

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 15, 2015

v

WADE ALLEN PHILLIPS,

Defendant-Appellant.

No. 322506
Kalamazoo Circuit Court
LC No. 2014-000014-FH

Before: BOONSTRA, P.J., and MURPHY and MARKEY, JJ.

PER CURIAM.

Defendant Wade Allen Phillips was convicted by a jury of two counts of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(b) (force or coercion used to accomplish sexual contact with the victim). He was sentenced as a third-offense habitual offender, MCL 769.11, to concurrent terms of 60 days in jail and five years' probation. The trial court denied defendant's motion for a new trial and he appeals by right. We affirm.

The victim, VD, testified that she lived with defendant and his girlfriend for several months in 2013. With respect to the incident leading to the charges, VD testified that she accompanied defendant to his friend's house for a bonfire. While there, defendant consumed alcohol. VD expressed a desire to leave, around 10:00 p.m. Because defendant was "really drunk," he allowed VD to drive them home. According to VD, during the car ride home, defendant touched her inappropriately several times, including on her breasts, inner thigh, the bare skin around her stomach, and possibly her vagina. Defendant persisted in touching VD despite her repeated demands to stop. While doing so, he repeatedly told her to "relax." According to VD, when they eventually arrived home, defendant admitted what he had done was wrong, stated he would never do it again, and warned VD not to tell anyone, lest they be unable to go anywhere together in the future. Nonetheless, VD reported the conduct to defendant's girlfriend that night and then to her mother the following day. Her mother contacted the police.

At trial, defendant acknowledged being intoxicated on the night in question and claimed to not have any specific recollections of what took place during the car ride home. He acknowledged that he "might have" inadvertently touched VD's breasts while reaching across her to roll the window down because the window control panel on his side of the vehicle did not work. Further, he admitted touching VD's knee during the car ride home because VD was not controlling her speed, and he wanted to steady her leg on the accelerator. Defendant specifically

denied ever touching VD's genital area or anywhere else for a sexual purpose. Nonetheless, he was convicted as noted above.

Defendant filed his appeal as of right. Thereafter, defendant moved the trial court for a new trial on the basis of newly discovered evidence. The evidence consisted of an affidavit from Robert Cicotte, a mutual acquaintance of defendant and VD, who claimed that he had a conversation with VD in April 2014, just before defendant's trial, during which VD allegedly told Cicotte that she had fabricated the allegations against defendant and admitted that defendant did not actually do anything to her. In support of his motion, defendant attached Cicotte's affidavit, as well as an affidavit from his trial counsel, Jeff Gagie, in which Gagie averred that he diligently investigated defendant's case but never learned of Cicotte's existence or the conversation allegedly had between Cicotte and VD just before defendant's trial.

A hearing on defendant's motion was held on October 15, 2014. Cicotte testified that he became friends with defendant's son, Geoff, while in prison for criminal sexual conduct. It was during this time that Cicotte learned of the charges against defendant. Thereafter, when Cicotte was released from prison in January 2014, he moved in with Geoff at the home of defendant and his girlfriend. While there, he met VD's father, who offered him a job driving truck. Around February 2014, Cicotte moved in with VD's father, where he stayed for several months. It was during this time frame that he met VD. According to Cicotte, in "late April" 2014, approximately one week before defendant's trial, he had the above-noted conversation with VD, during which VD "basically" told him that she lied about the allegations and admitted that the incident never happened. Cicotte claimed to have told VD's father about VD's admission, but her father did not believe him. Cicotte did not, however, tell anyone else about what he had learned because he did not want things to "get all messed up." Eventually, however, he did "the right thing" by telling defendant's appellate attorney after defendant was convicted.

The trial court denied defendant's motion for a new trial. In pertinent part, the trial court found that the substance of Cicotte's testimony could have been discovered before trial through reasonable diligence. Additionally, the trial court found that even with this new evidence, it was improbable that there would be a different outcome on retrial. Critical to the trial court's conclusion on the latter point was its determination that Cicotte was not a credible witness, and it did not appear that he was "telling the entire truth."

