STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HORACE M. HOWZE, JR.,

Defendant-Appellant.

UNPUBLISHED
January 24, 1997

No. 177482
LC No. 94-049718-FC

Before: Saad, P.J., and Holbrook and G.S. Buth,*JJ.

PER CURIAM

A jury convicted defendant of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(10(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced to concurrent terms of twenty to thirty years' imprisonment on each of the first-degree criminal sexual conduct convictions, and eight to fifteen years' imprisonment on the second-degree criminal sexual conduct conviction. Defendant appeals as of right. We affirm.

The female victim lived in Lapeer with her sister and defendant (her sister's boyfriend) from February 1992, until June 1992. She was eight years old at the time. The victim testified that, while living with her sister, defendant repeatedly forced her to engage in vaginal, anal and oral intercourse. Specifically, she stated that defendant assaulted her while she was lying on the couch in the living room, while she was in the shower and on the toilet, and twice while she was in the kitchen of the apartment. She also testified that defendant assaulted her while she was at her parents' home. She related that, each time, defendant put his penis into her vagina, and moved it around until "slime" came out. The victim also stated that defendant put his penis into her mouth, that "slime" came out, and that defendant forced her to swallow the "slime." In addition, the victim related that, on three occasions, defendant put his penis "in her butt," and refused to stop moving it when she told him that it burned and hurt. She also described how defendant wiped the "slime" that came out of his penis onto a towel, and forced the victim to smell it. Further, she stated that defendant licked her vagina with his tongue.

The victim testified that she did not tell anyone about the abuse because defendant threatened to kill her or her parents if she did. The victim's mother became aware of the abuse when the victim, while

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

playing with her female cousin, put a sock in the girl's mouth and began kissing the girl all over her body. When asked why she was engaging in such behavior, the victim began crying, stated that defendant had hurt her, and related the incidents of abuse. Defendant denied the incidents, and claimed that the victim was retaliating because he had punished her for cheating in school. The jury returned a guilty verdict on each count, and defendant now appeals.

I

Defendant asserts that the trial court pierced the veil of judicial impartiality when, in the course of determining the ten year old victim's competency to testify, the court questioned the victim about her religious habits.[1] In particular, defendant argued that the trial court's questioning violated MCL 600.1436; MSA 27A.1436, which provides:

> No person may be deemed incompetent as a witness, in any court, matter or proceeding, on account of his opinion on the subject of religion. No witness may be questioned in relation to his opinion on religion, either before or after he is sworn.

As a threshold matter, defendant did not object to the trial court's conduct. Absent an objection, we review a claim of judicial misconduct only if manifest injustice would result from a failure to review. *People v Paquette,* 214 Mich App 336, 340; 543 NW2d 342 (1995). After careful review of the record, we conclude that the trial court's questions to the victim about her religious habits to determine her competency as a witness did not unduly influence the jury, that defendant had a fair trial, and that no manifest injustice would result if this issue is not reviewed.

Even if we reviewed this issue, we would find no error. MCL 600.1263; MSA 27A.2163, provides in relevant part:

> Whenever a child under the age of 10 years is produced as a witness, the court shall by an examination made by itself publicly, or separate and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify.

Defendant acknowledges that, under MCL 600.1263; MSA 27A.1263, a trial court may inquire into the child's religious beliefs to determine the child's competency as a witness. See *People v Booth,* 58 Mich App 466, 470-472; 228 NW2d 425 (1975); *People v Choate,* 88 Mich App 40, 48; 276 NW2d 862 (1979). However, defendant contends that, because the victim was actually ten years and four months old at the time of trial, MCL 600.1263; MSA 27A.1263 did not apply. We agree that the terms of the statute did not technically apply to the victim, but we nonetheless find no error in the judge's colloquy.

