STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD RODNEY L'ESPERANCE,

Defendant-Appellant.

UNPUBLISHED
August 11, 2000

No. 215679
Barry Circuit Court
LC No. 98-000091-FH

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced to ten to twenty-five years' imprisonment for each of the four convictions, the sentences to be served concurrently. Defendant appeals as of right his convictions and sentences. We affirm defendant's convictions on all counts and his sentences for his CSC I convictions, but remand for resentencing on defendant's CSC II convictions.

Defendant argues first on appeal that there was insufficient evidence presented at trial to support his convictions. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). A prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Quinn*, 219 Mich App 571, 574; 557 NW2d 151 (1996).

A person is guilty of first-degree criminal sexual conduct where (1) the person engages in sexual penetration with another person, and (2) that other person is under thirteen years of age. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). "Sexual penetration" includes cunnilingus and "any other intrusion, however slight, of any part of a person's body into the genital . . . openings of another

person's body . . . ." MCL 750.520a(l); MSA 28.788(1)(l); *People v Reid*, 233 Mich App 457, 479; 592 NW2d 767 (1999).

There is no dispute in this case that the complainant was under thirteen years old when the charged acts took place. The complainant testified that on multiple occasions, defendant "st[u]ck his finger in" her private part. While defendant points to a medical report stating that the complainant's hymen was intact as proof that no penetration occurred, the fact that the hymen was intact does not necessarily rule out penetration. See *People v Bristol*, 115 Mich App 236, 237; 320 NW2d 229 (1981). Rather, "any intrusion, however slight," into a genital opening is sufficient. MCL 750.520a(l); MSA 28.788(1)(l). The definition of "genital opening" includes the labia as well as the vagina. *Bristol, supra* at 238. Moreover, the testimony of the victim need not be corroborated in prosecutions under §§ 520b to 520g. MCL 750.520h; MSA 28.788(8); *People v Lemmon*, 456 Mich 625, 632 n 6; 576 NW2d 129 (1998). Therefore, we find that on the basis of the testimony presented at trial, a rational trier of fact could find beyond a reasonable doubt that defendant sexually penetrated the complainant on at least two occasions, and was, therefore, guilty of two counts of CSC I.

A person is guilty of second-degree criminal sexual conduct where (1) the person engages in sexual contact with another person, and (2) that other person is under thirteen years of age. MCL 750.520c; MSA 28.788(3).

> "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the 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. [MCL 750.520a(k); MSA 28.788(1)(k).]

Here, in addition to the testimony of the complainant already discussed, the complainant testified to the following: that defendant made her touch his penis over his boxer shorts; that when he was wrestling with her on his bed, he pinned her down, spread her legs, and placed his chin on her "private part" and rubbed; and that on one occasion after she had just taken a shower, defendant pulled her towel off of her. The complainant also testified that defendant thanked her for "not telling on [him]." We conclude that on the basis of this testimony, a rational trier of fact could find beyond a reasonable doubt that defendant's contact with the complainant was intentional and that it was for the purpose of sexual arousal or gratification, and that he was, therefore, guilty of two counts of CSC II.

Defendant argues next on appeal that the trial court abused its discretion in admitting, pursuant to MRE 404(b), testimony by the complainant's sister that defendant had sexually abused her approximately four years earlier. The admissibility of MRE 404(b) "other acts" evidence is within the trial court's discretion and will be reversed on appeal only when there has been a clear abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). An abuse of discretion exists only when an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Rice (On Remand),* 235 Mich App 429, 439; 597 NW2d 843 (1999).

Under MRE 404(b), other acts evidence is admissible if it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). However, it is not admissible if offered solely to show the criminal propensity of an individual and that he acted in conformity with that propensity. *Id.* at 65. In addition, the trial court may provide a limiting instruction if requested. *Id.* at 75.

Prior to trial, the prosecution provided notice, pursuant to MRE 404(b), that it intended to introduce evidence that defendant had inappropriately touched another stepdaughter, the complainant's sister. The sister's testimony was that one morning about four years earlier when she was nine years old, as she was just awaking in the living room, defendant sat down on the couch next to her and put his hands in her underwear and touched her vagina. The complainant's sister moved, and defendant stood up and left the room. Defendant moved to exclude the evidence. The court ruled that it would, depending upon how the proofs unfolded, allow the evidence

> to rebut a mistake, an alleged mistake made by the defendant, or excuse by the defendant for any sexual contact that may come out by the victim. I'm going to allow it for—to explain any delay in reporting the incident. I'm also going to allow it to rebut any inference or evidence that the mother of the victim is trying to extort something from the defendant by having the children raise these allegations.

