

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GENNARO JOSEPH PISCOPO,

Defendant-Appellant.

UNPUBLISHED

June 24, 2004

No. 245835

Macomb Circuit Court

LC No. 2002-001210-FH

Before: Griffin, P.J., and Cavanagh and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of fourth-degree criminal sexual conduct (“CSC-4”). MCL 750.520e. He was sentenced to five years’ probation. Defendant appeals as of right, and we affirm.

I. Facts and Proceedings

Three complainants, KB, KR, and CPG, alleged that defendant, a pastor at the church they attended, sexually assaulted them during a religious practice known as the “deliverance.” KB and KR both alleged that defendant sexually assaulted them during a deliverance service held at defendant’s church on November 18, 2001. CPG alleged that defendant assaulted her during a private deliverance service in his home in September 1995. Defendant was charged with two counts of second-degree CSC (CSC-2), MCL 750.520c(1)(d) (non-penetrative sexual contact by force or coercion, involving accomplices) arising from KB’s allegations, and three additional counts of CSC-4, one pertaining to KR and two pertaining to CPG. All three complainants’ charges were tried jointly. Defendant was acquitted of the first count involving KB, but convicted of the lesser-included offense of CSC-4 on the second count. He was acquitted of all counts involving KR and CPG.

Defendant’s denomination practices a ritual called the “deliverance” to exorcise demons from persons. Adherents to the church believe that the ritual casts out evil spirits from participants and frees them from past hurts and experiences that are impeding their spirituality. Defendant’s church held a deliverance service each month, with a deliverance ritual serving as the final event. Defendant informed the participants that the doors would be locked, and anyone who tried to leave would be restrained. Defendant also instructed participants not to tell anyone what happens during the deliverance. Family members were separated from each other. Two or three church workers were assigned to minister to each participant. One worker sat in a chair

facing the participant, both with legs stretched forward, with the worker's knees straddling the participant's knees. Two other workers stood close by. Workers were not assigned or teamed according to sex, and a participant's workers could be all male, all female, or mixed. The workers leaned toward the participant with their faces only a few inches apart. The workers then began to scream at the participants. The alleged purpose of the screaming was to rebuke and cast out evil spirits.

Defendant's church taught that if the deliverance was successful, meaning that the participant was delivered of whatever evil spirits were inside, the participant would "manifest" the deliverance by screaming, crying, yawning, or shaking, and sometimes by vomiting. Participants were not permitted to leave their seats or look around the room. If a participant tried to look around, the worker would grab her face and force her to face the workers. The entire deliverance session lasts about 3 to 3-1/2 hours.

Of the approximately one hundred persons attending the November 2001 deliverance, thirty or forty were participants, and the rest were workers. Complainant KB and her husband, JB, had attended defendant's church a few times and decided to attend the November 2001 deliverance service. KB had attended deliverance services in other churches, but those involved intense prayer with a female partner, and no screaming or physical contact with males. KB found the deliverance ritual discomfiting and religiously illegitimate. She was disturbed by the screaming and the physical contact with male workers, and believed that the leg straddling, especially with male workers, was inappropriate and contrary to God's requirements. KB did not try to leave, because she believed it would be futile. She did not respond to the workers' screaming, and sat quietly in her chair.

Because KB was not manifesting deliverance of her evil spirits by screaming or other visible reaction, the workers stepped up their efforts to "deliver" her. After about an hour and a half, defendant came to KB and whispered in her ear that she was obligated to cooperate because the paperwork she had signed was a legal contract. Defendant did not touch KB at this time. When defendant left, the facilitators resumed screaming at KB, and told her that she had to cooperate for her own good. KB still refused to participate, and she kept thinking "that this is not of God."

