

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD EDWARD SNYDER,

Defendant-Appellant.

UNPUBLISHED

May 11, 1999

No. 206294

St. Joseph Circuit Court

LC No. 96-008493 FC

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant Richard Edward Snyder was convicted of three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to fifteen to thirty years' imprisonment. Defendant appeals his conviction and sentence as of right. We affirm.

Defendant first argues that the prosecution failed to present evidence sufficient to sustain a verdict of guilty on three counts of second-degree criminal sexual conduct. We disagree. In reviewing the sufficiency of the evidence, this Court considers the evidence in the light most favorable to the prosecutor and determines whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). Circumstantial evidence and reasonable inferences that arise therefrom may be sufficient to prove the elements of an offense. *Id.*

To prove second-degree criminal sexual conduct pursuant to MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), the prosecutor must show that the defendant engaged in sexual contact with another person who is less than thirteen years old. *People v Piper*, 223 Mich App 642, 646-647; 567 NW2d 483 (1997). MCL 750.520a(k); MSA 28.788(1)(k) defines "sexual contact" as

the intentional touching of the victim's or actor's intimate parts or 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.

“Intimate parts” is defined as including “the primary genital area, groin, inner thigh, buttock, or breast of a human being.” MCL 750.520a(c); MSA 28.788(1)(c).

The prosecutor presented evidence to support a finding that defendant engaged in sexual contact with the victim, who was four years old, on at least three occasions. The victim testified that defendant touched his privates “a lot of times” and that defendant did that by sticking his hand down the victim’s pants. He also testified that defendant kissed the victim’s penis, so the victim kissed defendant’s, and that defendant hurt him by pulling on the victim’s penis with his hand. The victim’s eleven-year-old brother testified that he saw defendant with his hand over the victim’s private part one time when the victim was clothed, a second time when the victim’s pants were unbuttoned and defendant’s hands were in the victim’s pants, and a third time when the victim’s pants were down to his knees and defendant was touching all around his private part. Testimony established that these incidents took place behind closed doors and that defendant threatened to hurt the boys if they told. Viewed in the light most favorable to the prosecution, this testimony was sufficient to permit a rational trier of fact to conclude beyond a reasonable doubt that defendant touched the victim’s intimate parts or the clothing covering that area for the purpose of sexual arousal or gratification on three occasions, and that he was, therefore, guilty of three counts of second-degree criminal sexual conduct.

Next, defendant claims three instances of prosecutorial misconduct. Because defendant did not object at trial to the alleged misconduct, appellate review is precluded unless a curative instruction could not have eliminated possible prejudice or failure to consider the issue would result in a miscarriage of justice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant first claims that the prosecutor improperly elicited hearsay evidence from the victim’s mother and stepfather regarding the victim’s and his brother’s disclosures to them of defendant’s behavior. Defendant further claims that the admission of the evidence was contrary to MRE 801 and 803A, and that he was prejudiced by its admission because it impermissibly bolstered the credibility of the boys’ testimony. However, prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence. *People v Missouri*, 100 Mich App 310, 328; 299 NW2d 346 (1980). The prosecutor is entitled to attempt to introduce evidence which he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant. *Id.* at 328-329. Because defendant did not object to the prosecutor’s questioning of these witnesses, the trial court did not have an opportunity to consider the grounds upon which the prosecutor would argue that the testimony was admissible. However, given the complexity of the hearsay rule and the exceptions to the rule, especially with regard to the revelations of children in CSC cases, we cannot conclude that the prosecutor acted in bad faith in eliciting the testimony in question. See *People v Moncure*, 94 Mich App 252, 261; 288 NW2d 675 (1979), vacated on other grounds 409 Mich 905 (1980). Furthermore, defendant has not established that he was prejudiced by the admission of the testimony. This was not a situation involving a one-to-one credibility contest between the defendant and the victim. See *People v Smith*, 456 Mich 543, 555, n 5; 581 NW2d 654 (1998). Rather, the victim’s brother independently corroborated, in

large part, the substance, if not the particular details, of the victim's allegations. Therefore, we conclude that manifest injustice will not result from our failure to review this issue.

