STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH ALLEN OSBORNE,

Defendant-Appellant.

UNPUBLISHED
June 4, 1996

Nos. 159117; 181596
LC No. 92-810-FH

Before: Holbrook, P.J., and Taylor and W. J. Nykamp,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(1)(a) (penile-vaginal penetration with a victim who is at least thirteen years old, but under sixteen). Defendant was acquitted of a second count that had alleged oral-vaginal penetration. Defendant was sentenced to ten to fifteen years in prison. Defendant appeals as of right. We reverse.

Defendant was the live-in boyfriend of the victim's mother. The victim testified that she and defendant began having sexual intercourse several times a month when she was fourteen or fifteen, while in the eighth grade, and that this continued until she was in the eleventh grade.

Defendant argues that he was denied a fair trial as a result of improper argument by the prosecutor and his counsel's stipulation to the introduction of irrelevant and prejudicial evidence. We agree.

During cross-examination by the defense, counsel asked the victim if she had sex with anyone other than defendant. The trial court sustained the prosecutor's objection to this question. Thereafter, a nurse practitioner testified that she had performed a pelvic examination of the victim after the victim turned seventeen years old and found that the victim's hymen was obliterated. The nurse opined that this was most likely the result of the victim engaging in repeated acts of sexual intercourse. In closing

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

argument, the prosecutor reminded the jury that the nurse had examined the victim and found the condition of the hymen showed that the victim had engaged in repeated sexual intercourse over a period of time. After noting that the victim did not have a boyfriend, was not allowed phone calls or visits from boys, had to be home early and had very strict supervision, the prosecutor asked: "Where else could this sexual penetration, sexual intercourse have occurred, except with [defendant]?" We find that the prosecutor's argument exploiting the trial court's ruling in conjunction with the improper admission of the nurse's testimony deprived defendant of a fair trial.

The prosecutor's argument essentially asked who else aside from defendant could have been responsible for the obliteration of the victim's hymen. This was improper argument, given the trial court's earlier sustaining of an objection by the prosecutor to defense counsel's question that may have elicited an answer to this question. *People v Housholder*, 74 Mich App 399, 401; 253 NW2d 780 (1977). As previously noted, defense counsel asked the victim if she had had sex with anyone other than defendant and the answer to this question was not allowed. The prosecutor then took unfair advantage of this evidentiary ruling by arguing that no one but defendant could have been responsible for the obliteration of the victim's hymen. *Id*.

Pursuant to MRE 404(a)(3) and MCL 750.520j; MSA 28.788(10) (the rape-shield statute), evidence of a criminal sexual conduct victim's past sexual experiences with persons other than the defendant is not admissible except to show the source or origin of semen, pregnancy, or disease.[1] However, once the prosecution introduces medical evidence to establish penetration, a defendant must be allowed to introduce evidence of other possible sources of the penetration in order to rebut the inference that defendant was the responsible person. *People v Haley*, 153 Mich App 400, 405-407; 395 NW2d 60 (1986). Here, the trial court's ruling prevented defendant from obtaining an answer that may have pointed to other possible sources of the penetration.

We further find that the nurse's testimony should not have been introduced into evidence. While testimony concerning a sexual assault victim's genital area is relevant to establish that a penetration occurred, *People v Vasher*, 167 Mich App 452, 459; 423 NW2d 40 (1988), such testimony is irrelevant and immaterial unless there is foundational evidence of the victim's physical condition before the alleged incident. *People v Mikula*, 84 Mich App 108, 114-115; 269 NW2d 195 (1978). In the case at bar, no medical evidence was introduced showing that the victim's hymen was not obliterated before defendant allegedly had sexual intercourse with her. The relevance of the nurse's testimony that the victim's hymen was obliterated was extremely marginal due to the significant time delay involved. The charged offense could not have occurred after November 3, 1990, when the victim turned sixteen. The nurse's examination, however, did not take place until March 1992, when the victim was seventeen. The fact that the victim's hymen was obliterated as of March 1992, apparently from engaging in repeated acts of intercourse, was not relevant or material to the condition of the victim's hymen before November 3, 1990. *Mikula, supra*. The introduction of the nurse's testimony was very prejudicial as it confirmed the victim's testimony that she and defendant had engaged in repeated acts of sexual intercourse. This was unfairly prejudicial to defendant where there was no evidence showing that the victim's hymen was intact before his allegedly having sexual intercourse with the victim and where

the victim's hymen could have been obliterated from having sexual intercourse after she turned sixteen (whether with defendant or others). In fact, there was testimony that defendant was found in bed with the victim after the victim turned sixteen. Even if the nurse's testimony was considered marginally relevant despite the lack of foundation and the time delay involved, we are satisfied that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. MRE 403.

We discuss the assignments of error concerning questions likely to arise again upon retrial. Defendant argues that the court abused its discretion in allowing the victim's sister to testify: (1) that she saw defendant and the victim in bed without clothes on after school after the victim turned sixteen, i.e., when the act would not have been in violation of the crime charged in the information; and (2) that defendant disapproved of the victim and herself associating with boys. We disagree.

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). The trial court determined that the testimony showing defendant was in bed with the victim after the victim turned sixteen was admissible under MRE 404(b) as it showed a plan, scheme, or system to have sex with the victim after school. The trial court did not abuse its discretion. *People v VanderVliet*, 444 Mich 52, 87; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994); MCL 768.27; MSA 28.1050. Likewise, we find the testimony that defendant attempted to prevent the victim from associating with boys her own age was properly admitted as it suggested that defendant wanted to make sure he was the victim's only sexual partner.

We reject defendant's claim that he was denied his right to a fair trial as a result of the prosecutor vouching for the complainant and appealing to the jurors' sympathy. Defendant did not object to this alleged prosecutorial misconduct at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We are also satisfied that the court's instruction to the jury that the arguments of counsel were not evidence, and that the jury was not to let sympathy influence its decision dispelled any potential prejudice. *Bahoda, supra* at 281.

Defendant's sentencing issues are moot given our reversal of his conviction.

Reversed and remanded for a new trial.

/s/ Clifford W. Taylor
/s/ Wesley J. Nykamp

I concur in the result only.

/s/ Donald E. Holbrook, Jr.

[1] Whether this rule of evidence supercedes the statute apparently remains unresolved. See *People v LaLone*, 432 Mich 103, 108; 437 NW2d 611 (1989).