STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 25, 2006
v	No. 262102 Wayne Circuit Court
RICHARD RANDOLPH RHODEN, Defendant-Appellant.	LC No. 04-009515-01

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

PER CURIAM.

A jury convicted defendant of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), and one count of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). The trial court sentenced defendant to concurrent prison terms of 8 years and 3 months to 15 years each for the third-degree criminal sexual conduct convictions and 18 months to 2 years for the fourth-degree criminal sexual conduct conviction. Defendant appeals as of right. We affirm defendant's convictions and remand for entry of an amended judgment of sentence.

I

Defendant first argues that the trial court abused its discretion by admitting other acts evidence involving a prior sexual assault of a coworker. This Court reviews the admission of other acts evidence at trial for an abuse of discretion. *People v McGhee*, 268 Mich App 600, 609; 709 NW2d 595 (2005), lv pending. An abuse of discretion exists if an unprejudiced person, considering the facts on which the trial court relied, would conclude that there was no excuse for the ruling made. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Generally, a decision on a close evidentiary question cannot be an abuse of discretion. *Id.*

Whether other acts evidence is admissible under MRE 404(b)(1) depends on four factors. First, the evidence must be offered for a permissible purpose, i.e., one other than showing character or a propensity to commit the charged crime. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Second, the evidence must be relevant under MRE 402. *Id*. Third, unfair prejudice must not substantially outweigh the probative value of the evidence under MRE 403. *Id*. Fourth, the trial court, if requested, may provide a limiting instruction to the jury under MRE 105. *Id*.

Citing *People v Crawford*, 458 Mich 376, 387-388; 582 NW2d 785 (1998), defendant argues that the prosecutor failed to establish a noncharacter purpose for admitting the evidence and that the prosecutor merely "offered up" the reasoning of a common plan or scheme in an effort to admit this otherwise inadmissible evidence. We disagree.

The prosecutor sought to admit the evidence involving the coworker to show defendant's intent and to show a common scheme or plan. The trial court focused on the fact that defendant assaulted both the coworker and the victim at his home. The court did not find that defendant had a propensity to engage in assaultive conduct, but that defendant's plan or scheme in circumstances in which a female comes into his home is to take advantage of that female by virtue of her presence in his home. The court reasoned that defendant's use of his home setting to his advantage was a common circumstance between both assaults. In addition, alcohol was involved in both cases. The coworker testified that defendant was extremely drunk, and the present victim testified that defendant had been drinking alcohol around the time of the assault. Thus, both assaults had this factor in common. Although there were differences between the two assaults, the trial court's focus on the fact that both assaults occurred in defendant's home was valid and it cannot be said that there was no excuse for the ruling. *Aldrich, supra*. Moreover, a trial court's decision on a close evidentiary question cannot constitute an abuse of its discretion. *Id* at 113.

Further, the probative value of the evidence involving the coworker was not substantially outweighed by unfair prejudice. Unfair prejudice exists when the jury might give marginally relevant evidence undue or preemptive weight or when it would be inequitable to allow use of the evidence. *In re MU*, 264 Mich App 270, 285; 690 NW2d 495 (2004), *Allen v Owens-Corning Fiberglass Corp*, 225 Mich App 397, 404; 571 NW2d 530 (1997). The evidence involving the coworker did not unfairly prejudice defendant or tend to elicit undue or preemptive weight from the jury. By comparison, defendant's assault in the instant case was much worse than defendant's conduct involving the coworker. Moreover, the coworker was an adult, whereas the victim here was 15 years of age. Thus, we cannot conclude that the evidence involving the coworker so prejudiced the jury that it amounted to unfair prejudice. Accordingly, the evidence was properly admitted.

II

Defendant argues that the trial court erred by denying his motion to exclude the medical testimony of Dr. Horling or to adjourn trial. This Court reviews a trial court's decision to permit the prosecutor to add witnesses at trial for an abuse of discretion. *People v Callon*, 256 Mich App 312, 325-326; 662 NW2d 501 (2003). This Court likewise reviews a trial court's decision on a motion for a continuance or adjournment for an abuse of discretion. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003).

