

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
June 3, 2014

v

MARK ALEXANDER MAJORS,  
  
Defendant-Appellant.

No. 313412  
Chippewa Circuit Court  
LC No. 11-000575-FC

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Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of three counts of criminal sexual conduct in the first degree (CSC I), MCL 750.520b (multiple variables), one count of accosting a minor for immoral purposes, MCL 750.145a, and one count of furnishing alcohol to a minor, MCL 436.1701(1). Defendant was sentenced as a habitual offender, fourth offense, MCL 769.12, to serve 45 to 60 years in prison for each CSC I conviction, 4 to 15 years in prison for the accosting a minor for immoral purposes conviction, and 60 days in jail for the furnishing alcohol to a minor conviction, sentences to be served concurrently. We affirm.

Defendant argues neither due process nor legislative intent allow a statutory construction of MCL 750.520b(1)(c) where accosting a minor for immoral purposes may be used as the underlying felony for a CSC I conviction. This Court reviews de novo the issue of statutory construction, *People v Kern*, 288 Mich App 513, 516; 794 NW2d 362 (2010), as well as the question of a statute’s constitutionality under the void-for vagueness doctrine, *People v Noble*, 238 Mich App 647, 651; 608 NW2d 123 (1999).

Defendant argues that MCL 750.520b(1)(c) is unconstitutionally vague or overbroad, or both. Because CSC I and III would encompass any sexual penetration with a victim at least 13 but less than 16 years of age, as such any sexual penetration would typically involve circumstances amounting to the felony of accosting a minor for immoral purposes. MCL 750.520b(1)(c) provides that a person who engages in sexual penetration with another person “under circumstances involving the commission of any other felony” is guilty of CSC I. This Court has held the language of MCL 750.520b(1)(c) is plain and unambiguous. *People v Waltonen*, 272 Mich App 678, 693-694; 728 NW2d 881 (2006). MCL 750.520d(1)(a) provides that a person who engages in sexual penetration with another person “at least 13 years of age and under 16 years of age” is guilty of CSC III. MCL 750.145a provides that “[a] person who

accosts, entices, or solicits a child less than 16 years of age . . . with the intent to induce or force that child . . . to submit to an act of sexual intercourse” is guilty of accosting a minor for immoral purposes.

This Court has explained the relationship between due process and statutory vagueness:

The void-for-vagueness doctrine flows from the Due Process Clauses of the Fourteenth Amendment and Const 1963, art 1, § 17, which guarantee that the state may not deprive a person of life, liberty, or property, without due process of law. A statute may be challenged as unconstitutionally vague when (1) it is overbroad and impinges on First Amendment freedoms[,] (2) it does not provide fair notice of the conduct proscribed, or (3) it is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to determine whether the law has been violated. [*People v Gratsch*, 299 Mich App 604, 609-610; 831 NW2d 462, vacated in part on other grounds 838 NW2d 686 (2013) (citation omitted).]

To challenge a statute as overbroad, the defendant must show the statute proscribes or “chills” constitutionally protected conduct. *People v Roberts*, 292 Mich App 492, 500; 808 NW2d 290 (2011); *People v McCumby*, 130 Mich App 710, 714; 344 NW2d 338 (1983). To challenge a statute as failing to provide fair notice, the defendant must first identify specific facts suggesting that he or she complied with the statute, and then show the language of the statute is vague. *People v Douglas*, 295 Mich App 129, 135; 813 NW2d 337 (2011). To challenge a statute as conferring unstructured and unlimited discretion, the defendant must first show “the wording of the statute itself is vague.” *Id.* at 138.

Here, defendant has not argued MCL 750.520b(1)(c) proscribes constitutionally protected conduct, the facts suggest he complied with MCL 750.520b(1)(c), or the language of MCL 750.520b(1)(c) is vague. Defendant has therefore failed to establish any one of the three alternative grounds for challenging a statute as vague. In any event MCL 750.520b(1)(c) only limits sexual penetration in circumstances involving the commission of another felony, which is not constitutionally protected conduct. And defendant does not dispute the facts of this case show both sexual penetration of the victim and the felony of accosting a minor for immoral purposes.

Defendant cannot reasonably argue his conduct was beyond the constitutional scope of MCL 750.520b(1)(c). The victim and her friend testified defendant, a middle-age man, instructed them to consume marijuana and alcohol while driving to his house. The victim believed she was not free to refuse. Defendant orchestrated a scheme to intoxicate the victim so she would be susceptible to sexual assault at his house, which defendant does not dispute was a violation of MCL 750.145a. This is not a marginal case that results in an unconstitutional application of MCL 750.520b(1)(c). See *People v Lockett*, 295 Mich App 165, 177; 814 NW2d 295 (2012) (only in “marginal cases” may a felony not establish the basis for a violation of MCL 750.520b(1)(c)).

