

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN MICHAEL CARTER,

Defendant-Appellant.

UNPUBLISHED

July 3, 2007

No. 270195

Wayne Circuit Court

LC No. 05-011783-01

Before: Servitto, P.J., and Jansen and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of fourth-degree criminal sexual conduct, (CSC IV), MCL 750.520e(1)(b) (force or coercion used to accomplish sexual contact). Defendant was sentenced to 24 months' probation. Of this time, defendant was ordered to serve 12 months in jail. We affirm defendant's conviction, but we remand this case for the trial court to consider defendant's attorney fees in light of his current and future financial circumstances and for resentencing.

I. FACTS

This case arises out of defendant's assault of a young woman at a Church's Chicken in Southfield. On November 7, 2005, around 2:30 p.m., the victim had just bought her lunch, and as she was leaving the restaurant, defendant, whom she had never seen before, met her in the doorway and grabbed her buttocks. The victim asked defendant what he was doing, and defendant responded, "You know you like it. You know you like it." The victim told defendant not to touch her, and she tried to move away from the door because defendant was trying to grab her a second time. After a few minutes, defendant left. The victim then reported the incident to a police officer, who was parked outside of the restaurant, and defendant was arrested.

At trial, the prosecution presented testimony from a victim from another case, who had been similarly assaulted by defendant at a gas station. The jury convicted the defendant of CSC IV, and defendant now appeals.

II. MRE 404(b)

Defendant first claims that the admission of evidence of his interaction with a different victim from another case violated MRE 404(b). We disagree.

A. Standard of Review

This Court reviews a trial court's decision to admit evidence under MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

B. Analysis

Generally, evidence is admissible if it is relevant and inadmissible if it is not. MRE 402; *People v Taylor*, 252 Mich App 519, 521; 652 NW2d 526 (2002). Evidence is relevant if it has any tendency to make a fact of consequence more or less probable than it would be without the evidence. MRE 401; *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002).

Regarding the admissibility of wrongful or criminal acts, MRE 404(b)(1) provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

For evidence of wrongful or criminal acts to be admissible under MRE 404(b), it must satisfy three requirements of the *VanderVliet* test: (1) the evidence must be offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, (2) the evidence must be relevant to an issue or fact of consequence at trial, and (3) the evidence must be sufficiently probative to outweigh the danger of unfair prejudice pursuant to MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended by 445 Mich 1205 (1994).

The trial court did not abuse its discretion in admitting evidence of defendant's interaction with a different victim.¹ First, the evidence was offered for the proper purpose of showing defendant's intent of sexual gratification and absence of mistake. Specifically, in both instances of sexual assault, defendant met an unaccompanied woman with whom he was not acquainted in a public place and "grabbed" the woman's buttocks as she was walking past him. Further, after grabbing each woman, defendant directed a sexual comment to her. From these similarities, it could be inferred that defendant did not mistakenly or even accidentally grab the victim when walking past her into the restaurant and that he did so with the intent of achieving sexual gratification. Thus, the evidence was relevant and offered for a proper purpose.

Second, given that defendant denied the charges against him, this evidence was relevant to show that defendant possessed the requisite intent to sustain a CSC IV conviction.² Third,

¹ Defendant had met the other victim at a gas station where he grabbed her buttocks and breasts and made sexually explicit comments to her when she rejected his advances.

² "A defendant can be found guilty of criminal sexual conduct in the fourth degree if he engages
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although this evidence was prejudicial, it was not unfairly so. Indeed, the similarities between defendant's interaction with both victims involved details that were not sexually explicit or gruesome. The fact that evidence may be damaging does not make it unfairly prejudicial. *People v Mills*, 450 Mich 61, 74-76; 537 NW2d 909, modified by 450 Mich 1212 (1995). Further, the trial court provided a cautionary instruction that the jury was not to use the other victim's testimony as substantive character evidence, thereby curing any error that could have resulted from its prejudicial nature. See *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002) (an appropriate limiting instruction may protect defendant's right to a fair trial).

