

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL KING,

Defendant-Appellant.

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UNPUBLISHED

May 10, 1996

No. 176530

LC No. 93-012179

Before: Jansen, P.J., and McDonald and D.C. Kolenda,\* JJ.

PER CURIAM.

Following a jury trial in the Detroit Recorder's Court, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was thereafter sentenced to concurrent terms of eight to fifteen years' imprisonment. He appeals as of right and we affirm.

This case arises out of the sexual abuse that defendant perpetrated on his nine-year-old stepson who was living with defendant and defendant's wife. Defendant raises four issues on appeal, however, we do not find any to require reversal.

Defendant first argues that the trial court abused its discretion in not allowing him to question Regina Moland, the complainant's aunt, regarding the complainant's credibility. The prosecutor concedes error on this issue, agreeing that the trial court abused its discretion in excluding testimony regarding whether the complainant was truthful when he lived with Moland. The prosecutor, however, argues that such error was harmless.

We agree with the parties that the trial court abused its discretion in excluding the testimony because it was properly admissible under MRE 608. However, there is no miscarriage of justice in this case where the trial court improperly rejected the admission of evidence to the jury. MCL 769.26; MSA 28.1096. Here, defense counsel asked Moland about the complainant's reputation for

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\* Circuit judge, sitting on the Court of Appeals by assignment.

truthfulness in the community. Moland testified that the complainant did not have a good reputation for being truthful. The trial court only sustained the prosecutor's objection to defense counsel's question to Moland regarding whether the complainant was truthful while living in her home.

Because defense counsel was permitted to question Moland regarding the complainant's reputation for truthfulness in the community, and Moland testified that the complainant did not have a good reputation for being truthful, we find the error in not allowing counsel to question Moland regarding the complainant's truthfulness while living with her to be harmless. Because defense counsel was attempting to impeach the complainant by showing that he was not a truthful person, he was able to do so with a different question. Thus, there was testimony regarding the complainant's reputation for being truthful before the jury. Any further questioning in this regard would have been merely cumulative.

Accordingly, any error in not allowing defendant to question Moland regarding the complainant's truthfulness while he lived with Moland is harmless beyond a reasonable doubt.

Defendant next argues that the prosecutor improperly bolstered the complainant's credibility with prior consistent statements. Defendant did not object to this testimony below, therefore, he has failed to preserve it for appellate review. Moreover, we do not find any substantial right of defendant's to be affected in this case. MRE 103(a)(1).

Upon reviewing the testimony that defendant now challenges on appeal, we find that the prosecutor's questions did not elicit a prior consistent statement used to bolster the complainant's credibility. On direct examination of Moland, the prosecutor asked her about the circumstances surrounding the complainant telling her about the sexual abuse and the action taken after the complainant told her what had happened. Moland testified that the day after the complainant told her about the incidents, he was taken to a psychiatrist and a counselor. The psychiatrist and counselor then called protective services, who, in turn, contacted the police. Moland's testimony did not include any prior consistent statements of the complainant. Therefore, the prosecutor did not bolster the complainant's credibility with the use of a prior consistent statement.

Defendant next argues that defense counsel was ineffective for failing to object to the introduction of certain allegedly improper testimony. In order to establish a claim of ineffective assistance of counsel, defendant must show that counsel's standard fell below an objective standard of reasonableness and that the representation so prejudiced defendant so as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). We find no ineffective assistance of counsel in this case.

Defendant first contends that counsel was ineffective for failing to object to Ednee Lainesse's (the complainant's grandmother) testimony about the complainant being beaten. Lainesse testified that she saw signs of the complainant being beaten because she saw red marks around his waist. When Lainesse began to testify regarding what other individuals stated about the red marks, defense counsel objected, and the trial court sustained the objection. Defendant does not argue how Lainesse's

testimony was improper or objectionable except to state in a conclusory fashion that it was prejudicial. We find nothing improper in the testimony and do not find that defendant was denied the effective assistance of counsel for counsel's failure to object to the testimony.

Defendant also argues that defense counsel was ineffective for failing to object to Moland's testimony that the complainant told his story to a psychiatrist and a social worker. We have already concluded that the prosecutor did not impermissibly attempt to bolster the complainant's credibility with a prior consistent statement. Accordingly, defendant has suffered no prejudice from counsel's failure to object to this testimony at trial.

Defendant was not denied the effective assistance of counsel at trial.

Last, defendant claims that the trial court erred in scoring OV 12 (criminal sexual penetrations) at fifty points (two or more criminal sexual penetrations). The sentencing guidelines instruct that all penetrations are to be scored involving the offender arising out of the same criminal transaction. In first- and third-degree criminal sexual conduct cases, the one penetration that forms the basis of the conviction is not to be scored. Although this issue has generated a great deal of conflicting opinions in this Court, see *People v Raby*, 213 Mich App 801 (1995), we find that OV 12 was properly scored at fifty points in this case.

Defendant was charged with three separate counts of first-degree criminal sexual conduct which were alleged to have occurred between April and September of 1993. According to the complainant's testimony at trial, there would be a series of sexual penetrations (usually oral and anal sexual contact) each time that defendant had contact with him. Therefore, there were more than two criminal penetrations arising out of the same criminal transaction. See *People v Cotton*, 209 Mich App 82, 84; 530 NW2d 495 (1995).

Further, even if OV 12 was scored at twenty-five points as argued by defendant, the sentencing guidelines range would be 60 to 120 months (rather than 96 to 240 months). Defendant's sentence of eight years would still fall within his proffered guidelines range of 60 to 120 months. Defendant has not shown that his sentence of only eight years, for numerous sexual contacts with his nine-year-old stepson, is violative of the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Accordingly, even if OV 12 was wrongly scored, any error is harmless in light of the fact that his sentence would still fall within the guidelines range. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

Defendant's sentence is not excessively severe and is valid.

Affirmed.

/s/ Kathleen Jansen  
/s/ Gary R. McDonald  
/s/ Dennis C. Kolenda