Defendant returned and spoke into KB's ear again. He told the three workers around KB to leave, and then gestured with his hand to summon two tall men. The men held her arms above the elbows. Defendant stood behind her chair and pressed his chest against her back. He rubbed her arms with his hands. He rubbed her legs and ran his fingers through her hair. Defendant rubbed her arms and legs again, and then started to rub her breasts, abdomen, and between her legs. He rubbed one breast with each hand, then her abdomen, and then her vaginal area. KB testified that these actions occurred very quickly. KB told defendant to stop touching her because it was wrong. She felt shocked and traumatized. KB estimated that defendant touched her breasts three to five times, and her genitals twice. She did not try to fight back or stand up.

KB eventually decided to cooperate, because she was afraid of what else defendant might do. She started crying and screaming and continued to do so until the deliverance was over, so that defendant would think that she was cooperating. When the deliverance was over, the participants and workers rose for a final prayer. Defendant came to KB and told her that he was glad that she cooperated. Defendant called the participants into the church sanctuary for "follow

up instructions.” He then said, “there are some of you women that might not have felt comfortable with what happened and – and I call that the ‘hoochie coochie’ . . . but I don’t want to hear any complaining.” The next day, KB reported the incident to the police.

Defendant denied touching any of the complainants inappropriately. He stated that one of the female workers put her hand on KB’s stomach, and he put his hand over the worker’s hand and prayed for her. He explained that he did this because there is sometimes activity in the participant’s stomach during deliverance. He tapped KB on the arms because he has found from his experience that this is “very effective” for women who have been abused in the past.

Defendant paid special attention to KB because he could tell that she was not releasing her demons or responding to the deliverance, and he wanted her to have a “greater manifestation,” which would be evident from yawning, coughing, screaming, or shaking. He touched her on two occasions because it sometimes takes repeated efforts to get the demons to leave. After he tapped her on the arms, she began to cry. Defendant testified that his workers “lightly restrained” KB, in accordance with his instructions, as a preventative measure. He stated that other workers laid hands on her while he prayed over her, and that there were probably ten hands on her. Defendant explained the term “hoochie coochie,” stating that he often uses this term after the deliverance to make light of the three-hour intense experience. The term was coined by a former church member.

Defendant also presented the testimony of several workers who attended to KB during the ritual or were present during the ritual. None of the witnesses reported observing any improper contacts to the breast or thigh area. Rather, they identified contact to the arms and outside of the legs only. Despite this testimony and the fact that the conduct occurred in the presence of a multitude of witnesses, defendant was convicted of the offense of CSC-4 with respect to KB.

II. Sufficiency of the Evidence

Defendant contends that the evidence was insufficient to establish CSC-4 because there was no evidence that the touching was done for a sexual purpose. We disagree. When a defendant challenges the sufficiency of the evidence in a criminal case, we consider whether the evidence, viewed in a light most favorable to the prosecution, would warrant a reasonable juror to find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).

MCL 750.520e(1)(b) provides that a person is guilty of CSC-4 if he engages in sexual contact with another person and the sexual contact is accomplished by force or coercion. MCL 750.520a(n) provides that “sexual contact” includes “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.” Defendant contends that there was no evidence that he touched KB’s intimate parts for the purpose of sexual arousal or gratification.

KB testified that defendant touched her intimate parts while purporting to deliver her from demons. Before touching these parts, he ran his fingers through her hair and talked about someone who loved her. After the deliverance, he referred to his conduct as the “hoochie

coochie,” an oblique term, but one with an arguably sexual connotation.¹ While looking at KB, he acknowledged that some women might have been uncomfortable with his actions, and then attempted to ward off criticism. From these circumstances, a jury could reasonably infer that defendant touched KB for the purpose of sexual gratification or arousal. The evidence, viewed in the light most favorable to the prosecution, was sufficient to support a finding of sexual contact. *Nowack, supra*.²

III. Admissibility of Expert Testimony

Defendant claims that the trial court erred in excluding the testimony of his expert witness. We review a trial court's decision regarding the admissibility of expert testimony for an abuse of discretion. *People v Peebles*, 216 Mich App 661, 667; 550 NW2d 589 (1996). We find no abuse of discretion here.

