

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLENN EARL PARR,

Defendant-Appellant.

UNPUBLISHED

October 13, 2009

No. 284715

St. Clair Circuit Court

LC No. 07-000837-FH

Before: Saad, C.J., and O’Connell and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant Glenn Earl Parr was convicted of one count of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b) (sexual penetration involving force or coercion), and six counts of fourth-degree CSC, MCL 750.520e(1)(b) (sexual contact involving force or coercion). He was sentenced to concurrent terms of 7 to 15 years’ imprisonment for the third-degree CSC conviction and one year’s imprisonment for each fourth-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant owned a business where he practiced massage therapy. Four women accused him of inappropriate sexual touching of their breasts and genitalia during their respective massages.

Defendant first argues that the trial court erred by excluding evidence of his appropriate behavior in giving massages to several clients other than the complaining witnesses, which he claims was offered as habit evidence. We disagree. We review evidentiary decisions for an abuse of discretion. See *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). “An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes.” *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). An evidentiary error does not merit reversal in a criminal case “unless ‘after an examination of the entire cause, it shall affirmatively appear’ that it is more probable than not that the error was outcome determinative.” *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (internal quotations in original).

MRE 406 states,

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of

eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

“There is general agreement that habit evidence is highly persuasive as proof of conduct on a particular occasion.” *McKinstry v Valley Obstetrics-Gynecology Clinic, PC*, 428 Mich 167, 182 n 6; 405 NW2d 88 (1987). This Court has held that habit evidence is admissible to prove that an individual acted in conformity with his previous behavior pattern. See *Kovacs v Chesapeake & Ohio R Co*, 134 Mich App 514, 538; 351 NW2d 581 (1984), aff’d 426 Mich 647 (1986) (holding that in a wrongful death case, a decedent’s habit of “approaching railroad crossings in a prudent and careful manner” was admissible as “evidence of the decedent’s habit, or regular response, in approaching and in traveling over railroad crossings”). Habit evidence establishes a set pattern, or evidence of something that is done routinely or on countless occasions, and is relevant to establish that an individual’s conduct on a particular occasion was in conformity with the habit. *Laszko v Cooper Laboratories, Inc*, 114 Mich App 253, 255-256; 318 NW2d 639 (1982).

In this case, defendant sought to introduce evidence that he had given massages to women in the past without touching them inappropriately. Defendant’s counsel had a list of seven to ten persons who were prepared to testify in this way. The trial court did not admit this evidence, stating, “you can bring in 50 people who have not been assaulted, [but doing so] doesn’t prove that the assaults did or did not occur Specific instances of conduct with regard to other individuals is not relevant.” We agree with the trial court.

Habit evidence concerns “the type of nonvolitional activity that occurs with invariable regularity. It is the nonvolitional character of habit evidence that makes it probative.” *Weil v Seltzer*, 277 US App DC 196, 203; 873 F2d 1453, 1460 (1989). In this case, defendant was charged with distinctly volitional misconduct. Evidence that he did not inappropriately touch several of his clients does not establish that he has a habit of not inappropriately touching several other women during their massages.

Further, it is more a matter of character than of habit that a massage therapist resists temptations to extend his touching beyond what is professional and proper while providing a massage and to engage in improper incursions on any given occasion. Accordingly, evidence of defendant’s good behavior while providing massage services to other clients was really more in the nature of character evidence than habit evidence. Indeed, the trial court recognized that what was being offered was character evidence, and it indicated openness to allowing such evidence under MRE 405. However, defense counsel declined to offer the evidence under this theory. For these reasons, the trial court did not abuse its discretion in disallowing what was offered as habit evidence.

Defendant next argues that the trial court erred in admitting prior consistent statements from one of the complainants. We disagree.

Hearsay is generally inadmissible. MRE 802. However, a statement “consistent with the declarant’s testimony [that] is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive” is not hearsay and therefore is admissible. MRE 801(d)(1)(B). “Prior consistent statements are inadmissible to rehabilitate a witness except to rebut a charge of recent fabrication, or as evidence of the fact that a witness had made a prior inconsistent statement. Whether evidence is probative of either of these facts is a matter within

the trial court's discretion." *People v Harris*, 86 Mich App 301, 305; 272 NW2d 635 (1978) (citations omitted).

Defendant argues that the statement at issue was not offered in direct response to challenged in-court testimony or to rebut a charge of recent fabrication or motive. However, it is clear from the record that defense counsel was trying to impeach the complainant's testimony. Defense counsel questioned her about minor inconsistencies between her testimony on direct examination and her testimony at the preliminary examination. Later in the trial, defense counsel continued to impeach the complainant through the police officer who took her report by showing an inconsistency between her trial testimony and what she told to the officer, as recorded in the report. Thus, defense counsel implicitly argued that the complainant had recently fabricated her account of events. Therefore, the prosecutor properly responded by offering evidence of prior consistent statements to rehabilitate her. See *People v Sayles*, 200 Mich App 594, 595; 504 NW2d 738 (1993). The trial court did not abuse its discretion by admitting this evidence.

Finally, defendant argues that the trial court improperly assessed a score of 15 points for Offense Variable (OV) 10 because defendant's actions were not predatory. Again, we disagree.

"Scoring decisions for which there is any evidence in support will be upheld." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). The sentencing guidelines prescribe 15 points for OV 10, which concerns exploitation of a victim's vulnerability where predatory conduct was involved. MCL 777.40(1)(a).¹

"[T]o be considered predatory, the conduct must have occurred before the commission of the offense." *People v Cannon*, 481 Mich 152, 160; 749 NW2d 257 (2008). "In addition, preoffense conduct must have been directed at a victim 'for the primary purpose of victimization.'" *Id.* at 161, quoting MCL 777.40(3)(a). Our Supreme Court set forth the following analytical questions to determine whether the conduct in question was predatory:

- (1) Did the offender engage in conduct before the commission of the offense?
- (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
- (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? [*Id.* at 162.]

"If the sentencing court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10" *Id.*

¹ At sentencing, although defense counsel disputed that a score of 15 points was proper for this offense variable, she conceded that a score of ten points was proper. See MCL 777.40(1)(b) (the offender "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status").

In this case, the score of 15 points stemmed from defendant's conduct in relation to the youngest victim, a 17-year-old girl. This girl was the victim connected with defendant's third-degree CSC conviction. This victim and her mother arrived together at defendant's place of business for massages. The mother testified that defendant had changed the original schedule of their appointments so that she was first and her daughter was second. The mother further testified that defendant suggested that she leave after her massage so she would not have to wait for her daughter, and he offered to drive her daughter to work after her massage.

The prosecutor, relying on the mother's testimony, argued that these actions constituted attempts by defendant at isolating the victim to gain more time with her and make her more vulnerable, because her mother would not be outside waiting for her during her massage. Defendant's explanation at trial was that the mother was always scheduled to go first and that the two of them arrived at the appointment arguing because the victim needed to be at work and was afraid she would be late. Defendant claimed that he flipped the order of the massages to accommodate the victim's schedule. Specifically, he stated that he offered to massage the victim first and have a co-worker drive her to work while he massaged the mother.

Again, scoring decisions are to be upheld if there is any evidence in support of them. *Endres, supra*. At issue, then, is whether there was any evidence to support the conclusion that defendant's actions were "for the primary purpose of victimization." *Cannon, supra* at 162. In this case, the evidence comports with the theory that defendant offered to change the order of the massages in order to isolate the victim and make her more vulnerable to assault. The victim testified that defendant used the cover of providing massage therapy to take great liberties with her intimate anatomy and was persistent in doing so. Given that defendant ultimately indulged in such indecent liberties, the evidence presented supported the trial court's determination that defendant's primary goal in offering to reschedule her massage and arrange for her transportation thereafter was to put some distance between the youthful victim and her mother. For these reasons, the trial court did not err in assessing defendant 15 points for OV 10.

Affirmed.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Brian K. Zahra