

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KURT DOUGLAS FAY,

Defendant-Appellant.

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UNPUBLISHED

June 1, 1999

No. 205786

Ottawa Circuit Court

LC No. 9720717 FH

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Defendant was charged with two counts of second-degree criminal sexual conduct pursuant to MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), for alleged sexual contact with his seven-year-old cousin on two separate occasions. Although the jury found defendant not guilty of count I, it found him guilty of count II. The trial court sentenced defendant to thirty-six months' probation. Defendant appeals as of right from his conviction. We affirm.

Defendant first argues the prosecutor presented insufficient evidence to support a conclusion that defendant engaged in sexual contact with the seven-year-old-victim. In the context of criminal sexual conduct, the phrase "sexual contact" denotes

the intentional touching of the victim's or [defendant's] intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or [defendant's] intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification. [MCL 750.520a(k); MSA 28.788a(k).]

In reviewing the sufficiency of the evidence presented in a criminal trial, we examine the evidence in the light most favorable to the prosecution to determine whether a rational finder of fact could have found the essential elements of the crime proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). In this case, the victim's mother testified that she walked into the victim's bedroom and saw him fondling defendant's penis. The victim testified that he and defendant were on his bedroom floor playing checkers when defendant fondled his penis and instructed him to reciprocate. Viewing this testimony in the light most favorable to the prosecution, a rational finder of fact could have found the prosecution proved the contact element of second-degree criminal sexual

contact beyond a reasonable doubt. Defendant's arguments relate to the credibility of the witnesses. This Court will rarely overturn a conviction when the only issue is credibility, and we decline to do so here. *People v Crump*, 216 Mich App 210, 215; 560 NW2d 640 (1996).

Next, defendant argues the trial court erred when it excluded evidence that the victim's mother engaged in overtly sexual conduct in front the victim and his brother. We find it wholly unnecessary to answer this question. According to defendant, the proffered evidence "fit with [his] theory that [on February 13, 1997,] it was the eight-year-old [sic] who was the aggressor, attempting to touch defendant while he was going to the toilet." Even if we were to assume *arguendo* that the trial court erred, the error was absolutely harmless. The jury acquitted defendant of the only charge to which he insists the evidence was relevant. See *People v Mateo*, 453 Mich 203, 210-212; 551 NW2d 891 (1996) (holding that a trial court's error does not require reversal unless that error prejudiced the defendant). Accordingly, we decline to review this issue.

Finally, defendant argues the trial court abused its discretion when it denied his request to present surrebuttal testimony. To preserve an evidentiary error for review, the aggrieved party must make an offer of proof sufficient to convey the information necessary to evaluate the claimed error. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). Defendant failed to disclose the contents of the proffered surrebuttal testimony both at trial and on appeal. Thus, we conclude that defendant preserved this issue only to the extent it appears from the record that defendant sought to buttress his claim that he did not attend school the afternoon of February 13, 1997.<sup>1</sup> To the extent defendant preserved this issue, we review the trial court's decision on the admission of rebuttal evidence for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. *Figgures, supra* at 399. A defendant is not entitled to present surrebuttal testimony that merely reiterates evidence he previously presented during his case-in-chief. *People v Solak*, 146 Mich App 659, 675; 382 NW2d 495 (1985).

Defendant testified that he did not attend school the afternoon of February 13, 1997. In rebuttal, Sandy Ratlidge testified that not only was defendant scheduled to attend school that afternoon, the school's attendance records showed that defendant was not marked absent. During cross-examination, however, Ratlidge acknowledged that she was not responsible for taking attendance. She further acknowledged that she could not verify the accuracy of the attendance records. Thus, there was evidence in the record which, if believed, would support a conclusion that defendant was being truthful when he testified that he was not at school the afternoon of February 13, 1997. Defendant was not entitled to present further evidence regarding the matter. Accordingly, we conclude that the trial court did not abuse its discretion when it denied defendant's request that he be permitted to retake the stand.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Jeffrey G. Collins

<sup>1</sup> We note defendant's argument that if the trial court had permitted him to retake the stand "he would have *directly disagreed* with the prosecutor's rebuttal witness." [Defendant's Brief, p 33 (emphasis added).]