STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 25, 2000
v	No. 217662 Otsego Circuit Court
DANIEL LEE FINCH, Defendant-Appellant.	LC No. 99-002314-FC

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced him to fifteen to thirty years' imprisonment for the CSC I conviction and to a concurrent term of 7 1/2 to 15 years' imprisonment for the CSC II conviction. We affirm.

Defendant first argues that the trial court should have suppressed a statement he made to a police officer before being read his *Miranda*[1] rights. Defendant contends that suppression was necessary because he made the statement while subject to a custodial interrogation.[2] The trial court found that defendant had not been in custody for purposes of *Miranda* when he gave the statement, and the court subsequently denied defendant's motion to suppress. Whether a person was "in custody for purposes of *Miranda* is a mixed question of law and fact that must be answered independently after review de novo of the record." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). However, "[f]actual findings made in conjunction with a motion to suppress are reviewed for clear error." *Id*. at 445. Moreover,

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 694 (1966).

[2] As stated in *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987), and *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995), *Miranda* warnings are not required unless the accused is subject to a custodial interrogation.

> [t]o determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave. . . . The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. [*Id*. at 449; citations omitted.]

Here, the questioning officer testified that he (1) merely asked (i.e., did not compel) that defendant come to his office for an interview; (2) told defendant that he was not in custody or under arrest; (3) told defendant that he was free to leave; and (4) did not threaten defendant with incarceration if he refused to confess. Moreover, defendant was not handcuffed or under any other physical restraint during the interview, the office in which the interview took place had no bars or other restraints, and defendant left the police station at the conclusion of the interview. We conclude that under these circumstances, viewed objectively, the trial court did not err in determining that defendant was not in custody for purposes of *Miranda* when he made the statement at issue.

Defendant contends that he did not feel free to leave during the interview; however, his subjective feeling was not the determinative factor. *Id*. Defendant additionally contends that the questioning officer (1) did not tell him that he was free to leave, and (2) threatened him with incarceration if he refused to confess. These were disputed issues of fact, however, and the trial court was free to believe the questioning officer's testimony to the contrary. *Id*. at 445. Accordingly, suppression based on the failure to give *Miranda* warnings was unwarranted. *Id*. at 449.

Next, defendant argues that the trial court should have excluded evidence of uncharged sexual contacts between defendant and the complainant. We decline to review this issue, however, because defendant failed to object to the challenged evidence at trial and because the admission of the evidence did not constitute a plain error affecting defendant's substantial rights. See *People v Carines*, 460 Mich 750, 762-764; 597 NW2d 130 (1999), and *People v Sardy*, 216 Mich App 111, 113; 549 NW2d 23 (1996). Indeed, even if this issue *had* been properly presented, reversal would not be warranted, because (1) the challenged evidence was admissible to support the complainant's credibility, see *People v DerMartzex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973), and *People v Layher*, 238 Mich App 573, 584-586; 607 NW2d 91 (1999);[3] (2) the trial court gave a limiting instruction; and (3) the testimony revealed only the general, undetailed fact of repeated sexual contacts, and its probative value therefore was not substantially outweighed by the risk of unfair prejudice, see *People v VanderVliet*, 444 Mich 52, 55, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Next, defendant argues that the prosecution presented insufficient evidence to support his CSC II conviction. In evaluating a claim of insufficient evidence, we view the evidence in the light most

[3] The evidence was also arguably admissible, with respect to the CSC II charge, to rebut defendant's testimony that he touched the complainant's breast only because the complainant made him do so; in other words, the evidence was relevant to show that defendant touched the complainant's breast not innocently but for the purpose of sexual arousal or gratification. See *People v Gast (On Remand)*, 186 Mich App 436, 437-438; 465 NW2d 346 (1990).

favorable to the prosecutor and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999). We will not interfere with the jury's determination of the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 478, amended 441 Mich 1201 (1992); *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

Here, the complainant's testimony supported a finding that defendant committed CSC II by touching her breast for sexual gratification. See MCL 750.520c(1)(a); MSA 28.788(3)(1)(a); MCL 750.520a(k); MSA 28.788(1)(k); MCL 750.520a(c); MSA 28.788(1)(c) (setting forth the elements of CSC II as applied to this case); see also *People v Daniels*, 163 Mich App 703, 706; 415 NW2d 282 (1987), and *People v Bowers*, 136 Mich App 284, 297; 356 NW2d 618 (1984) (indicating that a defendant's state of mind may be proven through circumstantial evidence). The complainant's credibility as a witness was properly left to the jury's resolution. *Wolfe*, *supra* at 514; *Terry*, *supra* at 452. Defendant suggests that the complainant's testimony regarding the touching of her breast was insufficient to support his CSC II conviction because the complainant could not recall the date on which the touching occurred. However, the date of conduct giving rise to a charge of CSC involving a child is not an essential part of the prosecutor's burden. *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987); *People v Naugle*, 152 Mich App 227, 235; 393 NW2d 592 (1986). Defendant's sufficiency argument is without merit.[4]