In *People v Burch,* 170 Mich App 772, 774-775; 428 NW2d 772 (1988), we considered an analogous claim where the trial court examined an *eleven*-year-old victim (who attended special education classes), pursuant to MCL 600.2163; MSA 27A.2163, to determine the victim's competency as a witness. On appeal, the defendant challenged the trial court's determination that the

victim was a competent witness. *Id*. at 774. In finding that the trial court had not abused its discretion in admitting the victim's testimony, this Court held:

> Here, although not required, the trial judge addressed the victim as if he were under ten years old and pursuant to MCL 600.2163; MSA 27A.2163. While the trial judge chose the cautious approach suggested by the statute, he was not obliged to do so and it cannot be considered error to follow an inapplicable statute. We find such an approach helpful in cases where the witness exceeds the age of ten, but evidences signs of mental impairment. Such an approach provides the reviewing court testimony with which to review the trial judge's exercise of discretion in determining a witness' competency to testify. [*Burch, supra* at 775.]

Here, although defendant does not challenge the trial court's determination to admit the victim's testimony, he does challenge the trial court's decision to follow MCL 600.2163; MSA 27A.2163, when not required. However, in light of *Burch*, where the critical witness is of tender years, and where the inquiry that touched upon "religious" issues was for the purpose of determining her competency to testify truthfully, the trial judge cannot be faulted for following a statute that was not technically applicable. Not only does such an approach provide the reviewing court with a record to review the judge's decision, it also secures the defendant's right to a fair and impartial trial. To find otherwise would elevate form over substance. Therefore, we conclude that the trial court's actions did not unduly influence the jury and, if anything, effectively guaranteed defendant his right to a fair and impartial trial.

II

Next, defendant raises several claims of prosecutorial misconduct. Defendant failed to object below to four of the five alleged instances, thereby leaving those claims unpreserved. Accordingly, appellate review of the unpreserved claims is precluded unless the misconduct was so egregious that no curative instruction could have removed the prejudice, or if manifest injustice would result in our failure to review. *Pacquette,* 214 Mich App at 343.

A

Defendant's first unpreserved claim of misconduct is that the prosecutor improperly elicited testimony regarding defendant's failure to appear at the police station for questioning before he was arrested. Defendant argues that the prosecutor's questioning in this regard was reversible error because it exploited defendant's silence and amounted to a tacit admission of his guilt. Defendant contends that his failure to preserve this allegation of misconduct is not dispositive because of this Court's recent decision in *People v Greenwood,* 209 Mich App 470; 531 NW2d 771 (1995). We do not find *Greenwood* to be controlling here.

In *Greenwood,* the prosecutor commented during closing argument that the defendant declined to accept a detective's invitation to appear at a police station to "offer an explanation" as to how the victim's ring disappeared, because the defendant took the ring. *Greenwood,* 209 Mich App at 473. The Court found that, because there was no evidence that the defendant adopted or believed in the truth

of the prosecutor's accusation, and because evidence in the case was purely circumstantial and hinged on the credibility of the defendant, the error was not harmless. *Id.* The Court reasoned that a curative instruction would not have cured the prejudice, and reversed the defendant's conviction. *Id.*

Here, we agree that the prosecutor's comment (that defendant failed to appear at the police station for questioning because he was avoiding the police), was improper because there was no evidence that defendant adopted or believed in the truth of the prosecutor's statement. See *Greenwood*, 209 Mich App at 473. However, because the evidence at trial here was *not* purely circumstantial nor did it hinge upon the credibility of defendant, we find the error to be harmless. There was extensive and detailed testimony from the victim regarding the sexual abuse defendant inflicted, testimony from the victim's aunt that expressed the victim's fear of defendant, and testimony from a medical expert that confirmed that the victim was sexually abused. Accordingly, unlike *Greenwood*, here a curative instruction would have cured any prejudice to defendant, and defendant's claim fails. See *Greenwood*, 209 Mich App at 473.

B

Defendant's second unpreserved claim is that, on cross-examination, the prosecutor improperly asked defendant that if he had, in fact, sexually abused the victim, would he admit it to the jury. Defendant argues that, as in *People v Williams*, 39 Mich App 458; 197 NW2d 858 (1972), the prosecutor's question was reversible error because it posed defendant with a hypothetical situation that damaged defendant no matter which way he answered. We disagree. Unlike *Williams*, the question did not place the prosecutor in a no lose situation; rather, it provided defendant an opportunity to proclaim his innocence. Accordingly, we find no miscarriage of justice from our failure to review this claim.

