

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MAURICE EDWARD MATHEWS,

Defendant-Appellant.

UNPUBLISHED

September 19, 2006

No. 261346

Muskegon Circuit Court

LC No. 04-050126-FC

Before: Sawyer, P.J., and Fitzgerald and O’Connell, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of criminal sexual conduct in the first degree, MCL 750.520b(1)(a), and one count of criminal sexual conduct in the second degree, MCL 750.520c(1)(a). He was sentenced 11 to 30 years’ imprisonment for his first-degree criminal sexual conduct conviction and 5 to 15 years’ imprisonment for his second-degree criminal sexual conduct conviction. Defendant appeals as of right his convictions and sentences. We affirm.

Defendant’s convictions arise from an incident at defendant’s home on Easter Sunday 2004. Defendant commented that the victim’s “chest was big” and brushed up against her back. She told him to “get away” from her, and he did. While the victim was bending to retrieve milk from the refrigerator, defendant again brushed against her, pushing the area between his chest and knees against her buttocks. She again told him to “get away” from her. Defendant commented further on the victim’s chest size. The victim went into a bedroom to eat her food and watch television. Defendant entered that room and again commented about the victim’s chest, pulling on her shirt and asking to see her breasts. She told him to “get gone.” Defendant left the bedroom, locked the front door and returned. He made another comment, pushed the victim back onto the bed and exposed her breasts, placing his mouth on them and fondling them. Defendant then forcibly removed the victim’s pants and underwear and engaged in sexual intercourse with her as she struggled against him. Defendant told the victim that he was sorry and asked her not to tell anyone what had transpired.

I

Defendant first argues that the trial court abused its discretion in allowing Dr. Gerald Buchanan, the chief of the emergency room at Hackley Hospital and medical director of the Children’s Advocacy Center, to testify as a rebuttal witness for the prosecution. Dr. Buchanan

testified that a fresh abrasion to the vaginal wall can have no plausible explanation other than acute trauma. He testified that the presence of the abrasion on the victim's posterior vaginal wall was consistent with the sexual assault that she described. Defendant asserts that Buchanan's testimony did not rebut any evidence or theories presented by the defense, but rather served only to bolster the testimony of the treating emergency room physician, who offered testimony during the prosecutor's case in chief.¹ We disagree.

The decision whether to admit rebuttal evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Orzame*, 224 Mich App 551, 557; 570 NW2d 118 (1997). An evidentiary error does not merit reversal unless it involves a substantial right, and after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

The test whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence was properly responsive to evidence introduced or a theory developed by the defendant. *Figgures, supra* at 399. "As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id.* Because the purpose of rebuttal is to weaken the opponent's case, and not to merely verify that of the proponent, a party may only introduce evidence during rebuttal if it responds to evidence introduced or a theory developed by the opponent. *Id.*; *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). It is the trial court that must evaluate the overall impression created by the defense proofs and decide whether the rebuttal testimony is admissible. *Figgures, supra* at 398.

¹ Defendant notes, correctly, that the prosecutor moved before trial to add Dr. Buchanan as a witness. Defendant asserted that his addition as a prosecution witness was prejudicial and would require additional consultation with an expert to evaluate how to address his testimony. The trial court provided defense counsel with an opportunity to interview Dr. Buchanan, and indicated that if, thereafter, defense counsel felt that defendant needed to present an expert of its own to counter Dr. Buchanan's testimony, it would either exclude Dr. Buchanan as a witness or adjourn trial to afford defense counsel time to prepare its own expert. The prosecution withdrew its motion to add Dr. Buchanan on the first day of trial. Defense counsel presents this as relevant to the question whether Dr. Buchanan's testimony was properly admitted on rebuttal. However, whether the prosecution attempted to add Dr. Buchanan as a witness to be called during its case in chief is not relevant to the determination whether Dr. Buchanan's testimony was proper rebuttal evidence. That is, the issue is not whether Dr. Buchanan's testimony could or should have been presented during the prosecution's case in chief, but, rather, whether Dr. Buchanan's testimony was responsive to evidence or theories presented by defendant. *People v Figgures*, 451 Mich 390, 398-399; 547 NW2d 673 (1996).

In this case, the trial court allowed Buchanan to testify, concluding that his testimony was responsive to theories proffered by the defense. Throughout cross-examination, defense counsel questioned the treating emergency room physician's knowledge and experience in the area of sexual assault in an attempt to cast doubt on her conclusion that the victim's injuries were consistent with the sexual assault described by her. Defense counsel challenged the physician's conclusion that the blood observed in the victim's vagina was fresh blood from the abrasion and not menstrual blood. Counsel questioned the physician regarding whether she was aware that African-American women were more friable than other women, whether she was aware of studies showing that children who were not sexually abused had abrasions with the same frequency as children who were sexually abused, and whether the abrasion suffered by the victim could have been caused by the improper insertion of a tampon.² Throughout the trial, defendant developed the theories that the victim was fabricating the allegations of assault because she disliked defendant for disciplining her and that the victim was not assaulted, but rather, injured herself inserting a tampon. Dr. Buchanan's testimony served to rebut defendant's assertion that the treating physician's findings were not reliable given her limited specialized knowledge as an emergency room physician and to refute the defense contention that the victim was injured by a tampon. This case is not analogous to a prosecutor's eliciting of denials during cross-examination of defendant's witnesses merely to revive a right to introduce evidence that could have been, but was not, introduced in the prosecution's case in chief. *Figures, supra* at 401. Rather, Dr. Buchanan's testimony was offered to rebut the defendant's theory of the case as developed primarily through *defendant's* cross-examination of the prosecution witness. Consequently, we conclude that the trial court did not abuse its discretion in admitting Buchanan's testimony.

In reaching our conclusion, we note that defendant also argues that Dr. Buchanan's testimony, that the vaginal injury suffered by the victim resulted from acute trauma, invaded the province of the jury to determine whether the victim's injury was caused by a sexual assault. However, this argument is founded on an inaccurate factual premise. Dr. Buchanan did not testify that the victim's injury necessarily resulted from *sexual assault*, but rather, he testified that the injury resulted from *acute trauma* to the victim's vaginal wall. The jury was as free to conclude after Dr. Buchanan's testimony, as it was in the absence of this testimony, that the victim's injury resulted from trauma other than sexual assault, specifically the improper insertion of a tampon or some other trauma. Thus, Dr. Buchanan's testimony did not invade the province of the jury to determine whether the victim was sexually assaulted.

II

Defendant next argues on appeal that the trial court incorrectly scored offense variable ("OV") 13, MCL 777.43. A sentencing court has discretion to determine the scoring of offense variables, provided that there is evidence on the record to support a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). We review the trial court's scoring decisions "to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score." *People v McLaughlin*, 258 Mich

² After the assault, when the victim discovered she was bleeding, she inserted a tampon.

App 635, 671; 672 NW2d 860 (2003). The sentencing court's scoring should be upheld if there is any support in the record for it. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004). The sentencing court's findings of fact are reviewed for clear error. *Id.*

OV 13, MCL 777.43, is scored at twenty-five points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). For purposes of scoring OV 13, a court is to count all crimes within a five-year period, including the sentencing offense, regardless whether the offense resulted in a conviction. MCL 777.43(2)(a). Here, the trial court determined that defendant committed an additional, uncharged instance of second-degree criminal sexual conduct during the course of the events leading up to, and including, the two criminal sexual conduct counts of which he was convicted. The trial court thus held that defendant had committed three felonies against the victim on the date in question, and therefore, that OV 13 was correctly scored at 25 points.

As noted above, the victim testified at trial that defendant brushed against her, pushing the area between his chest and knees against her buttocks while she was reaching for milk from the refrigerator, after defendant made suggestive comments to the victim about her breast size. The victim also testified that defendant placed his mouth on her breasts and fondled her breasts, before engaging in forcible sexual intercourse with her. Thus, we conclude that there was sufficient record evidence to support the trial court's conclusion that defendant committed three felonies against a person, specifically the victim, during the course of the events in question. Therefore, the trial court did not abuse its discretion in scoring OV 13 at 25 points. There was evidence on the record to support the scoring decision. *Houston, supra.*

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell