STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2004
v	No. 242250 Barry Circuit Court
LEROY CHARLES SCOTT, Defendant-Appellant.	LC No. 02-100029-FC

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals by of right his convictions by a jury of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), and second-degree CSC, MCL 750.520c(1)(a). The trial court sentenced him as an habitual offender under MCL 769.11 to concurrent terms of 20 to 30 years in prison for the first-degree CSC conviction and 10 to 15 years for the second-degree conviction. We affirm.

The instant case stems from allegations that defendant molested his girlfriend's twelve-year-old cousin. The incident occurred while the complainant was babysitting for defendant and her cousin at their trailer.

Defendant first asserts that the trial court denied him the right to counsel of his choice when it refused to grant his motion for an adjournment. We review the trial court's exercise of discretion affecting defendant's right to counsel of choice for an abuse of discretion. *People v Echavarria*, 233 Mich App 356, 368; 592 NW2d 737 (1999). The abuse of discretion standard gives great deference to the holdings of the trial court. In order for a decision to be overturned, the result must have been so violative of fact and logic that it evidences a perversity of will a defiance of judgment, or an exercise of passion or bias. *Id.*

In determining whether a trial court abused its discretion in denying a defendant's motion for adjournment, we consider several factors. *People v Williams*, 386 Mich 565, 575-578; 184 NW2d 337 (1972). These factors consist of: (1) whether defendant was asserting a constitutional right; (2) whether he had a legitimate reason for asserting that right; (3) whether he was guilty of negligence in failing to assert the right sooner; (4) whether defendant was responsible for previous adjournments of the trial; and (5) whether the defendant demonstrated prejudice resulted from the trial court's decision. *Id.* at 578; *Echavarria*, *supra* at 369.

Although there was no previous adjournment in the instant case, application of the other factors shows that the trial court did not abuse its discretion in denying defendant's motion to adjourn. Defendant, like the accused in *Williams, supra* at 578, asserts the constitutional right to counsel. However, the Sixth Amendment does not provide defendants with an absolute right to the attorney of their choice. *People v Krysztopaniec*, 170 Mich App 588, 598; 429 NW2d 828 (1988). Courts must balance the accused's right to counsel of his choice with "the public's interest in the prompt and efficient administration of justice." *Id.*, citing *Wilson v Mintzes*, 761 F2d 275, 280 (CA 6, 1985). And defendant failed to provide a legitimate reason for asserting his right to choose new counsel. In *Williams, supra* at 576, the Court found such a reason in that an "irreconcilable bona fide dispute" arose between the defendant and his attorney over whether to call alibi witnesses. No such conflict arose in the instant case. Defendant and his family merely "preferred" to have retained counsel.

Additionally, defendant was negligent. The defendant in *Williams, supra* at 576, did not act negligently in requesting substitute counsel at the last minute because the dispute with his attorney did not arise until the day before his trial. But a different result occurred when a defendant requested an adjournment to hire substitute counsel on the day of trial in *People v Stinson*, 6 Mich App 648, 653; 150 NW2d 171 (1967). This Court found that defendant had had three months in which to retain counsel, but had not "attempted to avail himself of this opportunity." *Id.* at 654. And he had not yet identified whom he wanted to act as his attorney. Based on these factors, this Court held that the trial court did not abuse its discretion in denying the adjournment. *Id.* at 656. No extenuating circumstances like those in *Williams* existed in the instant case. As in *Stinson*, defendant had months to prepare for trial and retain counsel of his own choosing, but waited until just before trial to request new counsel. Although defendant did name the counsel he wished to represent him, the trial court noted that it was uncertain whether he had actually been retained.

We find that the factors listed in *Echavarria* support the trial court's decision to deny defendant's motion for a continuance. Thus, its ruling is not so violative of fact and logic that it constitutes an abuse of discretion. *Id*. at 368.

