STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KIM CHARLES COBURN,

Defendant-Appellant.

UNPUBLISHED
January 26, 1999

No. 198504
St. Clair Circuit Court
LC No. A-96-000416 FH

Before: Holbrook, Jr., P.J., and Markey and Whitbeck, JJ.

PER CURIAM.

Defendant appeals by right his convictions of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and two counts of distributing obscene material to minors, MCL 722.675; MSA 25.254(5). Defendant was sentenced to prison terms of twelve to 22 ½ years for each count of CSC II and to terms of sixteen to twenty-four months for each count of distributing obscene material to minors, with all terms running concurrently. These sentences were enhanced under the habitual offender second statute. MCL 769.10; MSA 28.1084. We affirm defendant's convictions but vacate his sentence and remand for resentencing.

I

Defendant first argues that the trial court erred when it granted the prosecution's motion in limine to exclude a former teacher from testifying about one of the complainant's reputations for veracity. The complainants in this case are two young girls, ages ten and twelve. A teacher, who had the twelve-year-old complainant in her class two years before these events, was prepared to testify that this complainant's reputation among the teachers in her school was that of a "chronic liar." Although we agree with defendant that the evidence should have been admitted into evidence, we find that the error was harmless.

MRE 608(a) provides:

> (a) Opinion and Reputation Evidence of Character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but

> subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

In *People v Bieri*, 153 Mich App 696, 712-713; 396 NW2d 506 (1986), this Court held that under MRE 608, "[t]he admissibility of such evidence is limited and the testimony of a character witness must be based upon what he has heard other people in the subject's residential or business community say about the subject's reputation." Here, the trial court excluded the testimony upon concluding that the school was not a comparable community. In *Bieri*, *supra* at 713-714, however, this Court held that "a reputation may be established wherever one interacts with others over a period of time," and concluded that the jail employees' exposure to the defendant for approximately five months was sufficient time for them to arrive at a conclusion regarding the defendant's reputation for truthfulness within the jail, which was the inmate's community for purposes of this rule.[1] Indeed, for children of school age, the school they attend is analogous to a job where they would spend a majority of their day. Accordingly, the school is a child's community, and the teacher should have been permitted to testify.

Regarding the teacher's inability to comment on the complainant's reputation outside the school community and the fact that the complainant's reputation or behavior could have changed in the two years since this teacher had the complainant in her classroom, the prosecutor could address that matter on cross-examination.[1] Likewise, the fact that she may have been biased because her husband was defendant's good friend also could have been dealt with on cross-examination. *Bieri*, *supra* at 713. The witness' potential bias goes to her credibility rather than to the admissibility of the testimony. Therefore, the trial court abused its discretion in not allowing her to testify as to the complainant's reputation for untruthfulness in her school.

We believe, however, that the error was harmless because it is highly probable that the error did not affect the judgment. *People v Graves*, 458 Mich 476, 482-483; 581 NW2d 229 (1998). First, both complainants gave similar accounts of the events that transpired at defendant's home. Even if one of the young girls were deemed unbelievable, defendant offered no testimony to challenge the ten-year-old's veracity.[2] Second, the interviewing officer obtained statements from defendant that, in many ways, corroborated the girls' testimonies. Thus, even if the jury discounted one complainant's testimony as incredible, the other complainant and the investigating officer presented sufficient evidence for the jury to convict defendant of CSC II.

With respect to defendant's convictions for distributing obscene matter to minors, in light of the overwhelming evidence at trial, it is highly probable that the error did not affect the judgment. See *Graves, supra*. Accordingly, the trial court's decision to grant plaintiff's motion in limine and exclude the evidence constituted an abuse of discretion, but the error was harmless.

II

Defendant next argues that the trial court erred when it granted the prosecution's motion in limine to prevent defendant's previous attorney from testifying with respect to a complainant's

inconsistent statements and regarding the complainants' behavior in the court hallway before the preliminary examination. Defendant argues that this testimony should have been allowed under MRE 608(b) and MRE 613(b) as evidence of a prior inconsistent statement. We disagree because the evidence was irrelevant.

