

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEAN MARIE MILLER,

Defendant-Appellant.

UNPUBLISHED

January 23, 1998

No. 200532

Allegan Circuit

LC No. 96-010085

Before: Corrigan, C.J., and Doctoroff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct (sexual contact with person under the age of thirteen), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced defendant to serve two concurrent terms of thirty months to fifteen years' imprisonment. Defendant appeals as of right from her convictions and sentences. We affirm.

Defendant first argues that the trial court erred in failing to appoint an expert witness for this indigent defendant for the purpose of determining whether the victim was subjected to improper interview techniques. We disagree. We review a trial court's ruling to deny the appointment of an expert witness for an indigent defendant for abuse of discretion. *People v Miller*, 165 Mich App 32, 47; 418 NW2d 668 (1987). An abuse of discretion in a criminal case exists 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 Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

MCL 775.15; MSA 28.1252 authorizes the procurement of an expert witness for an indigent criminal defendant at the public's expense, provided that the defendant satisfies the presiding trial judge that the defendant cannot safely proceed to trial without the testimony of the proposed witness. In making her pretrial request for the appointment of the expert, defendant argued that the proposed expert was necessary to examine the circumstances of the case and report on the roles that interviewer bias and child-victim suggestibility might have played in the victim's making the allegations of sexual abuse. However, defendant made no showing that the victim, in fact, had been improperly interviewed

or that child-victim suggestibility played any role in the allegations of abuse. Therefore, defendant did not make the requisite showing that, without the expert, she could not safely proceed to trial. *Miller, supra* at 48. Accordingly, the trial court did not abuse its discretion in denying defendant's motion to appoint the expert witness.

Defendant next argues that the trial court erred in allowing Kathryn Spengler to testify as an expert witness because the prosecutor had not endorsed her as an expert before trial. We disagree. We review for abuse of discretion a trial court's decision to allow an unendorsed witness to testify. *People v Canter*, 197 Mich App 550, 563; 496 NW2d 336 (1992).

On June 12, 1996, the prosecution submitted to the defense its final list of witnesses whom it intended to present in its case-in-chief. The list included the name of Kathryn Spengler, but it did not identify Spengler as an expert witness. At trial, the prosecution moved the court to qualify Spengler as an expert in the area of social work and treatment of children who have been sexually abused. Defense counsel objected, arguing that the prosecutor failed to disclose before trial that she intended to call Spengler as an expert witness, and, consequently, he had not prepared to voir dire Spengler on her qualifications as an expert or to cross-examine her as an expert. The trial court ruled that Spengler could testify as an expert in the area of child sexual abuse. However, at defense counsel's request, the trial court afforded defense counsel until the following morning to prepare for his examination of Spengler.

MCR 6.201(A)(1) states that a party upon request must provide all other parties "the names and addresses of all lay and expert witnesses whom the party intends to call at trial." Plaintiff contends that the manner in which it disclosed its witnesses to defendant was sufficient because MCR 6.201(A)(1) only requires that the names of all lay and expert witnesses be disclosed and does not require that a disclosing party designate its intended witnesses as either expert or lay. We disagree with plaintiff's interpretation of the court rule. This Court must interpret the court rules in accordance with their plain language, and should avoid any construction that would render a court rule, or any part of it, surplusage or nugatory. *In re Neubeck*, 223 Mich App 568; 567 NW2d 689 (1997). MCR 6.201(A)(1) explicitly requires disclosure "of all lay and expert witnesses." If our Supreme Court had not intended to obligate the disclosing party to designate its proposed witnesses as either lay or expert, the Court would have omitted the words "lay and expert" from the court rule and, rather, only required the disclosure of all witnesses. Plaintiff's interpretation of MCR 6.201(A)(1) renders the words "lay and expert" mere surplusage. Thus, MCR 6.201(A)(1) must be read as imposing an affirmative duty upon a disclosing party to designate its proposed witnesses as either lay or expert. In failing to do so in the present case, the prosecution did not comply with MCR 6.201(A)(1). However, MCR 6.201(I), provides that "[i]f a party fails to comply with this rule, the court, in its discretion, may order that testimony or evidence be excluded, or may order another remedy." By giving the defense additional time to prepare, the trial court provided defendant with a sufficient remedy for the prosecutor's noncompliance with the court rule.

Defendant finally argues that the trial court erred in scoring Offense Variable 25 at fifteen points because there was insufficient evidence that three or more similar acts had occurred within six months of the charged offenses. Our review of challenges to the sentencing guidelines is very limited. *People v*

Mitchell, 454 Mich 145, 175-178; 560 NW2d 600 (1997). Application of the sentencing guidelines presents a cognizable claim on appeal only if the factual predicate supporting the score is wholly unsupported, or the factual predicate is materially false, and the sentence is disproportionate. *Id.* at 176. An appellate court is not to interpret the guidelines or to score and rescore the offense variables to determine if they were correctly applied. *Id.* at 178. The sentencing guidelines are merely a tool to aid the sentencing court in exercising its authority, and a framework for an appellate court's inquiry respecting whether the sentence is disproportionate. *Id.* A sentence violates the principle of proportionality if it is not proportionate to the nature of the offense and the background of the offender. *People v Milbourn*, 435 Mich 630, 650; 461 NW2d 1 (1990). Considering the severity of the offense, which involved the sexual assault of a very young child, we find defendant's sentence to be proportionate. Therefore, the sentencing court did not abuse its discretion.

Affirmed.

/s/ Maura D. Corrigan
/s/ Martin M. Doctoroff
/s/ E. Thomas Fitzgerald