At trial, defendant called Katherine Okla, Ph.D., as an expert witness to testify on evaluating sexual abuse allegations, memory and suggestibility, and the recovery of repressed memories. The trial court refused to qualify Dr. Okla as an expert because she had no experience with the deliverance concept or defendant's religion.

MRE 702 permits testimony by a qualified expert witness if the trial court “determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.” Admissibility is governed by a three-part test: (1) the expert must be qualified; (2) the evidence must serve to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue; and (3) the evidence must be from a recognized discipline. *Peebles, supra* at 667-668.

We cannot conclude that the trial court's decision was an abuse of discretion where Dr. Okla had no familiarity with the deliverance practice. *Peebles, supra*. Because Dr. Okla was unfamiliar with the deliverance, she could not have any basis for concluding that it involved the sort of heightened, regressive emotionalism that can induce an altered state of consciousness and impair perception and memory. Dr. Okla therefore was not a qualified expert as to KB's state of mind where she lacked the specific information to deduce that her general theories about emotionalism, perception, and memory applied to KB's experience at the deliverance.

IV. Admissibility of Questionnaire

¹ *Random House Webster's College Dictionary* (1997) defines “hootchy cootchy” as “a sinuous, quasi-Oriental dance performed by a woman and characterized chiefly by suggestive gyrating and shaking of the body.”

² Defendant also alleged that KB unjustifiably perceived his actions as sexually motivated in light of her traumatic past and would not have touched her with sexual intent in light of the number of individuals present. The defense presented its theory to the trier of fact, which rejected the theory in assessing the credibility of the witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Therefore, this challenge to the sufficiency fails.

Defendant contends that the trial court erred in not allowing him to cross-examine KB about the questionnaire she completed before the deliverance service. Defendant sought to use KB's responses on the questionnaire to undermine her credibility. In the questionnaire, KB revealed traumatic experiences in her life that included abuse and a psychic demonic experience. After reviewing the questionnaire in camera, the trial court decided to exclude it because: (1) the evidence was not relevant; (2) KB's assertions were hearsay and did not fall under the business records exception argued by defendant, MRE 803(6); and (3) some of the statements were barred by the rape-shield statute, MCL 750.520j, and evidentiary rule, MRE 404(a)(3). Defendant argues that the trial court's exclusion of this evidence was erroneous and unconstitutionally infringed on his right to cross-examine witnesses.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). However, an issue concerning the proper construction of a rule of evidence presents a question of law that is reviewed de novo on appeal. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002).

Defendant contends that the questionnaire evidence is either not excluded by the rape-shield statute or evidentiary rule, or is admissible despite the rape-shield law pursuant to his right of confrontation. Defendant maintains that KB's traumatic experiences are highly relevant to the defense theory that KB "had fantasies or projections about things that never occurred or was someone who was often mistaken in her perceptions of events she had experienced." The trial court dismissed this argument by stating that KB's allegations against her parents "are unproven as it now stands, no charges have been brought against the victim's parents, therefore, they are mere allegations and without merit or weight, and are of no relevance to the instant case."

In *People v Byrne*, 199 Mich App 674, 676; 502 NW2d 386 (1993), the defendant was charged with CSC-1 against a seven-year-old visitor to his home. Two weeks before the alleged assault, the complainant's father pleaded guilty to CSC-3 against the complainant. *Id.* The defendant sought to discover and introduce evidence pertaining to the father's sexual abuse, in support of a defense theory that the alleged episode with the defendant was "a figment of [the complainant's] imagination." *Id.* at 676-677.

