STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 18, 2001
V	No. 225125 Oakland Circuit Court
BRIAN CLOUTHIER, Defendant-Appellant.	LC No. 98-159079-FC

Before: Cooper, P.J., and Cavanagh and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with a person under the age of thirteen). The trial court sentenced defendant to five to twenty years' imprisonment. Defendant appeals by right. We affirm.

Defendant first contends that that trial court abused its discretion by precluding him from (1) introducing evidence that the victim had previously made a false allegation against him, and (2) impeaching the victim's credibility with a previous juvenile shoplifting conviction. We disagree. This Court reviews evidentiary issues for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). An abuse of discretion exists when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

In a prosecution for a sexual offense, a defendant may cross-examine the victim about a prior false accusation of a similar nature and submit proof of the false accusation if the victim denies making it. *People v Mikula*, 84 Mich App 108, 115; 269 NW2d 195 (1978). Before he is permitted to introduce testimony regarding the prior accusation, a defendant must first make an offer of proof, showing with concrete evidence, that the prior accusation was false. *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991); see, also, *People v Hackett*, 421 Mich 338, 348-351; 365 NW2d 120 (1984). Defendant failed to proffer any evidence that the prior accusation against him was false. Therefore, the trial court did not err in foreclosing defendant's attempt to impeach the victim with this information.

With respect to defendant's claim regarding the victim's alleged shoplifting conviction, defendant failed to preserve this issue because he did not object to the court's ruling. MRE 103(a)(1); *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999). Therefore, we review the issue only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Generally, evidence of juvenile adjudications are inadmissible to impeach a witness' credibility unless the conviction would be admissible to attack the credibility of an adult, and the court determines that the evidence is necessary for a fair determination of the case. MRE 609(e). Evidence that the witness has been convicted of a crime may not be admitted *unless* the evidence has been elicited from the witness or *established by public record* during cross-examination and the crime contained (1) an element of dishonesty or false statement, or (2) an element of theft (a) punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and (b) the court determines that the evidence has significant probative value on the issue of credibility. MRE 609(a); *People v Parcha*, 227 Mich App 236, 241-242; 575 NW2d 316 (1997). Here, the victim was a minor and there was no documentary evidence that the victim was convicted of shoplifting. Moreover, defendant abandoned this issue for appeal because he failed to argue the merits in his appellate brief. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). Even assuming that the victim was convicted of shoplifting, defendant failed to adequately address how the court abused its discretion or explain if the crime contained an element of dishonesty or false statement or contained an element of theft punishable by imprisonment in excess of one year or death. MRE 609 (a). Thus, defendant has failed to show that the trial court committed plain error. *Carines, supra* at 763.

Defendant next asserts that the trial court erred by permitting the prosecution's expert witness to (1) give opinions without first testifying to the recognized scientific knowledge in which his opinion was based, and (2) testify that defendant had sexually abused the victim. We disagree. First, defendant failed to preserve these issues for appeal because he failed to object to the disputed testimony at trial. MRE 103(a)(1); *Cain, supra* at 115. Therefore, these issues are reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

Defendant's contention that the expert's testimony was not based on recognized scientific knowledge is without merit because there is no serious question that sexual abuse therapy is a recognized discipline or area of expertise. *People v Beckley*, 434 Mich 691, 718 (Brickley, J.); 456 NW2d 391 (1990). The courts of this state have recognized behavioral therapy as a skilled discipline that can be helpful when explaining certain behavior found in child sexual abuse victims. *People v Peterson*, 450 Mich 349, 369, 373-375, 379-380; 537 NW2d 857 (1995); *Beckley, supra* at 721-722, 733 (Brickley, J.); *People v Smith*, 205 Mich App 69, 73-75; 517 NW2d 255 (1994), affirmed 450 Mich 349 (1995). There is no doubt that the expert's opinion testimony assisted the jury (1) in understanding why the victim in this case failed to report the sexual abuse for five years, and (2) in weighing the victim's credibility in light of her delayed reporting. *Smith, supra* at 75. If the prosecution's expert had not been allowed to explain why child sexual abuse victims often delay reporting the abuse, the jury would likely have found the victim less credible because of the five-year delay in reporting the abuse in this case. Defendant has failed to show that the trial court committed plain error.