Although defendant claims that these two instances were sufficiently dissimilar to render evidence of defendant's encounter with the other victim inadmissible, any differences were minor. That defendant met one woman during the day at a restaurant and another woman at night at a gas station is of little consequence. Moreover, even though defendant continued to abuse the other victim after initially grabbing her, but he only grabbed the victim in this case once, this difference is attributable to the different reactions of both victims to defendant, and it in no way negates the highly relevant inferences that defendant's actions were not accidental or mistaken and were done with the intention of achieving sexual gratification. Indeed, defendant attempted to grab the victim in this case a second time. Thus, when any dissimilarity is considered in light of the striking similarities of these situations as noted above, the trial court's decision to admit this evidence cannot be considered an abuse of discretion.

Defendant claims that the prosecution failed to provide notice of its intent to introduce evidence under MRE 404(b). This argument fails. Under MRE 402(b)(2), the prosecution is required to give defendant notice before trial, or with good cause shown, during trial, of its intent to present evidence of other bad acts. *People v Hawkins*, 245 Mich App 439, 453; 628 NW2d 105 (2001). At the pretrial conference of January 13, 2006, the prosecutor made a motion to introduce evidence of defendant's sexual assault of the other victim for the purpose of showing sexual gratification (i.e., intent) and absence of mistake. Therefore, the prosecutor satisfied the notice requirement.

III. MOTIONS FOR NEW TRIAL & RECONSIDERATION

Defendant next argues that the trial court improperly denied his motions for a new trial and for reconsideration. We disagree.

Although a trial court's ruling on a defendant's motions for a new trial and reconsideration is generally reviewed for an abuse of discretion, *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003), defendant has completely failed to provide any arguments in

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in sexual contact with another person and force or coercion is used to accomplish a sexual contact." *People v Lasky*, 157 Mich App 265, 271; 403 NW2d 117 (1987); see also MCL 750.520e(1)(b). Sexual contact is defined 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 . . .*" MCL 750.520a(o); see also *People v Russell*, 266 Mich App 307, 311; 703 NW2d 107 (2005) (emphasis supplied).

support of his position or even to cite to any authority in support of his claim. Therefore, defendant has abandoned this issue on appeal. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

IV. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence to support his convictions. Again, we disagree.

A. Standard of Review

In determining the sufficiency of the evidence, this Court reviews the evidence de novo in the light most favorable to the prosecution. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). The Court does not consider whether any evidence existed that could support a conviction, but rather, must determine whether a rational trier of fact could find that the evidence proved the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended by 441 Mich 1201 (1992).

In determining the sufficiency of the evidence, it is the role of the trier of fact, rather than this Court, to draw reasonable inferences from the evidence and accord the proper weight to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Issues of credibility and intent are also left to the trier of fact rather than this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). In addition, this Court must resolve all conflicts of evidence in the favor of the prosecution, who need not negate every reasonable theory of innocence, but must only prove its case beyond a reasonable doubt despite any contradictory evidence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

B. Analysis

Due process requires the evidence to show guilt beyond a reasonable doubt to sustain a conviction. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). “A defendant can be found guilty of criminal sexual conduct in the fourth degree if he engages in sexual contact with another person and force or coercion is used to accomplish a sexual contact.” *People v Lasky*, 157 Mich App 265, 271; 403 NW2d 117 (1987); see also MCL 750.520e(1)(b). Sexual contact is defined 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” MCL 750.520a(o); *People v Russell*, 266 Mich App 307, 311; 703 NW2d 107 (2005). Intimate parts include the buttocks. MCL 750.520a(d). The element of force or coercion may be satisfied “when the actor overcomes the victim through the actual application of physical force or violence,” MCL 750.520e(1)(b)(i), or “when the actor achieves the sexual contact through concealment or by the element of surprise,” MCL 750.520e(1)(b)(v).