C

Defendant's third unpreserved claim is that the prosecutor improperly used evidence of another man's guilty plea, whom the victim had previously accused of sexual abuse, to bolster the victim's allegations against defendant. We disagree. The record indicates that the parties stipulated to the admittance of the other man's guilty plea, and that defendant used the evidence as a way of accounting for the medical evidence that the victim had been sexually abused. Accordingly, where defendant opened the door to the use of this evidence, we find no miscarriage of justice in our failure to review. See *Pacquette*, 214 Mich App at 342.

D

Defendant's final unpreserved allegation of misconduct is that the prosecutor impermissibly bolstered the victim's credibility by eliciting testimony that she attended church. Defendant claims that the prosecutor's questions were in violation of MCL 600.1436; MSA 27A.1436, and constitute reversible error. We disagree. The record indicates that the prosecutor did not question the victim about her religious activities and beliefs as a means of bolstering her credibility. Rather, at the end of the prosecutor's direct examination of the victim, the subject of church arose in the context of the victim's

competency as a witness. Therefore, because the record does not support defendant's allegation, and because a curative instruction from the court would have removed any possible prejudice, defendant's claim fails. *Pacquette*, 214 Mich App at 342.

E

Finally, defendant argues that he was denied his right to a fair trial when the prosecutor impermissibly informed the jury that was aware of inculpatory evidence which he was unable to present at trial. We disagree. The record indicates that the prosecutor commented during rebuttal argument that he did not bring in the victim's counselors to testify because the testimony would have been inadmissible hearsay. The prosecutor made this comment in response to defense counsel's closing argument that the victim had opportunities to tell counselors about the abuse, but did not. Accordingly, where the prosecutor's comment was made in response to defendant's argument, and where defendant opened the door to this comment, defendant was not denied his right to a fair and impartial trial. See *People v Spivey*, 202 Mich App 719, 724; 509 NW2d 908 (1993); *Pacquette*, 214 Mich App at 342. Furthermore, in response to defendant's objection, the trial court gave a cautionary instruction to the jury. Therefore, any possible prejudice was cured.

III

Defendant next claims that the trial court abused its discretion in denying his motion for a new trial on the basis that the verdict was against the great weight of the evidence. We disagree. The victim provided detailed testimony of the sexual abuse inflicted by defendant, and the pediatrician who examined the victim testified that he found evidence of sexual trauma. Further, the testimony of the victim is credible because it is unreasonable to conclude that a ten-year-old child could fabricate such perverse and detailed instances of sexual abuse. We are not persuaded by defendant's argument that the pediatrician's findings were inconsistent with the degree of trauma to which the victim testified. Nor are we persuaded by defendant's testimony that he did not abuse the victim, particularly where the record indicates that defendant left the state immediately after the victim told her mother of the abuse. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).

IV

Defendant next claims that the trial court improperly instructed the jury that it sentenced the individual and not the crime when imposing sentence. Defendant contends that the instruction lessened the jury's sense of responsibility for its decision. We disagree.

Defendant failed to object to the instruction. Therefore, appellate review is precluded absent manifest injustice. *People v Ferguson*, 208 Mich App 508, 510; 528 NW2d 825 (1995). Here, unlike the cases relied upon by defendant, the challenged instruction reinforced the jury's role in the trial process and properly instructed them not to consider the potential penalty involved when deciding defendant's guilt. See e.g., *People v Foster*, 77 Mich App 604, 614-617; 259 NW 2d 153 (1977). Therefore, manifest injustice will not result from our failure to review this issue.

V

Defendant next argues that he was denied effective assistance of counsel when his attorney failed to object to the alleged instances of judicial and prosecutorial misconduct set forth above. We disagree.

As a threshold matter, defense counsel failed to address the merits of these claims in his brief. Therefore, this issue was not properly presented for appellate review. See *People v Sean Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Moreover, defendant failed to support his claim with any authority and, therefore, he effectively abandoned this issue on appeal. *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995). In any event, because defendant failed to move for a new trial or an evidentiary hearing on the basis that he was denied the effective assistance of counsel, our review is limited to the record. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Our review of the record does not indicate that defense counsel's performance fell below an objective standard of reasonableness, or prejudiced defendant so as to deprive him of a fair trial. See *People v Northrop*, 213 Mich App 494, 497; 541 NW2d 275 (1995). Thus, defendant's claim on this issue fails.

