

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LORENZO LEDESMA,

Defendant-Appellant.

UNPUBLISHED

September 13, 2002

No. 232328

Crawford Circuit Court

LC No. 00-001816-FC

Before: Markey, P.J., and Cavanagh and R. P. Griffin*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) [sexual penetration with a person under thirteen years of age], and his sentence of 18 to 30 years' imprisonment. We affirm.

Defendant first argues that there was insufficient evidence to establish the element of penetration. In reviewing a challenge to the sufficiency of the evidence, we consider 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).

Sexual penetration is an essential element of a CSC I charge, and includes sexual intercourse, anal 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." MCL 750.520a(1); *People v Reid*, 233 Mich App 457, 479; 592 NW2d 767 (1999). Here, the victim testified that she awoke and felt defendant's penis up her "bottom," and that she felt defendant's penis go inside her. This testimony sufficed to establish penetration. See *People v Robideau*, 94 Mich App 663, 674; 289 NW2d 846 (1980). Defendant's claim that the victim's testimony was inconsistent and incredible, particularly because her physical examination failed to reveal evidence of trauma, is not persuasive. The examining physician indicated that the lack of observable physical trauma did not disprove that penetration occurred, particularly where the examination was performed three months after the event. Further, we will not interfere with the jury's finding that the witness was credible because the jury is in a better position to make such determination. See *People v Lemmon*, 456 Mich 625, 642-644; 576 NW2d 129 (1998); *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748, amended 441 Mich 1201 (1992). In sum, a

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt; therefore, reversal is not required on this ground. See *Johnson, supra*; *Robideau, supra*.

Next, defendant argues that the trial court abused its discretion by admitting the victim's mother's testimony that she had seen defendant naked in bed with the victim, as well as the victim's testimony that defendant had rubbed her buttocks and kissed her stomach. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Because defendant did not object to the victim's testimony at trial, this issue is forfeited unless plain error is established. See *People v Grant*, 445 Mich 535, 550-552; 520 NW2d 123 (1994); *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001).

Under MRE 404(b), evidence of other crimes, wrongs, or acts is admissible if it is (1) offered for a proper purpose, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-498; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Here, the contested evidence was not simply offered to show defendant's bad character; rather, the evidence was admitted to rebut charges of recent fabrication and to support the complainant's credibility. Consequently, the evidence was offered for a proper purpose and was relevant to an issue of consequence at trial. See *People v Sabin (After Remand)*, 463 Mich 43, 69-70; 614 NW2d 888 (2000); *Starr, supra* at 501-502; *People v DerMartzex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973). Further, the evidence was not inadmissible simply because the very nature of it is prejudicial, and defendant has not demonstrated that he was unfairly prejudiced by the testimony. See MRE 403. Moreover, the trial court gave a jury instruction that limited the danger of unfair prejudice by restricting use of the evidence. See *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (1999). Accordingly, this issue does not warrant reversal.

Next, defendant argues that expert testimony was improperly admitted because it was unnecessary, exceeded the permissible scope, and improperly vouched for the victim's credibility. However, defendant objected to the expert testimony that sexual abuse is seldom a one-time-only incident on relevancy grounds but did not object to the expert testimony as unnecessary or that it improperly bolstered the victim's credibility. An objection raised on one ground at trial is insufficient to preserve appellate review on a different ground; therefore, the unpreserved claims are reviewed for plain error that affected defendant's substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Expert testimony is admissible under MRE 702 if (1) the witness is qualified as an expert, (2) the testimony serves to give the trier of fact a better understanding of the evidence or assists in determining a fact in issue, and (3) the evidence is from a recognized discipline. See *People v Beckley*, 434 Mich 691, 710-711; 456 NW2d 391 (1990). Here, defendant complains that there was no evidence that would require expert testimony to explain. However, the expert testified regarding typical behaviors of child abuse victims, including delays in reporting, to whom disclosure would be made, piecemeal disclosure, and discrepancies in details disclosed—all relevant in this case where there was about a three month reporting delay, disclosure was made to a friend's mother, in a piecemeal fashion, and included a discrepancy regarding whether physical pain was experienced. See *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857

(1995). Consequently, defendant has failed to demonstrate plain error in permitting the expert testimony.

Defendant also argues that the expert testimony went beyond the proper scope and impermissibly bolstered the victim's credibility because the expert testified that "sexual abuse is very seldom a one-time-only incident." However, even if the testimony was improper, it was not purposefully elicited by the prosecutor who merely questioned the expert as to common behavior exhibited by children after they have been sexually abused. The expert's answer was unexpected and unresponsive, did not bolster the victim's credibility with regard to the one charged incident, and, considering the other evidence against defendant as well as the trial court's limiting instruction, does not warrant reversal. See *People v Burch*, 170 Mich App 772, 776; 428 NW2d 772 (1988).