MRE 613(b) provides:

> Extrinsic Evidence of Prior Inconsistent Statement of Witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

"[T]he admissibility of extrinsic evidence of a prior inconsistent statement is limited by the collateral matter rule announced in *People v Williams*, 159 Mich 518, 521; 124 NW 555 (1910)." *People v Carner*, 117 Mich App 560, 571; 324 NW2d 78 (1982). "[I]f the cross-examining party would be entitled to go into the matter in its case-in-chief, the matter is not collateral." *Carner*, *supra* at 572.

MRE 608(b) states:

> Specific Instances of Conduct. 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 proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The comments to MRE 608 state that, "[s]pecific instances of conduct may be inquired into, but not proved by extrinsic evidence, in cross-examining principal witnesses as well as character witnesses." In the case at bar, one complainant denied that she had behaved in the manner that defendant's former attorney would have described. Under MRE 608(b), defense counsel had to accept this answer and could not introduce extrinsic evidence to support an assertion of an instance of specific conduct. See, generally, *People v Mitchell*, 402 Mich 506, 514-516; 265 NW2d 163 (1978).

Regarding the prior inconsistent statements, in *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984), this Court stated: "It is a rule of long standing in this jurisdiction that extrinsic evidence may not be used to impeach a witness on a collateral matter. This rule applies even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b)." Taking liberally from McCormick, Evidence (2d ed), § 47, pp 98-99, the Court indicated which matters are not collateral:

> "McCormick indicates there are three kinds of facts that are not considered to be collateral. The first consists of facts directly relevant to the substantive issues in the case. The second consists of facts showing bias, interest, conviction of crime and want of capacity or opportunity for knowledge. The third consists of any part of the witness's account of the background and circumstances of a material transaction which as a matter of human experience he would not have been mistaken about if his story were true." [*Rosen, supra* at 579, quoting *People v Guy*, 121 Mich App 592, 604-605; 329 NW2d 435 (1982).]
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> As to the second category of facts, McCormick states in part: "The second kind of facts meeting the above mentioned test for facts that are not collateral includes facts which would be independently provable by extrinsic evidence, apart from the contradiction, to impeach or disqualify the witness. Among these are facts showing bias, interest, conviction of crime, and want of capacity or opportunity for knowledge." [*Rosen, supra*.]

Defendant argues that the statement, "you're in big trouble now" was not collateral because it went to the complainants' interest and bias. Defendant, however, does not explain *how* this statement demonstrates the complainants' interest or bias, particularly in light of the complainant's ages. We conclude that defendant was improperly attempting to use a specific instance of conduct to attack the complainant's credibility based on her character for untruthfulness. This use of specific conduct is not allowed by MRE 608(b). See also *Rosen, supra* at 758. Thus, we find no abuse of discretion in the exclusion of this evidence.

III

Defendant next asserts that the trial court erred when it ruled that defendant's testimony regarding a complainant's alleged statement about framing him constituted hearsay. At trial defendant argued that this testimony was not hearsay but rather a "synopsis of a conversation." On appeal, he argues that this statement was an exception to the hearsay rule as a "[t]hen existing mental, emotional, or physical condition." MRE 803(3). This rule allows for "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health). . . ." *Id*. Arguing for the admission of evidence on one ground at trial is not enough, however, to preserve an argument on appeal for its admission on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Nevertheless, this Court is not precluded from "taking notice of plain errors affecting [the] substantial rights" of a party even if an issue is unpreserved. MRE 103(d). Here, we conclude that defendant's substantial rights were not affected.

The complainants' testimony was virtually identical and their testimony was supported, in large part, by that of the police. Furthermore, according to the police, defendant admitted that he had shown the girls obscene material, exposed himself, and "allowed" one of the complainants to touch his genitals. Defendant was the only one to have heard the statement regarding the alleged "frame-up." The jury

heard the challenged statement and it was never stricken from the record, even though the objection was sustained. Moreover, defense counsel was still able to argue in closing that the girls had lied about the charges. Therefore, in light of the other evidence presented at trial, the exclusion of this evidence did not affect the outcome of the trial, and we find no abuse of discretion.

