STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DANIEL PHILLIP HART, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

DANIEL PHILLIP HART,

Respondent-Appellant.

UNPUBLISHED
February 23, 1999

No. 208019
Allegan Juvenile Court
LC No. 97-007089 DL

Before: Whitbeck, P.J., and Cavanagh and Griffin, JJ.

PER CURIAM.

A juvenile court jury found respondent guilty of second-degree criminal sexual conduct, MCL 750.520c(1)(h)(i); MSA 28.788(3)(1)(h)(i), as a consequence of his sexual contact with his older brother, the original complainant. The trial court made respondent a temporary ward of the court and imposed a term of probation. Respondent appeals as of right. We affirm.

I. Basic Facts And Procedural History

Respondent and complainant are biological brothers born of the same woman and possibly the same father. Mary Ann and Thomas Hart adopted respondent and complainant[1] after serving as the brothers' foster parents. Respondent was fifteen years of age at the time of trial, and complainant was seventeen years of age at that time.

According to complainant, at some time after the commencement of the 1995-1996 school year, possibly in September 1995, respondent asked complainant to help respondent with his history homework. Respondent and complainant were home alone at the time, with respondent "babysitting" complainant because complainant suffers from "mild" cerebral palsy and "mental disabilities."

Complainant testified that he went into the basement of the Harts' home to help respondent with his homework. Once downstairs, complainant asked respondent to look at a book on the United

States presidents which had been given to him and respondent by their adoptive paternal grandparents. Respondent indicated that he would allow complainant to look at the book if complainant first let him "play doctor." Complainant agreed to the request.

Complainant further testified that, after he agreed to let respondent play doctor, respondent went into his bathroom and retrieved a container of Vaseline. Respondent then lowered complainant's pants and underwear, as well as his own. As complainant lay on his stomach on the floor of the basement hallway, respondent climbed on top of him and inserted his penis into complainant's anal canal.[2]

Respondent denied engaging in any sexual activity with complainant. Respondent's theory of defense was that the assault never occurred and that complainant had made up the assault because he was angry at the Harts and respondent. Respondent argued that the allegation of sexual misconduct was an effective way to punish these individuals.

The jury acquitted respondent on the original charge of first-degree criminal sexual conduct, but found him guilty of second-degree criminal sexual conduct.

II. Standard Of Review

A. Expert Witness Testimony

Respondent argues that the trial court abused its discretion when it qualified prosecution witness Betty Baker as an expert witness and allowed her to testify with regard to whether the victim suffered from a "developmental disability" and, hence, was "mentally disabled" within the meaning of MCL 750.520a(b) and (e); MSA 28.788(1)(b) and (e)[3]. These evidentiary challenges differ from the challenge advanced before the trial court. An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). We review these unpreserved evidentiary challenges de novo to determine whether manifest injustice will result from our failure to grant the requested relief. *Id*. at 398-399.

B. Sufficiency Of The Evidence

We review a challenge to the sufficiency of the evidence de novo. See e.g., *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992) (appellate courts review evidence in a light most favorable to the prosecutor and determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt).

C. Rebuttal Evidence

We review unpreserved claims of erroneously admitted rebuttal evidence to determine whether manifest injustice will result if this Court fails to grant relief. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985). The admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed on appeal absent a clear abuse of discretion. *People v Figgures*, 451 Mich

390, 398; 547 NW2d 673 (1996). With the exception of the objection to complainant's testimony regarding where his parents were at the time of the assault, respondent failed to preserve his evidentiary challenges below by timely and specific objections on the grounds now asserted.

D. Excluded Evidence

A trial court's decision to exclude evidence is reviewed for an abuse of discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

III. Statutory Provisions On Second Degree Criminal Sexual Conduct

MCL 750.520c(1); MSA 28.788(3)(1) provides as follows:

> A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:
>
> * * *
>
> (h) That other person is . . . mentally disabled, . . . and any of the following:
>
> (i) The actor is related to the victim by blood or affinity to the fourth degree.

