STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD WAYNE DILLINGHAM,

Defendant-Appellant.

UNPUBLISHED
July 6, 1999

No. 206847
Recorder's Court
LC No. 96-503287

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

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(d)(ii); MSA 28.788(3)(1)(d)(ii). He was sentenced to concurrent terms of eight to fifteen years in prison, and appeals as of right. We reverse and remand for a new trial.

The victim testified that defendant and codefendant Jones abducted her and drove her to the parking lot of a senior citizens complex where defendant sexually penetrated her and touched her breast. She also testified that Jones thereafter sexually penetrated her. The defendant testified to the contrary that the victim accepted his offer of a ride and voluntarily entered his truck. He claimed that once the victim was in the vehicle, she initiated sexual contact and he decided to take advantage of the opportunity that she had willingly presented to him. To counter defendant's claim that he and the victim engaged in consensual sexual relations, the prosecutor elicited testimony in her case-in-chief that the victim was not known to be a promiscuous person and had not displayed toward other men the type of conduct defendant described. In her closing, the prosecutor argued that this evidence disproved that the victim was the aggressor. Defendant failed to object to either this evidence or the argument at trial. On appeal, defendant contends that this evidence and argument were improper. We agree.

We review the trial court's decision to admit evidence for an abuse of discretion. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). We review claims of prosecutorial misconduct on a case by case basis to determine whether defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Even though defendant failed to make the appropriate objections at trial, review is not precluded where, as here, failure to review would result

in a miscarriage of justice or where a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We also find that because the complained of error could have been decisive of the outcome in this case, failure to review is not precluded. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

Evidence of a person's character or a trait of character is not admissible to prove action in conformity therewith on a particular occasion. MRE 404(a). There is an exception in prosecutions for criminal sexual conduct. In those cases evidence of the victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease is admissible. MRE 404(a)(3); MCL 750.520j(1); MSA 28.788(10)(1). The underlying rationale of this rape-shield statute and its corresponding rule of evidence is "that, in the overwhelming majority of prosecutions, evidence of a rape victim's sexual conduct with parties other than the defendant, as well as the victim's sexual reputation, is neither an accurate measure of the victim's veracity nor determinative of the likelihood of consensual sexual relations with the defendant." *People v Powell*, 201 Mich App 516, 519; 506 NW2d 894 (1993).

> The allowance of such evidence in the past caused victims to refuse to report the crime or to testify for fear that the proceedings would veer from an impartial examination of the accused's conduct on the date in question and instead take on aspects of an inquisition during which the victim would be required to acknowledge and justify her past. Hence, the law encourages a victim to report the assault by protecting the victim's sexual privacy. [*People v Wilhelm (On Rehearing)*, 190 Mich App 574, 580-581; 476 NW2d 753 (1991) (citation omitted).]

In *People v Bone*, 230 Mich App 699, 702-703; 584 NW2d 760 (1998), this Court ruled that "evidence of a victim's virginity as circumstantial proof of the victim's current unwillingness to consent to a particular sexual act" was precluded under MRE 404(a)(3) where it was used to argue "that the victim was acting in conformity with her prior lack of sexual activity." The Court concluded that the erroneous admission of the evidence constituted error requiring reversal and was not harmless. It stated that "[b]ecause the strength and weight of the untainted evidence depended on the jury's determination of the credibility of the victim, we cannot conclude that admission of evidence of the victim's virginity, and the prosecutor's suggestion that because the victim was chaste she would not have consented to sexual relations with defendant, was harmless." *Id.* at 703-704.

In the present case, the prosecutor introduced evidence that the victim did not have a reputation for being promiscuous, did not dress promiscuously, and had not evidenced prior sexually aggressive behavior when dealing with strangers. She then argued:

> Well, you heard staff testify about her reputation. None of them had ever heard of her having the reputation for being promiscuous. You heard testimony from male people who had contact with her, Keith Valbusch, Sgt. Terry, the doctor. I asked them, well did she raise her top to you? Did she grab at your genitals? No. She never did that. Because [the victim] wasn't the type of person to do that, and I submit to you,

> she wasn't the type of person to do t[hat] on August 28th [the date of the alleged rape] neither.