IV

Defendant next argues that his CSC II sentences were disproportionate. We disagree. Even when reviewing an habitual offender's sentence, we must determine whether the sentence is proportionate to the seriousness of the crime and defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). The sentencing guidelines do not, however, apply to habitual offender convictions. *People v Cervantes*, 448 Mich 620, 622, 625-630; 532 NW2d 831 (1995). Thus, when reviewing the sentences of habitual offenders, this Court should determine whether the trial court abused its discretion in imposing the sentence. *Id.* at 626-630, 636-637.

Here, we find no abuse of discretion. See *People v Broden*, 428 Mich 343, 350; 408 NW2d 789 (1987). Defendant's sentence of twelve to 22½ years' imprisonment for CSC II was proportionate to the offense and the offender. Under the CSC II statute, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), a defendant may receive a maximum sentence of fifteen years' imprisonment and, as a second habitual offender, defendant could have received a maximum term of 22½ years, pursuant to MCL 769.10(1)(a); MSA 28.1082(2)(a). Moreover, defendant was on probation from his OUIL 3rd conviction at the time of the instant offenses. Finally, the victims in this case were ten and twelve years old, which prompted the presentence investigation report to recommend this sentence in order to "protect the community from defendant." Accordingly, we find that defendant's sentence was not disproportionate.

V

Defendant finally argues that the trial court used inappropriate factors when sentencing him. We agree. A trial court is not allowed to sentence a defendant more harshly based on his refusal to admit guilt. *People v Wesley*, 428 Mich 708, 713-714; 411 NW2d 159 (1987). A court may, however, "address remorsefulness as it [bears] on defendant's rehabilitation[.]" *Id.*

In *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977), the Court stated in its order reversing the Court of Appeals that "a court cannot base its sentence even in part on a defendant's refusal to admit guilt." The Court held that the following statements, which were set forth only in the Court of Appeals opinion, required reversal:

> One of the things the court always seeks in determining disposition in criminal matters is the attitude of the accused with respect to whether they admit--how readily they admit they have done wrong. I can't talk to you about that because you don't admit it. That's your prerogative. I don't hold that against you, I just want to explain it, it makes it difficult.' [*People v Yennior*, 72 Mich App 35, 43; 248 NW2d 680 (1976), rev'd 399 Mich 892 (1977).]

In the present case, the trial judge stated during sentencing:

> . . . what I find to be about the most disgusting part of this, but the fact that you're not willing to, to fess up, to admit, to really consider the real big wrongness of what you've done, is close to the top of what I find to be the most disgusting.
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> . . . I have a feeling that you may never understand the terrible role that you played in this case. You're not willing to admit, and I'm worried that you'll never be able to admit that, but whatever I can say here this morning, I want you to, I want you to be assured that there's no question in my mind of what you did; that the jury was absolutely correct in finding you guilty as they found you guilty.

Based on the trial judge's comments, we have no option but to conclude that he took defendant's refusal to admit guilt, and not merely lack of remorse, into consideration. Therefore, remand for resentencing on the two convictions of distributing obscene materials to minors is required.

Defendant is not, however, entitled to resentencing before a new judge because he has failed to show that the trial judge would

> . . . 'have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, . . . [that reassignment] is advisable to preserve the appearance of justice, and [that] reassignment would [not] entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.' [*People v Evans*, 156 Mich App 68, 72; 401 NW2d 312 (1986), quoting *United States v Sears, Roebuck & Co, Inc*, 785 F2d 777, 780 (CA 9, 1986).]

Accordingly, defendant's convictions for CSC II and for distributing obscene matter to minors are affirmed, and the case is remanded for resentencing consistent with this opinion. We do not retain jurisdiction.

/s/ Donald E. Holbrook, Jr.
/s/ Jane E. Markey

[1] The Court reached this conclusion even after taking into account the fact that the relationship between the inmate and jail employees was not based on normal social or professional contacts. *Id.*

[2] In support of his position, defendant briefly argued that had this testimony been allowed, the jury might also have concluded that if the older girl were a liar, it is likely that she and the ten year old conspired in their allegations. Defendant, however, does not raise or discuss this more tangential issue, nor is there any evidence that this aspect of this issue was either presented to or considered by the trial court. Indeed, defendants brief repeatedly discusses the potential testimony or is referenced to the older

complainant. We, however, find this sub-issue to be part of the issue at hand and that there is no need to address it separately.