

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSSELL RICHARD STOKES,

Defendant-Appellant.

UNPUBLISHED

July 22, 2008

No. 276839

Kent Circuit Court

LC No. 06-002502-FH

Before: Murphy, P.J., and Bandstra and Beckering, JJ.

PER CURIAM.

Defendant Russell Richard Stokes appeals as of right his jury trial convictions for one count of assault with intent to commit sexual penetration, MCL 750.520g(1), and three counts of contributing to the delinquency of minors, MCL 750.145. Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to six months in jail and 60 months' probation for assault with intent to commit sexual penetration, and 90 days in jail for each count of contributing to the delinquency of minors. We affirm.

Defendant first argues that his conviction for assault with intent to commit criminal sexual conduct should be vacated because the admission of his inculpatory statement violated the corpus delicti rule. When reviewing a trial court's decision to admit evidence in satisfaction of the corpus delicti requirement, we review for an abuse of discretion. *People v King*, 271 Mich App 235, 239; 721 NW2d 271 (2006). "The corpus delicti rule requires that a preponderance of direct or circumstantial evidence, independent of a defendant's inculpatory statements, establish the occurrence of a specific injury and criminal agency as the source of that injury before such statements may be admitted as evidence." *Id.*, quoting *People v Burns*, 250 Mich App 436, 438; 647 NW2d 515 (2002); see also, *People v McMahan*, 451 Mich 543, 548-549; 548 NW2d 199 (1996); *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). The purpose of the corpus delicti rule is to prevent a defendant from being convicted of a crime that did not occur and to minimize the weight of a confession by requiring collateral evidence to support a conviction. *McMahan*, *supra* at 548-549; *Konrad*, *supra* at 269. Where a defendant makes admissions of fact that do not amount to confessions of guilt, those admissions may be admitted to prove the corpus delicti of the crime. *People v Rockwell*, 188 Mich App 405, 407; 470 NW2d 673 (1991), citing *People v Porter*, 269 Mich 284, 289-291; 257 NW 705 (1934).

To convict defendant as charged, the prosecution had to prove beyond a reasonable doubt that there was (1) an assault, (2) with the intent to commit criminal sexual penetration. MCL

750.520g; *People v Nickens*, 470 Mich 622, 627; 685 NW2d 657 (2004). An assault “is made out from either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery.” *People v Johnson*, 407 Mich 196, 210; 284 NW2d 718 (1979), quoting *People v Sanford*, 402 Mich 460, 479; 265 NW2d 1 (1978). A “battery is an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person.” *People v Reeves*, 458 Mich 236, 240 n 4; 580 NW2d 433 (1998).

Here, the prosecutor presented sufficient circumstantial evidence, apart from defendant’s statement, that defendant assaulted the victim with the intent to commit sexual penetration. At trial, the then 14 year-old victim testified that, after consuming alcohol provided by defendant, she passed out; she woke up “next to” defendant, on a bed inside defendant’s camper, wearing only her shirt and underwear. At that time, she perceived a sensation on the “inside . . . of [her] vaginal area.” The victim denied removing her own pants, and testified to being with defendant, drinking and smoking, before she passed out. Later, defendant drove the victim home; during the trip, he gave her a silver ring. Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). The circumstantial evidence supported that there was an assault on the victim and, at least, an attempt at sexual penetration.

Next, defendant argues that the trial court abused its discretion by excluding evidence, under the rape shield statute, MCL 750.520j, that would have impeached the credibility of the victim. We review a trial court’s decision to exclude such evidence for an abuse of discretion. *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). An abuse of discretion occurs where a trial court’s decision falls outside of the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A trial court’s decision on a close evidentiary question ordinarily will not be considered an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

During cross-examination of the victim, defendant’s trial counsel asked the victim whether she was familiar with the physical sensations associated with sexual penetration. The prosecutor objected, and the trial court sustained the objection because “the statute in question [MCL 750.520j] forecloses the inquiry.”

