STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE DANIEL DAVIS,

Defendant-Appellant.

UNPUBLISHED
April 8, 1997

No. 168115

Berrien Circuit Court
LC No. 93-002159-FC

Before: Doctoroff, C.J., and Wahls and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual assault, MCL 750.520b(1)(b)(i); MSA 28.788(2)(1)(b) (i) (sexual penetration of another at least thirteen but less than sixteen years of age who is a member of same household), and sentenced to a term of fifteen to thirty years' imprisonment. Defendant appeals as of right. We affirm.

The complainant in this case was defendant's wife's daughter (defendant's stepdaughter).

Defendant, who is black, first argues that he was denied his Sixth Amendment guarantee to a trial by an impartial jury drawn from a fair cross-section of the community because of a flaw in Berrien County's jury selection process. At trial, defense counsel noted that eighteen out of approximately sixty names had been stricken from the jury panel that had been called, leaving only one black person out of forty-two persons remaining in the jury array. The trial court stated that the eighteen names had been stricken because those persons "did not show up this morning," and noted that "no-shows" were a continuing problem. On appeal, defendant premises his fair-cross-section challenge on the ground that the proportion of black persons on his jury array (approximately 2.4 percent) was substantially below the proportion of black persons qualified for jury duty in Berrien County (approximately 9.2 percent).

The prosecution contends pursuant to *People v Kelly*, 147 Mich App 806; 384 NW2d 49 (1985), vacated 428 Mich 867 (1987), that defendant failed to preserve his challenge by putting it in writing and raising it before the jury was sworn. However, in *People v Hubbard (After Remand)*, 217

Mich App 459, 464-465; 552 NW2d 593 (1996), this Court rejected the prosecution's argument that a defendant must raise a fair-cross-section challenge in writing, noting that *Kelly*, *supra*, was subsequently vacated by our Supreme Court. Nevertheless, in *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996), this Court held that the defendant failed to preserve a fair-cross-section challenge where the challenge was not made until after the jury had been impaneled and sworn, and the defendant, in declining the trial court's offer to summon the county's jury clerk to testify about the allocation process, failed to create a factual record to support his challenge. In this case, defendant's challenge to his jury array was not made until after the jury had been impaneled and sworn. Moreover, no factual record to support defendant's challenge was made in this case where defendant failed to pursue the issue even though the trial court invited defendant, through defense counsel, to discuss the matter with the jury clerk, and stated that it would "be glad to hear further on the matter if you feel as though that you've got something you want to bring before the Court." Thus, we conclude that defendant did not preserve his fair-cross-section challenge.

Moreover, even assuming defendant's challenge is preserved,[1] we find no error. As stated in *Hubbard*:

> In order to establish a prima facie violation of the fair-cross-section requirement, the defendant must show "(1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." [*Id*. at 473.]

Concerning the third element, defendant argues that the underrepresentation of black persons on jury arrays in Berrien County occurs because "potential jurors who do not return jury selection questionnaires drop out of the process at that point, as do jurors who fail to show for jury duty." However, any resulting disproportionality caused by the failure of potential jurors to return questionnaires or show up for jury duty is not due to a problem in the process by which juries are selected in Berrien County, but, rather, is due to the choice of those individual potential jurors. Thus, we conclude that defendant failed to present a prima facie case that any underrepresentation of black persons on Berrien County jury arrays "is due to systematic exclusion of the group in the jury selection process." Cf. *Hubbard, supra*, with *People v Guy*, 121 Mich App 592; 329 NW2d 435 (1982).

Next, defendant argues that he was deprived of his due process right to present a defense where the trial court excluded evidence that defendant "did not engage in any sexual misconduct with another stepdaughter." Defendant is referring to the trial court's sustaining the prosecutor's objection when defense counsel asked the complainant's sister on cross-examination whether defendant "ever had sex with you or touched you improperly." However, assuming such evidence is relevant, we note that another witness who grew up with defendant as her stepfather during defendant's previous thirteen-year marriage to the mother of this witness testified for defendant that she told the complainant's mother that defendant had never engaged in sexual intercourse with her. Thus, we conclude that the error

complained of by defendant did not occur where defendant was able to present evidence of a defense that he did not engage in sexual misconduct with another stepdaughter.

