# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SPENCER ALAN FITZGERALD,

Defendant-Appellant.

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UNPUBLISHED
December 23, 1997

No. 186969
Recorder's Court
LC No. 94-007646

Before: Markey, P.J., and Jansen and White, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Defendant was sentenced to six to fifteen years' imprisonment. We affirm defendant's conviction and sentence, but remand for correction of defendant's presentence report.

I

Defendant first argues that the trial court erred in allowing into evidence similar acts testimony where such evidence was not introduced for a proper purpose, was more prejudicial than probative, and was introduced solely to show defendant's criminal propensity.

The prosecution argued at a pre-trial hearing that it would offer the testimony of one of defendant's older daughters, for the non-character purpose of showing that defendant used a scheme or plan similar to that used with the victim, whereby he would rape his daughters when his wife was out of town. At the hearing, the court asked the prosecutor if he had a statement to proffer, and the prosecution proffered the older daughter's statement to the Taylor police in 1987. Defense counsel objected on relevance grounds to admission of the older daughter's statement, and on the basis that it was more prejudicial than probative, further arguing that her credibility was in question because of her young age at the time, and that the statement was made eight years ago and in connection with an investigation that was dropped because she recanted the statement. Defense counsel argued that the court had to find that the statement was credible and argued that the court should not try a case within a

case. The court reviewed the statement and went through the four-step analysis of *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993) on the record, concluding that the evidence was admissible.

The older daughter testified at trial denying that defendant had committed any similar acts. When questioned regarding her prior statement that he had, she denied the truthfulness of the earlier statement. The statement was later admitted through Officer Marshall as a prior inconsistent statement.[1]

We conclude that the trial court did not abuse its discretion in concluding that the testimony was admissible under *VanderVliet* as relevant to a non-character issue, i.e., intent, scheme and plan. The evidence was not offered regarding identity and the strict requirements of *People v Golochowicz*, 413 Mich 298; 319 NW2d 518 (1982), do not apply. *VanderVliet, supra*.

Defendant also argues that the trial court erred in allowing the prosecution to impeach the older daughter's testimony with her prior statement to the Taylor Police because the witness disputed that the handwriting and signature on the report's second page was hers and because it was more prejudicial than probative.

A witness' denial of having made a prior statement is not a proper basis for excluding testimony that the statement was made. Further, the older daughter admitted writing part of the statement, although she said it was untrue. We conclude that defendants argument does not state a cognizable claim of error.

II

Defendant also argues that a statement from the older daughter's testimony in juvenile court was improperly admitted as a prior inconsistent statement when the statement was not really inconsistent with her trial testimony. At the juvenile court hearing, when asked if it was her signature on page two of her statement to the Taylor Police, she responded "I guess," and later added that "it looks the same, I write completely different, I don't know." At trial, she testified that it was not her signature. We find no error.

III

Defendant next argues that the trial court's belittling comments to his attorney denied defendant a fair trial. Our review of the record reveals that the challenged remarks by the court were made out of the presence of the jury, with one exception. In opening statement, defense counsel stated to the jury:

> . . . [the complainant] is not a young innocent girl. From the testimony you'll be able to see that this is a pretty sophisticated girl who had been dating a boy for some time at that point, intended to marry him, had been very intimate with him. We'll get into all this other stuff later. But the point I'm trying to make is you're going to hear –
>
> THE COURT: Approach the bench, both of you, please.

Jurors, step out, please.

The court at this point stated that it had seen the prosecutor rise to object, but that it was concerned about what defense counsel might say before the objection was made. The court asked defense counsel if he was familiar with the Rape Shield Act. After extensive discussion, the court determined that it would give a curative instruction, the jury was returned, and the court stated:

> Let me tell you that you have heard reference before the break by defense Counsel that strongly suggests that you will be hearing evidence of past or other intimate or sexual conduct on the part of the Complaining witness in this case.
>
> I remind you that what the attorneys say is not evidence, and you will not be hearing any such evidence in this case, and that statement to you was improper, and you should totally disregard it.

We find no error.

IV

Defendant next argues that the trial court abused its discretion in certifying a police officer as an expert witness in sexual abuse investigation. We find no abuse of discretion, as the police officer testified that she had investigated child sexual abuse cases for fifteen years at the rate of forty to fifty cases per year, and had attended approximately five training sessions on the subject of sexual abuse investigation. See *People v Haywood,* 209 Mich App 217, 225; 530 NW2d 497 (1995). Further, defendant offered the testimony of a doctor regarding the same subject matter.

V

Defendant next claims that the trial court abused its discretion in denying his motion for a new trial on the basis of juror misrepresentation. Because defendant failed to present proof of actual prejudice, and failed to establish that he would have successfully challenged these jurors for cause or otherwise had them dismissed if they had disclosed the information during voir dire, we conclude that the trial court did not abuse its discretion in denying defendant's motion. See *People v Graham,* 84 Mich App 663, 666; 270 NW2d 673 (1978). Defendant presented only hearsay with respect to juror Sommerville and established no inference of prejudice with respect to juror Sampson. Further, defendant offered no adequate explanation for his failure to raise the issue earlier. The jurors had no greater knowledge of their experiences with defendant than did defendant.

VI

Defendant next argues that he was entitled to have contested information stricken from the presentence report to prevent potentially false information from going to the Department of Corrections, where the court imposed sentence without taking that information into consideration.

Defendant's pre-sentence investigation report (PSIR) states that he had eleven felony convictions. At sentencing, defense counsel argued that the PSIR's adult record section did not set forth eleven convictions, as stated on the PSIR's cover page, that the convictions listed involved three cases disposed of on the same day, that he believed based on discussion at trial that defendant had a total of five or six convictions, and that the rap sheet the prosecution used at trial did not show eleven convictions. The prosecution argued that the PSIR did set forth eleven convictions.

The trial court stated that it would not consider that the PSIR said eleven convictions and "whether it's six or whether it's eleven, I'm not basing that information, I'm not basing my sentence on that information." The court stated that it was not going to change the PSIR, but for purposes of sentencing, it would consider only six convictions. The court also said that it would refer the matter for correcting to reflect the actual number of convictions.

The prosecution argues that defendant does not allege that the PSIR computation of convictions is inaccurate and that defendant is seeking that actual convictions be stricken. It does appear, however, that defendant is challenging the number of actual convictions, and the record is unclear regarding whether defendant had eleven prior convictions. We agree with the prosecution that the number of actual convictions controls, not the number of separate incidents, but we remand for clarification of the number of actual convictions, and for correction of the PSIR if necessary.

VII

Defendant next argues that his sentence is disproportionate. Appellate review of sentencing decisions by the trial court is limited to whether the sentencing court abused its discretion. *People v Poppa*, 193 Mich App 184, 187; 483 NW2d 667 (1992). We conclude that the court did not abuse its discretion, as the sentence is proportionate to the seriousness of the circumstances surrounding the offense and offender.

Affirmed, and remanded for findings regarding defendant's challenge to the number of felony convictions stated in the PSIR. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Kathleen Jansen

[1] Defendant did not argue below, and does not argue on appeal, that the prosecutor violated the principles set forth in *People v Stanaway*, 446 Mich 643 ; 521 NW2d 557 (1994).