On appeal, defendant first argues that the trial court erred in denying his motion for a new trial. We disagree. We review a trial court's decision whether to grant a motion for a new trial for an abuse of discretion. *People v Terrell*, 289 Mich App 553, 558; 797 NW2d 684 (2010). "An abuse of discretion occurs when the trial court's decision is outside the range of principled outcomes." *Id.* at 559. We review for clear error the trial court's factual findings but review de novo any underlying questions of law. *Id.*

A trial court may, in the "interests of justice" or to prevent a "miscarriage of justice," grant a defendant's motion for a new trial. *People v Lemmon*, 456 Mich 625, 634-635; 576 NW2d 129 (1998). See MCL 770.1; MCR 6.431(B). A new trial may be granted on the basis of newly discovered evidence, including impeachment evidence. *People v Grissom*, 492 Mich 296, 312-313, 319; 821 NW2d 50 (2012). A defendant must show that

(1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial. [*People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (quotations and citations omitted).]

The defendant carries the burden of satisfying all four factors. *People v Rao*, 491 Mich 271, 279; 815 NW2d 105 (2012). Michigan courts are reluctant to grant a new trial on the basis of newly discovered evidence, and a trial court's decision to deny such a motion will rarely be determined an abuse of discretion on appeal. *Id.* at 279-280; *Grissom*, 492 Mich at 212.

At the outset, plaintiff does not dispute that the evidence is newly discovered and does not assert it is cumulative to evidence presented at defendant's trial. *Cress*, 468 Mich at 692. The issues on appeal, then, are whether the trial court clearly erred in finding that the evidence could have been discovered through reasonable diligence before defendant's trial and whether presentation of the evidence would render a different outcome probable on retrial. *Id.* We need not resolve the former question as we find that the trial court did not clearly err by finding that a different result was not probable, or abuse its discretion in denying relief on that basis. *Id.* at 691; *Terrell*, 289 Mich App at 558-559.

When reviewing a trial court's findings, an appellate court must recognize the trial court's superior ability to judge the credibility of the witnesses appearing it. MCR 2.613(C); *People v Tyner*, 497 Mich 1001; 861 NW2d 622 (2015); *People v Canter*, 197 Mich App 550, 560; 496 NW2d 336 (1992). Here, the trial court found that Cicotte was not a credible witness, so it was not likely that a retrial would result in a different outcome. From this record, we cannot conclude that this determination was outside the range of principled outcomes. *Tyner*, 497 Mich 1001-1002; *Terrell*, 289 Mich App at 559. First, Cicotte readily acknowledged that he was a good friend of defendant's son Geoff and that he lived with defendant for a while. Thus, he had a motive to lie. Second, there were inconsistencies and oddities in Cicotte's affidavit and testimony. For example, he claimed that while living with her father, he saw VD "at least once a day" when VD would come to visit after school. But he also said that he was frequently out of town and was only around during the weekend for one or two days. Additionally, although he claimed to be barely acquainted with VD and that they had rarely said anything more than "hi" and "bye" to each other, he nonetheless had a serious conversation with her regarding the substance of her abuse allegations. Moreover, despite claiming that he and VD did not have much of a relationship, he felt comfortable claiming in his affidavit that VD was "immature" and a "pathological liar." Finally, despite acknowledging that he was good friends with Geoff, that he knew defendant, and that he had lived with them after being released from prison, he claimed that he did not tell anyone about the conversation he had with VD because he did not want things to "get all messed up." Yet, oddly, once defendant was convicted, he felt it was "the right thing" to become involved. Given these inconsistencies and oddities, the trial court did not abuse its discretion in finding that Cicotte's testimony was not credible and therefore would not make a different result probable on retrial. *Cress*, 468 Mich at 692.

Defendant next argues that there was insufficient evidence to support his CSC-IV convictions beyond a reasonable doubt. We disagree. We review sufficiency challenges de novo. *People v Kosik*, 303 Mich App 146, 150; 841 NW2d 906 (2013). The test is "whether the

evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt.” *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). The elements of a crime may be proved with circumstantial evidence and reasonable inferences arising from that evidence. *Id.* at 400. In reviewing a sufficiency challenge, all conflicts in the evidence must be resolved in favor of the prosecution. *Kosik*, 303 Mich App at 151. The testimony of a CSC victim need not be corroborated. MCL 750.520h.

The CSC-IV statute provides, in relevant part, that a person is guilty of criminal sexual conduct in the fourth degree if he engages in “sexual contact” with the victim through the use of force or coercion. MCL 750.520e(1)(b). “Sexual contact” “includes the intentional touching of the victim’s . . . intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s . . . intimate parts, if that touching can reasonably be construed as being for the purpose of sexual arousal or gratification” MCL 750.520a(q). “Intimate parts” include “the primary genital area, groin, inner thigh, buttock, or breast” MCL 750.520a(f). Force or coercion includes the actual application force or violence, or where the actor “achieves the sexual contact through concealment or by the element of surprise.” MCL 750.520e(1)(b)(i), (v).