Next, defendant argues that his constitutional right to confront the witnesses against him was violated. Specifically, defendant argues that the trial court abused its discretion in limiting defense counsel's cross-examination of his wife concerning her bias or interest arising out of her claims to defendant's home and his worker's compensation benefits in their divorce proceedings.

While the proper scope of cross-examination lies within the discretion of the trial court, the bias or interest of a witness is always a relevant subject of inquiry. *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995). A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes a denial of the constitutional right of confrontation. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). A claim that a denial of cross-examination has prevented the exploration of a witness' bias is subject to harmless error analysis. *Morton*, *supra* at 336. A constitutional error relating to the presentation of the case to the jury may be quantitatively assessed in the context of the other evidence presented in order to determine whether the error was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 405; 521 NW2d 538 (1994). This requires that the beneficiary of the error prove beyond a reasonable doubt that there is no reasonable possibility that the error complained of might have contributed to the conviction. *Anderson*, *supra* at 406.

Despite the court's limitation on defense counsel's cross-examination of defendant's wife concerning any interest on her part arising out of their divorce proceedings, defendant was nevertheless able to present an abundance of testimony that his wife had previously lied to the police, that she had a reputation for being untruthful, and that she was motivated to lie in her testimony for the purpose of sending defendant to prison because of her financial interest in their property settlement. During closing argument, defense counsel specifically argued that "the evidence strongly shows that the wife had an ample economic motive to lie . . . ." Thus, assuming that the court abused its discretion in limiting defense counsel's cross-examination of defendant's wife, we conclude that the prosecution has sustained its burden of proving beyond a reasonable doubt that there is no reasonable possibility that this error might have contributed to defendant's conviction.

Next, defendant argues that the trial court erred in denying his motion for a mistrial. As background, we note that during defense counsel's opening statement, counsel's primary theory of the case was that defendant's alleged sexual abuse of the complainant was a story fabricated by his wife for the purpose of sending him to prison so that his wife could obtain a generous property settlement in their ongoing divorce proceedings. However, counsel also proffered an additional theory in his opening statement:

> The evidence will show that there is another factor that gave both mother and daughter a strong reason to carry on with this, and that is Protective Services. As I suppose they rightly would do because they're not the judge or the jury and they don't

> know whether he did it or not, ordered that he [defendant] stay out of the home and took the daughter away from the mother for a period of time until she started, quote, cooperating. Cooperating in this context means saying what they wanted to hear.

At this point, the prosecutor objected, and the court clarified for the jury that the motivation or function of protective services was simply to investigate and protect children from various kinds of inappropriate behavior. Defense counsel then continued:

> Our point will simply be not that that is their function, but that is the practical effect of taking the child from the mother and telling the mother that until he gets the child—that she gets rid of the husband that child isn't coming back. Whether they intended or not is not the point. It is the practical and necessary effect.

Subsequently, defense counsel announced his intention to call William Gross, a protective services worker, for the purpose of cross-examination. However, counsel deferred to the prosecutor, who stated that she wanted to call Gross as a rebuttal witness. On direct examination, Gross testified that after receiving a January, 1993, referral that the complainant was the victim of a sexual assault, the "case was substantiated." Defendant counsel objected, and the trial court instructed the jury to disregard this testimony and any conclusions reached by the Department of Social Services regarding the facts of this case. On continued direct examination, Gross then testified that in March, 1993, he petitioned the probate court to remove the complainant from her mother's care "[b]ecause the child was being subjected to a substantial risk to her mental well-being while in the care of her mother." Defense counsel again objected, and the prosecutor discontinued her questioning of Gross. On cross-examination, defense counsel elicited testimony from Gross that the complainant had been removed from her mother's care for a period of time. Defendant subsequently moved for a mistrial on the ground that Gross' testimony that the case was substantiated constituted improper vouching for defendant's guilt by the Department of Social Services, an agency of the State. The trial court agreed that the testimony had been improper, but denied defendant's motion. The court reasoned that "substantiation" by protective services "is a long way from guilty beyond a reasonable doubt," and that the jury in this case had agreed, pursuant to the court's instructions to follow the law given to it in this case. The court also reasoned that Gross would not even have been called as a witness "but for positions taken by the Defense." Finally, the court concluded that the jury would give no weight to Gross' testimony that the complainant's case had been "substantiated" where it had promptly instructed the jury to disregard this testimony.