MCL 767.40a states, in relevant part:

> (3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

The underlying purpose of the statute is to provide notice to an accused of potential witnesses. *Callon, supra* at 327. A prosecutor's failure to follow this statute, however, does not necessarily warrant reversal. MCL 767.40a(4) grants a trial court discretion to permit the prosecution to amend its witness list as follows:

> The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

The trial court did not expressly make a finding of good cause before allowing the prosecutor to add Dr. Horling as a witness. The trial court did not abuse its discretion, however, because defendant was not unfairly prejudiced by Dr. Horling's testimony. Defendant argues that he could have obtained an expert to interpret and comment on Dr. Horling's findings had he been aware of the medical records and purported testimony sooner. But Dr. Horling's findings were inconclusive, at best. Dr. Horling found no physical evidence and testified that the victim's symptoms, including a reddish cervix, a scant white discharge, and tenderness to the right ovary, while consistent with a sexual assault, could also have been normal. The only portion of Dr. Horling's testimony that was damaging to defendant was her report that the victim had told her that defendant sexually assaulted her. Even if defendant had been provided an opportunity to obtain his own expert, that expert could not have offered an opinion regarding this testimony.

Moreover, defense counsel was provided an opportunity to speak with Dr. Horling concerning the substance of her testimony before she testified. In *People v Lino (After Remand)*, 213 Mich App 89, 92-93; 539 NW2d 545 (1995), overruled in part on other grounds *People v Carson*, 220 Mich App 662, 674-675; 560 NW2d 657 (1996), this Court held that the trial court did not abuse its discretion by permitting the late endorsement of a witness where the court ordered the prosecutor to make the witness available to defense counsel for an interview and to inform defense counsel of the substance of the witness's testimony. This Court stated that this remedy adequately protected the defendant's rights. *Id*. at 93. Here, the trial court's ruling that defense counsel be permitted to interview Dr. Horling before she testified adequately protected defendant's rights.

Defendant also argues that MCR 6.201 allowed the trial court to impose a variety of remedies for the prosecutor's failure to comply with discovery, including adjourning trial as defendant requested. As previously discussed, the trial court allowed defense counsel to question Dr. Horling before she testified. Because this remedy adequately protected defendant's rights and defendant was not prejudiced, the trial court did not abuse its discretion by declining to grant an adjournment.

III

Defendant contends that several of the trial court's evidentiary rulings were erroneous. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *Aldrich, supra* at 113.

Generally, all relevant evidence is admissible, except as otherwise provided by law, and evidence that is irrelevant is not admissible. MRE 402; *People v Fletcher*, 260 Mich App 531, 553; 679 NW2d 127 (2004). "Relevant evidence" is "evidence having any tendency to make the

existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Although relevant, evidence may be excluded 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 the needless presentation of cumulative evidence. MRE 403.

Defendant contends that the trial court erred by limiting his cross-examination of the victim. The trial court sustained a prosecution objection after defense counsel asked the victim whom she had been contacting in Scottsdale, Arizona. The trial court's ruling was not erroneous because the identity of the person was both irrelevant and cumulative. Defense counsel had already elicited from the victim that one of her best friends lived in Scottsdale, that she missed her friends in Arizona while she stayed with her father in Michigan, and that she frequently used defendant's computer and cell phone to communicate with them. Given this evidence, the specific identity of the person in Scottsdale was not relevant to whether the victim fabricated the assault in order to return home to Arizona.

Further, the trial court did not preclude defendant from pursuing his theory of defense. Even after the trial court sustained the prosecutor's objection, defense counsel questioned the victim regarding whether she preferred to stay in Arizona during the summer instead of visiting her father. In addition, the victim's father testified that his daughter frequently used defendant's computer to keep in touch with her friends because she missed them. Thus, defendant's theory of defense was evident throughout the trial and defense counsel was permitted to pursue the defense. The trial court did not abuse its discretion by excluding evidence of the specific identity of the person who lived in Scottsdale.