Defendant also claims that the prosecutor improperly elicited testimony from a child sexual abuse expert to vouch for and buttress the victim's credibility. An expert on childhood sexual abuse may (1) "testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim," and (2) "testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility." *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995).

Although defendant asserts that the prosecutor improperly restated trial testimony in detail, rather than posing hypothetical questions to the expert, defendant points to no authority prohibiting this method of questioning the expert. Defendant did not object to this procedure at trial, and following the prosecutor's summary, defendant agreed that the facts summarized were accurate, although not all-inclusive. This argument is abandoned because defendant failed to object and does not support his argument on appeal by citation to legal authority. *People v Rollins*, 207 Mich App 465, 468; 525 NW2d 484 (1994). In any event, the facts of a particular case on which an expert bases his testimony may be perceived by him or made known to him at or before trial. MRE 703; *People v Webb*, 458 Mich 265, 277-279; 580 NW2d 884 (1998).

With regard to the substance of the expert's testimony, most of the testimony was allowable under *Peterson*, *supra*. Defendant attacked the boys' credibility from numerous angles, raising, among other things, the inconsistencies in their testimony, the lack of disclosure to others, the victim's positive bond with defendant, and jealousy and a desire for a change in custody as motivations for false allegations. Defendant also explored numerous specific behaviors of the victim and his brother. Where a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may testify that the particular child victim's behavior is consistent with that of a sexually abused child. *Id.* at 373-374. In this case, the expert's analysis of the victim's behavior as consistent with child sexual abuse victims, in terms of hypersexualization, trauma bond, and inconsistencies in his statements, was admissible "to explain behavioral signs that may confuse a jury so that it believes that the victim's behavior is inconsistent with that of an ordinary victim of child sexual abuse." *Id.* at 362. Expert testimony regarding the delay of some six months in disclosure, and the manner of disclosure was also admissible. *Id.* at 374.

However, we do find one portion of the expert's testimony troubling and conclude that it was inadmissible under *Peterson*, because the expert was, in effect, expressing his opinion with regard to whether the victim was being truthful. The expert testified that "[c]hildren report with very good accuracy specific events that are out of the ordinary that have happened to them where they experience a [sic] overwhelmingness, a sense of gee, I don't understand what's going on because it's not in my frame of reference." The expert continued with a lengthy explanation of why children's reports of such events were accurate and reliable. He explained that children play these events over and over in their minds because the event is not in their frame of reference; thus, they can report the event with accuracy

because it “gets stuck in memory” and they have a picture in their minds of what has happened that keeps repeating itself. This testimony improperly vouched for the veracity of the child. *Id.* at 375-376. Expert testimony that references truthfulness goes beyond that which is allowed under MRE 702. *Id.* at 376.

Again, however, we cannot conclude that the prosecutor acted in bad faith in eliciting this testimony. Moreover, defendant has not demonstrated that he was prejudiced by this testimony. Indeed, the inadmissible testimony was a relatively small portion of the expert testimony and some of the expert’s testimony could be viewed as favorable to defendant, such as the expert’s statements that a desire for change in custody was the leading cause for false disclosure in sexual abuse cases. Finally, we find that any potential prejudice could have been cured by instruction. Therefore, the prosecutor did not deny defendant a fair and impartial trial in his questioning of the child abuse expert.

Finally, defendant claims that during his closing argument, the prosecutor improperly appealed to the jurors to sympathize with the victim and exhibited an emotional outburst that prejudiced defendant and resulted in a miscarriage of justice. We disagree. In reviewing alleged prosecutorial misconduct in closing argument, this Court examines the pertinent portion of the record and evaluates the prosecutor’s remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994).

Defendant contends that the prosecutor improperly appealed to the jury to sympathize with the victim when he asked them to consider the “knowledge in [their] hearts” in their deliberations. However, he followed that comment with an in-depth analysis of the evidence presented, he asked the jury to rely on logic and common sense when evaluating the evidence, and he concluded with the comment that they should decide the case based on “the law and the evidence.” Considered in context, the prosecutor’s remarks were not improper. With regard to any alleged emotional outburst, we find that a curative instruction would have eliminated any potential prejudicial effect. Our failure to review this issue will not result in a miscarriage of justice.

