STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 1, 2000
v LINDA LOUISE MARTIN, Defendant-Appellant.	No. 213915 Lapeer Circuit Court LC No. 97-006229-FH

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v STEVEN MARTIN, Defendant-Appellant.	No. 213916 Lapeer Circuit Court LC No. 97-006228-FH

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

PER CURIAM.

Following a jury trial, defendant Linda Louise Martin was convicted of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d; MSA 28.788(4), and defendant Steven Martin was convicted of one count of third-degree CSC. Linda Martin was sentenced to two concurrent prison terms of five to fifteen years each, and Steven Martin was sentenced to a single term of five to fifteen years' imprisonment. Both defendants appeal as of right. The appeals have been consolidated for this Court's consideration. We affirm.

Defendant Linda Louise Martin first argues that there was insufficient evidence of penetration to support a conviction for the second count of third-degree CSC, involving the charged offense that occurred in 1997. "In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution 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 Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

"Sexual penetration," as defined in MCL 750.520a; MSA 28.788(1), includes "sexual intercourse" or "any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."

The male complainant, a special education student who was a friend of the defendants' children and had been treated as a family member, was thirteen years old when the charged sexual activity with defendant Linda Martin first occurred in 1996. When asked in connection with the 1996 occurrences what "sex" meant to him, the complainant testified that he and defendant Linda Martin laid on a bed, both were naked, defendant was on top, and defendant touched his penis with her vagina while she moved up and down. This was sufficient to enable the jury to infer that the "sex" described by the complainant involved "penetration" under the statutory definition. Regarding the 1997 occurrences, the complainant testified that defendant was on top, both were naked, the complainant "was just enjoying himself," his penis and defendant's vagina touched, and he ejaculated. This description, considered in conjunction with the complainant's testimony that he "had sex" with defendant Linda Martin at least ten times in 1997, was likewise sufficient to enable the jury to infer that the element of penetration was proven beyond a reasonable doubt. *Jaffray, supra*.

Next, defendant Linda Martin argues that the verdict was against the great weight of the evidence. This Court reviews the trial court's determination that the verdict was not against the great weight of the evidence for an abuse of discretion. *People v Brown*, 239 Mich App 735, 744-745; 610 NW2d 234 (2000).

Defendant contends that the testimony of the complainant was unreliable because he testified at trial that he knew that he had to give the story the prosecution wanted to hear or he would be prosecuted for engaging in sex with the defendants' minor daughter. Further, his testimony at the preliminary examination was inconsistent with his trial testimony regarding how often he was in the Martin home, how often the incidents occurred, and how often he had to obtain permission from Steven Martin before engaging in sexual activity with defendant. Defendant also complains that her daughter's testimony was unreliable because she recanted her story of having seen defendant and the complainant having sex a couple of months before trial. Defendant argues that, given the discrepancies and inconsistencies in these two witnesses' testimony, it would be a miscarriage of justice to allow the verdict to stand.

The trial court did not abuse its discretion in denying defendant's motion for a new trial. There was sufficient evidence of penetration based solely on the testimony of the complainant. The testimony of a victim need not be corroborated in CSC prosecutions. MCL 750.520h; MSA 28.788(8). Furthermore, it is the jury's province to assess the credibility of witnesses, *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998), and this Court should not undertake the resolution of credibility issues anew, *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Because the complainant was thirteen and fourteen years old when the conduct took place and the fact of penetration could be established by his testimony alone, the great weight of the evidence did not preponderate heavily against the jury's verdict. *Lemmon, supra* at 627.

Defendant Linda Martin next complains that the trial court abused its discretion in refusing to admit the complainant's juvenile adjudication for retail fraud, in denying a request to obtain the complainant's criminal record, and in instructing the jury that questions and answers concerning the complainant possibly facing a charge of statutory rape were inaccurate and inappropriate for the jury to consider. Before trial, the trial court ruled that defendant could ask the complainant if he was on probation from juvenile court but could not ask about specific offenses, and denied defendant's requests for criminal histories of the complainant and other prosecution witnesses. Nonetheless, during trial, after the prosecutor questioned the complainant about a breaking and entering conviction in Florida, Steven Martin's counsel noted that the complainant was on probation for that charge and twice asked if he had also been convicted of shoplifting. The trial court sustained the prosecutor's objection to the reference to the shoplifting conviction both times.