In response to defense counsel's motion for reconsideration on the MRE 404(b) issue, the court clarified that its decision to admit the other acts evidence would be "based on what sort of defense is presented."

At trial, defendant acknowledged on direct examination that he hugged the children goodnight before they went to bed and that he wrestled with the children, but denied that he ever touched any of the children inappropriately when hugging them goodnight or when he was wrestling with them. Upon motion by the prosecution, the trial court ruled that it would admit the other acts evidence as rebuttal to defendant's testimony. Defendant argues that the court's ruling was in error because the evidence was not admitted for any of the purposes articulated in the court's pretrial ruling, and that because the complainant's sister did not allege that defendant touched her inappropriately while hugging her goodnight or wrestling with her, the other acts evidence was irrelevant and inadmissible. We disagree.

First, while the trial court identified specific circumstances under which it would admit the other acts evidence, the court also indicated that it was delaying its final ruling on the evidence because its admission depended on what defenses were employed by defendant. This procedure was approved of by our Supreme Court in *VanderVliet, supra* at 89-90. Further, our Supreme Court has explained that

> [r]ebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same." The question whether rebuttal is proper depends on what proofs the defendant introduced and not merely what the defendant testified about on cross-examination. [*People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). (Citations omitted.)]

Here, defendant opened the door to testimony regarding whether he had inappropriately touched any of the other children by asserting on direct examination that he never touched them inappropriately, albeit under specific circumstances. Defense counsel elicited this testimony to undermine the complainant's testimony that he had inappropriately touched her. The complainant's sister's testimony was admissible to rebut, i.e., weaken or impeach, defendant's assertion that he did not inappropriately touch the other children and to rebut the inference that complainant could not be telling the truth because defendant never touched any of the other children inappropriately. See *People v Starr*, 457 Mich 490, 501-502; 577 NW2d 673 (1998). Further, although the evidence was prejudicial to defendant, we do not believe its probative value was substantially outweighed by the danger of unfair prejudice. Finally, the court did provide a limiting instruction. We conclude, therefore, that the trial court did not abuse its discretion in admitting the other acts evidence.

Defendant argues next that he was denied his Sixth Amendment right to confront witnesses and to present a defense because the court refused to permit him to call two witnesses. Defendant first contends that the court erred in refusing to permit him to call Jennifer L'Esperance, defendant's oldest daughter, who was subpoenaed and prepared to testify that she had observed the complainant downloading pornography from the internet. However, while defendant argues that the court prevented him from presenting this testimony, the record shows that the court did not rule on the admissibility of the testimony. Rather, defense counsel indicated to the court that he wanted to introduce L'Esperance's testimony to impeach the complainant's preliminary examination testimony that she had never used America Online to access pornography. In response to the court's inquiry regarding the relevance of the testimony, defense counsel stated that "[i]t goes to the credibility of the witness and also with regard to the prosecution's being able to meet their burden." Then, apparently referencing the court's prior statements regarding the admissibility of the other acts evidence, defense counsel stated, "I believe that the prior testimony of the witness in this matter on a surrogate issue is not raising fabrication as to the allegations in the charged offense." The court responded, "I disagree with that conclusion," and defense counsel responded, "Thank you." There is nothing in the record to indicate that defendant pursued admission of L'Esperance's testimony or that the court made a ruling on the relevance of that testimony. Because defendant apparently abandoned the issue as a matter of trial strategy, he should not be allowed to assign error on appeal. To do so would allow defendant to harbor error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). We conclude that defendant has waived this issue and, therefore, decline to address it. See *People v Carter*, ___ Mich ___; ___ NW2d ___ (Docket No. 113817, decided 6/27/2000) slip op p 10.

