STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ASHLEY STEPHENS,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

No. 199327
St. Clair Circuit Court
LC Nos. 95-001162 FC
95-001169 FC

Before: O'Connell, P.J., and White and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions 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). The convictions stem from defendant's repeated sexual contacts over two and one-half years with his stepdaughter, who was ten to twelve years old during the incidents. The trial court sentenced defendant to concurrent terms of ten to fifty years' imprisonment for each of the CSC I convictions and ten to fifteen years' imprisonment for the CSC II conviction. We affirm.

I

Defendant first argues that the trial court abused its discretion by excluding, under the rape-shield law, MCL 750.520j(1); MSA 28.788(10)(1), evidence of an alleged prior sexual contact between his stepdaughter and a neighbor because she either made a false accusation, or in the alternative, the neighbor could have been the source of the penetration. The rape-shield law states, in part:

> (1) Evidence of specific instances of the victim's sexual conduct . . . shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
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> * * *

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [MCL 750.520j(1)(b); MSA 28.788(10)(1)(b).]

This Court has held that, within the rape-shield statute, "the Legislature intended that evidence of specific instances of sexual activity is admissible to show the origin of a physical condition when evidence of that condition is offered by the prosecution to prove one of the elements . . . ." *People v Mikula*, 84 Mich App 108, 115; 269 NW2d 195 (1978). This Court has also acknowledged that false accusations may be admitted where the complainant has acknowledged the falsity, or where there has been a determination by a court of the truth or falsity, because they are relevant to the complainant's credibility. *People v Dale Williams*, 191 Mich App 269, 272, 273 n1; 477 NW2d 877 (1991); *People v Garvie*, 148 Mich App 444, 448; 384 NW2d 796 (1986).

In this case, neither of these situations applies, and defendant's arguments have no merit. The victim did talk to police regarding her neighbor, but the prosecutor stated that her complaint was that he touched her breasts. Defendant did not make an offer of proof or argue that any other sexual activity took place between the victim and the neighbor, and in fact, argues in the alternative that the entire allegation is false. Evidence that the neighbor touched the victim's breasts would not show an alternative origin of the lacerations to her hymen, which were consistent with penile penetration. Also, the trial court did allow other evidence that could have shown possible alternative sources of the lacerations. In regard to the truth or falsity of the allegations about the neighbor, the victim has not acknowledged that her accusation against her neighbor was false, and there was no indication that she was likely to do so at trial. The only evidence that defendant seemed prepared to present was the neighbor's denial of the incident. However, defendant "was not entitled to have the court conduct a trial within the trial to determine whether there was a prior accusation and whether that prior accusation was true or false." *Williams, supra* at 274.

II

Defendant next argues that the trial court abused its discretion by denying the defense motion for an independent psychological examination of the victim because, defendant argues, she had been molested previously by her father and may have been confused when making the allegations against her stepfather, defendant. A trial court may, in its discretion, order an independent psychological evaluation of a complainant in a criminal sexual conduct case. *People v Graham*, 173 Mich App 473, 477-478; 434 NW2d 165 (1988). The defendant must demonstrate the need for such an examination by showing a "compelling reason." *Id*. at 478. Defendant seems to base his arguments on the recommendation of two doctors that the victim receive more counseling. However, the first doctor, after the molestation by the victim's father, simply noted that she would probably need more counseling in the future and the second doctor, after the victim alleged molestation by defendant, found that she was not grossly delusional or psychotic and that she was fully oriented. This evidence is insufficient to show that the victim may have suffered from such extreme trauma from the sexual misconduct of her father that she was confused as to the facts of the present case or that it affected her ability to tell the truth. This Court has determined that "unsupported arguments made by defense counsel" are not sufficient to meet the burden of a "compelling reason." *Id.* Additionally, this Court has held that a

complainant's veracity can properly be brought out during cross-examination and a psychologist's evaluation as to veracity may invade the province of the trier of fact. *Id*.

III

Defendant next contends that the trial court abused its discretion by allowing into evidence the testimony of two of the victim's friends who saw defendant push the victim on two different occasions. Defendant asserts that this evidence should have been excluded as prior bad acts evidence under MRE 404(b) because it was offered as an attack on his character. This argument is without merit. MRE 401 states:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

MRE 402 provides that, generally, all relevant evidence is admissible. It is under these rules that evidence that directly impacts some element or material issue in a case can be admitted. The prosecutor stated that these incidents helped to explain why the victim had failed to seek help earlier for the sexual abuse, about which defendant had questioned her. This Court has held that evidence of a defendant's conduct toward the victim "was relevant to explain her delay in reporting the alleged abuse." *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Thus, the witnesses' testimony was relevant to an issue other than mere propensity, and MRE 404(b) was not violated. *People v VanderVliet*, 444 Mich 52, 85; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Also, the probative value of this evidence was not substantially outweighed by unfair prejudice to defendant. The prosecutor made it clear that these witnesses were not testifying regarding any sexual abuse, and jurors who sat through three days of graphic sexual abuse testimony were unlikely to be emotionally swayed by evidence of a push. It is not necessary to analyze admission of this evidence under MRE 404(b) because the evidence was properly admitted under MRE 401 at the trial court's discretion. *People v Delgado*, 404 Mich 76, 82-84; 273 NW2d 395 (1978).

IV

Lastly, defendant raises the issue of prosecutorial misconduct, arguing that he was denied a fair trial because the prosecutor asked a police witness if the victim's statements could be characterized as either consistent or inconsistent. This issue is raised for the first time on appeal. "Because no objection was made to any of the prosecutor's [questions] at trial, appellate review is foreclosed unless our failure to consider the issue would result in a miscarriage of justice," *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977), or "if a curative instruction could not have eliminated the prejudicial effect," *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant had already elicited the substance of the statements on direct examination and his goal was to distinguish the statements to the police officer from statements to others and statements made at trial, there was no prejudice to defendant. A curative instruction certainly could have cured any possible technical error caused by the prosecutor's cross-examination questions. No manifest injustice resulted, and we therefore decline to review this issue.

We affirm.

/s/ Peter D. O'Connell
/s/ Richard A. Bandstra

I concur in result only.

/s/ Helene N. White