

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY JAMES EDINGTON,

Defendant-Appellant.

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UNPUBLISHED  
December 9, 2004

No. 251718  
Livingston Circuit Court  
LC No. 03-013485-FH

Before: O’Connell, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals of right his conviction and sentence following a jury trial for two counts of second degree criminal sexual conduct (CSC II), MCL 750.520c(1). The court sentenced defendant to forty-two months to fifteen years in prison. We affirm. This case arose when defendant entered his stepdaughter’s bedroom, got into bed with her, and fondled her breasts, buttocks, and vagina. Defendant stopped when the victim started crying. He apologized and told her that he thought she was her mother. Defendant recounted this same explanation to police.

Defendant argues that the trial court erred when it denied defendant’s motion for a directed verdict. We disagree. We review de novo a trial court’s decision on a directed verdict motion. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). When reviewing a trial court’s decision on a directed verdict motion, we view the evidence in a light most favorable to the prosecution and determine whether a reasonable jury could conclude that the prosecution met its burden of proof. *Id.*

Defendant argues that the prosecution failed to offer any evidence indicating that defendant intentionally touched his stepdaughter for the purpose of sexual arousal. We disagree. The victim testified that defendant reached under her nightshirt and touched her breasts over her brassiere. The victim also testified that defendant reached under her shorts and under her underwear when he rubbed her buttocks, and reached under her shorts but was over her underwear when he rubbed her vagina. She testified that he was awake because his hand was moving. The victim testified that she repeatedly moved his hand away, but defendant would put it back. According to the victim, the incident lasted about three minutes and did not end until she began crying and shouted “dad.” Given defendant’s conscious focus on the victim’s sexual areas, the jury had strong evidence from which it could reasonably infer that defendant intentionally rubbed the victim’s intimate parts for his own sexual stimulation. *People v Piper*,

223 Mich App 642, 645; 567 NW2d 483 (1997). Therefore, the trial court correctly denied defendant's motion for a directed verdict.

Next, defendant argues that the prosecutor improperly shifted the burden of proof when she told the jurors that the "beyond a reasonable doubt" standard did not require them to "give [defendant] the benefit of the doubt," and "it's not a standard that tells you to go back there and search for doubt." While these statements are not the most straightforward explanations of the legal standard, they did not raise an objection from defendant. When a defendant fails to object to a prosecutor's misstatement, we will not review the error unless the statement so prejudiced the defendant that the situation was beyond the correcting power of a curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In this case, the trial court could have cured any prejudice the moment after the prosecutor made the statement by simply clarifying the criminal standard for the burden of proof. Moreover, the trial court later provided the jury with extensive instruction on reasonable doubt, including the fact that defendant did not need to prove anything. Because defendant fails to demonstrate any substantial, uncorrectable prejudice from the comments, the issue does not warrant further review. *Id.*

Defendant also argues that the prosecutor made an inappropriate comment about inadmissible evidence during her opening statement and introduced highly prejudicial and inadmissible evidence against defendant during trial. During the prosecutor's opening statement, the prosecutor suggested that following the incident in the victim's bed, defendant would put his hand down the back of her pants as they walked alone together. Defendant immediately objected, claiming lack of written notice under MRE 404(b) and surprise. The trial court deferred any ruling on the admissibility of the evidence for a later time, but immediately cautioned the jury that they were to consider only defendant's charged conduct in the bedroom and should not interpret the prosecutor's statement as an implication that defendant "did anything else wrong." The trial court later determined that the evidence was inadmissible under MRE 404(b).

During trial, the prosecutor asked the victim why she essentially re-opened the case after she initially told the prosecution that she did not want to testify against defendant. In response, the victim testified that her mother "had talked to me one day and told me that [defendant] had admitted it to her." Defendant again objected immediately and again moved for a mistrial. The trial court found the testimony highly prejudicial, but in lieu of granting a mistrial, it provided a stern warning to the jurors that they must not give any credence to the mother's statement. The trial court emphasized the mother's lack of credibility, and thoroughly cautioned that they must disregard the statement entirely.