On appeal, defendant contends that the court erred in denying his motion for a mistrial because the testimony elicited from Gross on direct examination raised an inference that Gross believed the complainant's allegations of defendant's sexual abuse. Defendant argues that this testimony, therefore, violated the rule enunciated in the plurality decision of *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), in which a majority of our Supreme Court held that in a case involving the sexual abuse of a child, although an expert may testify that the particular behavior of the child is characteristic of sexual abuse complainants generally, an expert may not testify concerning whether the complainant's

allegations are truthful or whether sexual abuse in fact occurred. See also *People v Peterson*, 450 Mich 349; 537 NW2d 857, amended 450 Mich 1212 (1995) (reaffirming and clarifying *Beckley*).

The grant or denial of a mistrial is within a trial court's sound discretion. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1993). There must be a showing of prejudice to the defendant's rights if error requiring reversal is claimed. *Id*. The trial court's ruling must be so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice. *Id*. We find no abuse of discretion. In this case, although Gross' testimony that a protective services case was "substantiated" raised the inference that the complainant's allegations were truthful and that sexual abuse had, in fact, occurred, Gross did not testify as an expert witness and his testimony was not offered for the purpose of discussing the consistencies between a complainant's post-abuse behavior and that of other complainants of sexual abuse. See *Peterson, supra*; *Beckley, supra*. Thus, we find the holdings and analyses from these cases inapplicable to this case. Rather, Gross' testimony that a case was substantiated was given during a factual account of the nature of his protective services investigation. The jury was made well aware through defense counsel's opening statement that protective services had become involved with the complainant, her mother and defendant. Upon defendant's objection during Gross' direct examination, the trial court immediately instructed the jury to disregard any conclusions reached by the Department of Social Services concerning the facts of this case. Jurors are presumed to have followed a court's instructions until the contrary is clearly shown. *McAlister, supra*. Defense counsel's cross-examination of Gross again brought out the facts that protective services had initiated an investigation into this case, removed the complainant from her mother's care, and indicated to the complainant's mother its intention to keep the complainant out of her mother's home if her mother allowed defendant back into the home. Finally, we note that the prosecutor did not refer during closing argument to Gross' testimony that a case was substantiated. Accordingly, we conclude that the trial court's cautionary instruction was sufficient to cure any error.

Next, defendant argues that the trial court erred in prohibiting defense counsel from arguing to the jury the complainant's delay in reporting defendant's sexual abuse. We disagree. On a separate record in this case, the prosecution sought to introduce under *Beckley, supra*, the proposed testimony of an expert witness concerning typical symptoms of child sexual abuse for the purpose of explaining the complainant's delay in reporting defendant's sexual abuse and rebutting any inference created by the defense that the delay in reporting indicated that the complainant was not a credible witness. In response, defendant indicated that he should then be allowed to introduce evidence of the complainant's previous sexual abuse by an uncle, the counseling received by the complainant for such abuse, the complainant's alleged consensual intercourse with defendant, the complainant's sexual relationships with others, the complainant's comfort level with sex, and the complainant's current prenatal condition for the purpose of rebutting any inference raised by the expert's testimony that there may be no significance to a long delay in reporting sexual abuse and to establish that a delay in reporting sexual abuse can be attributable to a variety of factors, not just the fact that a complainant may or may not be a sexual abuse victim. The trial court ruled that the expert's proposed testimony was properly admissible under *Beckley, supra*. We find no error with this ruling. However, the trial court further ruled that it would not allow the expert to testify under the particular facts of this case because the evidence proposed by defendant to rebut the expert's testimony was inadmissible under MRE 403 where it constituted "a very

potentially prejudicial collateral inquiry probably in violation of the rape shield statute and certainly being very peripheral to the issues before this jury leading to the likely confusion of the jury and obfuscation of the basic issue of this case." The court further ruled that defense counsel would thus be prohibited from arguing to the jury the complainant's delay in reporting the sexual abuse:

