who got her pregnant. Additionally, the evidence had substantial probative value. "The threshold [for proving probative value] is minimal: 'any' tendency is sufficient probative force." *Id*. at 390.

Further, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice under MRE 403. "Evidence is unfairly prejudicial where there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *Crawford*, 458 Mich at 398; see also *People v McGhee*, 268 Mich App 600, 614; 709 NW2d 595 (2005) ("[U]nfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock"). The evidence had critical probative value because defendant's role in procuring pregnancy tests and abortion medication was inextricably intertwined with establishing that defendant engaged in sexual intercourse with complainant. While the evidence also had a potential for prejudice, in light of the controversial nature of abortion, this did not substantially outweigh its probative value. Moreover, the trial court instructed the jury that the evidence regarding defendant's alleged acquisition of abortion pills was to be considered solely for the purposes of evaluating complainant's credibility and that the jury was not to conclude, from this evidence, that defendant was a bad person, likely to commit crimes, or was "guilty of other bad conduct." Accordingly, the trial court did not abuse its discretion by allowing the challenged evidence.

Defendant next argues that the trial court erred by limiting his inquiry into the complainant's alleged abortion. Specifically, he argues that he was precluded from presenting evidence that, contrary to her testimony, complainant did not actually take the abortion medication until after the preliminary examination in this case, which would have been after she acknowledged being sexually active with at least one other person. While defendant does not clarify in his brief on appeal what right was implicated by the trial court's alleged error, we surmise that he argues that his constitutional right of confrontation was infringed. Defendant's argument seems to suggest not only that he should have been able to cross-examine complainant as to when she took the abortion medication, but also as to whether that alleged timeframe coincided with her alleged sexual encounters with another individual. However, the trial court properly ruled, in a pretrial hearing, that defendant could not inquire into complainant's other sexual encounters under the rape-shield statute, MCL 750.520j, because none of the proffered evidence regarding complainant's sexual history was relevant to any issue at trial. It is well-established that, because evidence of a victim's sexual history has minimal relevance "in the overwhelming majority of cases[,]" the prohibitions in the rape-shield statute "do not deny or significantly diminish [a] defendant's right of confrontation." See, e.g., *People v Arenda*, 416 Mich 1, 8-11; 330 NW2d 814 (1982).

Defendant also argues that the trial court erred by scoring several offense variables (OVs). We review a trial court's factual determinations under the sentencing guidelines for clear error to determine if they are supported by a preponderance of the evidence. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether 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 we review de novo. *Id.*

Defendant first argues that the trial court erred by scoring five points under OV 3. OV 3 is to be scored at five points when a victim suffers "[b]odily injury not requiring medical treatment[.]" MCL 777.33(1)(e).

> [I]n the context of CSC cases, "bodily injury" includes pregnancy. Looking to the technical dictionary definition of "bodily injury," *People v Meyers*, 250 Mich App 637, 643; 649 NW2d 123 (2002), we note that it is a defined as "[p]hysical damage to a person's body." Black's Law Dictionary (7th ed). As noted in other decisions, by necessity, a woman's body suffers "physical damage" when carrying a child through delivery as the body experiences substantial changes to accommodate the growing child and to ultimately deliver the child. See, e.g., *United States v Shannon*, 110 F3d 382, 388 (CA 7, 1997) (en banc) ("Apart from the nontrivial discomfort of being pregnant (morning sickness, fatigue, edema, back pain, weight gain, etc.), giving birth is intensely painful . . . ."). These types of physical manifestations to a woman's body during pregnancy and delivery clearly fall within the definition of "bodily injury," for the manifestations can and do cause damage to the body." *Id*. ("Pregnancy resulting from rape is routinely considered a form of grave body injury."). [*People v Cathey*, 261 Mich App 506, 514-515; 681 NW2d 661 (2004) (footnote omitted).]

In this case, there was evidence that complainant became pregnant as a result of her sexual encounter with defendant; this constitutes "bodily injury." *Id.*[1] Accordingly, the trial court did not err by scoring OV 3 at five points.