Here, VD testified that without warning and without consent, defendant touched, among other things, her breasts, inner thigh, and possibly her vagina. While defendant focuses on the uncertainty of VD’s testimony regarding the touching of her vagina, her testimony regarding the touching of the other two areas, both “intimate parts” of VD’s body, MCL 750.520a(f), was sufficient to establish two counts of CSC-IV.¹ Moreover, contrary to defendant’s argument, there was sufficient evidence from which a jury could find beyond a reasonable doubt that defendant touched VD intentionally for the purpose of sexual gratification. Specifically, VD testified that defendant repeatedly touched her despite her admonishments to stop and that he repeatedly told her to “relax.” Then, when the encounter ended, defendant acknowledged that his conduct was wrong; he apologized, promised to never do it again, and attempted to keep VD from telling anyone about the encounter. There was thus sufficient evidence to support defendant’s convictions on both counts.

Defendant finally argues that he was denied due process when the prosecution elicited without notice testimony from VD regarding defendant’s prior acts of misconduct. Defendant did not object to the challenged evidence at trial; consequently, the issue is unpreserved. We review unpreserved issues for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

During direct examination, VD recalled that defendant, after touching her breast the first time, “laughed” and “joked” that he was just trying to reach the window control panel. The prosecutor then asked VD whether she thought defendant was simply joking when he touched her. She responded “no.” When the prosecution then asked “why,” VD responded that defendant had previously touched her inappropriately on the buttocks while giving her hugs. On cross-examination, defendant’s trial counsel elicited similar testimony, at which point the trial

¹ Alternate acts committed by a defendant may be presented as evidence of the actus reus of the charged offense. *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994).

court interjected with a limiting instruction, cautioning the jury not to use the evidence for an improper purpose. A similar instruction was given during the trial court's final instructions.

At the outset, we disagree with the prosecution's argument on appeal that the challenged testimony was unsolicited and therefore unresponsive. To the contrary, the testimony was *directly* responsive to the prosecutor's question as to "why" VD believed that defendant was not simply joking when he touched her breast. From the record, however, it is simply impossible to determine whether the prosecutor expected the answer he received. Nonetheless, no prejudice resulted from the evidence. First, the evidence would have been admissible under MCL 768.27a.² Under that statute, in a case where a defendant is accused of committing a "listed offense" against a minor, evidence that he previously committed another "listed offense" against a minor "is admissible and may be considered for its bearing on any matter to which it is relevant." MCL 768.27a(1). A "listed offense" means, among other things, a CSC-IV offense. See MCL 768.27a(2)(a); MCL 28.722(j), (u)(x). Here, defendant was charged with committing a "listed offense"—two counts of CSC-IV against a minor, i.e., a person under the age of 18, see MCL 768.27a(2)(b). Thus, evidence that he previously committed a "listed offense"—i.e., that he previously committed CSC-IV upon VD by touching her buttocks, an "intimate part" of her body, see MCL 750.520a(f)—was admissible for its bearing on *any* matter to which it was relevant, including defendant's propensity for sexually assaulting young girls. MCL 768.27a; *People v Watkins*, 491 Mich 450, 470; 818 NW2d 296 (2012). Moreover, contrary to defendant's argument, the testimony was not unfairly prejudicial under MRE 403 since it was brief, less egregious than the charged conduct, and directly probative on several material points. Finally, any prejudice was alleviated by the trial court's subsequent instructions, which we note were more restrictive than required for evidence admitted under MCL 768.27a. In sum, admission of the evidence did not affect defendant's substantial rights.

To the extent defendant argues that he was denied due process by the prosecutor's failure to give advance notice of its intent to introduce the challenged testimony, we note that any error in this regard was harmless in light of our above conclusions that the evidence was admissible pursuant to MCL 768.27a and that defendant's substantial rights were not affected. See *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2011).

We affirm.

/s/ Mark T. Boonstra
/s/ William B. Murphy
/s/ Jane E. Markey

² While defendant also cites MRE 404(b) in his brief on appeal, it is well established that MCL 768.27a supersedes MRE 404(b) where it applies, and therefore no discussion of MRE 404(b) is necessary. *People v Watkins*, 491 Mich 450, 473-477; 818 NW2d 296 (2012).