> Having done that, however, it is equally clear that it would be fundamentally unfair to allow the Defense to utilize the argument, though rather as we now know simplistic argument, that the reason for the failure of—or for the delay of disclosure was because of some alleged interference by the mother or the fact that the mother may have put the child up to it, when as we all know there may be numerous other reasons including those related by [the prosecution's proposed expert witness] and those related by [defense counsel] in his cross-examination of [the expert witness.] And therefore it is equally inappropriate in this Court's opinion to allow the Defense to so argue.

The trial court has a duty to limit the introduction of evidence and the arguments of counsel to relevant and material matters. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996), citing MCL 768.29; MSA 28.1052; see also MCR 6.414(A). The court also has a duty to assure that all parties that come before it receive a fair trial. *Ullah*, *supra*. In this case, defendant's basic defense theory of the case was that neither the complainant nor her mother were credible witnesses, and that the complainant's mother caused the complainant to fabricate a story of defendant's sexual abuse so that the mother could send defendant to prison and receive a generous property settlement in their divorce. Our review of the record, as indicated throughout this opinion, reveals that defense counsel elicited abundant evidence supporting this defense, including evidence of inconsistent statements made by the complainant, and argued this evidence in support of the defense theory during closing argument. Further, although not argued by defense counsel pursuant to the court's ruling, evidence that the complainant delayed in reporting defendant's sexual abuse was elicited and placed before the jury. In addition, the trial court allowed defense counsel to argue the complainant's mother's delay in reporting defendant's sexual abuse. Thus, we conclude that defendant was not denied a fair trial or the ability to present a defense by the court's ruling precluding defense counsel from arguing the complainant's delay in reporting. Rather, we conclude that the court properly complied with its duty to ensure that both parties received a fair trial.

Next, defendant argues that a portion of the prosecutor's closing argument constituted an improper "civic duty" argument. We disagree. After reviewing the disputed remarks in context, we conclude that defendant was not denied a fair and impartial trial by the prosecutor's remarks. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

Next, defendant contends that instructional error occurred. As background, we note that defendant was charged with one count of first-degree criminal sexual conduct premised on four different sexual penetrations, i.e., vaginal intercourse, anal intercourse, fellatio and cunnilingus. At trial, the complainant testified to such penetrations by defendant. Defendant's defense at trial was that no sexual penetrations occurred and that his stepdaughter and wife were not telling the truth. During jury instructions, the trial court instructed the jury in general terms that its verdict must be unanimous.

Defendant did not object to these instructions, or request an instruction informing the jury that it must unanimously agree on which specific act of penetration was proven beyond a reasonable doubt. On appeal, defendant specifically contends that the trial court's failure to give a unanimity instruction with respect to a specific penetration constituted error requiring reversal.

Generally, appellate review of instructions to which no objection is made is foreclosed absent manifest injustice. *Ullah*, *supra* at 676. However, defendant relies on *People Yarger*, 193 Mich App 532, 533; 485 NW2d 119 (1992), in which this Court reversed a defendant's conviction of third-degree criminal sexual conduct on facts almost identical to those of this case. Although the defendant in *Yarger*, as in this case, failed to object to the lack of a specific unanimity instruction, this Court reached the merits of the issue on the ground that "at least a possibility that manifest injustice would result if we declined to review this argument." In reversing the defendant's conviction, the *Yarger* panel reasoned that "a possibility exists that, for example, six jurors were convinced that fellatio had occurred, but not intercourse, while the other six jurors held the opposite view." *Id*. at 537.