Defendant next contends that the trial court erred in denying his motion for a directed verdict because the prosecution presented insufficient evidence of his guilt. When reviewing a trial court's decision on a motion for a directed verdict, this Court reviews the record de novo to determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecution, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

Under MCL 750.520b(1)(a), one is guilty of first degree CSC if he engages in sexual penetration with another person and the victim is under the age of thirteen. *People v Hack*, 219 Mich App 299, 303; 556 NW2d 187 (1996). MCL 750.520a(l) defines sexual penetration as "sexual intercourse, cunnilingus, fellatio, 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." Additionally, under MCL 750.520c(1), a person is guilty of CSC in the second degree if the person engages in sexual contact with another person less than thirteen years of age. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). MCL 750.520a(k) defines

"sexual contact" as "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." *Id.*

The complainant here was twelve years old at the time of the alleged events. She testified that during the first incident, defendant reached into her underwear and that she could feel his fingers "where you would have a baby come out." During the second incident, a few minutes later in another room, defendant again reached into her underwear and touched her vagina. This testimony provides evidence of all the elements of the crimes charged. And under MCL 750.520h, "[i]t is a well established rule that a jury may convict on the uncorroborated evidence of a CSC victim." *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1997). Viewed in the light most favorable to the prosecution a rational jury could have found that the prosecution proved all elements of the crime beyond a reasonable doubt. Consequently, the trial court did not err in denying defendant's motion for a directed verdict.

Defendant also argues that even if sufficient evidence existed to justify the issue being sent to the jury, its decision went against the great weight of the evidence. We review a trial court's decision to grant or deny a motion for a new trial based on the great weight of the evidence for abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). "An abuse of discretion will be found only where the trial court's denial of the motion was manifestly against the clear weight of the evidence." *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

A trial court may grant a motion for a new trial based on the great weight of the evidence "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice allow the verdict to stand." *Lemmon*, *supra* at 627. But the trial judge does not sit as the "thirteenth juror" and "may not repudiate a jury verdict on the grounds that he disbelieves the testimony of the witnesses for the prevailing party." *Id.* at 636, citation and internal punctuation omitted. Generally, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* at 647. Thus, absent exceptional circumstances, the trial judge may not substitute its view of witness credibility for that determined by the jury. *Id*. at 642. Exceptional circumstances may occur when the "the testimony contradicts indisputable physical facts or law." *Id*, at 643-644, citing *United States v Kuzniar*, 881 F2d 466, 471 (CA 7, 1989), or "where a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror." *Lemmon*, *supra* at 644, citing *United States v Garcia*, 978 F2d 746, 748 (CA 1, 1992).

In the instant case, the evidence consisted primarily of testimony. In order to find that the jury's verdict went against the great weight of the evidence, the trial court would have had to determine that the witnesses presented by the prosecution were not worthy of belief. None of these witnesses gave testimony that was either contradicted by indisputable physical facts or inherently implausible. The trial court properly left the question of the witnesses' credibility to the jury as required by *Lemmon*. Therefore, its decision to deny defendant's motion for a new trial was not against the clear weight of the evidence. Based on *Daoust*, the trial court did not abuse its discretion, and we affirm its denial of defendant's motion.

Defendant also argues that the prosecution committed misconduct by initiating a line of questioning regarding a proposal defendant's brother made on the morning the crimes allegedly took place. Defendant contends that this line of questioning could only lead to the conclusion that defendant's brother was trying to resolve the matter because defendant was guilty. He further asserts that the witness' answers were impermissible hearsay and that the questions were misconduct on the part of the prosecutor.

First, under MRE 801(c), hearsay consists of a declarant's out-of-court statement offered in court to prove the truth of the matter asserted. It is inadmissible as substantive evidence unless one of the exceptions in the rules of evidence applies. *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993). In the instant case, no out-of-court statements were offered into evidence. The witness merely stated that she believed defendant's brother made a proposal. But she did not testify as to what he actually said. Although she may have been about to repeat an out-of-court statement, defendant's objection prevented this from occurring. Therefore, none of the testimony constituted impermissible hearsay.

Furthermore, charges of "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). And a prosecutor may "attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *Id.* at 660-661.

The line of questioning concerned relevant evidence. Under MRE 401, evidence is relevant if it has "*any* tendency" to make a fact at issue more or less probable. *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995), mod, remanded 450 Mich 1212 (1995), emphasis in original. Under this broad definition, evidence is admissible if it is helpful in throwing light on any material point. *Aldrich, supra* at 114. Although a material fact does not have to refer directly to an element of the crime, it must fall within the "'range of litigated maters in controversy.'" *Mills, supra*, 68, quoting *United States v Dunn*, 805 F.2d 1275, 1281 (CA 6, 1986). In the instant case, defendant conceded that evidence of a proposal could create an inference that he committed the crimes. This clearly falls within the range of "matters in controversy," making it logically relevant under MRE 401.