Defendant’s third argument on appeal is that he was denied effective assistance of counsel. Because defendant did not advance his claim of ineffective assistance before the trial court, this Court’s review is limited to errors apparent on the record. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Pickens*, *supra* at 314.

Defendant first claims that he was denied effective assistance of counsel because defense counsel did not object to inadmissible hearsay and other irrelevant and prejudicial evidence. As discussed above, however, defendant has failed to demonstrate that he was prejudiced by the admission

any of the evidence he cites. We find, therefore, that he was not denied his right to a fair trial by counsel's failure to object.

Defendant also claims that defense counsel's failure to lay a proper foundation for admission of extrinsic evidence of preliminary examination testimony of the victim and his brother for purposes of impeachment was a serious mistake that denied defendant his only substantial defense. We disagree. Several of the inconsistencies that defense counsel sought to use for impeachment related to the times of the alleged three instances of criminal sexual conduct, which the prosecution was not required to prove with accuracy. See *People v Naugle*, 152 Mich App 227, 234; 393 NW2d 592 (1986). In addition, there was extensive testimony by the expert witness explaining that such inconsistencies are common in children's recollection of events. Moreover, our review of the record indicates that many of the boys' statements were not inconsistent as alleged. Finally, defendant was allowed to read into the record one instance of inconsistent testimony by the victim's brother. Thus, we cannot conclude that there is a reasonable probability that further impeachment of the witnesses with their preliminary examination testimony would have altered the outcome of the trial. Accordingly, we find that defendant was not denied effective assistance of counsel.

Defendant's fourth argument on appeal is that the trial court abused its discretion when it denied defendant the use of some portions of preliminary examination testimony as extrinsic evidence to impeach the victim and his brother. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The record shows that the trial court referenced *People v Carson*, 87 Mich App 163; 274 NW2d 3 (1978), which was decided under an earlier version of MRE 613(a) not applicable at the time of trial, in deciding to preclude defendant's use of portions of the preliminary examination as extrinsic evidence to impeach witness testimony because defendant had not laid a proper foundation. While the prior version of the rule required that a prior inconsistent statement be identified as to time, place, and substance when questioning the witness, *Carson, supra* at 169, the current version does not include that requirement. However, MRE 613(b), not MRE 613(a), governs the situation where a party seeks to admit extrinsic evidence of a witness' prior inconsistent statement. MRE 613(b) provides, in pertinent part, that

[e]xtrinsic 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.

The trial court referenced the requirements of MRE 613(a) in allowing defendant to read into the record one prior inconsistent statement from the victim's brother's preliminary examination testimony. Defendant had questioned the victim's brother concerning that statement when he testified. However, the court precluded any further reading of preliminary examination testimony into the record

based on lack of foundation. While it is not clear from the record what portions of the preliminary examination testimony defendant sought to admit as extrinsic evidence of inconsistent statements, our review of the record does not show that either of the witnesses in question was afforded an opportunity to explain purportedly inconsistent statements. Therefore, we find no abuse of discretion. See *People v Parker*, 230 Mich App 677, 683-684; 584 NW2d 753 (1998). Furthermore, any abuse of discretion in this regard would constitute harmless error. Nonconstitutional error is harmless if it is highly probable that the error did not affect the verdict. *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998). For the reasons discussed under the previous issue, we find it highly probable that any error in the trial court's decision not to admit portions of the victim's and his brother's preliminary examination testimony as extrinsic evidence of inconsistent statements did not affect the verdict.

Defendant's final argument on appeal is that the trial court violated the concept of proportionality by imposing a sentence of fifteen to thirty years' imprisonment. This Court reviews sentencing determinations for an abuse of discretion. *People v Williams*, 223 Mich App 409, 410-411; 566 NW2d 649 (1997). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636, 654; 461 NW2d 1 (1990); *Williams*, *supra* at 411.

Defendant was convicted as a fourth-felony habitual offender. He has an extensive criminal history, with four prior felony and several misdemeanor convictions. The record shows that the trial court gave thorough consideration to the circumstances of this case, the seriousness of the offenses, and defendant's situation. Given defendant's criminal history, the victim's age and family relationship with defendant, and the alleged threat to the victim's sibling, we find that the trial court did not abuse its discretion in sentencing defendant to fifteen to thirty years in prison.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Jeffrey G. Collins