Here, as the victim in this case was leaving the restaurant, defendant grabbed her buttocks in a “hard” manner. The victim immediately asked defendant, “What are you doing?” Defendant replied, “You know you like it,” and attempted to grab the victim a second time. Given that “[c]ircumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime,” *People v Carines*, 460 Mich 750, 757;

597 NW2d 130 (1999), it is reasonable to infer that defendant intentionally touched the victim's intimate parts and that his action surprised her. Moreover, in light of defendant's comment to the victim, which was of a sexual nature, it is reasonable to infer that defendant touched the victim for the purpose of sexual arousal or gratification. Buttrressing the inference that defendant's actions were not mistaken and were done for the purpose of sexual gratification is defendant's similar encounter with the victim from a different case. Thus, sufficient evidence was presented to satisfy the elements of CSC IV beyond a reasonable doubt.

V. GREAT WEIGHT OF THE EVIDENCE

Defendant next argues that the verdict was against the great weight of the evidence. We disagree.

A. Standard of Review

The Court reviews the unpreserved issue of whether the verdict was against the great weight of the evidence for plain error affecting defendant's substantial rights. *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003), citing *Carines*, *supra* at 763-764.

B. Analysis

To determine whether the verdict is against the great weight of the evidence, this Court reviews the entire body of proofs. *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), overruled in part on other grounds *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998). When the evidence conflicts, the Court must leave the resolution of credibility issues to the jury, even if the testimony is impeached to a certain extent, *Lemmon*, *supra* at 642-643, "unless it can be said that directly contradictory testimony was so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or [the testimony] contradicted indisputable physical facts or defied physical realities" *Id.* at 645-646, quoting *Sloan v Kramer-Orloff Co*, 371 Mich 403, 410, 412; 124 NW2d 255 (1963).

Here, the evidence presented against defendant was consistent and incriminating. Further, defendant presented no evidence contradicting the evidence presented by the prosecution. Notwithstanding, none of the testimony in this case contradicted indisputable physical facts or defied physical realities. Thus, defendant's argument fails.

Defendant claims that the fact that no one came to the victim's aid in the restaurant is proof that the victim's version of events was false. However, the Michigan criminal sexual conduct statute provides that "the testimony of a victim need not be corroborated in prosecutions under sections [750.]520b to 520g." MCL 750.520h; see also *Lemmon*, *supra* at 632 n 6. Further, it is the role of the jury, rather than this Court, to assess witness credibility. *Wolfe*, *supra* at 514-515. Notwithstanding, that no one came to the victim's aid does not render the victim's version of events untrue. Indeed, her testimony neither contradicted indisputable physical facts nor defied physical realities. As noted above, defendant did not present a shred of evidence contradicting the victim's claim. Thus, the verdict was not against the great weight of the evidence.

VI. JAIL CREDIT

Defendant next argues that the trial court erred in failing to award jail credit against his current sentence.

A. Standard of Review

This Court reviews an unpreserved challenge to the validity of a sentence for plain error. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002).

B. Analysis

“MCL 769.11b provides that if a sentencing court has before it a convict who has served time in jail before sentencing because he or she could not afford or was denied bond, the court must credit that person with time served.” *People v Stead*, 270 Mich App 550, 551; 716 NW2d 324 (2006). However, “[w]hen a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense.” *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Rather, the jail credit is to be applied exclusively to the offense from which the parole was granted. *Stead, supra* at 552, citing *Seiders, supra* at 705.