Defendant also argues even if using the crime of accosting a minor for immoral purposes as the underlying felony for MCL 750.520b(1)(c) does not violate the plain language of the

statute, the “absurd results” doctrine of statutory construction compels a different outcome. This Court has recognized certain “‘ridiculous’ hypothetical circumstances” may result in an unconstitutional application of the statute. *Lockett*, 295 Mich App at 176. However, a defendant cannot successfully challenge the statute’s constitutionality when “the argument is based on hypotheticals.” *Id.* “[T]his Court is only concerned with whether [the defendant’s] specific conduct was fairly within the constitutional scope of the statute.” *Id.* For instance, “MCL 750.520b(1)(c) unconstitutionally invites arbitrary and abusive enforcement when it is applied to situations where . . . engaging in consensual, legal sexual penetration is elevated to [CSC I] solely because a minor was present and the ‘victim’ of the penetration was not impacted by the additional felony.” *Id.* at 177.

Defendant contends it would be absurd to aggravate the criminal behavior of “ordinary statutory rapists” from CSC III to CSC I. It is true statutes should be construed to avoid absurd results. *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010). However, the absurd-results doctrine only applies when the outcome of a *particular* case would be absurd. See *Johnson v Recca*, 492 Mich 169, 193-195; 821 NW2d 520 (2012). In this case, there is nothing absurd about applying the plain language of MCL 750.520b(1)(c) to a defendant that forced a 14-year-old victim to become intoxicated prior to forcing on the victim unwanted sexual penetration. Indeed, the facts of this case are precisely the type of situation the Legislature envisioned when it enacted MCL 750.520b(1)(c). See *Waltonen*, 272 Mich App at 694 n 8.

Moreover, MCL 750.520d(1)(a) and MCL 750.145a have distinct legislative purposes, such that a person who violates both has committed an additional wrongdoing than a person who only violates one or the other. The purpose of MCL 750.520d(1)(a) is “to protect children below a specific age from sexual intercourse.” *In re Hildebrant*, 216 Mich App 384, 386; 548 NW2d 715 (1996). The purpose of MCL 750.145a is “to criminalize a wide range of sexually predatory actions aimed at children.” *People v Kowalski*, 489 Mich 488, 501; 803 NW2d 200 (2011). In this case, defendant committed these two conceptually distinguishable criminal activities. Defendant engaged in sexually predatory actions in violation of MCL 750.145a and he had sexual intercourse with a person under 16 years of age in violation of MCL 750.520d(1)(a). It is fully consistent with the legislative intent for a defendant who commits both criminal activities to be convicted of CSC I, whereas a defendant who only commits the second criminal activity to be convicted of CSC III.

Defendant argues the prosecution failed to prove beyond a reasonable doubt its second alternate theory of CSC I, which was “personal injury to the victim and force or coercion [was] used to accomplish sexual penetration.” MCL 750.520b(1)(f). In particular, defendant argues the prosecution failed to prove mental anguish.

“‘Personal injury’ means bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ.” MCL 750.520a(n). Thus, bodily injury and mental anguish “are merely different ways of defining the single element of personal injury.” *People v Asevedo*, 217 Mich App 393, 397; 551 NW2d 478 (1996). If the evidence is sufficient to show either bodily injury or mental anguish, then the evidence is sufficient to show the element of personal injury. *Id.* The trial court instructed the jury “[p]ersonal injury means a bodily injury, disfigurement, chronic pain, pregnancy, disease, loss of [sic] impairment of the sexual or reproductive organ or mental anguish.” Further, because the

jury was presented with alternate theories, alternate definitions of personal injury, defendant's failure to challenge the bodily injury definition means "the evidence of personal injury was sufficient." *Id.* at 398. Accordingly, it is not necessary to address whether the evidence was sufficient to show mental anguish alone, although there was significant evidence of mental anguish including that defendant would increase the pain each time she begged him to stop raping her, she was crying after the rape and vomited during the rape. Additionally, there was sufficient evidence to prove bodily injury including the fact that she had blood in her urine and that every time she urinated, that the urination would sting. Defendant's argument that there was not sufficient evidence of personal injury for a conviction is simply without any merit.

Defendant argues the trial court erred in admitting the victim's hearsay statement to her mother that she was raped by a "black guy", following an objection by defense counsel. We review for an abuse of discretion a trial court's decision whether to admit or exclude evidence. *People v King*, 297 Mich App 465, 472; 824 NW2d 258 (2012). "The trial court abuses its discretion when its decision is outside the range of principled outcomes." *Id.* A preserved evidentiary error is reviewed "to determine whether it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is generally inadmissible unless otherwise provided by the rules of evidence. See MRE 802. "MRE 803(2) provides an exception to the hearsay rule for a 'statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.'" *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003), quoting MRE 803(2).

Here, defendant argues the victim's statement to her mother about being raped by a black man did not qualify as an excited utterance, under the facts and circumstances of this case. The prosecution does not specifically concede the trial court abused its discretion in admitting the victim's statement, it only argues any error was harmless.