VI

Defendant next argues that the sentencing court improperly considered the fact that defendant was in arrears in his child support payments, and erroneously imposed a disproportionate sentence in violation of the *Milbourn*[2] proportionality standard. We disagree.

A sentencing court may consider a broad range of information when weighing sentencing factors, including facts not admissible in determining the defendant's guilt, such as character evidence and information contained in the presentence report. See *People v Potrafka*, 140 Mich App 749, 751; 366 NW2d 35 (1985). Here, defendant's presentence report made note of his arrearage and noncompliance with a previous court order regarding child support. Therefore, we conclude that the sentencing court did not abuse its discretion in considering this information. *Id.*

Defendant also argues that his sentence was not proportional. Defendant contends that the sentencing court abused its discretion in sentencing him above the guidelines, particularly where he was twenty-eight years old at the time, was a first offender, had an extensive employment history, and had numerous letters of support submitted on his behalf. We disagree. A sentencing court is free to depart from the guidelines' recommended range when the range is disproportionate to the circumstances of the offense and offender. *People v Haywood*, 209 Mich App 217, 233; 530 NW2d 497 (1995). Here, the recommended guidelines range for defendant's convictions for first-degree criminal sexual conduct was eight to fifteen years. The court exceeded the guidelines and sentenced defendant to a minimum term of twenty years' imprisonment. The court based its decision upon the particularly perverse nature of the abuse (forceful rape and sodomy, fellatio where the victim was forced to swallow semen and smell it on a towel), the tender age of the victim (eight years), and the substantial period of time over which the abuse occurred (approximately six months). The court also considered defendant's lack of

remorse, reluctance to cooperate with authority, and dangerous character. Therefore, considering the perverse circumstances of the offense and the nonrepentant nature of defendant, we conclude that the trial court did not abuse its discretion in sentencing defendant above the guidelines.

Affirmed.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.
/s/ George S. Buth

[1] The colloquy between the trial judge and the victim provided in pertinent part:

THE COURT: All right. Now, you do know that you're here to testify in this case . . . . Now, where to [sic] you live?

THE VICTIM: (No response)

THE COURT: Where do you live?

THE VICTIM: 2748 Sloan Street.

THE COURT: Sloan Street. And who do you live with?

THE VICTIM: My mother.

THE COURT: All right. And do you go to school?

THE VICTIM: Yes.

THE COURT: Where do you go to school?

THE VICTIM: Anderson School.

THE COURT: And what grade are you in?

THE VICTIM: Fourth.

THE COURT: All right. And how are you getting along in school?

THE VICTIM: Good.

THE COURT: Okay, good. Now, I'm going to see that these people, the lawyers in this case, they're going to be asking you some questions. And we want you to answer the questions. Would you do that for us?

THE VICTIM: Yes.

THE COURT: Do you attend church of any kind?

THE VICTIM: Yes.

THE COURT: What church do you go to?

THE VICTIM: Canaan Missionary - -

THE COURT: Canaan Baptist Church on Hamilton?

THE VICTIM: (No Response)

THE COURT: Where?

THE VICTIM: On Gillespie Street.

THE COURT: On Gillespie, all right. And who's the pastor?

THE VICTIM: Reverend Roots.

THE COURT: All right. And how often do you go?

THE VICTIM: Every Sunday.

THE COURT: Good for you. All right. Now, you're going to tell us the truth, will you do that today?

THE VICTIM: Yes.

THE COURT: Now, as you know, in church they tell you not to lie, don't they? You know all about the ten commandments?

THE VICTIM: Yes.

THE COURT: Okay. And you know that you're supposed to tell the truth, don't you?

THE VICTIM: Yes.

THE COURT: All right. And do you promise that you will tell the truth in this case?

THE VICTIM: Yes.

THE COURT: All right, fine. You know what that means, don't you?

THE VICTIM: Yes.

THE COURT: In other words, you're taking an oath that you're going to tell the truth?

THE VICTIM: Yes.

[2] 435 Mich 630, 635-636; 461 NW2d 1 (1990).