

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL ALLEN WRIGHT, JR.,

Defendant-Appellant.

UNPUBLISHED

November 20, 2007

No. 273148

Wayne Circuit Court

LC No. 06-002338-01

Before: Servitto, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a), and sentenced to 6 to 15 years' imprisonment. He appeals as of right. We affirm but remand for resentencing.

Defendant was charged in three separate files with a total of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and eight counts of second-degree CSC, arising from his alleged sexual abuse of two stepdaughters and a stepdaughter's friend, KS. The charges were consolidated for trial. The jury convicted defendant of two counts of CSC II involving KS and acquitted him of the remaining counts.

Defendant first argues that evidence of prior allegations of sexual misconduct was improperly admitted at trial, contrary to MRE 404(b). We find no merit to this issue.

Evidence of other crimes, wrongs, or acts of a defendant is inadmissible under MRE 404(b)(1) unless the evidence is (1) offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the act, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh the danger of unfair prejudice, MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Before trial, the trial court granted the prosecutor's motion to allow evidence of the charged acts involving one complainant to be used to consider the charges against the other complainants. Defendant does not challenge this ruling on appeal. Instead, defendant argues that evidence of other uncharged sexual misconduct involving his wife's niece was inadmissible under MRE 404(b)(1). However, the challenged evidence was not offered under MRE 404(b)(1), nor was it introduced by the prosecution. Instead, this evidence was introduced by defendant, who testified on direct examination that he had been the subject of prior allegations of sexual abuse involving other alleged victims, and cooperated in those

investigations. Error requiring reversal cannot be error to which the appellant contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003), lv den and disapproved on other grounds 469 Mich 967 (2003). By affirmatively offering the evidence in question, defendant waived any claim of error. *Id.*

Next, defendant argues that the trial court's conduct denied him a fair trial. Because defendant did not object to the trial court's conduct at trial, this issue is not preserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999).

As this Court explained in *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988):

Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. *People v Cole*, [349 Mich 175, 199; 84 NW2d 711 (1957)]. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. *People v London*, 40 Mich App 124, 129-130; 198 NW2d 723 (1972); *People v Wilson*, 21 Mich App 36, 37-38; 174 NW2d 914 (1969). The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975). . . . See *People v Burgess*, 153 Mich App 715, 719; 396 NW2d 814 (1986).

Portions of the record should not be taken out of context to show that trial court bias against a defendant. Instead, the record should be reviewed as a whole. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995).

In *People v Kenneth Ross*, 181 Mich App 89, 91; 449 NW2d 107 (1989), this Court observed:

A defendant has a right to be represented by an attorney who is treated with the consideration due an officer of the court. Belittling observations aimed at defense counsel are necessarily injurious to the one he represents. Trial judges who berate, scold, and demean an attorney, so as to hold him up to contempt in the eyes of the jury, destroy the balance of impartiality necessary for a fair hearing. *People v Anderson*, 166 Mich App 455, 461-462; 421 NW2d 200 (1988), lv den 432 Mich 858 (1989). Although unfair criticism of defense counsel in front of the jury is always improper, reversal is necessary only where the court's conduct denied the defendant a fair and impartial trial by unduly influencing the jury. *Anderson, supra*.

Comments by the court that are critical or disapproving of, or even hostile to, counsel, the parties, or the case generally do not prove partiality. Expressions of impatience, dissatisfaction, annoyance, and anger, that are within the bounds of what imperfect men or women display at

times, also do not establish partiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497 n 30; 548 NW2d 210 (1996).

Viewed in context, the trial court's comments during defense counsel's opening statement were intended to prevent counsel from engaging in improper argument. The court had previously admonished counsel not to make arguments in his opening statement, but he continued to do so. The court's remarks were not calculated to improperly influence the jury against defendant. Further, the fact that the trial court allowed the prosecutor to ask an additional question of a witness did not reflect partiality. Also, the trial court's annoyance with defense counsel when counsel recalled defendant's wife to testify was not completely unjustified. Under MRE 611(a) and (b), it was within the trial court's discretion to allow defense counsel to fully examine the witness when she first testified. Defense counsel should have advised the court of his intent to call her as a defense witness. Under the circumstances, the trial court's remarks did not pierce the veil of judicial impartiality and did not deny defendant a fair trial.

We agree, however, that some of the court's comments to defense counsel were improper. The trial court improperly scolded defense counsel when he was trying to respond to an objection by the prosecutor. The court again scolded counsel and told him to "shut up" when he attempted to place an objection on the record. The court went so far as to tell counsel that he did not have a right to object. We find these comments troubling, but upon reviewing the record as a whole, we conclude that the court's improper conduct did not deny defendant a fair and impartial trial. It is apparent that the trial court's conduct did not unduly influence the jury against defendant considering that the jury acquitted defendant of eight of the ten charges, including both charges of CSC I and all charges involving two of the complainants.

Defendant additionally claims that the trial court prevented him from providing his theory of the case to the jury and also complains about an evidentiary ruling made by the trial court regarding his wife's testimony, but defendant does not provide any citations to the record to demonstrate factual support for these claims. "Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court." MCR 7.212(C)(7). This Court will not search the record to provide factual support for a party's claim. *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 388; 689 NW2d 145 (2004). Accordingly, defendant has waived review of these claims.

Defendant next argues that the evidence at trial was insufficient to support either the original charges of CSC I or his convictions of CSC II. We disagree.

In reviewing a sufficiency of the evidence claim, this Court must determine whether the evidence, viewed in a light most favorable to the prosecution, was sufficient to justify a rational trier of fact in finding the defendant guilty beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere in the trier of fact's role of determining the weight of evidence or the credibility of the witnesses, and all conflicts in the evidence must be resolved in favor of the prosecution. *People v John Williams, Jr*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

A person is guilty of CSC II if he engages in sexual contact with another person under the age of 13 years. MCL 750.520c(1)(a); *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). At the time of this offense, MCL 750.520a(n)¹ defined “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, done for a sexual purpose, or in a sexual manner for:

- (i) Revenge.
- (ii) To inflict humiliation.
- (iii) Out of anger.

At trial, KS testified that defendant touched her genital area underneath her underwear and also touched her breasts underneath her brassiere. This testimony was sufficient to enable the jury to find beyond a reasonable doubt that defendant intentionally touched KS’s intimate parts. Additionally, KS testified that defendant made comments of a sexual nature when he touched her, thereby supporting an inference that defendant engaged in the touching for purposes of sexual gratification. Contrary to what defendant argues, independent corroboration of KS’s testimony was not required. See MCL 750.520h (“[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g”). Therefore, even if other evidence may have raised questions about KS’s testimony, the credibility of her testimony was for the jury to determine. Accordingly, the evidence was sufficient to support defendant’s convictions for two counts of CSC II.

We also reject defendant’s claim that there was no evidence to support submitting the original CSC I charges to the jury. A person is guilty of CSC I if he engages in sexual penetration with another person under the age of 13 years. MCL 750.520b(1)(a); *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

At the time of the offense, MCL 750.520a(o)² defined “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, but emission of semen is not required.* [Emphasis added.]

¹ MCL 750.520a was amended by 2006 PA 171, effective August 28, 2006, and former subsection (n) was redesignated as subsection (o).

² MCL 750.520a was amended by 2006 PA 171, effective August 28, 2006, and former subsection (o) was redesignated as subsection (p).

KS testified at trial that defendant put his fingers in half the way between the two pieces of skin where she wiped herself after urinating. Dr. Kim testified that if KS was touched in the area she described, it would have been within the labia majora. A touching within the labia majora is considered penetration. *People v Bristol*, 115 Mich App 236, 237-238; 320 NW2d 229 (1981). Defendant's stepdaughter, AS, testified that defendant touched her genital area, or the area where she goes "to the bathroom" with his finger and that it hurt. She also told a detective that defendant placed his thumb in her vagina and that it hurt. This testimony, viewed in a light most favorable to the prosecution, was sufficient to establish penetration and, therefore, the trial court properly denied defendant's motion for a directed verdict on the two counts of CSC I.

Defendant's final argument is that the trial court did not articulate objective and verifiable reasons for departing from the recommendation of the Michigan sentencing guidelines, which was 29 months to 57 months, when he sentenced him to 72 months to 15 years. We agree. We therefore vacate defendant's sentence and remand for resentencing. The trial judge may rescore the guidelines if justified or state objective and verifiable reasons for the upward departure. MCL 769.34(2), (3), *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

Affirmed but remanded for resentencing. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ David H. Sawyer
/s/ Christopher M. Murray