The defendant also claims that the expert witness improperly testified that defendant sexually abused the victim. An expert witness testifying in a sexual abuse case may not render an ultimate opinion on whether the alleged sexual abuse occurred, whether the defendant is guilty, or whether the victim was telling the truth. *Lukity*, *supra* at 500; *Peterson supra* at 369; *Smith*, *supra* at 73. The prosecution's expert witness did not testify that defendant sexually abused the victim. He stated that he did not know if the incident occurred or if the victim's allegations were true. Even when specifically asked for his opinion, he declined to give it. Further, to the extent that defendant argues that the expert vouched for the victim's credibility, we conclude otherwise. When the complained-of testimony is read in context, the expert's testimony cannot be construed as vouching for the victim. We also note that in two of the three instances where error is alleged, defendant counsel elicited the expert's responses. Defendant "opened the door" to the witness' responses and cannot now complain of an error he precipitated. To hold otherwise would allow defendant to harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000); *People v Shuler*, 188 Mich App 548, 552; 470 NW2d 492 (1991); *Bufford v Brent*, 115 Mich App 146, 149; 320 NW2d 323 (1982). Therefore, defendant's argument is without merit.

Defendant next asserts that he is entitled to have this Court remand his case to the trial court to "determine an appropriate restitution" because he received the restitution report on the day of sentencing. We disagree. Defendant has waived his right to challenge the restitution order because he failed to timely object at sentencing. *People v Griffis*, 218 Mich App 95, 103-104; 553 NW2d 642 (1996). Defendant never contested the amount of restitution; therefore, the sentencing court was entitled to rely on the amount recommended in the restitution report "which is presumed to be accurate unless the defendant effectively challenges the accuracy of the factual information." *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997).

Defendant next asserts that his sentence is disproportionate and that the trial court erred by exceeding the sentencing guidelines. We disagree. We review sentencing issues for an abuse of discretion. *Cain*, *supra* at 130.

Sentences that fall within the guidelines' range are presumed proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). In this case, the sentencing guidelines' calculation resulted in a suggested minimum sentence of two to eight years' imprisonment. Defendant was sentenced to five to twenty years' imprisonment for sexually penetrating his ten-year-old daughter. The statutory sentence for CSC I is life or any term of years. MCL 750.520b(2). Therefore, defendant's sentence is presumptively proportionate because his sentence is within the recommended guidelines' range and the statutorily imposed range. Defendant has failed to present any unusual circumstances sufficient to overcome this presumption of proportionality. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

Finally, defendant asserts that the trial court erred when it permitted the prosecution to amend the date of the sexual assault. We disagree. This Court reviews a trial court's ruling to amend an information for an abuse of discretion and will not reverse unless the defendant was prejudiced in his defense or a failure of justice has occurred. MCL 767.76; *People v Prather*, 121 Mich App 324, 333-334; 328 NW2d 556 (1982).

An indictment or information must contain "[t]he time of the offense as near as may be." MCL 767.45(1); *People v Higuera*, 244 Mich App 429, 443-444; 625 NW2d 444 (2001). "No variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.45(1); *Higuera*, *supra* at 443-444. An information may be amended at any time before, during, or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and proofs, as long as the defendant was not prejudiced by the amendment and the amendment does not charge a new crime. *People v Goecke*, 457 Mich 442, 459-460; 579 NW2d 868 (1998); *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987); MCL 767.76; MCR 6.112(H). Defendant's argument is without merit because time is not of the essence, nor a material element, in a CSC case where a child victim is involved. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990); *Stricklin*, *supra* at 634. Defendant has also failed to show that he suffered any prejudice in developing his case because the amendment occurred approximately two and one-half months before the start of trial. *Taylor*, *supra* at 8.

We affirm.

/s/ Jessica R. Cooper
/s/ Mark J. Cavanagh
/s/ Jane E. Markey