

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WARREN LELAND MATTICE,

Defendant-Appellant.

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UNPUBLISHED  
November 2, 2004

No. 248699  
Muskegon Circuit Court  
LC No. 01-046777-FC

Before: Whitbeck, C.J., and Jansen and Bandstra, JJ.

PER CURIAM.

Defendant was charged with one count of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b), and one count of second-degree CSC, MCL 750.520c(1)(b). Following a jury trial, defendant was convicted of second-degree CSC, for which he was later sentenced as an habitual offender, second offense, MCL 769.10, to a prison term of seven to twenty years.<sup>1</sup> Defendant appeals his conviction as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant's statement to the police was admitted in evidence against him. Throughout the statement, defendant expressed the opinion that the victim, his daughter, had fabricated the charges. In one particular passage, defendant was asked why the victim might have fabricated the charge of first-degree CSC predicated on digital penetration and defendant replied, "Because she's at the point right now where I caught her with uh, two packs of cigarettes and a rubber in her bedroom," and added, "And I asked, I mean I confronted her about it, she (inaudible) that's why I told you that little boy J[ustin]." Defendant contends that the trial court erred in excluding the second statement under the rape-shield law. We review the trial court's ruling regarding the admission of evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

"A complainant's sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant." *People v Adair*, 452 Mich 473, 481; 550 NW2d 505 (1996). The rape-shield law bars, with two exceptions, all evidence of the complainant's sexual

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<sup>1</sup> The jury was unable to reach a verdict as to first-degree CSC and the court declared a mistrial as to that charge.

activity not incident to the alleged rape, *id.* at 478, including evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct. MCL 750.520j(1). One exception is the complainant's sexual conduct with the defendant himself, MCL 750.520j(1)(a), as evidence of consensual sexual encounters between the complainant and the defendant could be probative of the defendant's claim that the incident in question was consensual. *Adair, supra* at 482. The other exception permits admission of the complainant's sexual activity with another person "to prove that the semen recovered from the complainant or her resulting physical condition was the result of someone other than the defendant." *Id.*; MCL 750.520j(1)(b); see also MRE 404(a)(3). In addition, the evidence must be material to a fact at issue in the case and its inflammatory or prejudicial nature cannot outweigh its probative value. MCL 750.520j(1).

The one statement at issue, "And I asked, I mean I confronted her about it, she (inaudible) that's why I told you that little boy J[ustin]," "does not reveal any prior sexual activity by the complainant" or come within the other categories of evidence excluded under the rape-shield law. *People v Ivers*, 459 Mich 320, 328; 587 NW2d 10 (1998). In addition, the statement was relevant because it disclosed a motive for fabrication of the charges. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). Therefore, the trial court erred in ruling that the evidence was subject to exclusion under that law and abused its discretion in excluding the evidence.

Although we agree that the court improperly excluded the statement at issue, we hold that the exclusion is not grounds for reversal because the error was not outcome determinative for several reasons. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). First, the statement related to the allegation of digital penetration and defendant was not convicted of first-degree CSC. The challenged statement did not relate specifically to the conduct giving rise to the second-degree CSC charge of which defendant was convicted. In addition, the statement is not wholly comprehensible and the jury was allowed to hear defendant's more cogent explanations for a false accusation: his daughter's emotional distress over her mother leaving home and being angry because defendant "told her that I didn't want J[ustin] in the house no more," as well as evidence that the accusations came on the heels of an argument in which defendant slapped his daughter and an incident in which she was punished for possession of cigarettes. Thus, the statement was simply cumulative of other evidence regarding the defense of fabrication. Finally, defendant admitted to police that he had touched the victim's breasts on various occasions. Because defendant admitted to the conduct giving rise to the charge of which he was convicted, it is unlikely that had one more statement about his belief that the victim fabricated the charges been admitted, the verdict would have been different.

Affirmed.

/s/ William C. Whitbeck

/s/ Kathleen Jansen

/s/ Richard A. Bandstra