Before sentencing, defendant was in jail for 172 days. At the time defendant was arrested for the instant offense, he was under parole supervision by the Michigan Department of Corrections (MDOC) for a prior offense. Therefore, defendant was being held on a parole detainer until he was convicted of the instant offense. *Seiders, supra* at 705. Consequently, defendant was not entitled to credit for time served in jail on the sentence for the instant offense. *Id.*

Defendant claims that it is erroneous to assume that the MDOC will award jail credit to the sentence of his paroled offense. However, defendant is merely speculating that the MDOC will not follow the law and has not provided any evidence to support his assumption. Defendant also claims that due process entitles him to have jail credit awarded against his sentence for the instant offense. However, merely framing an issue as constitutional does not create such an issue. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994). Moreover, defendant not only fails to cite any authority supporting this blanket assertion, but he also fails to explain the nature of this claim. Therefore, defendant has abandoned this issue on appeal. *Kevorkian, supra* at 389.

VII. DETERMINATION OF DEFENDANT’S FINANCIAL ABILITY

Defendant next argues that the trial court erred in imposing fines, costs, and attorney fees without inquiring into defendant’s ability to pay. We agree with defendant to the extent this argument pertains to attorney fees.

A. Standard of Review

This Court reviews this unpreserved issue for plain error affecting substantial rights. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004). However, because defendant failed to raise this issue below, it is waived as it pertains to fines and costs. See *People v Music*, 428 Mich 356, 363; 408 NW2d 795 (1987) (a defendant who fails to timely challenge costs

reasonably assessed by the trial court waives his right to appeal the assessment). Defendant was ordered to pay \$730 in attorney fees. Regarding the assessment of attorney fees, a court must indicate that, in assessing attorney fees, it considered defendant's ability to pay. *Dunbar, supra* at 254-255.

B. Analysis

Defendant failed to raise the issue of his ability to pay the assessed fees and costs at sentencing. Therefore, the court was not required to hold a hearing. See *Music, supra* at 361-362. However, in assessing attorney fees to defendant, the court failed to indicate whether it considered defendant's financial circumstances. Therefore, we remand this case for the trial court to consider these assessments in light of defendant's current and future financial circumstances. *Dunbar, supra* at 255.

VIII. SENTENCING

Defendant next claims that the trial court erroneously sentenced him to 12 months' in jail.

A. Standard of Review

Although this issue is appealable because defendant's sentence is outside the appropriate guidelines range, this Court reviews for plain error affecting substantial rights because defendant failed to raise this issue below. *People v Kimble*, 470 Mich 305, 310-312; 684 NW2d 669 (2004).

B. Analysis

MCL 769.34(4)(a) provides in part:

If the upper limit of the recommended minimum sentence range for a defendant determined under the sentencing guidelines set forth in [MCL 777.1 *et seq.*] is 18 months or less, the court shall impose an intermediate sanction unless the court states on the record a substantial and compelling reason to sentence the individual to the jurisdiction of the department of corrections. An intermediate sanction may include a jail term that does not exceed the upper limit of the recommended minimum sentence range or 12 months, whichever is less.

Defendant's sentencing guidelines range was 0 to 11 months, thereby placing him in an intermediate sanction cell. Absent a substantial and compelling reason, the maximum jail term the trial court could impose was 11 months. However, the court sentenced defendant to 12 months in jail and provided no reasons for its departure. Therefore, this sentence was erroneous and this case should be remanded for resentencing.³

³ We note the prosecutor's argument that even if trial court failed to articulate substantial and compelling reasons for its departure from the guidelines, this Court should affirm defendant's sentence because, as a second habitual offender, MCL 769.10, the trial court had the authority to
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IX. FAIR TRIAL

Defendant next argues that he was denied a fair trial due to the miscarriage of justice that resulted from the state trying the instant case before trying the case against him pertaining to his interaction with the other victim.⁴ We disagree.

A. Standard of Review

Defendant failed to raise this issue below, therefore, we review for plain error affecting substantial rights. *Carines, supra* at 763-764.

B. Analysis

MCL 769.26 provides:

No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.

