

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CECIL ARTHUR BURROUS, JR.,

Defendant-Appellant.

UNPUBLISHED

August 31, 2004

No. 249440

Van Buren Circuit Court

LC No. 02-012842-FC

Before: Whitbeck, C.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a). The trial court sentenced him to a term of 2 to 25 years in prison. We affirm.

I. FACTS

The instant case stems from allegations that defendant sexually abused his godson when the victim would spend the night at his house. The victim testified that he used to refer to defendant and defendant's wife as his aunt and uncle and acknowledged that they were his godparents. The victim used to go over to their house between two and five times per week and often stayed overnight. At the time, he had wanted to get away from his parents and he enjoyed being over at defendant's house. Defendant sometimes took naps with the victim and often gave him back rubs.

When asked if anything ever happened at defendant's house that he did not like, the victim responded that defendant "stuck his penis in my butt." Although he did not remember how many times this occurred, he thought it was more than ten times and could not remember a time he stayed overnight at defendant's house when this did not happen. He did not remember how old he was when defendant first did this, but he thought it was before he was in third grade. The last time occurred on the day before the victim disclosed the abuse to his mother.

Defendant testified he was very close to the victim and thought of him as a son. The victim used to spend the night at his home at least twice a week. During these visits, he would often give the victim back rubs before he went to bed. The victim usually requested the back rubs and always remained clothed during the massages. He never gave the victim a massage when the victim did not want one. Additionally, defendant denied ever inserting his penis into

the victim's rectum or touching his private parts for sexual gratification. He did not know why the victim would make false allegations against him, but stated that before the accusations, the victim was the most truthful child he had ever known. Following instructions and closing argument, the jury deliberated and returned a verdict of guilty as charged. Defendant appeals as of right.

II. SUFFICIENCY OF THE EVIDENCE

Defendant contends that the prosecution presented insufficient evidence to sustain his conviction. We disagree.

A. Standard of Review

We review de novo challenges to convictions based on the sufficiency of the evidence. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). The prosecution must introduce evidence sufficient to justify a rational trier of fact in concluding that all of the essential elements of the crime were proved beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). When reviewing the sufficiency, this Court examines the evidence in the light most favorable to the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

B. Analysis

Under MCL 750.520b(1)(a), a person is guilty of CSC-I if the person engages in sexual penetration with another person and the victim is under the age of thirteen. *People v Hack*, 219 Mich App 299, 303; 556 NW2d 187 (1996). MCL 750.520a(o) defines sexual penetration 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.”

In the instant case, evidence of sexual penetration existed in that the victim testified that on numerous occasions when he spent the night at defendant's home, defendant "stuck his penis in my butt." He further explained that defendant's penis would actually be up inside of his "bottom." In addition, a pediatrician, Dr. Collette Gushurst, testified that she examined the victim, discovered an irregularity on the folds of his anal opening, and opined that these physical findings were consistent with the victim's allegations. This testimony provided sufficient evidence on the element of sexual penetration. It is undisputed that the victim is under age thirteen. Viewed in the light most favorable to the prosecution, a rational jury could have found that the prosecution proved all elements of CSC-I beyond a reasonable doubt.

Nevertheless, defendant contends that insufficient evidence existed because the testimony of the victim was not credible. He asserts that, under *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998), a trial court may substitute its view of the credibility of a witness for that of the jury where the witness’ testimony defies the physical realities or is so inherently implausible that it could not be believed by a reasonable juror. However, defendant’s argument confuses the standard for a challenge to the sufficiency of the evidence with the standard trial courts employ when ruling on a defendant’s motion for a new trial on the grounds that the jury’s verdict went against the great weight of the evidence. *Id.*, 633-634. In deciding whether to grant

such a motion, trial courts may weigh the credibility of witnesses in the limited fashion cited by defendant. *Id.*, 643-644. But even when reviewing a trial court's decision regarding the great weight of the evidence, "this Court may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

When considering claims of insufficient evidence, this Court must view the evidence in a light most favorable to the prosecution. *Lemmon, supra*, 627. This includes all determinations concerning the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). Furthermore, under MCL 750.520h, "[i]t is a well established rule that a jury may convict on the uncorroborated evidence of a CSC victim." *Lemmon, supra*, 643, n 22. Thus, sufficient evidence existed and we affirm defendant's conviction.

III. PROSECUTORIAL CONDUCT

Next, defendant asserts that the prosecution engaged in misconduct by presenting testimony from Trooper Erin Ginn regarding the two instances when investigators interviewed defendant. We disagree.

