

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD STEVEN SERVOSS,

Defendant-Appellant.

UNPUBLISHED

October 17, 2006

No. 262862

Oakland Circuit Court

LC Nos. 04-198959-FH

04-198962-FC

Before: Hoekstra, P.J., and Meter and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of seven counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration of a person under 13 years of age), one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact of a person under 13 years of age), two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d (multiple variables), and one count of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a) (force or coercion). Defendant was sentenced to concurrent terms of 25 to 50 years' imprisonment for the CSC I convictions, 10 to 15 years' imprisonment for the CSC II and CSC III convictions, and one to two years' imprisonment for his conviction of CSC IV. Defendant appeals as of right. We affirm.

Arguing that the prosecutor failed to timely disclose the evidence, defendant first asserts that the trial court erred in allowing the prosecutor to impeach defense witness Carol Ulin with evidence of her prior conviction for filing a false tax return and with several statements made by her during recorded telephone conversations between herself and defendant. We disagree.

A trial court's decision to admit evidence not properly disclosed by a party is reviewed for an abuse of discretion. MCR 6.201(J); *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). An abuse of discretion exists "only when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made." *People v Tate*, 244 Mich App 553, 559; 624 NW2d 524 (2001).

MCR 6.201 governs matters related to criminal discovery. *People v Gilmore*, 222 Mich App 442, 448; 564 NW2d 158 (1997). MCR 6.201(B)(3) provides for disclosure, upon request, of "any written or recorded statements by a defendant, codefendant, or accomplice pertaining to the case, even if that person is not a prospective witness at trial." "Thus, under the court rule, a prosecutor must supply a felony defendant copies of the defendant's statements, the statements

of any codefendants and any accomplices whether or not they are potential witnesses at trial.”¹ *People v Pruitt*, 229 Mich App 82, 87; 580 NW2d 562 (1998). MCR 6.201(A)(4) provides for mandatory disclosure of “any criminal record that the party may use at trial to impeach a witness.” The prosecutor has a continuing duty to promptly notify the other party if at any time the prosecutor discovers additional information. MCR 6.201(H). If the prosecution fails to comply, the trial court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy. MCR 6.201(J). “When determining the appropriate remedy for discovery violations, the trial court must balance the interests of the courts, the public, and the parties in light of all the relevant circumstances, including the reasons for noncompliance.” *People v Banks*, 249 Mich App 247, 252; 642 NW2d 351 (2002).

In the present case, the record reveals that the prosecutor did not learn of defendant’s intent to call Ulin as a witness until the day before trial, when an amended witness list adding Ulin as a potential witness was filed by the defense. Despite this late disclosure, see MCR 6.201(A)(1), the trial court permitted defendant to add Ulin as a witness on the first day of trial—a fact considered by the court in determining whether the evidence at issue should be admitted. The record further reveals that defense counsel was made aware of the telephone recordings before the prosecutor’s cross-examination of Ulin, and that defendant was given the opportunity to review the recordings and rehabilitate Ulin during redirect examination. Defendant also had the opportunity to examine Ulin, whom the record shows defendant dated for a number of years, regarding whether she had a prior conviction. Finally, there is no indication that defendant could not himself have discovered the challenged evidence with reasonable diligence. See, e.g., *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). Under such circumstances, and considering that defendant does not dispute that the challenged evidence was otherwise admissible, we cannot conclude that the trial court’s decision to permit its use to impeach Ulin’s testimony was an abuse of the discretion afforded the court in such matters. MCR 2.601(J); see also *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987) (“the exclusion of otherwise admissible evidence is a remedy which should follow only in the most egregious cases”).

Defendant also argues that the prosecutor presented insufficient evidence to support his convictions. Again, we disagree. In reviewing a claim of insufficient evidence, this Court must view the evidence de novo, *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002), and in a light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt, *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

¹ Although cited by defendant as requiring disclosure of the telephone recordings at issue, we find it questionable whether MCR 6.201(B)(3) required that the prosecutor inform the defense of the recordings. Indeed, although made during a conversation with defendant, the statements sought to be used by the prosecutor were those of Ulin, and not of “defendant, [or any] codefendant, or accomplice.” MCR 6.201(B)(3). Nonetheless, regardless whether MCR 6.201(B)(3) required a more timely disclosure of Ulin’s statements, as explained below we find no error in the trial court’s decision to admit those statements at trial.

With the exception of his conviction of CSC I for having engaged the minor victim in cunnilingus, defendant does not challenge the existence of evidence to satisfy the elements of the various offenses of which he has been convicted. Rather, defendant urges this Court to reverse his convictions on the ground that the testimony in support thereof, in particular that of the victim and defendant's codefendant, James Warner, was not credible. Questions of credibility are, however, left to the trier of fact and will not be resolved anew by this Court on appeal. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Here, the jury chose to credit the testimony of Warner and the victim and, with the exception noted above, it is not disputed by defendant that the substance of their testimony was sufficient evidence to satisfy each element of the offenses of which defendant was convicted.

Regarding defendant's conviction of CSC I for having engaged the victim in cunnilingus, a person commits CSC I when "he or she engages in sexual penetration with another person and . . . [the] other person is under 13 years of age." MCL 750.520b(1)(a); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(o). A person engages in "cunnilingus" when they place their mouth on the external genitals of a female; no further penetration is required to prove "sexual penetration." *People v Lemons*, 454 Mich 234, 254-255; 562 NW2d 447 (1997); see also *People v Harris*, 158 Mich App 463, 469-470; 404 NW2d 779 (1987). Here, defendant correctly argues that the victim, whom it is not disputed was only six years of age at the time of the offense, testified on direct examination that she did not remember whether defendant engaged in cunnilingus. However, during redirect examination the victim expressly testified that defendant "stuck [his] tongue inside [my] vagina." Warner also testified that he watched as defendant "placed his mouth in [the victim's] vagina [sic] area," and that defendant engaged in cunnilingus with the child. When viewed in a light most favorable to the prosecutor, this testimony was sufficient to support the challenged conviction. *Harris, supra*; *Tombs, supra*.

Finally, defendant argues that the sentences imposed for his convictions constitute cruel and unusual punishment violative of the state and federal constitutions. See US Const, Am VIII; Const 1963, art 1, § 16. Because defendant failed to properly preserve this issue by making an objection on this ground at sentencing, our review is limited to plain error affecting defendant's substantial rights. See *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). After review of the record, we find no such error.

Defendant does not dispute that his sentences are within the properly calculated guidelines ranges applicable to each offense. Because defendant's sentences fell within the sentencing guidelines' recommended range, they are presumptively proportionate. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004); *People v Moseler*, 202 Mich App 296, 300; 508 NW2d 192 (1993). Given the severity of the sexual assaults and the age of the victim, defendant has failed to overcome this presumption and, "because the sentences are not disproportionate in relation to the crimes, they are . . . not cruel or unusual." *People v Williams (After Remand)*, 198 Mich App 537, 543; 499 NW2d 404 (1993); see also *Drohan, supra* at 92. Accordingly, defendant has failed to establish plain error affecting his substantial rights.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Patrick M. Meter
/s/ Pat M. Donofrio