However, in *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993), our Supreme Court, again, on facts almost identical to those of this case and *Yarger*, declined to reach the merits of the issue of whether a trial court's failure to give a specific unanimity instruction constituted error on the ground that where the defendant did not request such an instruction, the failure to give such an instruction did not constitute manifest injustice.[2] In finding no manifest injustice, our Supreme Court reasoned:

> The number or specific identification of acts of sexual penetration was not in dispute in this case. The defendant's position was simply that there was no sexual assault committed. It was obvious to the participants in the trial that the verdict turned on whether the jury believed the testimony of the complainant and Terry Doyle [a witness] on the one hand, or found reasonable doubt that any sexual assault occurred, as claimed by the defendant. Given that posture of the case, there was no reason for the parties to focus on the specifics of individual penetrations. In this context, the failure to give an instruction requiring unanimity on a particular act in no way impeded the defense or denied the defendant a fair trial. [*Id*. at 545.]

In arriving at its holding, our Supreme Court stated that "[w]e express no opinion whether *People v Yarger*, *supra*, was correctly decided. *Van Dorsten*, *supra* at 545, n6.

We conclude that *Van Dorsten* controls this case. The parties in this case did not focus on the specifics of individual penetrations because defendant's trial was a credibility contest with the verdict obviously turning on which witnesses the jury believed. In this regard, and contrary to defendant's assertion on appeal, the focus of the defense theory was that no sexual penetrations had occurred and that defendant's stepdaughter and his wife were not telling the truth. Thus, as in *Van Dorsten*, we conclude that "[i]n this context, the failure to give an instruction requiring unanimity on a particular act in no way impeded the defense or denied the defendant a fair trial." We find no manifest injustice.

Next, defendant again argues that instructional error occurred. During jury instructions in this case, the trial court instructed the jury that it alone was the sole and exclusive judge of the facts, and that it was required to find defendant not guilty if it, for any reason after considering all of the evidence, was not satisfied that every element of the offense had been proven beyond a reasonable doubt. The court instructed the jury that any instructions or comments that it had made were not intended to influence the jury's verdict or to express any opinion on its part about the facts, and that the jury was wrong if it had come to believe either that the court had an opinion concerning the trial's outcome or that the court was trying to signal an appropriate verdict. The court instructed the jury that the prosecution had to prove each of the elements of first-degree criminal sexual conduct beyond a reasonable doubt. The court then instructed the jury concerning the elements of this crime pursuant to CJI2d 20.1 (sexual penetration) and CJI2d 20.4 (complainant between thirteen and sixteen years of age and living in the same household as the defendant). Immediately thereafter, the trial court added the following instruction:

> There are three separate elements to this offense. Actually there's a fourth one I'll tell you about in a minute. But there are three main elements. One is whether any or all of those enumerated acts were done by this Defendant. Second, the age of [the complainant], *which is really not contested, that she was 13 and 14 years of age at that time*. And third, that at the time of the alleged act the Defendant and [the complainant] were living in the same household, *and really that's not contested in this case either*. The contest is whether the acts occurred.

Defendant contends that by stating that the elements of age and cohabitation were "really not contested," the trial court improperly invaded the fact-finding province of the jury and relieved the prosecution of its burden of proving each element of the crime beyond a reasonable doubt. Defendant failed to object to this comment by the court. Generally, appellate review of instructions to which no objection is made is foreclosed absent manifest injustice. *Ullah*, *supra* at 676. However, manifest injustice includes instances where "a court rules as a matter of law with respect to an element of the offense." *Id*. at 677, n 2. In such cases, the lack of an objection is not critical because the emphasis is on the trial court's responsibility in charging the jury. *People v Allensworth*, 401 Mich 67, 70; 257 NW2d 81 (1977). Thus, we will review this issue.