Next, defendant argues that the prosecutor committed misconduct requiring reversal by (1) eliciting testimony from the complainant that she was not trying to get defendant in trouble or seeking some advantage, (2) eliciting testimony from the complainant that she was telling the truth, and (3) stating during opening statements that the police officer assigned to the case did a "good job" of investigating the case and obtaining a statement from defendant. We review alleged prosecutorial misconduct to determine whether the defendant was denied a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). We review each case on its own particular facts and analyze allegedly improper remarks in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). A determination of impropriety must rest on an evaluation of all the facts, evidence, and arguments in a case. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Here, defense counsel did not object at trial to the prosecutor's comments, and we therefore will not review this issue on appeal "unless the prejudicial effect could not have been cured by a jury instruction or

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[4] Defendant additionally suggests that the charging documents were deficient for failing to precisely specify the date on which the sexual touching occurred. Defendant failed to preserve this argument below; nor did he raise it in his statement of questions presented on appeal. See *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999), and *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995) (providing that issues not raised in the statement of questions presented on appeal are waived). Accordingly, the argument provides no basis for reversal. See *People v Sabin*, 223 Mich App 530, 531-532; 566 NW2d 677 (1997), reversed on other grounds ___ Mich ___ (Docket No. 114953, decided 7/27/2000).

failure to consider the issue would result in manifest injustice." *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

Contrary to defendant's contention, the elicitation of the challenged testimony was proper. In eliciting the testimony, the prosecutor was not claiming special knowledge about the complainant's credibility, see *People v Bahoda*, 448 Mich 261, 275-277; 531 NW2d 659 (1995), or using the prestige of the prosecutor's office to bolster her credibility. See *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). The prosecutor was simply eliciting relevant evidence from the witness. The remark about the police investigation, however, could arguably be seen as an improper attempt to vouch for the officer's credibility. However, given the brief, unelaborated nature of the comment, it did not result in manifest injustice, and any possible prejudice it caused could have been cured by an appropriate instruction. *Truong*, *supra* at 336; *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Reversal is unwarranted.

Finally, defendant argues that the sentencing court imposed disproportionately harsh sentences. We review sentencing decisions for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993), overruled on other grounds *People v Edgett*, 220 Mich App 686; 560 NW2d 360 (1996). If the principle of proportionality – which dictates that a sentence be proportionate to the seriousness of the crime and the defendant's prior record – is violated, an abuse of discretion has occurred. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990).

Here, defendant's sentence for CSC I fell within the sentencing guidelines' range. Accordingly, it is presumed to be proportionate.[5] *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Wybrecht*, 222 Mich App 160, 175; 564 NW2d 903 (1997). However, a sentence within the guidelines' range can conceivably violate the principle of proportionality in unusual circumstances. See *Milbourn, supra* at 661, and *People v Sharp*, 192 Mich App 501, 505; 481 NW2d 773 (1992). Defendant has not alleged any unusual circumstances and therefore has failed to establish a basis for relief, see *People v Hill*, 221 Mich App 391, 397; 561 NW2d 862 (1997), and his CSC I sentence was proportionate in any event, given his ongoing sexual abuse of the young complainant and given that the court sentenced him at the low end of the guidelines' range.

Nor has defendant established a basis for relief with regard to his CSC II sentence. Again, he has failed to argue *how* the sentence is disproportionate, see *Hill*, *supra* at 397, and the sentence was proper in any event, given the ongoing sexual abuse of the young complainant, who was occasionally a member of defendant's household.

Moreover, in imposing the sentences, the sentencing court noted the seriousness of the offenses, their continuing pattern, the likelihood of long-term harm to the complainant, and the inability of the community to tolerate such behavior under any circumstances. The court also noted that it was

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[5] We reject defendant's argument that this "presumption of proportionality" for sentences within the guidelines has somehow been overruled. Moreover, while the Supreme Court's guidelines are superseded for crimes committed on or after January 1, 1999, they remain applicable to crimes, like the instant ones, that were committed before that date. See MCL 769.34; MSA 28.1097(3.4).

sentencing defendant within the guidelines' range, which alone has been held to be sufficient explanation of a sentence. *People v Lawson*, 195 Mich App 76, 77; 489 NW2d 147 (1992); *People v Poppa*, 193 Mich App 184, 190; 483 NW2d 667 (1992). The court provided a sufficient explanation for the criteria considered and its reasons for the sentences imposed, as required by *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). While the sentencing court did mistakenly refer to defendant's convictions as plea-based, this misstatement, in itself, does not give rise to a basis for relief, in light of the court's proper articulation of the reasons for the sentences it imposed and in light of the proportionality of the sentences.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot