STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTURO VASQUEZ,

Defendant-Appellant.

UNPUBLISHED
October 18, 1996

No. 180585
LC No. 94-026133-FC

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to enhanced concurrent terms of forty to sixty years' imprisonment on each CSC I conviction. We affirm.

Defendant asserts multiple claims of prosecutorial misconduct. We have examined the prosecutor's remarks in context and conclude that defendant was not denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). During jury selection, defense counsel asked several potential jurors if they believed that children could make up a claim of sexual abuse. The prosecutor then asked whether they would consider defendant's "34 years on the planet to hone [his] ability to lie and deceive." Prosecution arguments are considered in light of defense arguments. *People v Spivey*, 202 Mich App 719, 723; 509 NW2d 908 (1993). Because the prosecution had a legitimate interest in impaneling a jury not unduly inclined to believe the accused, the inquiry about defendant's greater life experience is not grounds for reversal.

Defendant also asserts that the prosecutor improperly questioned Roman Poronczuk, a witness who claimed defendant tried to engage him to intimidate the complainant's mother. The prosecutor's inquiry about Poronczuk's concern for the complainant's mother was not an improper attempt to inject sympathy. This evidence was relevant to the witness' credibility because it tended to show Poronczuk's motive for coming forward with the information which countered any motive he may have had in fabricating testimony to seek a more favorable plea agreement. *People v Minor*, 213 Mich App 682,

685; 541 NW2d 576 (1995). In any event, the trial court cautioned the jury to consider the testimony for motive purposes only.

Defendant raises additional claims of prosecutorial misconduct, which he did not preserve. We need not consider these issues because no miscarriage of justice would result. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). The prosecutor's leading question about whether the complainant had told his mother that he thought defendant had a gun was relevant to explain why the complainant had not reported the molestation earlier. In addition, testimony that defendant was a "suspect in another matter" was actually elicited by defense counsel, not the prosecutor. The prosecutor's closing argument, mentioning that the complainant's mother was widowed and worked during the afternoons, was not aimed at creating sympathy but supported the claim that the complainant was often alone with defendant.

Defendant next argues that the testimony about the complainant telling his mother that he had been molested by defendant was improperly admitted under MRE 803A, the tender years exception. There was no abuse of discretion. This was the complainant's first statement describing the incident, his mother's recitation corroborated his testimony at trial, and he was under ten years of age when the statement was made. Further, the child's statement was made in response to extremely brief, general questions, the response was immediate, and thus, it was spontaneous and without indication of manufacture. Just as a statement made in response to questions does not preclude it from being an excited utterance, *People v Hackney*, 183 Mich App 516, 523-524; 455 NW2d 358 (1990), it will not preclude it from qualifying under the tender years exception. Finally, any delay in making the statement was excusable as having been caused by fear. The complainant testified that defendant told him not to tell his mother about the incidents and that he believed defendant had a gun.

Defendant argues that a child prosecution witness should not have been permitted to testify about incidents in which defendant approached him and attempted to induce him to accompany defendant. The trial court did not abuse its discretion by admitting this testimony. It was highly probative of a scheme or plan by defendant to attempt to entice young children and thus, was not subject to exclusion under MRE 404(b). *People v VanderVliet*, 444 Mich 52, 84-85; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205; 520 NW2d 338 (1994).

However, defendant also challenges this child's testimony that defendant said he was going to keep $40 in a wallet that he showed the child, which implied that defendant was keeping money that was not his. This testimony established nothing pertinent and tended only to show defendant's criminal propensity, a purpose proscribed by MRE 404(b). It should not have been admitted. However, we find that any error was cured by the trial court's cautionary instruction that this testimony could not be used to show that defendant was a bad man. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994). Further, in light of the substantial evidence against defendant, this error was harmless. *People v Mateo*, 453 Mich 203; ___ NW2d ____ (1996).[1]

We also reject defendant's argument that a police officer's testimony about having known defendant from past encounters was precluded by MRE 404. This testimony did not reference any

prior bad act. Further, it was relevant to establish the officer's ability to identify defendant. Defendant also notes testimony by the officer that he was a "suspect in another matter." However, as noted earlier, defendant is not entitled to relief based on that testimony because it was elicited by the defense. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995) ("To hold otherwise would allow defendant to harbor error as an appellate parachute.").