Next, defendant argues that the prosecutor's closing argument improperly vouched for the victim's truthfulness, appealed to the jury's sympathy, and denigrated defendant's character. Because defendant did not object to the statements at trial, our review is for plain error that was outcome determinative. See *Carines, supra* at 763; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

A prosecutor may not vouch for the credibility of a witness by implying that he has some special knowledge concerning a witness' truthfulness, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), or by placing the prestige of his office behind the witness. *People v Erb*, 48 Mich App 622, 631-632; 211 NW2d 51 (1973). In this case, the prosecutor argued that the jury should find the victim's testimony credible because a child her age would have no reason to fabricate the story. Because this argument was based on the facts of the case rather than the prosecutor's knowledge or opinion, and a prosecutor may argue that a witness should be believed, it was permissible. See *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *Schutte, supra* at 722.

With respect to the prosecutor's comments on defendant's character and the effect of his acts on the victim, the prosecutor was not required to state his argument in the blandest possible terms. *Id.* Although the language may have been somewhat inflammatory, the comments were isolated and did not deprive defendant of a fair trial. See *Watson, supra*. Further, any prejudicial effect of these comments could have been cured by a timely instruction, therefore, no error requiring reversal occurred. *Schutte, supra* at 721.

Finally, defendant challenges his sentence on the basis that two offense variables (OV) were improperly scored, the trial court's departure from the guidelines was unjustified, and the resulting sentence was disproportionate. We disagree.

First, defendant argues that the trial court misscored OV 10 (exploitation of a vulnerable victim) and OV 13 (continuing pattern of criminal behavior). The trial court's scoring of the guidelines is reviewed for an abuse of discretion and if there is evidence that supports a particular score, the trial court's decision will be affirmed. See *People v Cain*, 238 Mich App 95, 129-130; 605 NW2d 28 (1999), quoting *People v Dilling*, 222 Mich App 44, 54; 564 NW2d 56 (1997). Here, the trial court's finding that defendant exploited his father-daughter relationship with the victim, as well as her youth, was supported by the record; therefore, the trial court did not abuse its discretion in scoring OV 10 at ten points. See MCL 777.40(1)(b); *People*

v Elliott, 215 Mich App 259, 260; 544 NW2d 748 (1996). Further, the trial court's scoring of OV 13 at twenty-five points was also supported by the record which revealed that defendant could have been found guilty by a jury of previously committing two counts of CSC II against his daughter when he rubbed her buttocks and kissed her from her neck down her bare stomach. See MCL 750.520c(1)(a); 777.43(1)(b); *Elliott, supra*.

Second, defendant argues that the trial court abused its discretion in finding a substantial and compelling reason to support its upward departure from the statutory sentencing guidelines range of 81 to 135 months to the 216 to 360 month disproportionate sentence actually imposed. We disagree. Under the sentencing guidelines statute, a trial court may not depart from the recommended minimum sentence range unless it finds on the record a substantial and compelling reason for that departure. See MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 438-439; 636 NW2d 127 (2001); *People v Babcock*, 244 Mich App 64, 72; 624 NW2d 479 (2000). The factors relied on by the trial court as constituting substantial and compelling reasons in support of departure must be objective and verifiable, the existence of which is reviewed by this Court for clear error. *Id.* at 75-76, quoting *People v Fields*, 448 Mich 58, 67-70; 528 NW2d 176 (1995). That such factors are objective and verifiable is reviewed de novo as a matter of law and that they present substantial and compelling reasons to depart from the sentencing guidelines is reviewed for an abuse of discretion. *Babcock, supra* at 77-78.

Here, in departing from the guidelines, the trial court articulated several factors it deemed either not considered or inadequately considered by the guidelines, including that (1) most significantly, this was defendant's second CSC conviction, the first of which resulted in a sentence of 40-60 months' imprisonment and parole, (2) defendant failed to cooperate with the probation department or properly complete the PSI interview packet prior to sentencing, (3) defendant had a significant history of assaultive conduct, and (4) defendant demonstrated a lack of rehabilitative potential since he had participated in group therapy for sex offenders following his first CSC conviction, and he indicated a lack of remorse or concern for the victim, his own eight-year-old daughter. Because the departure factors considered by the court are objective and verifiable and constitute substantial and compelling reasons to depart from the minimum sentencing range, and defendant's sentence adequately reflects the seriousness of the circumstances surrounding the offense and offender, resentencing is not required. See *Hegwood, supra* at 437, n 10; *Fields, supra* at 78-79; *People v Milbourn*, 435 Mich 630, 635; 461 NW2d 1 (1990).

Affirmed.

/s/ Jane E. Markey
/s/ Mark J. Cavanagh
/s/ Robert P. Griffin