Defendant next argues that the trial court erred by scoring ten points under OV 4. OV 4 provides that ten points may be scored where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). Defendant argues that there was no evidence that complainant sought any treatment and also points out that she did not submit a victim impact statement. However, "the fact that treatment has not been sought is not conclusive." MCL 777.34(2). And, notwithstanding the lack of a victim impact statement, there was sufficient evidence to suggest that complainant suffered serious psychological injury. Complainant testified that she became pregnant as a result of having sexual intercourse with defendant, which in and of itself makes it possible, if not likely, that she suffered psychological damage. More importantly, the trial court noted that it observed complainant at times throughout the criminal process "very emotionally upset," and complainant testified to the harassment she endured by her peers. Complainant's mother testified that complainant was "absolutely miserable" after the accusations came to light. Thus, there was evidence that complainant's sexual relationship with defendant caused her anxiety, altered her demeanor, and substantially affected her life at school. Accordingly, the trial court did not err in scoring ten points under OV 4.

[1] Judge Murphy dissented in part in *Cathey*, 261 Mich App at 517-520, because he did not believe pregnancy constituted "bodily injury" under the scoring guidelines. In the case before us, even if OV 3 is scored at zero rather than five points, it would not result in a change to the guidelines range and would not require resentencing.

Defendant argues that the trial court erred by scoring 10 points under OV 10. OV 10 concerns the exploitation of a vulnerable victim and provides that ten points may be scored where "[t]he offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship or the offender abused his or her authority status." MCL 777.40(1)(b). "[P]oints should be assessed under OV 10 only where it is readily apparent that a victim was 'vulnerable,' i.e., was susceptible to injury, physical restraint, persuasion, or temptation." *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008). Defendant argues that his position as a teacher is insufficient to support finding that complainant was vulnerable. However, the trial court based its decision not only on the fact that defendant was a teacher, but also on the fact that defendant took advantage of complainant's youthfulness, two factors that weigh in favor of scoring points under OV 10. MCL 777.40(1)(b); *Cannon*, 481 Mich at 158-159. Moreover, the record established that defendant allowed complainant to consume alcohol in his presence, another factor that weighs in favor of finding that he exploited her vulnerability. *Id*. Thus, the trial court did not err by scoring OV 10 at 10 points.

Defendant next argues the trial court erred in scoring 25 points under OV 11. OV 11 allows the scoring of 25 points where "[o]ne criminal sexual penetration occurred." MCL 777.41(1)(b). However, OV 11 also provides that "the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense" cannot be scored under OV 11. MCL 777.41(2)(c). Finally, OV 11 provides that any act of sexual penetration used to score points under that statute must "arise out of the sentencing offense." MCL 777.41(2)(a). See also *People v Johnson*, 474 Mich 96, 100-102; 712 NW2d 703 (2006). Here, the act of penetration that formed the basis for defendant's CSC III conviction could not be used to score points under OV 11. MCL 777.41(2)(c); *Johnson*, 474 Mich at 102 n 2. Moreover, while complainant testified to other acts of sexual penetration—which were either not charged or which did not result in a conviction—that occurred between her and defendant, those acts are alleged to have occurred on separate dates. Thus, these other acts of sexual penetration also could not be used to score points under OV 11 because they did not "arise out of the sentencing offense;" that is, there was no more than "an incidental connection" between them. *Johnson*, 474 Mich at 102, citing MCL 777.41(2)(a). Accordingly, the trial court erred by scoring OV 11 at 25 points.

However, the trial court's scoring of OV 11 at 25 was ultimately harmless. When scoring OV 11, the trial court removed the score of 25 points for OV 13 suggested in defendant's presentence information report. OV 13 allows the scoring of 25 points when a defendant's "offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c). Outside of the act of penetration for which defendant was convicted, complainant testified to at least two other acts of penetration that could have formed the basis of felony CSC III charges. Since crimes may be scored under OV 13 even if they did not result in conviction, MCL 777.43(2)(a), the trial court would not have erred by scoring OV 13 at 25 points. Accordingly, the trial court's error in scoring OV 11 at 25 points was harmless and does not, in itself, entitle defendant to resentencing.

Finally, defendant argues that the trial court erred by scoring 10 points under OV 19. OV 19 provides that 10 points may be scored where "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). The trial court's scoring of OV 19 was based on its conclusion that defendant committed perjury during his testimony. As defendant acknowledges, Michigan courts have held that perjury constitutes an

attempt to interfere with the administration of justice. See *People v Adams*, 430 Mich 679, 681-682; 425 NW2d 437 (1988); *People v Underwood*, 278 Mich App 334, 338; 750 NW2d 612 (2008). Accordingly, we must affirm the trial court's scoring of 10 points under OV 19.

Affirmed.

/s/ William B. Murphy
/s/ Douglas B. Shapiro
/s/ Michael J. Riordan