Jury instructions are read in their entirety to determine if error requiring reversal occurred. Instructions that are somewhat imperfect are acceptable, so long as they fairly present to the jury the issues to be tried and sufficiently protect the defendant's rights. *People v Gaydosh*, 203 Mich App 235, 237; 512 NW2d 65 (1994). However, a defendant has an absolute right to a jury determination upon all of the essential elements of the offense. *Allensworth*, *supra*. Where a defendant has not made an "understandingly tendered waiver," the trial court may not, under any circumstances, usurp this right by ruling as a matter of law on an essential element of the charged crime. *Id*. Thus, appellate courts will not hesitate to reverse a guilty verdict when an instruction improperly frees the prosecution from its obligation to prove each element of the crime beyond a reasonable doubt, invades the province of the jury, or amounts to either a directed verdict or a direction that an essential element of the charged crime exists as a matter of law. *People v Tice*, 220 Mich App 47, 54; 558 NW2d 245 (1996); *Gaydosh*,

supra at 237-238. A harmless error analysis is not appropriate where the court has invaded the fact finding province of the jury. *People v Reed*, 393 Mich 342, 348-351; 224 NW2d 867 (1975).

In *Allensworth*, the defendant was convicted of first-degree felony murder. *Allensworth, supra* at 67. At trial, the court instructed the jury without objection (1) that the parties had reached an agreement that the victim had been killed during the commission of a robbery or attempted robbery; (2) that it could therefore accept as a fact without deliberation that the victim's killing constituted first-degree felony murder, and (3) that the principle fact to be decided by the jury was whether the defendant or his codefendants did the killing. *Id*. at 69. Our Supreme Court reversed the defendant's conviction on the ground that the instruction had improperly removed from the jury's consideration the elements of the felony and death. *Id*. at 71. The Court stated that the defendant's failure to object to the instructions constituted, at most, "an implied waiver," and not the requisite "understandingly tendered waiver." *Id*.

In *People v Williams*, 118 Mich App 266, 268; 324 NW2d 599 (1982), the defendant was convicted of attempted burning of a dwelling house. During jury instructions, the court stated, in relevant part: "'Thirdly, the building must be shown to have been used as a dwelling by a person. *Here the Arnolds*.'" In rejecting the defendant's claim that this instruction charged that an element of the crime had been proven as a matter of law, this Court stated:

> The statement, "Here the Arnolds" was not a ruling that the building was used as a dwelling by the Arnolds, but a reference to the prosecution's theory regarding that element. In effect, the jurors were told that they must find that the building was used as a dwelling by the Arnolds. Unlike the defective instruction in *Reed, supra*, the instruction here did not remove an element from the jurors' consideration.

In this case, although the issue is close, we conclude that the error complained of by defendant did not occur in this case. As indicated previously, the jury was properly instructed on the prosecution's burden and that it had the exclusive duty to determine the facts. Read in context, we do not believe that the court's added instruction that the elements of age and cohabitation were "really not contested" constituted a finding of fact for the jury on the essential elements of the crime, *Reed, supra*, or denied the jury the right to believe or disbelieve the evidence as it saw fit, thus giving the jury no alternative but to convict defendant, *Gaydosh, supra*. As noted in *Reed, supra* at 351, "[t]here is a difference between commenting on the evidence and making a finding a fact for the jury." We do not believe that the trial court's added instruction, in context, crossed that line in this case.

Finally, defendant argues that the trial court erred in permitting his wife to testify to two conversations they had concerning his sexual abuse of the complainant. The first conversation occurred during the middle of the night in the marital bedroom when defendant's wife confronted defendant with the allegations of sexual abuse immediately after the complainant first told her mother about the abuse, and defendant responded with apparent remorse. Defendant's wife then took defendant to a motel where the second conversation occurred. Defendant argues that these conversations were protected by the marital communication privilege and, therefore, should not have been admitted into evidence.

However, concerning the first conversation, defendant objected to this evidence below not on the basis that it was inadmissible under the marital communication privilege, but on other grounds. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). The failure to object to the admission of evidence waives appellate review absent manifest injustice. *Id*. In this case, we find no manifest injustice because defendant's wife's testimony concerning the first conversation was cumulative of earlier testimony given without objection by the complainant, who also heard the conversation. Further, unlike defendant's wife, the complainant also testified that when defendant's wife asked defendant in their bedroom if he had been having sex with the complainant, that defendant said "Yes." Likewise, any error in defense counsel's failure to specify the marital communication privilege as a ground for an objection to defendant's wife's testimony did not constitute ineffective assistance of counsel where, in light of the complainant's testimony, defendant is unable to show that there is a reasonable probability that, but for the alleged error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Moreover, as explained in *People v Byrd*, 207 Mich App 599, 602; 525 NW2d 507 (1994):

> At issue is the marital communication privilege, which "bars one spouse from testifying 'as to any communications made by one to the other during the marriage' without the consent of the other." *People v Vermeulen*, 432 Mich 32, 35; 438 NW2d 36 (1989), quoting MCL 600.2162; MSA 27A.2162.[3] While the trial court correctly noted that there are no exceptions to the marital communication privilege,[4] it ignored the requirement that the communication be confidential. *Id*. at 39. The nature and circumstances of the communication may be considered in determining whether a communication is confidential. *Id*. However, the nature or status or the marital relationship is not a consideration. *Id*.

In this case, although defendant and his wife were in their bedroom and the complainant was in her room, the complainant testified that defendant's wife "spoke loud, and you can hear things through the house real easy," and that she was able to hear the conversation through a vent in her room. Accordingly, we conclude that under the circumstances of this case, the first conversation between defendant and his wife was not confidential. *Byrd, supra* at 603; *People v Biggs*, 202 Mich App 450, 456; 509 NW2d 803 (1993). Likewise, counsel's failure to object to the evidence of this conversation on the basis of the marital communication privilege did not, therefore, constitute error. *Stanaway, supra*.

Concerning the second conversation, defendant failed to object below to the admission of the substance of this second conversation. Rather, defense counsel conceded that this evidence was "probably admissible." We acknowledge that there is no evidence that anyone else was privy to this conversation. However, although the exact words spoken during the second conversation between defendant and his wife were different than the words spoken during the first conversation between them, the tenor of both conversations were the same--defendant's continuing remorseful reaction when confronted by his wife with the complainant's allegations of sexual abuse. Thus, the evidence of the

communications made during the second conversation was essentially cumulative of the evidence of the communications made during the first conversation. Accordingly, we find no manifest injustice. *Asevedo, supra*. Likewise, any error in defense counsel's failure to object to defendant's wife's testimony concerning the second conversation did not constitute ineffective assistance of counsel where, in light of defendant's wife's and the complainant's testimony concerning the first conversation, defendant is unable to show that there is a reasonable probability that, but for the alleged error, the result of the proceeding would have been different.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Myron H. Wahls
/s/ Michael R. Smolenski

[1] Before the jury was sworn in this case, defendant expressed satisfaction with the jury subject to an objection concerning certain matters previously addressed at the bench. Defense counsel, in raising defendant's fair-cross-section challenge after the jury had been sworn, noted that he had previously raised this issue at the bench before any jurors had been called. Thus, the record could be interpreted to the effect that defendant timely raised his fair-cross-section challenge before the jury was sworn.

[2] Cf. *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994), in which our Supreme Court reached the merits of this issue where defense counsel had requested at trial that the jury be instructed that it must unanimously find which specific act of sexual penetration occurred.

[3] The statute also establishes the spousal privilege, which bars one spouse from testifying against the other without the other's consent "except . . . in cases of prosecution for a crime committed against the children of either or both . . . ." MCL 600.2162; MSA 27A.2162; *Byrd, supra* at 602, n 1. Obviously, this privilege is not at issue in this case.

[4] MCL 600.2162; MSA 27A.2162 was amended effective April 1, 1994, to provide that "a married person may be examined with his or her consent as to any communication made between that person and his or her spouse during the marriage" in a case "of prosecution for a crime committed against the children of either or both." See 1994 PA 67. However, the amendment is inapplicable here where the trial in this case occurred in August, 1993.