Under MRE 609(e), evidence of juvenile adjudications is generally not admissible to impeach the credibility of a witness, but the court may, in a criminal case, "allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied the admission is necessary for a fair determination of the case or proceeding." The offense of first-degree retail fraud, MCL 750.356c; MSA 28.588(3), is punishable by imprisonment for not more than five years and would be admissible to attack the credibility of an adult if the court determined that the evidence had significant probative value on the issue of credibility. However, the offense of second-degree retail fraud, MCL 750.356d; MSA 28.588(4), is punishable only by imprisonment up to one year and would not be admissible to attack the credibility of an adult. MRE 609(a)(2). The prosecutor alleges that the complainant's prior conviction was for second-degree retail fraud and, therefore, was not admissible for purposes of impeachment. Without further information, we cannot determine whether the shoplifting offense was admissible for impeachment or whether allowing impeachment by this offense was necessary to a fair determination of the case. MRE 609(e). However, even if the trial court abused its discretion, any error was harmless. The jury had already been informed of the complainant's conviction of breaking and entering in Florida and that he was on probation. Under these circumstances, the jury had sufficient information to evaluate his credibility.

Defendant also argues that whether the complainant faced potential charges of statutory rape was relevant and admissible to establish his bias in cooperating with the prosecution. In cross-examining the complainant, Steven Martin's defense counsel asked a series of questions intended to show the complainant's motivation for telling the story about the Martins. During this examination, counsel read questions and answers from the complainant's preliminary examination testimony, which stated that statutory rape was "a life sentence crime." At the beginning of the next day's proceedings, the trial court gave a cautionary instruction to the jury, indicating that it was inappropriate for the jury to consider the possibility of the complainant facing a statutory rape charge or any possible penalty for that charge; the jury could consider the fact that the complainant was on probation, which he admitted.

The general rule is that arrests or charges that do not result in conviction may not be used to impeach a witness. *People v Falkner*, 389 Mich 682, 695; 209 NW2d 193 (1973). However, an exception exists where the evidence is offered to show the witness' interest in the matter, his

bias or prejudice, or his motive to testify falsely when the witness has charges pending against him arising out of the same incident for which the defendant is on trial. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). In *People v Layher*, 238 Mich App 573, 578-579; 607 NW2d 91 (1999), this Court noted that charges the prosecutor had failed to prove or had dismissed were relevant to show the witness' bias or interest because "the bias or interest of a witness is almost *always* relevant to the substantive issue of witness credibility."

In this case, defendant did not seek to introduce evidence of prior charges, only evidence that the complainant had engaged in behavior that might subject him to prosecution. However, there was no evidence that any charges were pending or even considered by the prosecutor. The trial court did not abuse its discretion in informing the jury that it was not to consider the defense's attempt to show the possibility of the complainant being charged with a crime. Moreover, as the prosecution notes in its brief, "the record is replete with attacks on the complainant regarding the potential charges of statutory rape" and, therefore, defendant was not prejudiced by the instruction in question.

Finally, defendant Linda Martin argues that she was denied a fair trial because the prosecutor deliberately induced improper testimony from prosecution witnesses and because the officer in charge of the criminal case improperly vouched for prosecution witnesses. When reviewing allegations of prosecutorial misconduct, this Court examines the alleged misconduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). However, review of unpreserved allegations of prosecutorial misconduct is foreclosed unless a curative instruction could not have removed any undue prejudice to the defendant or manifest injustice would result from failure to review the alleged misconduct. *Id.*

Defendant first challenges a statement made during the testimony of prosecution witness Michelle Phillpotts, who worked with the Martins when she was employed by the LIFT (Lapeer Investing in Families Together) program. Phillpotts testified that she had worked with the Martin family from October 1996 "until January when their son was removed from the home." This statement did not deny defendant a fair trial. The testimony that one of defendant's children had been removed from defendant's home was not solicited by the prosecutor, the court immediately admonished the witness to not delve into unrelated matters, and the court instructed the jury that the evidence was not to be considered in determining defendant's guilt or innocence.

Defendant also challenges several statements by Protective Services worker Michael Sumbur. During questioning about Sumbur's contacts with the complainant and the Martin family, Sumbur stated that he had "[m]any contacts regarding the welfare of the children in the home" and had spoken to three of the defendants' children. Sumbur testified that he referred the criminal matter regarding the complainant to the police for follow-up, but his "primary work with the family was to see that the Martin children themselves were protected and not [the] subject of any abuse or neglect." Upon further questioning, Sumbur stated that the criminal assault allegation involving the complainant was initially referred to him, "but there were also other concerns." Defendant also complains about testimony from Sumbur on cross-examination by Steven Martin's attorney that prosecution witness Matthew Counterman was not only part of the criminal investigation but also knew something about the other children. On redirect

examination by the prosecution, Sumbur testified that he had contacted Counterman "to find out what his involvement was in the Martin home with the children, what the children were privy to regarding his sexual involvement with the parents." In response to another question on redirect, Sumbur responded, "I have an open Children's Protective Services case."