Defendant also argues that the trial court erred by allowing the victim's father to testify that the victim had called him and said "Rick raped me." The trial court initially admitted the statement as an excited utterance and then as a prior consistent statement. A hearsay statement is admissible under MRE 803(2) if it relates to a startling event or condition and was made while the declarant was under the stress of excitement caused by the event or condition. MRE 803(2); *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003). Under this exception to the rule against hearsay, the pertinent inquiry is not whether the declarant had time to fabricate the statement, but whether she was so overwhelmed that she lacked the capacity to fabricate. *Id.* at 659-660.

The victim's statement was not admissible as an excited utterance. The victim made the statement at least four days after the assault occurred, and the evidence did not suggest that she was so overwhelmed that she lacked the capacity to fabricate. After her first sexual encounter with defendant, she "cuddled" with him and smoked a cigarette with him. After the second encounter, she continued to stay in defendant's home after he fell asleep on the couch, and she fell asleep on the floor next to the couch. Even if the assaults constituted a startling event, the evidence did not indicate that the victim was still under the stress of excitement caused by the event when she made the statement at least four days later. MRE 803(2); *McLaughlin, supra* at 659. The victim's actions following the assaults simply do not indicate that she was so overwhelmed that she lacked the capacity to fabricate.

Moreover, the statement was not admissible under MRE 801(d)(1)(B) as a prior consistent statement. This rule provides that a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. [*People v McCray*, 245 Mich App 631, 641-642; 630 NW2d 633 (2001), citing MRE 801(d)(1)(B).]

But a consistent statement made after the motive to fabricate arose does not fall within this hearsay exclusion. *Id*. at 642; *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

Here, because the victim's alleged motive to fabricate, i.e., returning to Arizona to be with her friends, arose before the victim made the statement to her father, MRE 801(d)(1)(B) does not apply. The prosecutor argues that the evidence was not introduced to rebut a charge of recent fabrication, but rather, to rebut a charge of improper motive. Therefore, the prosecutor contends that the prior consistent statement was not required to be made before the alleged motive to fabricate arose. The prosecutor fails to cite any authority for this proposition. In any event, the prosecutor's argument is a distinction without a difference in the context of this case. Whether deemed "recent fabrication" or "improper motive," defendant's theory of defense was that the victim fabricated the assaults in order to quickly return to Arizona to be with her friends. Because the victim made the statement after this alleged motive to fabricate arose, the statement does not fall within the parameters of MRE 801(d)(1)(B). *McCray, supra* at 642; *Rodriquez, supra* at 332.

Notwithstanding the above, the statement was properly admitted because it did not constitute hearsay. Hearsay is "a statement offered by someone other than the declarant to prove the truth of the matter asserted . . . ." *McGhee, supra* at 639. A statement that does not constitute hearsay may be properly admitted. *Id*. In this case, the prosecutor questioned the victim's father as follows:

> *Q*. Had you had any contact with Mr. Rhoden since August 4th, since that week?
>
> *A*. That Wednesday I got a call from [the victim] and she says, Dad, Rick raped me. I immediately –

When examined in context, the statement was not being offered for the truth of the matter asserted, i.e., to prove that defendant sexually assaulted the victim. Rather, the victim's father was attempting to explain how the allegations affected his relationship with defendant. Because the statement was not offered for its truth, it did not constitute hearsay and was admissible. To the extent that the trial court allowed the evidence on improper bases, this Court will not reverse a correct decision reached for the wrong reason. *In re People v Jory*, 443 Mich 403, 425; 505 NW2d 228 (1993).

Finally, defendant argues that the trial court erred by allowing Roger Gove to testify regarding defendant's conduct toward the coworker. Defendant argues that Gove's testimony was not admissible under MRE 404(b). Because defense counsel suggested that the coworker's testimony was untruthful, Gove's corroborating testimony was relevant, was not needlessly cumulative, and, like the coworker's testimony, tended to show defendant's scheme or plan as

previously discussed. Further, the probative value of Gove's testimony was not outweighed by unfair prejudice. Indeed, if the coworker's testimony was not unfairly prejudicial, then Gove's testimony could not have logically been unfairly prejudicial. Accordingly, the trial court did not abuse its discretion by admitting Gove's testimony at trial.