MCL 750.520j, provides:

(1) Evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct shall not be admitted under sections 520b to 520g [MCL 750.520b to MCL 750.520g] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim’s past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

The evidence at issue here does not fit within any exception to the rape shield statute. Notably, there was no allegation that the victim had engaged in past sexual conduct with defendant, and the proposed evidence would not have showed the source or origin of semen, pregnancy or disease. MCL 750.520j(1)(b). Instead, defendant's trial counsel appears to have been searching for an admission that the victim had previously been sexually active, which, while possibly relevant to explain her perception that the sensation she felt when she awoke in bed next to defendant was indicative of sexual contact, is precisely the type of evidence that the rape-shield statute seeks to prohibit. MCL 750.520j; *People v Adair*, 452 Mich 473, 480; 550 NW2d 505 (1996). It would only serve to cast a shadow on the victim's reputation, specifically demonstrating that she already had sexual experiences and knows what they feel like. The evidence was inadmissible. Further, the exclusion of this evidence did not implicate defendant's Sixth Amendment confrontation rights, because it did not pertain to past consensual sexual incidents between defendant and the victim, it did not demonstrate a possible source of bias on behalf of the victim, it was not probative of any ulterior motive on the part of the victim and it did not show that the victim previously made false accusations of rape. *Hackett, supra* at 348. Therefore, the trial court did not abuse its discretion by precluding the admission of the contested evidence.

Defendant next argues that the trial court committed plain error and violated defendant's Sixth Amendment right to confront the witnesses against him by precluding him from impeaching the victim with her prior writings, which were posted on a social networking website and which defendant asserted were inconsistent with the victim's trial testimony. Defendant failed to preserve this issue by arguing that the preclusion of the contested evidence violated his Constitutional right to confront the witnesses against him. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). Because defendant failed to preserve this issue, we review for plain error that affected defendant's substantial rights, i.e., there must be a showing that the error affected that outcome. *Carines, supra* at 763. Ultimately, reversal is only required when the defendant is actually innocent, or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 774.

The Confrontation Clause provides that, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. The Michigan Constitution also guarantees the same right. Const 1963, art 1, § 20. The Confrontation Clause, however, does not confer an unlimited right to admit all evidence a defendant requests. *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). A defendant must still comply with established rules of evidence and procedure, allowing the trial court to exclude irrelevant evidence. *Id.* Thus, the right to present a defense does not include the right to cross-examine witnesses on irrelevant issues. *Hackett, supra* at 344, quoting *People v Arenda*, 416 Mich 1, 8; 330 NW2d 814 (1982). Trial courts retain "wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Adamski, supra* at 138.

As a general rule, out-of-court statements offered for their truth are considered inadmissible hearsay and may not be admitted as substantive evidence. MRE 801(c); *People v Chavies*, 234 Mich App 274, 281; 593 NW2d 655 (1999), overruled in part on other grounds *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006). However, a witness's prior inconsistent statement may be admitted to establish the truth of the matter asserted if the witness is available for cross-examination at trial regarding the statement and if that prior statement "was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition" MRE 801(d)(1)(A).

On the record, defendant has not demonstrated the existence of plain error. Defendant does not dispute that the trial court correctly determined that the writings themselves were hearsay. He has not demonstrated that any of the writings were admissible as hearsay exceptions. The record supports that defendant was allowed to probe all purported inconsistencies between the victim's trial testimony and her prior statements. Defendant was able to elicit testimony related to the writings without their admission. Thus, he cannot demonstrate that any error in the preclusion of the evidence affected the outcome of trial.

Defendant finally argues that he was denied a fair trial by cumulative error. Defendant's argument that the cumulative errors deprived him of a fair trial is without merit, because no errors were found with regard to any of the above issues. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

We affirm.

/s/ William B. Murphy
/s/ Richard A. Bandstra
/s/ Jane M. Beckering