On appeal, defendant attempts to portray Sumbur's role in this case as that of a police officer who has a special obligation not to venture into forbidden evidentiary areas. However, she cites no authority in support of her contention that a Protective Services worker has such a duty. This Court will not search for authority to sustain a party's position. *People v Hoffman*, 205 Mich App 1, 17; 518 NW2d 817 (1994). Defendant also incorrectly asserts that there were references to other criminal acts. All references were to possible abuse or neglect of children in connection with a child protection investigation rather than a criminal investigation.

The prosecutor used Sumbur's testimony to establish how the case came to the attention of the criminal authorities, which occurred after defendant's daughter told a therapist that she observed her mother and the complainant having sex, and the therapist contacted Protective Services. Because of the nature of this case, and the fact that the defendants had young, school-age children, it would not have been surprising that Protective Services might be concerned about the defendant's children and might have contact with them. Therefore, Sumbur's testimony about the ongoing Protective Services' investigation was not unfairly prejudicial to defendant and did not deny her a fair trial. Further, the trial court instructed Sumbur that "other concerns" about defendant's family were "not relevant to this proceeding." The questions concerning Counterman came during cross-examination by Steven Martin's attorney. There can be no assignment of prosecutorial misconduct to these questions. Further, Linda Martin's counsel did not object to this questioning, and a curative jury instruction could have removed any undue prejudice. The prosecutor's questions on redirect examination were to rebut the inference by Steven Martin's counsel that Sumbur had been overzealous and perhaps worked with the prosecutor beyond his need to do so for the child protective proceedings. Although Sumbur's response implicated defendants in other sexual involvement, it did not deny them a fair trial. The trial court instructed the jury that they could only consider the answer to explain Sumbur's conduct during the investigation.

Defendant also contends that she was denied a fair trial because the officer in charge, Detective Sergeant Nancy Stimson, improperly vouched for the prosecution's witnesses. A prosecutor may not vouch for witness credibility or suggest that the government has some special knowledge that a witness will testify truthfully. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Police witnesses have a special obligation not to venture into forbidden testimony. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). However, as defendant concedes in her brief to this Court, because defendant did not object to the detective's remarks, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

No miscarriage of justice occurred. Detective Stimson testified that she found the statements made personally to her by defendants' daughter to be "truthful" and that she based her

reports and investigation on the "truthful information" given to her by the complainant. In response to a question by Steven Martin's defense counsel about whether Stimson had a "scientific instrument" or a "crystal ball" that told her when people were telling the truth, Stimson replied that she relied "on my experience and my own common sense." On redirect examination, the prosecutor asked how many CSC investigations Stimson had conducted, and she responded over three hundred. Asked if there were usually eyewitnesses in a CSC case, Stimson responded "no." These remarks did not impermissibly vouch for the truthfulness of the complainant or the defendants' daughter. The officer's remarks were in response to questions from Steven Martin's defense counsel about how she approached her investigation. The follow-up questions on redirect were in rebuttal to questions implying that this CSC case was unusual in that the jury would have to determine the defendants' guilt on their judgment of the truthfulness of the victim's statements. Failure to further consider this issue would not result in a miscarriage of justice.

Defendant Steven Martin argues that his conviction was based on insufficient evidence and that the trial court erred in denying his motions for directed verdict and a new trial. Pursuant to MCL 767.39; MSA 28.979, "[e]very person concerned in the commission of an offense, whether he directly commits the act constituting the offense or procures, counsels, aids, or abets in its commission may hereafter be prosecuted, indicted, tried and on conviction shall be punished as if he had directly committed such offense." To convict a defendant of aiding and abetting, the prosecution must establish the following elements:

> "(1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement which aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement." [*People v Wilson*, 196 Mich App 604, 609; 493 NW2d 471 (1992), quoting *People v Genoa*, 188 Mich App 461, 463; 470 NW2d 447 (1991).]

Mere presence, even with knowledge that an offense is about to be committed or is being committed, is insufficient to show aiding and abetting. *Wilson*, *supra* at 614. The phrase "aiding and abetting" describes all forms of assistance rendered to the principal, including all words or deeds that may "support, encourage, or incite the commission of a crime." *Id*. To convict a defendant as an aider and abettor, the prosecution must show that the defendant either possessed the required intent or participated while knowing that the principal had the requisite intent. *Id*.

The complainant testified that after he returned to Michigan in 1997 and again began spending time at the Martin residence, he "had to ask Steve to have sex with Linda"; defendant would usually respond "yes," after which, according to the complainant, "I'd usually have sex with her." The complainant testified that he asked defendant's permission to have sex with Linda "[a]bout ten times." According to the complainant, there was one occasion when defendant denied the complainant's request to take a shower with Linda, and the complainant complied with the denial. The complainant further testified that defendant was sometimes in the bedroom during the sexual acts, although the complainant did not know what defendant was doing, other than "[j]ust laying there," and defendant did not say anything. The complainant

further testified that when he told Linda over the telephone that Protective Services worker Sumbur came to his school he could hear defendant in the background threatening to accuse the complainant of having sex with the defendants' minor daughter if the complainant said anything.

We disagree with the trial court that the fact that defendant either owned or rented the home in which the criminal activity occurred, and that at least some of the activity took place in his presence, would alone be sufficient to convict him as an aider and abettor. Nonetheless, the complainant's testimony that he had to ask defendant's permission to have sex with Linda Martin in 1997, that defendant usually gave his permission, and that the complainant would then have sex with Linda, was sufficient to find that defendant's conduct supported or encouraged the criminal sexual acts. Further, while defendant's mere presence during the sexual activity was insufficient to find that he aided and abetted Linda's crime, the fact that he gave permission for the activity to occur more than once, coupled with his knowledge that the sexual activity followed his giving of permission, is sufficient to find that he either possessed the requisite intent or encouraged the act knowing that Linda had the requisite intent. Thus, there was sufficient evidence to convict defendant as an aider and abettor of third-degree CSC.

Defendant next argues that the trial court erred in denying his motion for mistrial because his case should have been severed from that of his codefendant wife and they should have had separate trials. The decision whether to sever the trials of codefendants lies within the discretion of the trial court. *People v Hana*, 447 Mich 325, 331; 524 NW2d 682 (1994). This Court reviews a lower court decision regarding a motion for mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). At trial, Phillpotts testified that Linda Martin had said that Steven wanted Linda to have sex with the complainant but that she had not done so. The trial court instructed the jury that an out-of-court statement by Linda was not admissible against Steven. When Steven's counsel later moved for a mistrial, he argued that Steven's trial should have been severed from Linda's trial because he could not get a fair trial based on Phillpotts' testimony.

Pursuant to MCL 768.5; MSA 28.1028, "[w]hen 2 or more defendants shall be jointly indicted for any criminal offense, they shall be tried separately or jointly, in the discretion of the court." Under MCR 6.121(C), the trial court must sever the trial of defendants when the offenses are related "on a showing that severance is necessary to avoid prejudice to substantial rights of the defendant." In *Hana*, *supra* at 349, the Supreme Court stated:

> Inconsistency of defenses is not enough to mandate severance; rather, the defenses must be "mutually exclusive" or "irreconcilable." . . . Moreover, "[i]ncidental spillover prejudice, which is almost inevitable in a multi-defendant trial, does not suffice." . . . The "tension between defenses must be so great that a jury would have to believe one defendant at the expense of the other." [Citations omitted.]

The defenses offered by Linda and Steven Martin were not mutually exclusive or irreconcilable and the trial court did not abuse its discretion in not severing the trials. Both defendants took the position that the alleged sexual conduct never occurred and the prosecution's witnesses were not credible. Accordingly, Steven Martin was not entitled to a mistrial on this

basis. Furthermore, defendant has failed to show prosecutorial misconduct or a violation of a discovery order regarding Phillpotts' testimony.

Finally, defendant challenges his sentence of five-to-fifteen years' imprisonment. This Court reviews a trial court's sentence for an abuse of discretion. A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *Id*.

Defendant argues that his sentence is disproportionate because three offense variables were improperly scored. Defendant's challenge to the scoring of offense variables does not present a cognizable appellate issue. *People v Mitchell*, 454 Mich 145, 176-178; 560 NW2d 600 (1997). Furthermore, defendant's arguments are without merit. The sentence imposed is within the range recommended by the sentencing guidelines and it is proportionate to the seriousness of the offense and this offender.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Michael J. Talbot
/s/ Patrick M. Meter