

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERNESTO VASQUEZ,

Defendant-Appellant.

UNPUBLISHED

July 22, 1997

No. 192730

Grand Traverse Circuit Court

LC No. 95-0068258-FH

Before: Reilly, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(a). He was sentenced to 60 to 180 months' imprisonment. Defendant appeals as of right. We affirm.

In the mid-1980s, defendant and the victim's parents became friends. The victim's mother eventually allowed defendant to babysit her children, particularly the victim's brother who has Down's Syndrome. The victim's mother indicated that, except for three instances, she was usually in attendance when defendant was with the children.

In October 1993, the victim, who was sixteen years old at the time of trial, told her parents that, on three occasions between 1985 and 1987, when she was between six and eight years old, defendant molested her. In 1995, two years after reporting the incidents to her parents, the victim pressed charges against defendant, and he was arrested.

According to the victim, the first instance occurred while she and her brothers were watching television. Defendant lifted her onto a couch, placed a blanket over them, and touched her front genital area by running his hands both under and over her underpants. He also rubbed around her genital area with his fingers, pulled her pants halfway down, exposed himself, and then placed her hand on his erect penis. On a second occasion, while lifting the victim to give her a piggy-back ride, defendant cupped his hand under her groin and began to rub her. The final incident occurred when defendant took the victim for a motorcycle ride. Defendant told her that they would have to stop the bike in the woods

because it was "too hot and had to cool off." After sitting on the ground, defendant suggested that the victim sit on his lap. The victim declined. She then observed defendant "do up his pants."

I

Defendant first argues that the trial court erred in allowing the prosecutor to introduce rebuttal evidence regarding defendant's character even though defendant did not place his character in issue. A trial court's decision regarding the admission of rebuttal testimony will not be disturbed absent an abuse of discretion. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). There is an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *People v Sawyer*, 222 Mich App 1, 5; ___ NW2d ___ (1997). Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the opposing party. *Humphreys*, *supra*.

During trial, defense counsel asked defendant's sister whether defendant had "spent any time with [her] children." She replied that defendant had "spent a lot of time with [her] kids and that he is "really good with kids." Following this exchange, the prosecutor moved to admit evidence that specifically rebutted the evidence that defendant was good with children. The prosecutor argued that defense counsel opened the door by eliciting the favorable response to his question. The trial court engaged in a lengthy analysis of the issue and ultimately allowed limited rebuttal evidence.

In an attempt to rebut the evidence that defendant was good with children, the prosecutor asked defendant's estranged wife about defendant's actions toward her children during cross-examination. She responded that "[a]t times he can get very mad and at other times, he can . . . be really, you know super with them." She testified that defendant had a temper and, after they were married, defendant yelled and screamed at her children, and called them negative names. She also testified that defendant was physically abusive to her children.

MRE 404 establishes the circumstances under which character evidence is admissible and provides, in pertinent part:

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

Under this court rule, a defendant in a criminal case is permitted to open the door to scrutiny of his character and offer evidence that it is unlikely that he committed the crime. *People v Watkins*, 176 Mich App 428, 431; 440 NW2d 36 (1989). Once a defendant has placed his character in issue, the prosecution may properly introduce evidence that the defendant's character is not as impeccable as is claimed. *People v Johnson*, 409 Mich 552, 558-559; 297 NW2d 115 (1980). The rebuttal evidence is restricted to the character traits that the defendant placed in issue. *Id.* "It is fundamental that unless

the defendant has first chosen to place his good character in issue, the state is not permitted to attack his character." *Id.*, quoting *Roti v State*, 334 So 2d 146, 148 (Fla App, 1976). The issue, therefore, is whether defendant placed his character in issue.

Here, we are satisfied that the trial court did not err in concluding that defendant's sister's testimony was a vehicle for placing a pertinent character trait before the jury. The question "has [defendant] spent time with your children" seeks a response and inferences drawn from that response that have no relevance other than to explore defendant's character. As the trial court indicated, defendant's sister's testimony was basically that defendant is good with children, is trusted by others to spend time with their children, and does, in fact, spend a lot of time with children. The logical implication from the testimony is that the victim is not credible because defendant's character of being good with children is inconsistent with defendant committing the crime. Given the particulars of this case, no rational explanation exists as to why defense counsel would ask the question other than to show that defendant was not the type of person who would harm children. In fact, during the prosecutor's motion to admit rebuttal evidence, defense counsel stated:

Yes, your, honor, my questions, did I intend it? No. The answer is not that. *Did I anticipate that that might come up? Of course.* I'm a trial attorney and I felt that might be an issue.

Although defense counsel used a circuitous route, it can be concluded that he anticipated a response relating to defendant being good with children. Further, at no time did counsel attempt to limit defendant's sister's testimony, nor did he ask to strike her answer as unresponsive. By placing such significant character evidence before the jury, defendant invited the prosecution's rebuttal. Under these circumstances, we find that the trial court did not abuse its discretion in allowing the prosecutor to present the limited rebuttal evidence that was admitted concerning defendant's character.

II

Defendant also argues that there was insufficient evidence to convict him of CSC II. When reviewing a claim regarding the sufficiency of evidence, this Court views the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). A prosecutor need not negate every reasonable theory of innocence, but must prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996). Circumstantial evidence and reasonable inferences drawn from the evidence may be sufficient to prove the elements of a crime. *People v Jolly*, 442 Mich 458, 466, 502 NW2d 177 (1993); *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). A court must not weigh the evidence or assess the credibility of the witnesses. *People v Herbert*, 444 Mich 466, 473-474; 511 NW2d 654 (1993).

Under MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), a defendant may be found guilty of CSC II if he engages in "sexual contact" with a person "under 13 years of age." "Sexual contact" includes:

[T]he intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification.

Here, there was uncontroverted evidence that, at the time of the alleged offenses, the victim was between six to eight years old. There was sufficient evidence presented, through the victim's testimony, that on two separate occasions defendant touched the victim's genital area. On one occasion, defendant touched the victim's front genital area by running his hands both under and over her underpants, rubbed all around her genital area with his fingers, pulled her pants halfway down, exposed himself, and then placed her hand on his erect penis. On a second occasion, while lifting the victim to give her a piggy-back ride, defendant cupped his hand under her groin and rubbed the area. In addition, the jury could reasonably infer that defendant's intentional touching of the victim was for the purpose of sexual arousal or gratification. The victim also testified that during their first encounter, defendant's penis was erect. Thus, there was sufficient evidence presented for the jury to find that the essential elements of CSC II were proved beyond a reasonable doubt.

Defendant, however, does not take issue with any specific element of the crime. Rather, he questions the lapse of time between the alleged incidents and his arrest, as well as the victim's time frame of when the incidents allegedly occurred. In essence, these are simply challenges to the victim's credibility. However, issues concerning the credibility of witnesses are matters for the jury, as the trier of fact, and will not be resolved anew on appeal. *Herbert, supra*. There was sufficient evidence to find that defendant was guilty beyond a reasonable doubt of CSC II.

Affirmed.

/s/ Maureen P. Reilly
/s/ Harold Hood
/s/ William B. Murphy