

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRIAN SCOTT HUVER,

Defendant-Appellant.

UNPUBLISHED

May 15, 2008

No. 274099

Eaton Circuit Court

LC No. 06-020118-FH

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), and one count of possession of less than 25 grams of cocaine, MCL 333.7403(2)(a)(v). He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 6 to 30 years for each criminal sexual conduct conviction and one to eight years for the possession of cocaine conviction. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of inappropriately touching a 12-year-old girl. The victim wrote about the touching in her diary. She acknowledged that, on two occasions, defendant had reached under her blouse and inside her bra and touched her breast. Shortly after the second incident, defendant pulled the victim onto his lap and pushed her hand over the crotch area of his pants, which was “hard.”

The police arrested defendant for an outstanding child support warrant. During the arrest, the police discovered a small container of cocaine on defendant’s person. Defendant was questioned by the police and waived his right to remain silent. The interview began with questions about the child support warrant, but the police later questioned defendant about the victim’s accusations, which defendant vehemently denied. When defendant was asked if he had ever been accused of improperly touching a child before, defendant stated, “That’s enough,” but then continued talking. Later, defendant denied ever being previously accused of touching a child improperly. When the officer asked defendant if he had ever lived in Shelby County, Tennessee, defendant responded, “I’m done talking. I’m just . . . I’m tired.” Officer Montague told defendant that he had not been honest about the charges in Tennessee, and defendant acknowledged that he had been accused of abusing his girlfriend’s child and of attempted oral penetration involving a three-year-old girl. Defendant stated that he thought there was no record of these accusations, which was why he initially denied them.

On appeal, defendant first argues that trial counsel was ineffective for failing to move to suppress his police statements regarding the prior charges on the ground that defendant had unequivocally invoked his Fifth Amendment right to silence.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687, 690, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

“Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment right” to remain silent. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). However, once a defendant waives his rights and answers questions, the police are only required to stop questioning when the defendant unequivocally invokes his right to remain silent. *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991).

Here, defendant did not unequivocally invoke his right to remain silent. There is no dispute that defendant was advised of his rights, including his right to remain silent, and waived that right by agreeing to speak to Officer Montague. Although defendant responded at one point, “That’s enough,” he thereafter continued talking to the officer, again denying that he had improperly touched his neighbor’s daughter and characterizing the victim as “wild” and unreliable. Defendant later stated, “I’m done talking. I’m just . . . I’m tired,” but this statement also was not an unequivocal assertion of defendant’s right to silence, but rather a statement describing defendant’s physical state, especially considering that defendant had just finished a work shift when he was arrested. Moreover, when Officer Montague then remarked that defendant had not been honest about the charges in Tennessee, defendant immediately continued to speak and discussed the accusations in Tennessee. “[A] defendant who speaks following *Miranda*^[1] warnings must affirmatively reassert the right to remain silent.” *Davis, supra* at 35-36. Where a defendant does not respond to some questions while responding to others after waiving his rights, he has not unequivocally invoked his right to remain silent. *People v McReavy*, 436 Mich 197, 212; 462 NW2d 1 (1990).

Because the record does not support defendant’s claim that he unequivocally invoked his right to remain silent, trial counsel was not ineffective for failing to move to suppress the defendant’s statements on this ground. Counsel is not required to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Next, defendant argues that evidence of the Tennessee offenses was improperly admitted under MCL 768.27a. Defendant argues that the statute conflicts with MRE 404(b) and, therefore, is unconstitutional because the Michigan Supreme Court has the exclusive authority to prescribe rules governing court practice and procedure. This Court considered and rejected this argument in *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007). In

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Pattison, this Court determined that MCL 768.27a “does not violate the principles of separation of powers” because it is not merely procedural. *Id.* at 620. Rather, it “is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts” but instead reflects a policy decision that, “in certain cases, juries should have the opportunity to weigh a defendant’s behavioral history and view the case’s facts in the larger context that the defendant’s background affords.” *Id.* at 619-620. Therefore, we reject this claim of error.

Finally, defendant argues that the evidence of the Tennessee offenses violated his right to due process and a fair trial. The decision whether to admit evidence is within the trial court’s discretion and will be reversed only where there has been an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). Preliminary questions of law are reviewed de novo. *Id.*

Defendant’s argument is based largely on MRE 404(b) and case law interrupting that rule of evidence. However, MCL 768.27a allows “evidence of a defendant’s uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b).” *Pattison, supra* at 619. The Tennessee accusations qualify as listed offenses under the sexual offender registration act and, therefore, evidence of both offenses are admissible under MCL 768.27a for their bearing on any matter to which they are relevant. The trial court allowed the evidence for the limited purpose of challenging the credibility of defendant’s denials in his custodial interview that he had inappropriately touched the victim in this case, given that in the same interview defendant initially denied ever being previously accused of inappropriately touching a child. The trial court gave a cautionary instruction advising the jury on the limited purpose of the evidence and advising that the jury must not convict defendant because they might think he is a bad person, likely to commit such crimes, or is guilty of other bad conduct. Juries are presumed to follow the court’s instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Under the circumstances, the trial court did not abuse its discretion in admitting the evidence. Additionally, the trial court’s instruction protected defendant’s rights. Defendant was not denied his right to due process and a fair trial.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ William B. Murphy