The trial court abused its discretion in admitting this testimony from the victim. The statement was hearsay based on this record. See *People v Jones (On Rehearing After Remand)*, 228 Mich App 191, 224; 579 NW2d 82, mod in part on other grounds 458 Mich 861 (1998) ("The 'matter asserted' in the definition of hearsay has always referred to the matter asserted by the out-of-court declarant, not the party offering the evidence."). The delay of six months between the startling event and the hearsay statement removed it from the realm of excited utterances based on the record in this case. See *People v Straight*, 430 Mich 418, 425-426; 424 NW2d 257 (1988) (statement made one month after startling event did not qualify on that record as excited utterance). Each case is different and there may be times that a six month delay would not exclude a hearsay statement from being admissible, however, that is not the case with the record before us.

When a hearsay statement is erroneously admitted at trial, the error is more likely to be harmless if the statement "is cumulative to in-court testimony by the declarant . . . particularly when corroborated by other evidence." *People v Gursky*, 486 Mich 596, 620; 786 NW2d 579

(2010). For instance, when an erroneously admitted hearsay statement “involves the testimony of a sixteen-year-old victim whom the defense had full opportunity to cross-examine,” the prejudice of the error is minimized. *People v Smith*, 456 Mich 543, 555 n 5; 581 NW2d 654 (1998). However, an erroneously admitted hearsay statement is less likely to be harmless “[i]n a trial where the evidence essentially presents a one-on-one credibility contest between the victim and the defendant.” *Gursky*, 486 Mich at 620-621.

Here, admission of the hearsay statement at issue was harmless error. The hearsay statement was minimally important in the overall trial. The victim promptly told her friend she had been raped by defendant, so her disclosure to her mother about six months after the event was not a new allegation. In addition, the jury heard testimony the victim alleged in multiple police interviews she was raped by defendant. And the victim was subject to extensive cross-examination by defendant about her allegations. Simply put, the hearsay statement was cumulative to the victim’s testimony, which minimized any prejudicial error. See *Gursky*, 486 Mich at 620.<sup>1</sup>

Defendant argues the trial court violated his Sixth and Fourteenth Amendment rights by increasing his minimum sentence on the basis of facts that were not proven to the jury beyond a reasonable doubt. Defendant argues that the recent decision of the United States Supreme Court in *Alleyne v United States*, \_\_\_ US \_\_\_; 133 S Ct 2151; 186 L Ed 2d 314 (2013), bars the trial court from using judicial findings of fact to score sentencing variables that determine the minimum sentence. In *Alleyne*, the Court held that “any fact that increases the mandatory minimum is an ‘element’ that must be submitted to the jury.” *Id.* at 2155.

This Court rejected defendant’s argument in *Herron*, 303 Mich App 392, 405, \_\_\_NW2d\_\_\_ (2013):

We hold that judicial fact-finding to score Michigan’s guidelines falls within the “‘wide discretion’” accorded a sentencing judge “‘in the sources and types of evidence used to assist [the judge] in determining the kind and extent of punishment to be imposed within limits fixed by law.’” [*Alleyne v United States*, 570 US \_\_\_, \_\_\_ n 6; 133 S Ct 2151; 186 L Ed 2d 314 (2013)], quoting *Williams v New York*, 337 US 241, 246; 69 S Ct 1079; 93 L Ed 1337 (1949). Michigan’s sentencing guidelines are within the “broad sentencing discretion, informed by judicial factfinding, [which] does not violate the Sixth Amendment.” *Alleyne*, 570 US at \_\_\_; 133 S Ct at 2163.

Therefore, defendant’s arguments are without merit.

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<sup>1</sup> The jury also heard testimony about the victim’s distraught emotional state and her subsequent appointments with a counselor and the police. The victim’s emotional state and her subsequent appointments were not hearsay because they were not assertions. See *Gursky*, 486 Mich at 625 (the young victim’s emotional state after the sexual assault was not hearsay and tended to show that a traumatizing event had occurred).

Lastly, we have reviewed defendant's Standard 4 brief and find it to be without merit. A criminal defendant appearing in propria persona is held to "less stringent standards than formal pleadings drafted by lawyers," the leeway arising from the prisoners right of access to the courts. *Haines v Kerner*, 404 US 519, 520; 92 S Ct 594; 30 L Ed 2d 652 (1972); *People v Herrera*, 204 Mich App 333, 338-339; 514 NW2d 543 (1994). However, this leeway is not without limit: the defendant must still provide support for his or her claims. See *Hughes v Rowe*, 449 US5, 9-10; S Ct 173; 66 L Ed 2d 163 (1980); *Estelle v Gamble*, 429 US 97, 106-108; 97 S Ct 285; 50 L Ed 2d 251 (1976). Here, defendant in his Standard 4 brief offers no support for his various allegations, legal or factual. Accordingly, we reject all of defendant's claims.

Affirmed.

/s/ Jane M. Beckering  
/s/ Amy Ronayne Krause  
/s/ Mark T. Boonstra