Defendant next argues that, despite MRE 609(c), his right to confrontation was violated when the trial court precluded him from impeaching Poronczuk with certain convictions. We disagree. Under MRE 609(c), the trial court properly precluded evidence of these convictions to impeach credibility because a period of more than ten years had elapsed. In *People v Redmon*, 112 Mich App 246, 255-258; 315 NW2d 909 (1982), a panel of this Court concluded that the Sixth Amendment right to confrontation required that a defendant be permitted to impeach a witness with convictions that would otherwise be excluded by the ten-year rule if the court finds that their probative value substantially outweighs their prejudicial effect. However, in *People v Carter*, 128 Mich App 541, 548; 341 NW2d 128 (1983), rev'd on other grounds sub nom *People v Woodward*, 422 Mich 941; 369 NW2d 852 (1985), another panel of this Court held that automatic exclusion of evidence of convictions pursuant to the ten-year rule does not violate the right to confrontation. We find it unnecessary to resolve this conflict because the convictions that were excluded had scant probative value in light of the admission of Poronczuk's three more recent prior felony convictions and pending theft charges.

Defendant next argues that second-degree criminal sexual conduct (CSC II) is a necessarily included lesser offense of CSC I and, accordingly, that the trial court was required to give a requested CSC II instruction. However, in *People v Wilhelm (On Rehearing)*, 190 Mich App 574, 577; 476 NW2d 753 (1991), this Court determined that CSC II is a cognate lesser offense of CSC I and not a necessarily included lesser offense. Thus, because there was no evidence of mere sexual contact, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and defendant did not present a defense asserting mere contact, defendant cannot seek reversal based on the trial court's refusal to instruct the jury on CSC II as it would have been inconsistent with the evidence and defendant's theory of the case. Defendant urges this Court to follow case law predating *Wilhelm*. However, we agree with *Wilhelm* and, in any event, are required to follow it under Supreme Court Administrative Order 1996-4.

Defendant also challenges the trial court's refusal to instruct on fourth-degree criminal sexual conduct. However, as with CSC II, there was no evidence to reasonably support a finding that defendant engaged in sexual contact with the complainant without sexually penetrating him. *People v Steele*, 429 Mich 13, 20; 412 NW2d 206 (1987); *People v Stephens*, 416 Mich 252, 262-263; 330 NW2d 675 (1982). The trial court also properly refused to instruct the jury on assault and battery because other assaultive crimes, without sexual conduct elements, are not cognates of CSC. See *People v Harris*, 133 Mich App 646, 651; 350 NW2d 305 (1984); *People v Payne*, 90 Mich App 713, 720-721; 282 NW2d 456 (1979).

Defendant claims that the trial court abused its discretion in denying his motions for a mistrial. We find no abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). First, the admission of Wood's testimony regarding the wallet was, at most, harmless error,

and not a basis for mistrial. Second, contrary to defendant's argument, a police officer's testimony that defendant said he did nothing wrong was not precluded by MRE 404(b) as it was not evidence of a prior bad act. Third, the witness' testimony that he came forward regarding the request to intimidate the mother out of concern for her was relevant. Fourth, defendant did not establish cumulative error warranting a mistrial. Fifth, although a close evidentiary question, we determined that precluding the defense from eliciting testimony that a witness faced life imprisonment was not an abuse of discretion and thus, it was not grounds for a mistrial. Sixth, the trial court properly refused to instruct the jury on CSC II.

Defendant also argues that the evidence presented at trial was insufficient to support his conviction of any of the three CSC I offenses. Viewing the evidence most favorably to the prosecution, *People v Partridge*, 211 Mich App 239, 240; 535 NW2d 251 (1995), we disagree and conclude that the trial court properly denied a directed verdict on these charges. A person commits CSC I, in pertinent part, by engaging in sexual penetration with another person who is under thirteen years of age. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The complainant described three separate incidents in which defendant rectally penetrated him. There was also testimony that the complainant was only nine years old at the time of trial.

Finally, defendant argues that his sentences were disproportionate. We disagree. "[T]he archetype 'no abuse of discretion' case is the imposition of a maximum sentence in the face of compelling aggravating factors." *People v Merriweather*, 447 Mich 799, 807; 527 NW2d 460 (1994). Further, in *People v McElhaney*, 215 Mich App 269, 285-286; 545 NW2d 18 (1996), this Court rejected as "ridiculous" the defendant's argument that thirty to sixty year sentences for each of three counts of CSC I committed against a nine-year-old child were disproportionate. Here, defendant was convicted of horrible crimes and had previously been convicted of attempted CSC II. We conclude that his sentences were not disproportionately severe.

We affirm.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard A. Bandstra

[1] Defendant also characterizes the testimony about the wallet as prosecutorial misconduct. Because we determined that this was harmless, it follows that defendant was not denied a fair trial, *Bahoda*, *supra*, and thus, this does not present grounds for reversal.