Furthermore, the prosecution made only a single reference to the proposal. No testimony concerning the actual content of this proposal was admitted. And as noted previously, the complainant's testimony concerning the alleged abuse standing alone provides sufficient grounds for defendant's conviction. *Lemmon*, *supra* at 643 n 22. As in *Nobel*, *supra* at 661, "defendant has not demonstrated bad faith on the part of the prosecutor or that he was prejudiced by admission of the testimony." Based on the record, we find that the prosecutor's conduct did not deny defendant a fair and impartial trial.

Defendant next asserts that the trial court erred in failing to instruct the jury it could consider the defense of mistake; however, defendant did not adequately develop this issue. The appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, *People v Leonard,* 224 Mich App 569, 588; 569 NW2d 663, nor may he give issues cursory treatment with little or no citation or supporting authority, *People v Kelly,* 231 Mich App 627, 641; 588 NW2d 480 (1998).

Next, defendant asserts that the trial court erred in quashing his subpoena of assistant prosecutor Rebecca Hawkins. He alleges that Hawkins would have testified about police interviews with the complainant that she observed through a two-way mirror, and that this evidence would have impeached the complainant's credibility and exculpated defendant. But, defendant has failed to present any specific information concerning content of this proposed testimony. Therefore, we have no way of determining how or even if the assistant prosecutor's testimony would impeach defendant's credibility. Again, a party may not leave it to this Court to search for the factual basis to sustain or reject his position. *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001), citing *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Based on the record presented, we find that the trial court did not abuse its discretion in quashing defendant's subpoena and affirm his convictions.

Furthermore, even if the trial court abused its discretion in quashing the subpoena, the error was harmless. MCL 769.26 controls judicial review of preserved, nonconstitutional errors. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). The statute requires reversal of a conviction only where, after an examination of the entire cause, "it is more probable than not that the error was outcome determinative." *Id.* at 496. Here, even without the assistant prosecutor's testimony, defendant had access to similar evidence impeaching the complainant's credibility. Defendant had copies of the audiotapes of the interviews about which he wanted Hawkins to testify. And the Barry County sheriff's deputy who conducted the interviews testified concerning what occurred. She acknowledged that the complainant gave different accounts of the alleged incidents during the interviews and at trial. Despite this evidence, the jury found complainant's testimony credible and convicted defendant. As the trial court noted in denying defendant's motion for a new trial, the assistant prosecutor's testimony would have been cumulative. Therefore, any error in quashing the subpoena would not have been outcome determinative.

Finally, defendant contends that for his first-degree CSC conviction, the trial court imposed a harsher sentence than provided for by the sentencing guidelines without articulating any reasons for the increased term. Under MCL 769.34(10), we must affirm the trial court's sentence if it is within the appropriate guidelines range, unless the trial court erred in scoring the guidelines or relied on inaccurate information in determining defendant's sentence. *People v Babcock*, 469 Mich 247, 261; 666 NW2d 231 (2003). But if the trial court imposes a sentence outside of the guidelines range, we must determine whether it "articulated a substantial and compelling reason" to justify departing from that range. *Id.* at 261-262.

Defendant's argument misstates the facts. Defendant's counsel objected to the habitual offender information in that it had defendant listed as a fourth habitual offender. He pointed out that two of the offenses listed were convictions from the same date. Multiple convictions obtained in the same judicial proceeding may count as separate convictions for purposes of application of the habitual offender statutes only if those convictions arose out of separate criminal transactions. *People v Preuss*, 436 Mich 714, 717, 738; 461 NW2d 703 (1990). So, defendant now asserts that he should have been listed only as a third offender. But, defendant's counsel acknowledged that defendant had additional previous felony convictions and stated that he would not object if the habitual offender information were amended to include one of these other offenses. The court then granted a prosecution motion to so amend the information.

The amended habitual offender information properly listed defendant as a fourth habitual offender. Under the sentencing guidelines, the sentence the trial court imposed falls within the appropriate range for such an offender. Therefore, MCL 769.34(10) requires that we affirm his sentence. *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003); *Babcock*, *supra* at 261.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot