

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW ALLEN MITCHELL,

Defendant-Appellant.

UNPUBLISHED

May 18, 2006

No. 260489

Charlevoix Circuit Court

LC No. 04-091509-FH

Before: Sawyer, P.J., and Kelly and Davis, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of third degree criminal sexual conduct, MCL 750.520d(1)(b) (force or coercion used to accomplish sexual penetration), for which he was sentenced to 20 months to 15 years in prison. We affirm.

At the time of the alleged criminal sexual conduct, defendant was visiting a friend at a cottage owned by the friend's family. Another family was staying at the cottage as well, including the victim, a 14-year-old girl. According to the victim and other witnesses, defendant flirted with her and repeatedly offered her alcohol while they were at the cottage. The victim testified that on her second and last night at the cottage, defendant entered her room late at night, removed her clothes, and raped her.

Defendant first argues that the trial court erred by admitting testimony from defendant's friend, who stated that defendant had told him two weeks before the assault that he thought the victim was "hot" and that he found her attractive. Defense counsel objected at trial that this constituted inadmissible evidence of other crimes, wrongs, or acts under MRE 404(b). We review a trial court's decision whether to admit evidence for an abuse of discretion, but our review is de novo to the extent it involves a preliminary question of law. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). We disagree with defendant's characterization of the testimony.

A prior statement is not itself an "act," so MRE 404(b) generally does not apply to a defendant's prior statement. *People v Goddard*, 429 Mich 505, 518; 418 NW2d 881 (1988). A prior statement may implicate MRE 404(b) if the statement in fact constitutes evidence of an actual prior act. See *People v Rosen*, 136 Mich App 745, 751-755; 358 NW2d 584 (1984). The statement here is, at most, a general statement of intent. Therefore, "the appropriate analysis is whether the prior statement is relevant, and if so whether its probative value outweighs its

potential prejudicial effect.” *Goddard, supra*. Defendant’s general denial placed all elements of the crime at issue. *People v Sabin (After Remand)*, 463 Mich 43, 68; 614 NW2d 888 (2000). The prior statement was probative of defendant’s motive, which is relevant to prove that the act was committed. *People v Engelman*, 434 Mich 204, 223 n 28; 556 NW2d 851 (1996) (“Evidence of motive which suggest the doing of the act charged is always admissible”) (citation omitted). Additionally, the probative value of this evidence was not outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 73-75; 508 NW2d 114 (1993). The testimony was properly admitted.

Defendant next argues that his sentence was disproportionate. However, defendant acknowledges that his sentence is within the appropriate statutory guidelines range. We therefore affirm defendant’s sentence with no further analysis required or permitted. MCL 769.34(10); *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). Defendant contends that this limitation on our review is an unconstitutional violation of the separation of powers, his right to due process, and the right to appeal guaranteed by the state constitution. See Const 1963, art 1, § 20. Our Supreme Court unanimously found MCL 769.34(10) did not violate the constitutional principle of separation of powers and, further, was not forbidden by any provision of the Michigan or United States constitutions. *People v Garza*, 469 Mich 431, 432-435; 670 NW2d 662 (2003). The state constitution gives the Legislature, not the Supreme Court, the power to prescribe the jurisdiction of the Court of Appeals. Const 1963, art 6, § 10; *People v Bulger*, 462 Mich 495, 509; 614 NW2d 103 (2000). We reject defendant’s claim that MCL 769.34(10) is unconstitutional.

Defendant next argues that the trial court erred in the scoring of his offense variables, citing *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, defendant waived appellate review of this issue by affirmatively accepting the scoring of the sentencing guidelines. *People v Carter*, 462 Mich 206, 215; 612 NW2d 438 (1998). Thus, any potential error was extinguished. In any event, our Supreme Court has explained that *Blakely* does not apply to this state’s indeterminate sentencing guidelines. *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004). For this reason, we disagree with defendant’s argument that trial counsel was ineffective for failing to object to the scoring of his offense variables. Counsel cannot be deemed ineffective for failing to advocate a position that is without merit. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed.

/s/ David H. Sawyer
/s/ Kirsten Frank Kelly
/s/ Alton T. Davis