Here, respondent challenges the sufficiency of the evidence presented to establish that complainant was mentally disabled within the meaning of the act. MCL 750.520a(e); MSA 28.788(1)(e) indicates that a person who is "mentally disabled" includes "a person [who] . . . has a developmental disability." Section 750.520a(b) defines the term "developmental disability" as follows:

> "Developmental Disability" means an impairment of general intellectual functioning or adaptive behavior which meets the following criteria:
>
> (i) It originated before the person became 18 years of age.
>
> (ii) It has continued since its origination or can be expected to continue indefinitely.
>
> (iii) It constitutes a substantial burden to the impaired person's ability to perform in society.
>
> (iv) It is attributable to 1 or more of the following:
>
> (A) Mental retardation, cerebral palsy, epilepsy, or autism.
>
> (B) Any other condition of a person found closely related to mental retardation because it produces a similar impairment or requires treatment and services similar to those required for a person who is mentally retarded.

The first line of § 750.520a(b) indicates that the term developmental disability means an impairment of general intellectual functioning "or" adaptive behavior. The disjunctive "or" generally refers to a choice or alternative between two or more things. *Auto-Owners Ins Co v Stenberg Brothers, Inc*, 227 Mich App 45, 50; 575 NW2d 79 (1997); but see also *People v Humphreys*, 221 Mich App 443, 451-452; 561 NW2d 868 (1997). Accordingly, to sustain respondent's conviction the record must contain sufficient evidence to establish beyond a reasonable doubt that respondent suffered either an impairment of general intellectual functioning or an impairment of adaptive behavior.

Section 750.520a(b) does not define the term "adaptive behavior." Where a statute does not define one of its terms, a court may look to a dictionary for a definition. *People v Lee*, 447 Mich 552, 558; 526 NW2d 882 (1994). 1 Schmidt, Attorneys' Dictionary of Medicine, p A-138, defines the term "adaptive behavior" as "[a] pattern of behavior which helps an individual in adjusting to the environment."

IV. Expert Witness Testimony

A witness must be qualified by "knowledge, skill, experience, training, or education" to testify as an expert. MRE 702; *People v Whitfield*, 425 Mich 116, 122; 388 NW2d 206 (1986); *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995). However, "a trial court should not require a proposed expert witness to satisfy an overly narrow test of qualifications." *Id.* at 225. The qualification of an expert witness rests in the discretion of the trial court and the exercise of that discretion will not be overturned on appeal absent an abuse of discretion. *Id.* at 224-225.

We conclude that the trial court did not abuse its discretion when it qualified the prosecution's proposed expert witness, Betty Baker, as an expert in the area of emotionally impaired juveniles. Baker's qualification as an expert was proper in light of her master's degree in counseling, her specialized training in recognizing and treating emotionally impaired children, her experience in counseling emotionally impaired teenagers and the number of prior times she has been qualified as an expert in other proceedings in the area of treating emotionally impaired juveniles.

Similarly, we conclude that the trial court correctly determined that Baker was qualified to testify about the emotional impairments suffered by complainant, the effect those impairments had on complainant's ability to function within the parameters set by society, the treatment complainant received for those impairments and the relationship between the nature and history of complainant's impairments, the treatment he receives for his impairments and the criteria set forth in § 750.520a(b). Baker was so qualified in light of her training and experience in recognizing and treating emotional impairments in juveniles and her treatment of complainant for almost a year before trial.

Respondent also argues that the trial court abused its discretion when it allowed Baker to offer testimony that invaded the province of the court and the jury. Respondent failed to preserve this issue for appellate review, and manifest injustice will not result from our failure to grant the requested relief. *Asevedo, supra* at 398-399.

In any event, Baker's testimony did not involve an opinion as to what constitutes the appropriate legal standard for determining the existence of a developmental disability. Rather, once the definition was provided to her and the jury, she applied her expertise and observations of complainant to those standards and opined that complainant suffered a developmental disability as defined by the statute. Moreover, the testimony related to a subject completely outside the court's legal knowledge and did not conflict with the instructions given the jury. On this record, Baker's testimony did not invade the province of the trial court to instruct the jury on the applicable principles relating to whether the victim suffered a developmental disability. *People v Drossart*, 99 Mich App 66, 77-79; 297 NW2d 863 (1980).

