STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CLIFFORD EUGENE BUCK, SR.,

Defendant-Appellant.

UNPUBLISHED
May 23, 1997

No. 195645
Calhoun Circuit Court
LC No. 95-002986-FC

Before: Griffin, P.J., Doctoroff and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction and sentence on two counts of second-degree criminal sexual conduct (CSC-2), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The convictions resulted out of defendant's alleged sexual activities with a five-year-old girl for whom he baby-sat. In addition to the testimony of the victim, the prosecution introduced a photograph taken from defendant's possession which depicted the victim viewing a pornographic magazine. The back of the photograph contained what was admittedly defendant's handwriting. The trial court sentenced defendant to imprisonment for a term of seven to fifteen years. We affirm.

I

Defendant claims that the trial court denied him his constitutional right to present a defense by preventing him from cross-examining the victim's mother as to her past encounters with the Department of Social Services (DSS). Defendant also argues that the court erred in excluding testimony that the victim's mother had admitted that the victim's father had been sexually molesting the victim during the time in question. We disagree.

The scope of cross-examination rests within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion. *People v Carner*, 117 Mich App 560, 569; 324 NW2d 78 (1982). An abuse of discretion is found only where 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 McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994). Thus, a close call on an evidentiary question ordinarily cannot be an abuse of discretion. *People v Bahoda*, 448 Mich 261,

290; 531 NW2d 659 (1995). Constitutionally speaking, a defendant does not have an unlimited right of cross-examination; cross-examination may be limited as to collateral matters bearing only on general credibility as well as on irrelevant issues. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

At trial, defendant sought to cross-examine the victim's mother regarding the DSS' investigation into terminating her parental rights. Defendant attempted to introduce the testimony for the purpose of showing that the victim's mother had reason to persuade her daughter to lie about being sexually abused by defendant. Defendant's theory was that, by inventing the sexual charges against defendant, the victim's mother believed she could keep defendant from telling the DSS about her lack of parenting skills. While witness credibility is a relevant, material issue, *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995), the trial court regarded defendant's theory as too attenuated.

> THE COURT: There are two bridges that do not completely cover the chasm in your argument; to wit, just because Susan O'Brien may not have been a good mother, then you get to the point where she would somehow get her daughter to make up a story. Then the next chasm is that the daughter makes up a story in the detail that she does. And in spite of the fact that Mr. Buck apparently has this photo of the child in a compromising situation found in his room and he admits that it is his writing on the back of the photo, I don't know what's going on, but I'm not going to permit you to leap those two chasms, Mr. Hentchel. [Tr I, 30-31.]

We agree with the trial court's analysis. Furthermore, we find that there was no evidence that the victim was not telling the truth about the abuse or that the victim's mother had influenced the victim regarding what she reported.

We find that the trial court did not abuse its discretion in preventing defendant from cross-examining the victim's mother about her past involvement with DSS on the basis that such evidence was irrelevant. Defendant's theory linking that evidence to an alleged motive for the victim's mother to persuade the victim to lie was too attenuated.

Defendant also claims that the trial court infringed his right to present a defense by preventing him from introducing evidence that the victim's mother had told several people that the victim's father had been sexually molesting the victim during the time in question. Importantly, defendant was not offering this evidence to prove the truth of what the victim's mother allegedly reported to others, but only to impeach her credibility.

MRE 608(b) provides, "Specific instances of conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proven by extrinsic evidence." Thus, pursuant to MRE 608(b), the trial court properly prevented defendant from calling these three witnesses to impeach the victim's mother on this collateral matter.

II

Defendant next argues that the trial court erred in refusing his request for a jury instruction on fourth-degree criminal sexual conduct (CSC-4). We find that defendant failed to preserve this issue.

An appellate court is obliged to review only those issues which were properly raised and preserved, *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994), and an objection not raised at trial is waived on appeal, *People v Furman*, 158 Mich App 302, 330; 404 NW2d 246 (1987). Specifically, "[t]he failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused." MCL 768.29; MSA 28.1052.

The record shows that defendant failed to properly request a CSC-4 instruction. Although defendant, at one point, stated that he was considering whether to request the instruction, the trial court stated that it would be "willing to consider" the matter later. Defendant apparently abandoned the request for a CSC-4 instruction, as the record contains no further discussion on the topic. Moreover, following the reading of the instructions to the jury, defendant, even upon inquiry from the court, did not raise any objection to the absence of a CSC-4 instruction.

III

Defendant next argues that he is entitled to resentencing based on an error in the calculation of offense variable (OV) 2 and OV 25. We disagree.

As recently clarified by our Supreme Court, the sentencing guidelines do not have the force of law, and no cognizable claim for relief can be based on a sentencing judge's discretionary interpretation of the unchallenged facts. *People v Mitchell*, 454 Mich 145, 176; ___ NW2d ___ (1997).

> [A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate.
>
> Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. Guidelines are tools to aid the trial court in appellate courts' inquiry into the question whether the sentence is disproportionate and, hence, an abuse of the trial court's discretion. [*Id.* at 177-178.]

In this case, defendant challenges the scoring of OV 2 as 25 points for "bodily injury and/or subjected to terrorism." Guideline instruction C defines terrorism as "conduct that is designed to increase substantially the fear and anxiety that the victim suffers during the offense." Here, the presentence report states that the victim reported that defendant would spank her if she did not comply with his directives in perpetrating his criminal conduct. Thus, it is clear that the factual predicate upon which the sentence was imposed was supported by the evidence and was not materially false. See *Id.* Defendant does not claim that the sentence was disproportionate. Accordingly, defendant has failed to state a cognizable claim for relief from his sentence. *Id.*

Defendant's argument regarding OV 25 fails for the same reason. The trial court scored fifteen points for three or more contemporaneous criminal acts, stating, "There was evidence of acts not simply of this defendant on the little girl but also what the little girl did to him, and I fully believe that the record in this case justifies the inclusion of those fifteen points." The record supports the trial court's assessment. The victim testified that, when defendant used to baby-sit her, she, on more that one occasion, saw defendant's penis. She testified that, pursuant to defendant's instructions, she rubbed his penis until "yucky"-tasting juice emerged from it. She also testified that defendant had touched her "crotch" with his fingers and with his tongue. This happened on at least two occasions; one time defendant had his clothes on; another time he had his clothes off. Furthermore, defendant gave the victim "naked magazines" for her to look at, and he took a photograph of her looking at one. The victim's mother testified that defendant's unsupervised contact with the victim was limited to a two-month period.

OV 25 Instruction A provides, "A criminal act is contemporaneous if: (1) it occurs within twenty-four hours of the offense upon which the offender is being sentenced or within six months if it is identical to or similar in nature and (2) it has not and will not result in a separate criminal conviction." The jury convicted defendant of CSC-2, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), defined as sexual contact with a person under 13 years of age. The evidence supports a finding of at least five separate instances of sexual contact, namely (1) defendant forcing the victim to rub his penis; (2) and (3) defendant's action in touching the victim's crotch with his fingers on two separate occasions; (4) and (5) defendant's action in touching the victim's crotch with his tongue on two separate occasions. The record is also clear that these similar sexual contacts, having occurred within a two-month period, fall within the six-month time period described by OV 25. Thus, because the factual predicate upon which the sentence was imposed was supported by the evidence and was not materially false, and defendant does not claim that the sentence was disproportionate, he has failed to state a cognizable claim for relief from his sentence. *Mitchell, supra*.

Affirmed.

/s/ Richard Allen Griffin
/s/ Martin M. Doctoroff
/s/ Stephen J. Markman