At the pretrial conference on March 3, 2006, the trial court scheduled this case for trial on April 11, 2006, and scheduled the case pertaining to the charges against defendant concerning his interaction with the other victim for trial on April 5, 2006. However, on April 5, 2006, the trial for the instant case commenced. There is no reference in the lower court record regarding the rescheduling of these trials. Notwithstanding, both trials were scheduled less than one week apart. In addition, the evidence to be presented at both trials was substantially similar. Indeed, both victims were to offer testimony describing defendant's sexual assault of them at both trials. In light of this, it can hardly be said that trying the instant case first amounted to a miscarriage of justice.

Defendant claims that changing the order of the trials amounted to a miscarriage of justice because defense counsel was unprepared for this trial. Defendant's argument is overly broad. Specifically, after voir dire, defense counsel indicated to the court that he did not have notice of the prosecution's intent to introduce evidence of other acts under MRE 404(b) in the

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sentence defendant to an even lengthier sentence for his conviction. However, from our review of the record, it appears that the trial court never determined that defendant was an habitual offender because it was under the mistaken impression that the statute did not apply to defendant's misdemeanor charge. However, this Court has held to the contrary. *People v McGill*, 131 Mich App 465, 478; 346 NW2d 572 (1984) (concluding "that the offense of criminal sexual conduct in the fourth degree is a felony for the purposes of the habitual offender statutes despite its express designation as a misdemeanor."). Therefore, the trial court may also wish to consider this issue at resentencing.

⁴ Defendant was originally charged with CSC IV and assault and battery, MCL 750.81, as a result of his interaction with the other victim.

instant case and, that as a result, he was unprepared to address this evidence. At the outset, it should be noted that the attorney who represented defendant at trial was not defendant's original attorney for this case. Notwithstanding, on January 13, 2006, the prosecution provided notice of its intent to introduce evidence of other acts under MRE 404(b) in both the instant case and the defendant's case involving the other victim. Thus, defense counsel's claim that the prosecution did not provide notice of its intent to introduce this evidence was baseless.

Regardless, there was no miscarriage of justice. Indeed, defendant's trial counsel in this case was also defendant's trial counsel in defendant's case involving the other victim. The other acts evidence the prosecutor introduced in this case was evidence of defendant's interaction with the other victim – the very same evidence supporting the charges against defendant in the case involving the other victim. Thus, given that the case involving the other victim was originally scheduled for trial on April 5, 2006 (the date the instant case was actually tried), it cannot be said that defense counsel was unprepared to address this evidence. Therefore, defendant's claim fails. Alternatively, defendant has failed to show that the timing of his trial affected his substantial rights given the incriminating evidence presented against him at trial.

X. INFORMATION TO JURY VENIRE

Defendant next argues that the trial court should have declared a mistrial for reading the wrong information to the jury venire. In making this claim, defendant is essentially arguing that he was denied a fair trial because this reading tainted his jury array. However, a defendant waives his right to challenge a jury array if he indicates his satisfaction with an impaneled jury after voir dire. *People v Hubbard (After Remand)*, 217 Mich App 459, 466-467; 552 NW2d 493 (1996). Here, defendant indicated his satisfaction with his impaneled jury after voir dire. Therefore, he was waived this claim on appeal.

XII. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also claims that defense counsel's failure to object to the reading of the wrong information denied him the effective assistance of counsel.

A. Standard of Review

Because this issue is unpreserved, this Court limits its review to mistakes apparent on the existing record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

B. Analysis

The United States and Michigan Constitutions guarantee a defendant the right to the effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20. "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To succeed in his claim that he was denied the effective assistance of counsel, "defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Arguably, defense counsel's failure to object constituted trial strategy. An objection to the reading of the wrong information after the trial court admitted its mistake would have drawn even more attention to defendant's interaction with the other victim – a fact that did not help defendant's case at trial. Further, given the uncontroverted evidence presented against defendant, the failure to object was not outcome determinative. Therefore, defendant's claim fails.

We affirm defendant's conviction, but remand for reconsideration of defendant's attorney fees in light of defendant's present and future ability to pay and for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ Kathleen Jansen

/s/ Bill Schuette