Although defendant argues that the cumulative effect of these alleged evidentiary errors deprived him of a fair trial, no cumulative effects exists in this case because no individual error occurred.

IV

Defendant asserts that the trial court's deadlocked jury instruction coerced the jury into reaching a verdict. We disagree. Because defendant did not preserve this issue for appellate review this Court reviews this issue only for plain error affecting defendant's substantial rights. *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

Claims of coerced verdicts are reviewed case by case, considering the facts and circumstances of every case, including the language that the trial court used. *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992). When assessing jury instructions, coercion is a relevant inquiry. *People v Hardin*, 421 Mich 296, 313, 316; 365 NW2d 101 (1984). "A jury verdict may be coerced if the jury is required to deliberate until an unreasonable hour." *People v Cadle*, 204 Mich App 646, 658; 516 NW2d 520 (1994), overruled in part on other grounds *People v Perry*, 460 Mich 55; 594 NW2d 477 (1999). Further, a jury may not be required to deliberate for unreasonable periods. *People v Cook*, 130 Mich App 203, 206; 342 NW2d 628 (1983).

The jury began its deliberations at approximately 2:36 p.m. on Thursday, March 10, 2005. The jury resumed deliberations on Friday morning. Before the lunch break on Friday the jury sent a note to the trial court stating that it was deadlocked. The trial court stated that it would not excuse the jury from further deliberations and ordered the jurors to continue deliberating after the lunch break. After excusing the jurors from the courtroom, the judge called them back into the courtroom and gave the following instruction that defendant now challenges:

> I didn't mention this, after you come back from your lunch break, you'll continue with the deliberation process when all of you are present. If you have not reached a decision by the end of the day, our quitting time, 4, 4:15, you will be excused from the jury room to return Monday morning at 9:00 to the jury room.

The trial court recessed for lunch at 1:32 p.m., and the jury rendered its verdict at approximately 4:00 p.m.

Here, the jury was not required to deliberate for an unreasonable amount of time or for unreasonable periods. Rather, on the first full day of deliberations, the trial court merely instructed the jury before its lunch break that if it did not reach a verdict by the end of the day it would be excused and would report back the following Monday morning at 9:00 a.m. to resume deliberations. The instruction was not coercive and merely indicated that the jurors would have to return the following day. Nothing about the instruction suggested that the jurors were required

to reach a verdict by the end of the day. See *Vettese, supra* at 244-245. The trial court's instruction was not coercive and did not constitute plain error.

V

Defendant challenges the trial court's scoring of offense variables 3, 4, 11, and 13 of the sentencing guidelines. A sentencing court has discretion in determining the number of points to be assessed for each variable, provided that record evidence adequately supports a given score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). "Scoring decisions for which there is any evidence in support will be upheld." *Id.*

Defendant argues that the trial court erred by scoring OV 3 at five points. Five points may be scored under OV 3 if "[b]odily injury not requiring medical treatment occurred to a victim." MCL 777.33(1)(e). The trial court based this score on Dr. Horling's testimony that the victim suffered bruising. The trial court was apparently referring to the tenderness exhibited during Dr. Horling's examination. Dr. Horling testified that the victim complained of discomfort during the examination and exhibited tenderness in the area of her right ovary. Although Dr. Horling testified that the discomfort could have been the victim's reaction to the examination itself, scoring decisions that are supported by *any* evidence must be upheld. *Endres, supra* at 417. Moreover, the victim testified that her vaginal area was dry and itchy following defendant's assault and that she applied an over-the-counter medication to the area. This condition also supported the trial court's score of OV 3.

Defendant also contends that the trial court erred by scoring OV 4 at ten points. Ten points should be scored under OV 4 if "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). And ten points should be scored "if the serious psychological injury may require professional treatment. In making this determination, the fact that treatment has not been sought is not conclusive." MCL 777.34(2). In scoring OV 4 the trial court relied on the victim's impact statement wherein the victim indicated that she was psychologically injured as a result of the assault. The victim denied being in need of counseling or therapy, but stated that she is shocked and devastated and feels disgusted by the assault. She indicated that she has had many problems with relationships as a result of defendant's conduct and expressed a feeling that a part of her youth had been taken away from her and would never return. Although the victim did not express a need for therapy at the time of her statement, her statement supports a finding that she suffered serious psychological injury that "may" require professional counseling. Indeed, the prosecutor stated at sentencing that the victim and her mother had since made efforts to get into a counseling program.