Baker's testimony also did not invade the province of the jury. The field of identifying and treating developmentally disabled children is a field largely unfamiliar to the jury. Additionally, Baker was qualified by training and experience to testify about whether complainant suffered a developmental disability under the statute. Accordingly, because she was so qualified, it follows that she could offer an opinion related to the ultimate issue in fact, without invading the province of the jury. MRE 704; *Drossart*, *supra* at 80.

V. Sufficiency Of The Evidence

Respondent argues that the prosecutor failed to present sufficient evidence to sustain respondent's conviction. We disagree.

Respondent first argues that the prosecutor presented insufficient evidence to sustain respondent's conviction because the prosecutor failed to present evidence "which proved beyond a reasonable doubt that complainant had the statutory level of impairment in general intellectual functioning envisioned by the Legislature when it enacted the statute." Viewing the testimony in a light most favorable to the prosecutor, we conclude that a rational trier of fact could find beyond a reasonable doubt, *Wolfe, supra,* that complainant suffered an impairment of general adoptive behavior in light of his difficulty controlling his anger, his obsessive-compulsive behavior, his inability to apply his knowledge to situations with which he is presented when his emotions are involved and his difficulty in responding appropriately to novel situations with which he is presented.

Respondent also argues that the prosecutor presented insufficient evidence to sustain respondent's conviction because the prosecutor failed to present evidence that the impairment of complainant's general adaptive behavior has continued since its origin or can be expected to continue indefinitely. Because the prosecutor offered no evidence as to when the impairment of complainant's adaptive behavior originated, the question becomes whether the prosecutor presented sufficient evidence from which a rational trier of fact could find beyond a reasonable doubt that the impairment would continue indefinitely.

Section 750.520a does not define the term "indefinitely." Random House Webster's College Dictionary (2d ed, 1997), p 662, defines the term "indefinite" as "1. having no fixed or specific limit . . .[;] 2. not clearly defined or determined . . . ." Viewing the testimony in a light most favorable to the prosecutor, a rational trier of fact could find beyond a reasonable doubt, *Wolfe, supra,* that complainant

suffered an impairment of general adaptive behavior that can be expected to continue indefinitely in light of the fact that complainant's maladaptive behavior continues after ten years of counseling and treatment with various medications and in light of Baker's testimony that she observed nothing in complainant's behavior that suggested that his maladaptive behavior would end anytime soon.

Respondent also argues that the prosecutor presented insufficient evidence to sustain respondent's conviction because the prosecutor failed to present evidence from which the jury could find beyond a reasonable doubt that complainant's impairment constituted a substantial burden on his ability to perform in society.

Section 750.520a does not define the term "substantial burden." Random House Webster's College Dictionary (2d ed, 1997), p 1285, defines the term "substantial" as "of ample or considerable amount, quantity, size, etc." It defines the term "burden" as "that which is borne with difficulty; onus[.]" *Id*., at 175. Viewing the testimony in a light most favorable to the prosecutor, a rational trier of fact could find beyond a reasonable doubt, *Wolfe, supra,* that complainant's impairment substantially burdens his ability to perform in society.

Finally, respondent argues that the prosecutor presented insufficient evidence to sustain respondent's conviction because the prosecutor failed to present any evidence that complainant's impairment of general intellectual functioning was causally connected to his cerebral palsy or a condition closely related to mental retardation. Respondent does not address the question of whether the prosecutor presented sufficient evidence to sustain respondent's conviction on a theory that complainant's adaptive behavioral impairment was caused by a condition closely related to mental retardation because it "requires treatment and services similar to those required for a person who is mentally retarded."

The evidence established that complainant was not mentally retarded. Additionally, although there was evidence that complainant suffered from mild cerebral palsy, there was no evidence that his maladaptive behavior was attributable to cerebral palsy. There was evidence introduced, however, from which a rational trier of fact could conclude beyond a reasonable doubt that complainant's behavioral impairment was attributed to a condition closely related to mental retardation because it requires treatment and services similar to those offered to a mentally retarded person. Viewing this evidence in a light most favorable to the prosecutor, a rational trier of fact could conclude beyond a reasonable doubt, *Wolfe, supra* that complainant's behavioral impairment was attributable to a condition closely related to mental retardation by the types and quantity of services provided complainant to allow him to function in a productive manner.

In sum and viewing the evidence in a light most favorable to the prosecutor, we conclude that a rational trier of fact could conclude beyond a reasonable doubt that complainant suffered a developmental disability. MCL 750.520c(1)(h)(i); MSA 28.788(3)(1)(h)(i); MCL 750.520a(b) and (e); MSA 28.788(1)(b) and (e).

VI. Rebuttal Evidence

Respondent argues that the trial court abused its discretion when it admitted certain rebuttal evidence and we agree. Nevertheless, reversal is unwarranted.

First, respondent advanced a theory of defense that complainant fabricated the story of the sexual assault to punish both complainant's former adoptive parents and respondent because the victim was angry with these individuals. The rebuttal evidence introduced by the prosecutor *supported* this defense by supplying a rationale for complainant directing his anger in such a manner, i.e., that the former adoptive parents treated respondent better than complainant and that the former adoptive parents were abusive to complainant. In fact, this was the strongest evidence introduced at trial that supported the offered defense. Accordingly, we conclude that the erroneously admitted evidence could not have adversely effected the outcome of respondent's trial. *People v Belanger*, 454 Mich 571, 575-576; 563 NW2d 665 (1997); *Figgures*, *supra* at 402.

Second, respondent argues, and we agree, that the trial court erred when it admitted Baker's rebuttal testimony. Respondent offered no evidence and left no impression that complainant had sexually assaulted any of the juveniles residing at the Lakeside facility, where complainant had resided after his adoptive parents' parental rights were terminated. Baker's testimony was not responsive to any evidence or theory advanced by respondent and, therefore, constituted improper rebuttal evidence. *Figgures*, *supra* at 399. Manifest injustice will not result, however, from this Court's failure to reverse respondent's conviction. The erroneously admitted evidence was not outcome determinative because it did not paint respondent in a bad light and was consistent with complainant's admission on cross-examination by respondent that he sometimes resulted to physically violent behavior when angered. *Belanger*, *supra* at 575-576; *Figgures*, *supra* at 402.

Third, respondent argues, and we agree, that the trial court erred when it admitted "family dynamics" rebuttal evidence. This evidence was introduced by the prosecutor during cross-examination after the trial court refused to allow respondent to explore these dynamics. Accordingly, the prosecutor's rebuttal evidence was not responsive to the evidence or the theory advanced by respondent; instead, the evidence was admitted solely to respond to denials elicited by the prosecutor on cross-examination. As such, the evidence did not constitute proper rebuttal evidence. A prosecutor may not elicit a denial on cross-examination simply to create an issue for rebuttal. *Figgures*, *supra* at 401; *People v McIntire*, 232 Mich App 71, 108; 151 NW2d 187 (1998). Nevertheless, respondent was not unfairly prejudiced by its admission in light of the fact that the evidence *supported* his theory of defense.

VII. Excluded Evidence

Respondent has abandoned his evidentiary challenge with regard to the bleachers incident[4] by failing to provide citation to specific authority supporting his claim that the evidence was admissible for the purpose for which admission was sought. *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

Affirmed.

/s/ William C. Whitbeck
/s/ Mark J. Cavanagh
/s/ Richard Allen Griffin

[1] In May of 1996, the Harts' parental rights to complainant were terminated by mutual agreement between complainant and the Harts.

[2] Although his testimony was vague on this point, complainant also appears to have testified that respondent penetrated his anus with respondent's penis on other occasions, although he could not recall the number of times or any approximate dates on which such acts occurred. Complainant indicated that the "things" respondent did ended in May, 1996.

[3] To the extent that respondent advances arguments for the exclusion of Baker's testimony other than the lack of qualification, we decline to address those arguments because they were not set forth in the statement of the issues presented or necessarily included therein. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).

[4] The trial court excluded evidence that would have demonstrated that complainant filed a false police report against Mary Ann Hart alleging that she pushed him from a bleacher.