Defendant also contends that he was deprived of his Sixth Amendment right to confront witnesses and to present a defense because he was not allowed to recall the complainant as a witness to question her about her internet usage and use Jennifer L'Esperance's testimony to impeach the complainant's credibility. However, because defendant did not pursue admission of L'Esperance's testimony, defendant would have no basis for impeaching the complainant's testimony. Moreover, defendant was not deprived of the opportunity to confront and question the complainant. Indeed, he could have questioned the complainant regarding her internet usage during cross-examination. Defense counsel acknowledged at trial that he had avoided certain issues during cross-examination in an attempt to avoid admission of the other acts evidence, and wished to recall the complainant so that he could

address those issues. Thus, defendant had the opportunity to question the complainant and chose, as a matter of trial strategy, not to inquire with regard to certain matters on cross-examination. We find no error in the court's decision not to allow defendant to recall the complainant, especially in light of the fact that there was no basis offered upon which defendant could impeach her credibility.

Defendant argues next that he was denied his right to a fair trial because of prosecutorial misconduct. We review issues of prosecutorial misconduct on a case-by-case basis, examining and evaluating the alleged improper remarks in context. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). The test is whether the defendant was denied a fair and impartial trial. *Id.*

Defendant contends that the prosecutor committed misconduct by comparing the proofs in this case to the type of evidence in other criminal sexual conduct prosecutions. Specifically, defendant claims that the following remark made on rebuttal during closing arguments by the prosecutor amounts to prosecutorial misconduct:

> No corroboration. Well, I don't know what Mr. McNeill thinks is going to happen. Does he think that – that his client's going to do this in front of somebody else and have a witness there? It – it's -- just doesn't happen in cases like this. There is hardly ever any corroboration in a case like this.

However, these remarks were made in response to defense counsel's repeated comments during closing arguments that the complainant's testimony was uncorroborated. A defendant's right to a fair and impartial trial is not prejudiced by remarks of a prosecutor where those remarks are made in rebuttal to issues raised by defense counsel during his closing argument to the jury. *People v Dersa*, 42 Mich App 522, 527; 202 NW2d 334 (1972); *People v Leighty*, 161 Mich App 565, 576; 411 NW2d 778 (1987). Accordingly, we find that the prosecutor remarks did not deprive defendant of his right to a fair and impartial trial.

Defendant argues next that he was denied his right to the effective assistance of counsel because his trial counsel failed to call two witnesses. Defendant did not move for an evidentiary hearing or new trial based on ineffective assistance of counsel in the trial court. Therefore, 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. *Id.* at 314. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *Id.* at 76-77.

Defendant contends that he was denied his right to the effective assistance of counsel because trial counsel failed to call as a witness the physician who examined the complainant. The examining physician was unable to be at trial, so both parties stipulated to the entry into evidence of the medical report as well as a statement made to the physician during the medical examination that was included in the medical report. Defendant maintains that had defense counsel called the physician to answer questions about her examination of the complainant and the usual tearing of the hymen during penetration, the physician's testimony would have cast doubt on the truth of the complainant's statement to the physician that defendant put his finger inside her. As discussed above, however, "sexual penetration" includes any intrusion, however slight, into a genital opening of a person's body. MCL 750.520a(l); MSA 28.788(1)(l). The fact that the hymen was intact does not necessarily rule out penetration. *Bristol, supra.* We conclude, therefore, that live testimony from the examining physician would not have afforded defendant any benefit that the report did not offer, and the result of the proceeding would not have been different.

Defendant also contends that he was denied his right to the effective assistance of counsel because counsel failed to call Jennifer L'Esperance to testify that she saw the complainant downloading pornography from the internet in order to impeach the complainant's preliminary examination testimony. However, as discussed above, defense counsel's decision not to pursue admission of L'Esperance's testimony appears to have been a matter of trial strategy. We find, therefore, that defendant was not denied the effective assistance of counsel.

Finally, defendant argues that because his sentences for his CSC II convictions exceed the statutory maximum, he must be resentenced. We agree. A sentence which exceeds statutory limits is invalid. *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). Defendant was convicted of two counts of CSC I and two counts of CSC II. He was sentenced on October 29, 1998, to 120 to 300 months' (ten to twenty-five years') imprisonment for each of the four convictions. While the statute governing first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), provides for a penalty of imprisonment for life or for any term of years, the statute governing second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3), provides for a penalty of imprisonment for not more than fifteen years. Because defendant's sentences of ten to twenty-five years' imprisonment for his two CSC II convictions exceed the statutory limits, they are invalid. Accordingly, we remand to the trial court for resentencing on those two convictions.

We affirm defendant's convictions on all counts and his sentences for his CSC I convictions, but remand for resentencing on defendant's CSC II convictions.

/s/ Kathleen Jansen
/s/ Joel P. Hoekstra
/s/ Jeffrey G. Collins