This Court acknowledged that the "'figment of the imagination' theory of the defense might just possibly be sufficiently intertwined with defendant's Sixth Amendment right of confrontation so as to overcome the exclusionary effect of the rape-shield statute." *Id.* at 678. The Court then considered what proof the defendant would need in order to show that the evidence was relevant and necessary to protect his right of confrontation. *Id.* The Court noted that "[t]he Sixth Amendment right of confrontation is subject to a balancing test involving other legitimate state interests in the criminal trial process, including avoiding, among other things, harassment, prejudice, confusion of the issues, safety of the witness, or interrogation that is repetitive or only marginally relevant." *Id.* at 679, citing *Michigan v Lucas*, 500 US 145; 111 S Ct 1743; 114 L Ed 2d 205, 212 (1991). The Court stated:

At a minimum, defendant in this case would have to establish that the sexual conduct of which he is accused is highly similar to that charged against the victim's father. Defendant is charged with inserting his tongue in the victim's anus; if the father engaged only in relatively dissimilar sexual conduct, the evidence would be inadmissible as irrelevant, its prejudicial impact grossly exceeding its probative value. [*Id.* at 679.]

Applying these principles to the instant case, we find no abuse of discretion in the trial court's decision. *Manser, supra*. Other than involving a male pastor, KB's delineation of her traumatic experiences were markedly different from her allegations against defendant. Neither the ongoing pattern of the abuse, nor the nature of the relationship, nor the details of the one specific incident, bear any similarity to the one-time groping incident that KB alleged against defendant. Defendant failed to demonstrate that the evidence was necessary to protect his right to confront the witness. *Byrne, supra*. The trial court thus properly excluded the questionnaire evidence as irrelevant and contrary to the rape-shield laws. Consequently, there is no need to consider whether the evidence is hearsay and not within the business records exception.

V. Instructional Issues

Defendant raises two instructional issues. First, he argues that the trial court erroneously denied his request for an instruction on the defense of accident.

This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal. *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). "Even if somewhat imperfect, [jury] instructions do not create error if they fairly presented the issues for trial and sufficiently protected the defendant's rights." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000).

The trial court did not err in declining to instruct on accident when he consistently maintained that he did not touch KB on any inappropriate part of her body. Defendant's argument for an accident instruction is based on the following exchange from his direct examination:

Q. Relative to [KB and KR], is there a realm of possibility that you could have accidentally brushed against them, touched them?

A. There's a possibility.

Defendant's mere acknowledgment of a theoretical possibility, in the face of his own and other defense witnesses' testimony that there was no inappropriate contact, did not warrant an instruction on this defense. More importantly, the trial court instructed the jury that it had to find that defendant *intentionally* touched the victims' intimate parts. The jury was thus implicitly instructed on the defense of accident.

Defendant also argues that the jury instructions created the risk of a non-unanimous verdict. However, defendant not only failed to raise any objection to the court's unanimity instruction, but also approved the instructions except with respect to certain specific objections. Our Supreme Court held in *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000), that approval of jury instructions, in contrast to a mere failure to object, constitutes waiver of the issue on appeal. Waiver extinguishes any error and precludes appellate review. *Id.* at 215-216. Consequently, we need not consider this issue.

VI. Denial of Motion for Severance

Defendant claims that the trial court erred in denying his motion to sever the charges against the individual complainants. MCR 6.120(B) provides that the trial court must grant a defendant's motion to sever unrelated offenses for separate trials. Offenses are related if they are based on the same conduct or on a series of connected acts or acts constituting part of a single scheme or plan. MCR 6.120(B)(1) and (2). A trial court's decision on a motion to sever under MCR 6.120(C) is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). We cannot conclude that the trial court's denial of the motion was an abuse of discretion. *Id.* The charged offenses were part of a single scheme or plan. See *People v Miller*, 165 Mich App 32, 43-45; 418 NW2d 668 (1987).

VII. Cumulative Error

Defendant claims that he was denied a fair trial by the cumulative effect of several errors. This Court reviews this issue to determine if the combination of alleged errors denied defendant a fair trial. *People v Knapp*, 244 Mich App 361, 387; 624 NW2d 227 (2001). Because we have not found any errors, there can be no cumulative effect.

Affirmed.

/s/ Richard Allen Griffin
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood