# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH A. SUTTON,

Defendant-Appellant.

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UNPUBLISHED
February 14, 1997

No. 186813
Recorder's Court
LC No. 94-009820

Before: Hood, P.J., and Saad and T.S. Eveland,* JJ.

PER CURIAM.

Defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), following a jury trial. Defendant was sentenced to twenty-five to fifty years' imprisonment for each of his CSC I convictions, and eleven to fifteen years' imprisonment for his CSC II conviction. He appeals as of right. We affirm defendant's convictions and remand for correction of defendant's CSC II sentence.

In December 1993, defendant moved into an apartment with the complainant's mother, the complainant, born June 13, 1986, and his three-year old daughter. The three-year old was the complainant's mother's daughter by defendant as was another child, who was four months old at the time of trial. The complainant was from a previous marriage. At trial, the complainant's mother testified that in January 1994, the complainant approached her and said that defendant had "pulled [the complainant's] pants down." The complainant testified that, sometime in late 1993 or early 1994, while in the living room of the apartment, defendant pulled her pants down, got on top of her and inserted his penis into her vagina. He threatened to harm her if she told anyone. On a subsequent occasion, defendant placed his penis into the complainant's mouth and forced her to perform fellatio. During a third encounter, defendant inserted his penis into the complainant's rectum.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant first contends that the trial court erred in allowing the complainant's mother to testify regarding the complainant's statement to her because it was not the first statement that the complainant made to someone concerning the alleged sexual abuse. We agree, but find the error harmless. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

While testimony such as that offered by the complainant's mother would ordinarily be inadmissible hearsay, MRE 801, Michigan provides a "tender years" exception to this general rule of exclusion. MRE 803A. In this case, although the complainant did not relate the events that transpired to her mother immediately, that delay could easily be "excusable," MRE 803A(3), because of the seven-year-old complainant's fear of defendant. *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995). Thus, in a normal situation, the complainant's statement would have satisfied the requirements of MRE 803A. However, in this case, in addition to not being the first statement made, the complainant's statement to her mother was also not "corroborat[ion of] testimony given by the [complainant] during the same proceeding." MRE 803A. The statement was that complainant said defendant merely pulled her *pants* down while the complainant testified that defendant pulled her *panties* down and penetrated her vagina. The statement was clearly hearsay and its admission was error.

We, nevertheless, conclude that the admission of the testimony constituted harmless error where the complainant testified in detail about the incidents of sexual abuse and was available for cross-examination concerning the statement she made to her mother. *Hammons*, *supra*.

Defendant next raises several claims of prosecutorial misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). By not raising a timely objection in the trial court, defendant failed to preserve these issues for appeal. *People v Smith*, 205 Mich App 69, 75-76; 517 NW2d 255 (1994). Our review is, therefore, limited to whether the resulting prejudice, if any, was so great that it could not have been cured by an appropriate instruction by the trial court and whether failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), cert den sub nom *Michigan v Caruso*, ___ US ___; 115 S Ct 923; 130 L Ed 2d 802 (1995); *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993).

Defendant's first prosecutorial misconduct claim is that the prosecution failed to give him advance notice of its intent to introduce the complainant's statement through her mother's testimony. It is undisputed that no written notice of intent was given to defendant. However, the record indicates that approximately seven months prior to trial, the complainant testified at defendant's preliminary examination that she told her mother that defendant pulled her pants down. It is, therefore, reasonable to conclude that well in advance of trial, defendant had notice that the complainant's mother might be called to testify concerning the complainant's statement to her. Also, as previously indicated, any error resulting from admission of the statement was harmless.

Defendant's second claim of prosecutorial misconduct is that the prosecutor improperly argued the qualifications of the testifying medical expert and the emergency room physician. We disagree. The prosecutor's remarks were proper as reasonable inferences based on evidence that was admitted at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989). Additionally, the trial court instructed the jury that the attorney's statements were not evidence, the jury was free to believe or disbelieve any of the witnesses and whether the medical expert's testimony was credible.

Defendant's final claim of prosecutorial misconduct is that the prosecutor shifted the burden of proof to defendant by arguing that no contradictory evidence was presented, particularly because he did not testify. A prosecutor may not comment upon a defendant's failure to testify. MCL 600.2159; MSA 27A.2159; *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). We, however, do not believe that the comment in question impermissibly shifted the burden of proof. This Court has held that a statement that the evidence is uncontroverted does not constitute an impermissible comment on a defendant's failure to take the stand. See *Perry*, *supra*; *People v Smith*, 143 Mich App 122, 135; 371 NW2d 496 (1985); *People v Balog*, 56 Mich App 624, 629; 224 NW2d 725 (1974). Furthermore, the trial court instructed the jury that defendant was presumed innocent until proven guilty, defendant had the absolute right not to testify and that defendant's choosing to not testify "must not affect [the jury's] verdict in any way."

Defendant also argues that the trial court should have *sua sponte* excluded two medical reports that contained sexual abuse evaluations conducted on complainant because they contained irrelevant and highly prejudicial hearsay. Not only did defendant fail to object to the admission of the reports, but stipulated to their admission. Because defendant failed to object and failed to cite any authority in support of his argument, we decline to review this issue. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994); *People v Connor*, 209 Mich App 419, 430; 531 NW2d 734 (1995). Also, defendant may not choose a course of action and then "sit back and harbor error to be used as an appellate parachute." *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995).

Defendant's claim that the trial court should have ascertained on the record whether he intelligently and knowingly waived his right to testify is without merit. The court has no such duty. *People v Bell*, 209 Mich App 273, 277; 530 NW2d 167 (1995).

Defendant next argues that he was denied the effective assistance of counsel because defense counsel stipulated to the admission of the two medical reports. We disagree. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

Defendant has failed to overcome the presumption that defense counsel's action was sound trial strategy where the emergency room physician's report contained exculpatory statements. *People v*

*Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Furthermore, defendant failed to offer any evidence that, but for his counsel's actions, the outcome of his trial would have been different, particularly where the same statements contained in the medical expert's reports came in through that expert's testimony at trial.

Defendant's argument that the cumulative effect of the aforementioned errors denied him the right to a fair trial is also without merit. Because no cognizable errors were identified that deprived defendant of a fair trial, reversal under this theory is unwarranted. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Defendant's final claim is that his eleven- to fifteen-year sentence violates the "two-thirds" rule. We agree. Any sentence which provides for a minimum exceeding two-thirds of the maximum is improper as failing to comply with the indeterminate sentence act. MCL 769.8; MSA 28.1080; *People v Thomas*, 447 Mich 390, 392; 523 NW2d 215 (1994); *People v Tanner*, 387 Mich 683, 689-690; 199 NW2d 202 (1972). Two-thirds of a fifteen-year maximum sentence would provide for a maximum minimum sentence of ten years. We, therefore, remand to the trial court for the sole purpose of setting aside defendant's eleven- to fifteen-year sentence for CSC II and imposing a 10-year minimum term of imprisonment and a 15-year maximum term of imprisonment. In all other respects, defendant's convictions and sentences are affirmed.

Affirmed and remanded for correction of defendant's CSC II sentence. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Henry William Saad
/s/ Thomas S. Eveland