This argument is clearly impermissible where the prosecutor suggested that because the victim was not sexually aggressive or promiscuous in the past, she would not have, in conformity with her character, been sexually aggressive or promiscuous on the date in question. As in *Bone*, the use of such evidence constitutes error requiring reversal because the strength and weight of the remaining evidence depended upon the complainant's credibility versus that of defendant.[1] Accordingly, we find that defendant is entitled to a new trial on the criminal sexual conduct charges.

We also note that defendant argues that the evidence presented at trial was insufficient to prove the elements of the crimes charged beyond a reasonable doubt. Specifically, he argues that there was no showing of force as is required by MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii) and MCL 750.520c(1)(d)(ii); MSA 28.788(3)(1)(d)(ii). We disagree that there was insufficient evidence.

Defendant was charged as the principal in one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. There was testimony that defendant and Jones physically picked the victim up and put her in the truck, and that defendant thereafter moved and shifted her body into position in order to accomplish penetration. This evidence was sufficient to prove the element of force necessary to establish first- and second-degree criminal sexual conduct in which defendant was charged as the principal. See *People v Premo*, 213 Mich App 406, 409-410; 540 NW2d 715 (1995) where the Court discussed what constitutes force and concluded that the pinching of a victim's buttocks satisfied the force element because the act of pinching requires "the actual application of physical force." Here, defendant's act of pulling the victim's legs toward him to accomplish the penetration required the actual application of physical force.

Defendant was also charged as an aider and abettor to codefendant Jones. There was testimony that defendant participated in the victim's abduction and drove her to the spot where the sexual assault occurred. He thereafter waited behind the truck while Jones sexually penetrated the victim, from which it is reasonable to infer that he was acting as a lookout and in that fashion rendered assistance to Jones. One could reasonably infer from the circumstances of the abduction and penetration that defendant aided and abetted Jones. We also note that there was evidence that the victim sustained a tear in the area between her vagina and rectum, which was consistent with forced vaginal penetration.

Defendant also argues that he is entitled to a new trial because two charges were added at the end of the preliminary examination, specifically for kidnapping and for second-degree criminal sexual conduct because of his alleged touching of the victim's breast. He claims that the new charges resulted in unfair surprise, inadequate notice and an insufficient opportunity to defend. We disagree. Defendant was acquitted of the kidnapping charge. Thus, even if it was error to submit such a charge to the jury, the error was harmless in light of the acquittal on the charge. *People v Graves*, 458 Mich 476, 486-487; 581 NW2d 229 (1998). In addition, it was not error to add the additional count of second-degree criminal sexual conduct because the testimony supported the new charge and because there has been no showing that defense counsel's actions at the preliminary examination would have or could have

been any different had he known of the new charge. *People v Fortson*, 202 Mich App 13, 16-17; 507 NW2d 763 (1993). Also, although the prosecutor did not make a formal offer to allow defendant to question the victim about the added count, defense counsel never requested to do so, and thus, we cannot say that he was precluded from questioning the victim on the charge. *Id.* Finally, we disagree that defendant had an insufficient opportunity to defend the charge where the request to amend to add the charge was granted at the preliminary hearing, ten months prior to the trial. *Id.* at 17.

In light of our disposition, we need not address defendant's remaining issues on appeal.

Reversed and remanded. We do not retain jurisdiction.

/s/ Harold Hood
/s/ Donald E. Holbrook, Jr.

[1] Because the prosecutor may not, on retrial, introduce evidence of the victim's lack of promiscuity, defendant will have no need to try to rebut that evidence by use of her prior sexual encounters with other men. In any event, such evidence is inadmissible as a matter of law under the rape-shield statute and corresponding rule of evidence. *People v Adair*, 452 Mich 473, 481; 550 NW2d 505 (1996).