

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 2, 2012

v

JAMES STEPHEN CRAWFORD,
Defendant-Appellant.

No. 302648
Saginaw Circuit Court
LC No. 10-033962-FC

Before: STEPHENS, P.J., and SAWYER and OWENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of kidnapping, MCL 750.349, criminal sexual conduct in the first degree (CSC I) MCL 750.520b(1) (during commission of a felony; use of force), and assault with intent to do great bodily harm less than murder, MCL 750.84. Defendant was sentenced as a habitual criminal offender, fourth offense, to serve 25 to 40 years for the kidnapping conviction, 30 to 40 years for the CSC I conviction, and 20 to 40 years for the assault conviction. Defendant was sentenced to serve the kidnapping and CSC I sentences consecutively, and the assault sentence concurrently with the other sentences. Defendant appeals by right. We affirm.

I. SUFFICIENCY OF THE EVIDENCE

First, defendant argues that there was insufficient evidence to support his convictions because the victim's testimony was so inconsistent and incredible that the jury was required to speculate to determine defendant's guilt.¹ We disagree.

¹ Defendant also argues that because the prosecutor's case relied on circumstantial evidence, the prosecutor was required to prove the case to an "impelling certainty." The statement that a defendant can be convicted on the basis of circumstantial evidence only if the evidence proved the prosecutor's case with "impelling certainty" is "a misstatement of the law." *Ericksen*, 288 Mich App 196. The burden of proof (beyond a reasonable doubt) is constant regardless of whether direct or circumstantial evidence is considered. *Id.*

A defendant need not take any special steps to preserve this issue for appeal. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). The Court reviews sufficiency of the evidence claims de novo because the argument involves the defendant’s constitutional right to due process of law. *Id.* We consider the evidence in a light most favorable to the prosecution to determine whether a rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010).

“Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). When witnesses testify inconsistently, it is the role of the trier of fact to determine the weight and credibility of the evidence, and we will not interfere with the jury’s role in hindsight. See *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). Further, in reviewing a sufficiency challenge, “any conflict in the evidence must be resolved in the prosecutor’s favor.” *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). The finder of fact may infer intent from minimal circumstantial evidence because of the difficulty of proving an actor’s state of mind. *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008). The jury was entitled to rely on the victim’s testimony if it concluded that her testimony was credible, and could convict defendant if the testimony provided minimal circumstantial evidence of his intent.

When viewing the evidence in the light most favorable to the prosecution, and keeping in mind the role of the finder of fact to determine witness credibility and to weigh circumstantial evidence, sufficient evidence supported defendant’s convictions for kidnapping, CSC I, and assault.

The pertinent parts of MCL 750.349 define kidnapping as follows:

(1) A person commits the crime of kidnapping if he or she knowingly restrains another person with the intent to do 1 or more of the following:

* * *

(c) Engage in criminal sexual penetration or criminal sexual contact with that person.

* * *

(2) As used in this section, “restrain” means to restrict a person’s movements or to confine the person so as to interfere with that person’s liberty without that person’s consent or without legal authority. The restraint does not have to exist for any particular length of time and may be related or incidental to the commission of other criminal acts.

Defendant’s neighbor testified that defendant grabbed the victim and dragged her upstairs. The victim testified that she was wearing a heavy winter coat and that defendant dragged her up the stairs by the collar while she was screaming and telling him to let her go. She testified that in response, defendant told her that she was not going anywhere and he was going

to “f*** [her] all night.” After the victim was in defendant’s apartment, he blocked the door with a loveseat, held her down by the shoulders, straddled her, hit her, and sexually penetrated her against her will. She also testified that defendant was choking her with his forearm. This testimony established that defendant knowingly restricted the victim’s movements with the intent to engage in a criminal sexual assault.

The jury found defendant guilty of CSC I on the grounds of both “personal injury and kidnapping.” MCL 750.520b(1) defines the pertinent elements of CSC I as follows:

(1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:

* * *

(c) Sexual penetration occurs under circumstances involving the commission of any other felony.

* * *

(f) The actor causes personal injury to the victim and force or coercion is used to accomplish sexual penetration. Force or coercion includes, but is not limited to, any of the following circumstances:

(i) When the actor overcomes the victim through the actual application of physical force or physical violence.

As explained above, the victim’s testimony established kidnapping and defendant’s intent to commit a sexual assault. Kidnapping is a felony. MCL 750.349(3). Therefore, a reasonable juror could find that the sexual penetration² occurred during the commission of another felony.

Sufficient evidence also supported a finding that defendant had overcome the victim through the use of physical force. The victim testified that when defendant hit her, she was knocked onto her back. The physician who examined the victim at the hospital testified that she “had a significant amount of trauma to the face,” including a swollen lip, a loose tooth, and facial bruising, as well as neck pain, back pain, bruising to her right elbow crease, and possibly a bruise on one knee. A reasonable juror could find that defendant overcame the victim through the use of force.