Defendant also challenges the trial court's scoring of 50 points under OV 11. OV 11 should be scored at 50 points if "[t]wo or more criminal sexual penetrations occurred." MCL 777.41(1)(a). MCL 777.41(2) directs the scoring of OV 11 as follows:

> (a) Score all sexual penetrations of the victim by the offender arising out of the sentencing offense.
>
> (b) Multiple sexual penetrations of the victim by the offender extending beyond the sentencing offense may be scored in offense variables 12 or 13.

> (c) Do not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.

In *People v Johnson*, 474 Mich 96; 712 NW2d 703 (2006) the Court stated with regard to OV 11:

> [W]e have previously defined "arising out of" to suggest a causal connection between two events of a sort that is more than incidental. We continue to believe that this sets forth the most reasonable definition of "arising out of." Something that "aris[es] out of," or springs from or results from something else, has a connective relationship, a cause and effect relationship, of more than an incidental sort with the event out of which it has arisen. For present purposes, this requires that there be such a relationship between the penetrations at issue and the sentencing offenses. [*Id.* (second set of brackets in original).]

The Court reasoned that there was no causal relationship because the two penetrations at issue occurred on different dates and no evidence suggested that the penetrations "resulted or sprang" from one another. *Id*. The Court stated that no evidence existed that "the first sexual penetration arose out of the second or that the second penetration arose out of the first penetration." Rather, the relationship between the two penetrations was merely incidental. *Id*.

Here, however, the penetrations did arise out of each other and were causally connected. The penetrations occurred early on the same morning, within a few hours of each other. Defendant digitally penetrated the victim before removing her clothing and twice engaging in penile penetration. The victim did not put her pants back on after the first penile penetration and before the second penile penetration. Under these circumstances, the penetrations were causally connected and "resulted" or "sprang" from each other. Because defendant was convicted of three counts involving sexual penetration, and all the penetrations arose out of each other, he was properly assessed 50 points under OV 11.

Defendant further argues that the trial court erred by scoring OV 13 at 25 points. MCL 777.43(2)(c) directs, "[e]xcept for offenses related to membership in an organized criminal group, do not score conduct scored in offense variable 11 or 12." The prosecutor concedes that OV 13 should have been scored at zero points because defendant was properly scored 50 points under OV 11. Applying the plain language of MCL 777.43(2)(c), defendant should not have been assessed additional points under OV 13. If OV 13 is correctly scored at zero, however, defendant's total OV score will be 75 points. His OV level will remain at VI and the sentencing guidelines range will remain at 99 to 160 months. The scoring error did not affect defendant's sentencing guidelines range and he is not entitled to resentencing. Because the sentence is within the appropriate guidelines range, this Court must affirm defendant's sentence. MCL 769.34(10); *Endres, supra* at 417.

Although not an issue raised by defendant, we note that defendant's sentence of eighteen months to two years for his fourth-degree criminal sexual conduct conviction violates MCL 769.34(2)(b), which prohibits a court from imposing a minimum sentence that exceeds 2/3 of the statutory maximum sentence. Because the statutory maximum sentence for fourth-degree criminal sexual conduct is two years, MCL 750.520e(2), the longest minimum sentence defendant could permissibly receive for this offense is 16 months. The remedy for this violation

is to reduce the minimum sentence to two-thirds the maximum. *People v Thomas*, 447 Mich App 390, 392-394; 523 NW2d 215 (1994). Accordingly, pursuant to MCR 7.216(A)(7), we remand this case for entry of an amended judgment of sentence reflecting a 16-month minimum sentence for defendant's fourth-degree criminal sexual conduct conviction.

Affirmed in part and remanded for entry of an amended judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad