

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR GLEN CRON,

Defendant-Appellant.

UNPUBLISHED

March 22, 2007

No. 265576

Kent Circuit Court

LC No. 04-006801-FH

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age), and one count of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a) (victim between 13 and 16 years of age and actor is more than 5 years older than victim). Defendant was sentenced to 2 to 15 years’ imprisonment for his second-degree criminal sexual conduct conviction, and to 16 to 24 months’ imprisonment for his fourth-degree criminal sexual conduct conviction. Defendant now appeals as of right. We affirm.

These charges arise from defendant’s sexual molestation of two girls who were friends with his eleven-year-old daughter. The girls alleged that defendant sexually touched each of them during separate sleepovers at defendant’s home. The first victim testified that defendant touched her on two occasions, and the second victim testified that defendant touched her once. Defendant subsequently confessed to police that the girls’ accusations of inappropriate touching were true, but he denied penetrating either victim.

Defendant claims that the trial court erred by denying defendant’s pretrial motion to suppress his confession. We disagree. We review de novo the ultimate decision whether to suppress a confession, but we review for clear error the trial court’s underlying factual findings. *People v Walters*, 266 Mich App 341, 352-353; 700 NW2d 424 (2005). We also defer to the trial court’s assessment of the weight of the evidence and credibility of the witnesses. *Id.* at 353.

Defendant first claims that his statements were obtained in violation of *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). However, “*Miranda* warnings are necessary only when the accused is interrogated while in custody, not simply when he is the focus of an investigation.” *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). Whether the defendant is in custody for purposes of *Miranda* is determined by considering the

totality of the circumstances and asking whether a reasonable person in the defendant's position would feel free to leave. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). This is an objective determination that does not depend on the subjective view of the police officer or the defendant. *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999).

Here, defendant voluntarily drove himself to the police station. As indicated in a recording of the interview, the interviewing detective specifically told defendant that he was not under arrest and that he was free to leave at any time. In addition, when defendant declared his intention to leave, the detective replied, "Well I told you [that you could] get up and leave at any time." At that point a Child Protective Services investigator, who collaborated with the detective, told defendant that she still needed to talk to him about his CPS matter. The detective stated, "you still have to talk to her . . . but I won't talk to ya." Defendant acknowledged that the detective did not follow him into the hallway with the investigator and did not speak to defendant again until he returned to the interview room. Although defendant claimed that the investigator took his parking slip from his hand, he acknowledged that she explained that she was going to get the slip validated. The evidence available at the *Walker*¹ hearing suggests that the trial court correctly concluded that a reasonable person in defendant's position would have felt free to leave the police interview, and defendant in fact admitted that he was about to leave the station house when the CPS investigator followed him and threatened him. Under the circumstances, the trial court correctly concluded that defendant was not in custody.

However, defendant also claims that his confession was not voluntary because the investigator threatened to place his children in the custody of the foster care system unless he confessed to assaulting the victims. Defendant explained that the investigator persuaded him to confess in exchange for her promise to place his children in the custody of their maternal grandmother. "The test of voluntariness is whether, considering the totality of all the surrounding circumstances, the confession is the product of an essentially free and unconstrained choice by its maker, or whether the accused's will has been overborne and his capacity for self-determination critically impaired." *People v Givans*, 227 Mich App 113, 121; 575 NW2d 84 (1997).

Threatening to remove a defendant's child from custody for failure to cooperate amounts to psychological coercion that may negate the voluntariness of a confession. See *Lynnum v Illinois*, 372 US 528, 534; 83 S Ct 917; 9 L Ed 2d 922 (1963); *People v Richter*, 54 Mich App 598, 601-603; 221 NW2d 429 (1974). However, before we may consider the influence that a promise had on a defendant's will, we must first determine whether such a promise was actually made. *People v Conte*, 421 Mich 704, 739; 365 NW2d 648 (1984). We concur with the trial court that the recorded portions of defendant's confession, along with the investigator's testimony, suggest that no such promise was made. The trial court was called upon to resolve a credibility contest between defendant and the investigator regarding whether the alleged threat occurred while the individuals were alone in the hallway for approximately two minutes. Questions regarding the credibility of witnesses are for the trier of fact and should not be disturbed by this Court. *People v Shipley*, 256 Mich App 367, 373; 662 NW2d 856 (2003).

¹ *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

Considering the totality of the circumstances surrounding defendant's statements and deferring to the trial court's superior ability to judge the credibility of the witnesses, *id.*, we agree with the trial court that defendant's confession was not coerced by any promise, but was voluntary.

Defendant next claims that the trial court miscalculated two offense variables, OV 4 and OV 10, at the time of sentencing. A sentencing court has discretion to determine the score for offense variables, and we will affirm a sentencing court's scoring if there is any evidence to support it. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002).

Here, the trial court properly assessed 10 points for OV 4 because the evidence reflected that the first victim required professional treatment for a serious psychological injury caused by defendant's abuse. MCL 777.34(1)(a). Although defendant argues that the first victim suffered from a variety of cognitive and emotional disorders at the time of her victimization, her mother testified that the victim experienced further psychological injury as a result of defendant's conduct. The victim's mother testified that the injury defendant caused had symptoms that far exceeded the normal symptoms of her diagnosed developmental disabilities. Furthermore, the presentence information report contains a victim impact statement written by the mother on her daughter's behalf, asserting that the daughter was hospitalized for psychiatric treatment as a result of the injury inflicted by defendant. Because the record reflects a severe psychological injury that required professional treatment, the evidence supports a score of ten for OV 4. *Hornsby*, *supra* at 468.

The trial court also correctly assessed ten points for OV 10 based on the exploitation of "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). The first victim was 12 years old when defendant sexually abused her. She testified that defendant woke her up in the middle of the night and demanded sex. She testified, "I was afraid so I did. There was nothing I could do at the time." Defendant was the only adult in the home and the victim was away from home in the middle of the night. Because defendant used the victim's youth, fear, and deference to him as an authority figure to exploit her, his actions clearly merited ten points under the statute. MCL 777.40(1)(b), (3)(d).

Defendant also claims that the scoring of OV 4 and OV 10 enhanced his sentence on the basis of facts that were not proved at trial, so the scoring of those offense variables violated his Sixth Amendment right to a jury trial under *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, Michigan's indeterminate sentencing scheme is not affected by the cited cases because the maximum amount of punishment permitted by the jury's verdict were the maximums set by the statutes, which were not exceeded here. See *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Defendant next argues that the trial court erred by denying his motion for mistrial. Specifically, defendant argues that the trial court erroneously admitted evidence that his father was previously convicted for criminal sexual conduct against defendant's daughter. We disagree. We review for an abuse of discretion a trial court's decision to deny a motion for mistrial. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995)

(citations omitted). The trial court is in the best position to judge the prejudice or evidentiary value of a given piece of evidence, so “a defendant must meet a high burden to show that a trial court abused its discretion by declining to exclude relevant evidence under MRE 403.” *People v Albers*, 258 Mich App 578, 588-589; 672 NW2d 336 (2003).

In this case, defendant claimed that the evidence of his father’s nolo contendere plea should have been excluded pursuant to MRE 403 because its relevance was substantially outweighed by its prejudicial effect. Defendant argued that the jury would infer from the evidence that he was more likely to violate children because his father was a convicted sex offender. However, the trial court found that the evidence was relevant and proper to rebut two claims made by defendant in his direct testimony. First, defendant introduced evidence that the investigator’s interview with his children on the same morning that he confessed resulted in one of his daughter’s claiming that defendant’s father touched her inappropriately. Defendant testified that he was upset and surprised by this revelation. Second, defendant premised his entire defense on the theory that he was a devoted father who had worked tirelessly to win his children back from the foster care system and that he was coerced into a false confession to ensure the well being of his children.

As an initial matter, a defendant may not introduce evidence at trial to sustain his defense theory and then argue on appeal that the evidence was prejudicial and denied him a fair trial. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Here, defendant initially introduced evidence that his father sexually abused his daughter in an apparent effort to strengthen his claim that he was emotionally distraught at the time he confessed. When defense counsel asked defendant about his encounter with the investigator on the morning of his police interview, defendant volunteered that the investigator told him that one of his daughters claimed that her grandfather sexually abused her. This testimony alone seriously undermines defendant’s argument that evidence of the grandfather’s conviction unduly prejudiced him. Under the circumstances, it was proper for the prosecutor to rebut defendant’s claim that he was in “disbelief” by proving defendant’s knowledge of his father’s previous conviction for violating the daughter.

Moreover, the evidence of the grandfather’s conviction undermined defendant’s testimony regarding his own willingness to do anything, including confess to a crime he did not commit, to protect his children. “Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant’s character is not as impeccable as is claimed.” *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). The prosecutor attacked defendant’s self-portrayal with various examples of defendant’s prior neglect of his children and several instances in which he put the well being of his children behind other priorities. Through the evidence of the grandfather’s conviction, the prosecutor demonstrated that defendant took his father’s side against his daughter’s claims and that he subsequently let his father see the children without supervision. Under the circumstances, defendant failed to meet his burden of proof that the relevant evidence was substantially more prejudicial than probative. *Albers, supra*. Because the admission of the conviction was not erroneous, we reject defendant’s argument regarding his motion for mistrial, as well as his related claims of ineffective assistance of counsel and prosecutorial misconduct. See *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

In his Standard 4 brief, defendant raises the issue that the trial court violated his due process right to have notice of the charges against him by granting the prosecution’s request for a

jury instruction on CSC 4. He erroneously argues that CSC 4 is not a lesser included offense of CSC 2 because force or coercion had to be proved to convict him of CSC 4. However, defendant was convicted of CSC 4 under a provision of MCL 750.520e that does not require evidence of force or coercion. Instead, the CSC 4 instruction, much like the originally charged CSC 2 instruction, was predicated on defendant's age (thirty-seven),² which was undisputedly more than five years older than his fourteen-year-old victim. MCL 750.520e(1)(a). Under the circumstances of this case, defendant has failed to demonstrate any error by the trial court or his defense counsel. See *People v Apgar*, 264 Mich App 321, 327; 690 NW2d 312 (2004), lv gtd 474 Mich 1099 (2006); see also *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Affirmed.

/s/ Peter D. O'Connell
/s/ Christopher M. Murray
/s/ Alton T. Davis

² We note that, even if defendant did not have notice of his own age, his date of birth was included on the information.