A. Standard of Review

Defendant failed to preserve the issue; therefore, we review it for plain error affecting his substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). We review claims of prosecutorial misconduct on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). A prosecutor's good-faith effort to admit evidence cannot provide the basis for a finding of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 278-279; 662 NW2d 836 (2003).

B. Analysis

Contrary to defendant's assertions, Trooper Ginn's testimony concerning defendant's demeanor at the first interview was relevant in that it had some tendency to make a fact at issue more or less probable. *People v Mills*, 450 Mich 61, 66; 537 NW2d 909 (1995), mod, remanded 450 Mich 1212; 539 NW2d 504 (1995). The record contains no indication that defendant ever invoked his right to remain silent; therefore, her testimony concerning the second interview does not implicate his rights under the Fifth Amendment. See *People v Solmonson*, __ Mich App __; __NW2d __ (#245178, rel'd 4/29/04) slip op p 4. None of the testimony elicited from Trooper Ginn provides support for defendant's claims of prosecutorial misconduct. Thus, no plain error occurred and we decline to further review the issue.

IV. ADMISSION OF TESTIMONY

Defendant also contends that the trial court abused its discretion by allowing the prosecution to introduce testimony bolstering the truthfulness of the victim when the defense did not attack his character for truthfulness. We disagree.

A. Standard of Review

We review decisions on whether to admit evidence for abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion exists where “an unprejudiced person would find no justification for the ruling made.” *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

B. Analysis

Under MRE 608(a), a party may present reputation or opinion evidence supporting a witness’ character for truthfulness “only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.” *Lukity, supra*, 489. The prosecution may present such evidence on direct examination if a defense counsel attacks a witness’ character for truthfulness in an opening statement. *Id.*, citing *United States v Cruz*, 805 F2d 1464, 1479-1480 (CA 11, 1986); *United States v Jones*, 763 F2d 518, 522 (CA 2, 1985).

In *Lukity, supra*, 489-490, the defense counsel stated during opening arguments that the alleged incident of sexual abuse never occurred and that testimony would show that the complainant suffered from serious problems that may affect her ability to recount and describe the incident. The trial court found that this statement attacked the complainant’s credibility and allowed the prosecution to present evidence supporting her character for truthfulness. *Id.*, 490. In reviewing the trial court’s decision, our Supreme Court stated as follows:

Credibility may be attacked in numerous ways, e.g., demonstrating a witness’ inability to perceive or remember the event at issue. Attacking a witness’ character for truthfulness is one of the means by which a witness’ credibility may be attacked. Thus, the two terms are not synonymous; rather, character for truthfulness is a specific aspect of credibility. [*Id.*]

The Court then stated that the defense counsel “did not accuse complainant of intentionally lying,” but rather stated that she was unworthy of belief due to her emotional problems. *Id.* Because the opening statement attacked the complainant’s credibility but “did not attack her character for truthfulness, i.e., it did not suggest that she was lying” the Court held the trial court abused its discretion in allowing the prosecution to present testimony supporting the victim’s character for truthfulness. *Id.*, 490-491.

In contrast with *Lukity*, defense counsel in the instant case specifically attacked the victim’s character for truthfulness. During his opening statement in the instant case, defense counsel asserted that the victim enjoyed spending time with defendant and his wife Linda because they paid attention to him and that he often complained about his own parents being too busy to listen to him. He then raised a question as to why the victim would accuse defendant and stated, “[O]nly [the victim] can answer that, but I think as the evidence unfolds, we may get a glimpse of what motivated him and how the idea got into his head.” Counsel further stated that the victim’s story contained numerous discrepancies and that investigators had made no effort to “look for a possible motive to falsify the accusations.” Defense counsel questioned the truthfulness of the victim’s character in his opening statement. In addition to his opening statement, when arguing that the victim’s statements to the doctor who examined him were not admissible under MRE 803(4), defense counsel stated that the victim had “had plenty of time to falsify, plenty of time to decide what his story was going to be.”

Furthermore, defense counsel's questioning of the victim's parents made it clear that his theory of the case was that the victim fabricated the allegations against defendant in order to get attention from his parents. Counsel asked them numerous questions concerning the amount of time they spent with the victim before and after the allegations were disclosed. He also inquired into whether they initially believed the victim's allegations.

In allowing the prosecution to present testimony concerning the victim's character for truthfulness, the trial court found that defendant's arguments clearly suggested that the victim was lying about being abused and that he fabricated the allegations in order to get attention from his parents. Based on defense counsel's statements, an unprejudiced person could not find that the trial court's determination lacked any justification. Because it found that defendant attacked the victim's veracity, it did not err in permitting the prosecution to present character witnesses supporting his character for truthfulness pursuant to MRE 608(a). Therefore, the trial court did not abuse its discretion and we affirm defendant's conviction.

V. REBUTTAL WITNESS

Defendant next asserts that the prosecution failed to inform him that it intended to call Robin Zollar as a rebuttal witness until part way through the fourth day of trial and argues that the trial court abused its discretion in allowing her testimony. We disagree.

A. Standard of Review

We review a trial court's decision regarding the appropriate remedy for noncompliance with a discovery order for an abuse of discretion. *People v Davie*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

B. Analysis

On July 1, 2002, defendant filed a request for discovery under MCR 6.201 that requested the names and addresses of all lay and expert witnesses that the prosecution intended to call at trial. MCR 6.201(A)(1) provides for mandatory disclosure and requires a party to disclose such information upon request. Additionally, MCR 6.201(H) states that if a party "discovers additional information or material subject to disclosure under this rule, the party, without further request, must promptly notify the other party." But where a party violates this rule, the trial court, "in its discretion, may order that testimony or evidence be excluded, or may order another remedy." MCR 6.201(J).

A trial court's exercise of discretion regarding discovery matters "involves a balancing of the interests of the courts, the public, and the parties." *Davie, supra*, 598, quoting *People v Loy-Rafuls*, 198 Mich App 594, 597; 500 NW2d 480 (1993), rev'd in part on other grounds 442 Mich 915 (1993). "It requires inquiry into all the relevant circumstances, including 'the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice.'" *Id.*, quoting *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987).

In the instant case, defendant's trial counsel objected to the presentation of Zollar as a witness on the grounds that he was unfamiliar with her curriculum vitae and that due to the lack of notice he had been unable to prepare for cross-examination. In response to this objection, the

trial court asked defense counsel how long he had known the witness, and stated, “[Y]ou’ve been aware for at least 15 or 20 years that she was a person who treated abused children and testified in court as to those areas.” Defense counsel replied, “I know that she’s testified in court with regard to child abuse cases.” He also testified that he had known of her for quite some time. The trial court noted:

I don’t want this record to reflect that this is some stranger that you just came upon and never heard of before. It’s someone from your own county that has practiced in this area for decades whom you’re well aware of, and you may not know the CV [curriculum vitae], but I do not want a false impression left on this record that you’ve been blindsided by some unknown expert that you haven’t a clue about.

Furthermore, the record indicates that during jury voir dire on the first day of trial, the prosecution named Zollar as a potential witness.

Under MCR 6.201(H), the prosecution was required to promptly notify defendant that it intended to call Zollar as a rebuttal witness. However, the trial court had the discretion to allow the testimony after balancing the interests of the court and the parties. The trial court analyzed the situation, taking into account defense counsel’s status as a former judge in the area and Zollar’s status as a local expert who was well-known in the legal community. Further, defendant was advised on the first day of trial (February 4, 2003) that the prosecution intended to call Zollar. Zollar testified on February 11, 2003, allowing defense counsel a full week to investigate her curriculum vitae and prepare for her testimony as a witness. Defendant failed to establish “actual prejudice” as required by *Davie, supra*, 598. Thus, we find that the trial court did not abuse its discretion in refusing to exclude Zollar’s testimony.

In addition to his assertion that the prosecution failed to comply with the discovery rules, defendant contends that Zollar’s testimony exceeded the proper scope of rebuttal evidence. Decisions concerning the admissibility of rebuttal evidence are within the discretion of the trial court and “will not be disturbed absent a clear abuse of discretion.” *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996), citations omitted. But because defendant failed to preserve his claim that the testimony exceeded the proper scope of rebuttal evidence, we review the issue for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

In *Figgures, supra*, 399, our Supreme Court defined the scope of rebuttal as follows:

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. The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.

The Court further stated that the test for whether a trial court properly admitted rebuttal evidence “is not whether the evidence could have been offered in the prosecution’s case in chief.” *Id.* Rather, admissibility depends on “whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant.” *Id.*, citing *People v Bettistea*, 173 Mich App

106; 434 NW2d 138 (1988); *Nolte v Port Huron Bd of Ed*, 152 Mich App 637, 645; 394 NW2d 54 (1986). “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.*

In the instant case, although some of Zollar's testimony could have been presented in the prosecution's case in chief, the record shows that it was presented in response to evidence introduced and theories developed by defendant. Based on *Figgures, supra*, 399, the testimony did not exceed the scope of proper rebuttal. The trial court did not abuse its discretion and no plain error occurred.

Affirmed.

/s/ William C. Whitbeck
/s/ Donald S. Owens
/s/ Bill Schuette