Accordingly, there was sufficient evidence for a reasonable jury to find that defendant had committed CSC I because he both engaged in sexual penetration with the victim during commission of another felony and because defendant had overcome the victim through force.

² Defendant does not challenge that the victim was sexually penetrated.

Additionally, defendant argues that there is insufficient evidence to support his conviction of assault with intent to do great bodily harm less than murder. Specifically, he argues that the evidence did not show that he had the intent to seriously injure the victim, and that if he had wanted to, he could have inflicted greater injuries.

“The elements of assault with intent to do great bodily harm less than murder are: (1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder.” *People v Brown*, 267 Mich App 141, 146-147; 703 NW2d 230 (2005) (internal quotation marks and citations omitted). Intent to do great bodily harm is defined as “an intent to do serious injury of an aggravated nature.” *Id.*, quoting *People v Mitchell*, 149 Mich App 36, 39; 385 NW2d 717 (1986).

The evidence that defendant beat the victim, choked her, and rendered her unconscious established that he acted with the intent to seriously injure the victim. As noted above, the physician who attended to the victim at the hospital testified about the extent of her injuries. The victim testified that defendant hit her hard enough to knock her onto her back, that he choked her, and that at some point she lost consciousness. She testified that after the assault, she called for an ambulance because her head was throbbing, she lost hearing in one ear, her face was swelling, and she felt as though she would lose consciousness again. Viewing this evidence in the light most favorable to the prosecution, a reasonable juror could have inferred defendant’s intent to seriously harm the victim from his conduct.

Sufficient evidence supported each of defendant’s convictions.

II. OTHER ACTS EVIDENCE

Second, defendant argues that the admission of evidence of other acts of domestic violence in this case violated his constitutional right to due process, and that MCL 768.27b is an unconstitutional violation of the separation of powers in the Michigan Constitution. An issue is preserved if it is raised before the trial court. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). A challenge must be on the same ground to preserve an issue on appeal. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Defendant did not challenge this evidence on constitutional grounds below. In any event, this Court has held that MCL 768.27b does not violate the separation of powers. *People v Schultz*, 278 Mich App 776, 779; 754 NW2d 925 (2008).

Defendant also argues that the trial court abused its discretion when it admitted the other acts evidence in this case because the evidence was irrelevant and unfairly prejudicial. We disagree. We review the trial court’s admission of other acts evidence for an abuse of discretion. See *People v Waclawski*, 286 Mich App 634, 669-670; 780 NW2d 321 (2009). The trial court abuses its discretion when its outcome is outside the permissible principled range of outcomes. *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003).

A defendant’s tendency to commit domestic assault in the past is highly relevant to whether he has committed another domestic assault. Evidence is relevant if it makes any fact of consequence more or less likely to be true. MRE 401. Having a “complete picture of a defendant’s history” can help a jury determine how likely it is that a given crime was committed,

and propensity evidence is “extraordinarily pertinent to a given defendant’s behavior in a similar case,” *People v Pattison*, 276 Mich App 613, 620-621; 741 NW2d 558 (2007), as well as being “highly relevant to show [a] defendant’s tendency to assault” again, *Railer*, 288 Mich App at 220. When a defendant is charged with assault with intent to commit great bodily harm less than murder against a family or household member, MCL 768.27b(5)(a)(ii), (b)(iv), the trial court may admit evidence of previous domestic violence. *Railer*, 288 Mich App at 220. Accordingly, the prior acts were relevant to help the jury determine whether defendant assaulted the victim on this occasion and the trial court did not err in determining the evidence was relevant.

Further, the evidence was not so prejudicial that it needed to be excluded. “[T]he prosecution does not have to use the least prejudicial evidence to make out its case.” *People v Cameron*, 291 Mich App 599, 611; 806 NW2d 371 (2011). The probative value of prior acts evidence admitted under MCL 768.27b will generally only be substantially outweighed by the danger of unfair prejudice if the evidence is inflammatory or interferes with the jury’s ability to logically weigh the evidence. *Railer*, 288 at 220-221. This is particularly true when the testimony on the other acts is brief and not very graphic. *Id.* at 220. As stated above, the victim’s references to the prior acts were extremely brief, not graphic, and in comparison to her detailed testimony about the sexual assault were not likely to confuse the jury about which facts related to the present incident. We conclude that the trial court did not abuse its discretion in admitting this evidence.

III. DEFENDANT’S CONSECUTIVE SENTENCES

Next, defendant argues that the trial court abused its discretion when it sentenced him to consecutive terms of imprisonment for the CSC I and kidnapping convictions. If the minimum sentence is within the guidelines range and a defendant does not raise an issue challenging a sentence at sentencing, in a motion for resentencing, or in a motion to remand, the party may not raise it on appeal. MCL 769.34(19); *Kimble*, 470 Mich at 309. Defendant did not meet any of these preservation requirements. In any event, we conclude that the trial court did not abuse its discretion to impose a consecutive sentence. MCL 750.520b(3).

IV. PROSECUTORIAL MISCONDUCT

Defendant next asserts that the prosecutor committed misconduct in eliciting irrelevant evidence and by making improper closing arguments. Review of alleged prosecutorial misconduct is precluded unless the defendant “timely and specifically” challenged the alleged misconduct before the trial court, or unless failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008). Defendant did not challenge these issues below.³ Therefore, the claims are unpreserved and reviewed for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

³ Defendant claims to have challenged the admission of certain evidence in a motion in limine, but careful reading of defendant’s motion reveals that defendant challenged the admission of the process by which police obtained a search warrant for defendant’s apartment, *not* the process the

When faced with a claim of prosecutorial misconduct, this Court seeks to determine whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Defendant's assertions that the prosecutor sought admission of irrelevant evidence are meritless. Defendant argues that the procedure by which police gained entry to his apartment was irrelevant. We disagree. Evidence of flight, such as evidence that a defendant resisted arrest or attempted to escape custody, is admissible to show consciousness of guilt. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). A person can be attempting to escape custody even if no actual movement takes place. *Unger*, 278 Mich App at 226. A detective testified that when executing the search warrant on defendant's apartment, another officer yelled "police, search warrant, several times" and waited approximately ten seconds before ramming the door. The detective testified that even after defendant's door was opened, it was difficult for him to get into the apartment because the door had been barricaded with a couch and pillows. That defendant barricaded his door was evidence of an attempt to avoid arrest, and accordingly was evidence of his consciousness of guilt.

Defendant argues that the prosecutor elicited an irrelevant response in the following exchange:

Q. Why is it that you've chosen to cooperate in the prosecution of the defendant on this occasion when you haven't done so in the past?

A. Because I was in fear of my life and I thought he was going to kill me. And I feel like if he gets another chance he will kill me.

He also characterizes the exchange as a "combination of a civic duty and sympathy argument." Civic duty and sympathy arguments are arguments that occur during closing. See *People v Wise*, 134 Mich App 82, 102, 104; 351 NW2d 255 (1984). Defendant's characterization of the exchange as an "argument" is incorrect and we decline to analyze it under civic duty or sympathy frameworks.

A prosecutor's good-faith effort to admit relevant evidence does not constitute misconduct. *Dobek*, 274 Mich App at 70. The prosecutor's question to the victim about why she had chosen to cooperate with police when she had not before was relevant to her credibility. Facts that may have influenced a witness's testimony are relevant. *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005). Defendant strongly challenged the victim's credibility at trial, and specifically questioned victim's credibility by asking if she was receiving any financial benefits "because of a perceived victim status." The victim's motives to testify at trial were at issue in this case and had a bearing on her credibility. Therefore, good faith questions about her motives to testify were proper and relevant.

Likewise, defendant challenges the testimony of a Saginaw Police Department sergeant, who testified that she went to defendant's apartment but that no one answered the door and that the door was locked. Although not particularly relevant, defendant cannot show how the

police engaged in when executing that warrant. As noted above, a challenge on one ground does not preserve an issue for appeal on another ground. *Kimble*, 470 Mich at 309.

admission of that testimony prejudiced him, given the weight of the other evidence properly introduced.

Defendant's argument that the prosecutor argued facts not in evidence is also without merit. The prosecutor is free to argue the evidence and reasonable inferences arising from it. *Unger*, 278 Mich App at 236. The prosecutor need not state the inferences in the blandest possible terms, *Dobek*, 274 Mich App at 66, and may fairly respond to an issue raised by the defendant, *People v Fields*, 450 Mich 94, 110-111; 538 NW2d 356 (1995). Here, the prosecutor argued that that defendant "hit [the victim] hard enough to loosen her teeth." This was directly in response to defendant's argument that the victim's injuries were not severe enough to support her claim of violent rape. The victim testified on cross-examination that it was defendant's penis that loosened her teeth. However, she also testified that defendant was hitting her while attempting to have oral sex with her. It was reasonable for the prosecution to infer that defendant's blows loosened the victim's teeth, rather than that defendant's penis was responsible.

Although the prosecutor did improperly imply that defense counsel was attempting to mislead the jury, this unpreserved error did not affect defendant's substantial rights because defendant has not shown that the argument prejudiced his case. This Court reads prosecutorial comments as a whole and evaluates them in light of defense arguments and the relationship they bear to the evidence admitted at trial. See *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008). A prosecutor may not argue that defense counsel is attempting to mislead or fool the jury. *Unger*, 278 Mich App at 235-236. The prosecutor characterized defendant's arguments as an "octopus defense" because "if an octopus gets attacked, it sprays its ink and tries to escape in the confusion. That is what is being created here, in this case." The prosecutor's remarks do tend to imply that defendant was attempting to mislead the jury. However, defendant did not challenge this argument below. It is likely that defendant could have alleviated any prejudicial effect with a timely objection and curative instruction. *Id.* Accordingly, we conclude that although the prosecutor's comment was improper, it was not error warranting reversal in this case.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ David H. Sawyer

/s/ Donald S. Owens