Defendant argues that the cumulative effect of these two errors deprived him of a fair trial. We disagree. The trial court immediately provided thorough instructions regarding the prosecutor's comment and the victim's non-responsive testimony. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). The prosecutor's comments did not contain anything so prejudicial that the trial court's brief curative instruction could not erase the implication of wrongdoing. *Id.* In fact, the instruction tended to make the prosecutor's comments sound like exaggeration, and the later lack of evidence likely confirmed that impression. Furthermore, the trial court twice instructed the jury that the attorney's statements were not evidence, and jurors are presumed to follow their instructions. *People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001). Moreover, given the tremendous benefit defendant received from the prosecutor's

technical failure to provide adequate notice, his trial was not made perceptibly unfair by the mere mention of the later-excluded evidence in the prosecutor's opening statement.<sup>1</sup>

Defendant also fails to demonstrate any significant prejudice from the victim's testimony regarding her mother's statement. The evidence already demonstrated that the mother knew of the incident but tried to keep her daughter from telling the authorities. Moreover, defendant admitted the basic facts underlying the prosecutor's case; he only claimed that they were slightly exaggerated and unintentional. Given the vagueness of the victim's statement, combined with the court's persuasive derogation of the mother's credibility and forceful admonition from the bench to disregard the statement, we are not persuaded that the comment substantially prejudiced defendant. *People v Mateo*, 453 Mich 203, 211-212; 551 NW2d 891 (1996). We find it hard to imagine that the jury would find the victim's account of the incident in the bedroom incredible but would find forthright and persuasive the victim's testimony that her mother told her that defendant "admitted it." *Id.*

The reality is that these two incidents pale in comparison with the strong, untainted evidence of defendant's guilt. Defendant admitted to police that he regularly joined the thirteen-year-old victim in her bed at night and, occasionally, would sleep there with her. He claimed that he joined her in her bed because she talked in her sleep and he found it amusing. On the night in question, he was holding her in the bed with her back facing him. He claimed that he was startled by her shouting and discovered that his hands were on her breast and buttocks. He stated that he did not know whether he was sleeping, and also claimed that he could have confused her with her mother. The victim explained, however, that at the time of the incident, her mother was unmistakably larger in stature and build, particularly in the chest. Under these circumstances, we are not persuaded that the jury returned its verdict based on the two trial irregularities rather than its acceptance of the victim's version of the relevant events. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

Defendant argues that the trial court erred when it sentenced him to a minimum sentence of forty-two months in prison rather than the twenty-four months prescribed in the sentencing guidelines.<sup>2</sup> We disagree. The presentence information report (PSIR) contained the victim's account of the incident where defendant placed his hand down the back of her pants, reached into her underpants, and touched her buttocks while they were walking together. In a special hearing at sentencing, the trial court confirmed the veracity of the victim's claim. The trial court had ruled that defendant's conduct did not establish a "pattern" of criminal activity, so the guidelines as scored did not account for this additional incident. MCL 769.34. Nevertheless, the incident

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<sup>1</sup> It is important to note that evidence regarding a defendant's continued sexual touching would ordinarily be admissible in any "fair" trial, including a new trial in this case, provided the prosecutor has given the defendant advance notice. Therefore, we focus our attention more on the lack of notice rather than the full prejudice carried by the evidence itself.

<sup>2</sup> We note that the guidelines' minimum sentence was only twenty-four months because the trial court found that defendant's conduct was not part of a "pattern" of criminal behavior despite the fact that defendant clearly committed at least three crimes against the victim. MCL 777.43.

clearly indicated defendant's continued pursuit of a sexual relationship with the child. Therefore, the trial court did not abuse its discretion when it held that this objective and verifiable incident provided a substantial and compelling reason to sentence defendant to forty-two months in prison rather than the twenty-four months prescribed in the guidelines. *People v Babcock*, 469 Mich 247, 267-270; 666 NW2d 231 (2003).

Affirmed.

/s/ Peter D. O'Connell  
/s/ Richard A. Bandstra  
/s/ Pat M. Donofrio