STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 9, 2008
v GERALD GEORGE CUMPER, Defendant-Appellant.	No. 274068 Montmorency Circuit Court LC No. 05-000962-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v GERALD EUGENE FLETCHER, Defendant-Appellant.	No. 274069 Montmorency Circuit Court LC No. 05-000963-FC

Before: Saad, C.J., and Fort Hood and Borrello, JJ.

PER CURIAM.

Defendants Gerald Cumper and Gerald Fletcher committed criminal sexual conduct at a farm owned by Cumper in Atlanta, Michigan. Testimony established that defendants sexually assaulted two victims, FB and JN, while the victims lived at the farm. In Docket No. 274068, a jury convicted Cumper of one count of first-degree criminal sexual conduct (CSC I),[1] and five counts of second-degree CSC (CSC II).[2] In Docket No. 274069, the jury convicted Fletcher of three counts of CSC I, six counts of CSC II, MCL 750.520c(1)(b)(i) and one count of accosting children for immoral purposes.[3] For the reasons set forth below, we affirm.

[1] MCL 750.520b(1)(b) (victim is at least 13 but less than 16 years of age).

[2] MCL 750.520c(1)(b)(i) (victim is at least 13 but less than 16 years of age).

[3] MCL 750.145a.

I. Gerald Cumper

A. Age of the Victim

Cumper argues that the prosecutor failed to prove beyond a reasonable doubt that one victim, FB, was less than 16 years old at the time of the sexual assaults.[4] The jury convicted Cumper under statutes that require proof that the victim "is at least 13 but less than 16 yeas of age . . . ."[5] FB provided inconsistent and contradictory testimony about how old he was when the assaults occurred. FB testified that he was born on February 19, 1987, and that the first instance of abuse happened when Fletcher molested him in the office trailer shortly after he arrived at the farm in January 2002. Based on his birth date, FB would have been 14 years old at that time. Without acknowledging his prior assertion, FB later testified that he was 15 years old when the first incident with Fletcher occurred. FB then testified that he was 16 years old when Cumper first asked him to engage in sexual activity and that Cumper and Fletcher molested him in their bedroom a few days later. FB also testified that he was 16 when Cumper told him that he could not see his girlfriend unless he had sex with Cumper and FB later submitted to his demand. When Cumper's attorney questioned FB about his age, FB agreed that he was certain that he was 16 years old when Cumper molested him, but wavered on this point when he estimated that he was 15 or 16 at the time. FB later reiterated his assertion that he was 16 at the time of Cumper's assaults. During redirect examination, the prosecutor had FB figure out his age at the time of the incidents by counting down from his age at trial. After the prosecutor established that FB turned 15 years old in February 2002, the prosecutor elicited testimony from FB that he was "probably" mistaken about his age in his prior testimony. However, on recross, FB once again contradicted his prior testimony and agreed that he was 16 years old when Cumper assaulted him.

Later in the trial, FB's mother testified that FB asked to return home from the Cumper farm in October 2002 and that she permitted him to move back home around Christmas of 2002. She further testified that, once he left, FB did not return to live at the farm. Because FB would have turned 16 in 2003, the mother's testimony tended to establish that any molestation by Cumper had to have occurred before FB's 16th birthday. FB's mother later testified that she is not good at remembering dates, but that she thought about it for a long time and consulted with her mother to provide the best estimate she could about when FB was on the farm. The prosecutor also presented the testimony FB's friend who stated that FB disclosed that Cumper

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[4] "In reviewing the sufficiency of the evidence, this Court must view 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 proved beyond a reasonable doubt." *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). Further, it is well established that "[t]his Court should not interfere with the jury's role of determining the weight of the evidence or the credibility of the witnesses." *Id.* Moreover, "[a]ll conflicts in the evidence must be resolved in favor of the prosecution and [this Court] will not interfere with the jury's determinations regarding the weight of the evidence and the credibility of the witnesses." *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). To that end, in viewing the evidence in a light most favorable to the prosecution, courts must "avoid weighing the proofs or determining what testimony to believe." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

[5] MCL 750.520b(1)(b)(i) and MCL 750.520c(1)(b)(i).

and Fletcher were doing sexually inappropriate things to him. Though he could not give a specific date, FB's friend stated that FB told him about the conduct "around 2002."

While we agree that the evidence regarding FB's age at the time of the assaults is somewhat equivocal, contradictory evidence presents an issue for the jury and the jury must determine the weight of the evidence and the credibility of the witnesses. *People v Unger*, 278 Mich App 210, 222; 749 NW2d 272 (2008). Further, Michigan law provides that, upon review by an appellate court, the evidence presented must be viewed in a light most favorable to the prosecution. *Id.* Cumper essentially asks this Court to conclude that FB's testimony that he was 16 years old outweighs his testimony that the assaults occurred in 2002 (when he was 15 years old). Cumper's assertions also suggest that this Court should disregard or find unconvincing the testimony of FB's mother and friend. Again, however, this Court must resolve all conflicts in favor of the prosecution and, in doing so, the Court must "avoid weighing the proofs or determining what testimony to believe." *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Accordingly, we hold that the trial court correctly permitted the jury to decide the issue. The prosecutor presented sufficient evidence to establish that FB was less than 16 years old at the time of Cumper's sexual assaults and Cumper is not entitled to reversal on this basis.

B. Severance of Charges

Cumper maintains that the trial court erred when it denied his request to sever the charges relating to FB's accusations and those relating to JN's accusations.[6] The record shows that, throughout the history of this case, the attorneys discussed the question of whether the court should consolidate the allegations brought by FB and JN. On May 23, 2005, at a hearing to discuss the admission of evidence under MRE 404(b), Cumper's attorney, Mitchell Nelson, told the trial judge that, although one of the preliminary examinations was not yet completed, he wanted the charges brought by FB and JN tried together because it "would be the most judicial use, or the judicial economy would make sense this way." The trial judge later stated that, pursuant to MRE 404(b), he would likely allow the introduction of JN's testimony in the trial involving FB's claims and that, therefore, the attorneys would probably want to try all of the charges together. At a hearing on June 27, 2005, Cumper's counsel informed the trial court that he and Fletcher's attorney intended to try the cases and all of the charges together and it is clear from the transcript that the attorneys moved forward with this understanding.

On July 20, 2005, the prosecutor filed a formal motion for consolidation to try all charges against both Cumper and Fletcher in one proceeding "for the reason that said cases involve substantial and controlling common questions of fact; the same witnesses are necessary for the trials; and the cases are based on the same conduct or on a series of acts committed together." A hearing took place on July 25, 2005, in which the attorneys discussed the motion to join the

[6] This Court reviews de novo whether charges are related for joinder purposes. *People v Abraham*, 256 Mich App 265, 271; 662 NW2d 836 (2003). However, this Court reviews a trial court's ultimate decision on a motion to sever charges for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). "A trial court abuses its discretion when it fails to select a principled outcome from a range of reasonable and principled outcomes." *People v Kahley*, 277 Mich App 182, 184; 744 NW2d 194, 196 (2007).

charges of FB and JN. Cumper's counsel stated that it was his understanding that the charges of both JN and FB would be tried together. Fletcher's counsel agreed, and observed that, if the trial court permitted both victims to testify at each trial under MRE 404(b), it would be appropriate to try all of the charges together under MCR 6.120.

On March 27, 2006, one of Cumper's new attorneys stated at a motion hearing that he was "entertaining the possibility of filing a motion to sever the counts between the two victims." Thereafter, on April 18, 2006, Cumper's attorney filed a motion to sever the trials and Fletcher joined the motion on April 20, 2006. Cumper argued that, pursuant to MCR 6.120(B), the offenses alleged by FB and JN occurred at different times and constitute distinct, unrelated criminal allegations. Cumper further argued that the trial court should sever the charges because the individual assaults on FB and JN were not based on a series of connected acts or a single scheme or plan. The prosecutor characterized the motion as one for reconsideration because the trial court had joined the cases several months before. She further argued that the motion was not timely and that joinder is appropriate under the circumstances. The trial court ruled that it "was [his] assumption these case would be tried together, and we're going to enter an order to try them together." Cumper's attorney asked for clarification and the trial judge opined:

> I'm making that ruling because this Court already advised the parties in open court, and I don't know whether there's an order or not an order. In fact, I stated I can't imagine anyone would want separate trials to win a case in front of two juries, when each jury was going to hear all the of [sic] the evidence. No one said a word. No one objected. So whatever has to be granted is granted. We are going to have one trial, there will be testimony, the cases wherein the victims are [FB] and [JN] will both be tried as to both Defendants. Going to try them all at once.

MCR 6.120 governs the joinder and severance of charges. The rule provides, in relevant part:

> **(B) Postcharging Permissive Joinder or Severance.** On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.
>
> (1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on
>
> (a) the same conduct or transaction, or
>
> (b) a series of connected acts, or
>
> (c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

(C) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

We agree with the trial judge that, though there is no written order in the court file, the trial judge and the parties essentially agreed from the outset, in May 2005, that all of the charges would be tried at once, implicitly relying on the relationship of the offenses under MCR 6.120(B). It was not until almost a year later that Cumper retained new counsel, Michael Cronkright, who disputed the decision to try the charges together though, significantly, Cumper was also represented by Benjamin Bolser, who acted as co-counsel throughout the proceedings. In any case, while there is no written order in the lower court file, Cumper's attorney in May 2005 expressed that he preferred to have all of the charges tried together for purposes of "judicial economy." Fletcher's counsel also acknowledged that, if the trial court permitted FB and JN to testify in each trial, joinder of all of the charges would be appropriate, and Cumper did not object to that position. Thus, though the trial court record is somewhat vague about an actual order of joinder, it is clear from the record that the parties understood and agreed that all charges would be tried together. For this reason, we hold that Cumper's motion to sever the offenses was not timely, because it was essentially an untimely motion for reconsideration and because defense counsel reversed positions shortly before trial and after months of consolidated trial preparation.

As a substantive matter, were we to rule that Cumper's motion to sever was timely and that severance should have been granted, Cumper was not prejudiced by any alleged error. The trial court correctly concluded that, pursuant to MRE 404(b), FB and JN could testify at each trial regarding the abuse they endured during the years they stayed on Cumper's farm. If the trial court had granted the motion to sever, the court's admission of FB and JN's testimony, along with testimony of the other abused boys, would have made the evidence presented at each trial nearly identical. Accordingly, were we to hold the joinder improper, any error to Cumper is virtually harmless. Our Supreme Court has held that, generally, joinder is a "discrete, nonconstitutional concept[] that should not be conflated with the constitutional double jeopardy protection." *People v Nutt*, 469 Mich 565, 592 n 28; 677 NW2d 1, 15 (2004). Preserved, nonconstitutional errors do no require reversal unless it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Because nothing suggests that Cumper would have been acquitted if the trial court granted separate trials, he is not entitled to relief on this issue.

C. MRE 404(b) Evidence

Cumper contends that the trial court improperly admitted the testimony of two witnesses, SK and DG, because the testimony was not offered for a proper purpose under MRE 404(b).[7] SK and DG each testified that, while staying at Cumper's house when they were boys, Cumper asked them to get into bed with him at night and Cumper then sexually assaulted them. We hold that the evidence was properly offered to show Cumper's common system, scheme, or plan to befriend his young victims, invite them into his bedroom, and to molest them in his bed. The uncharged acts and the charged acts are sufficiently similar to support an inference that they are manifestations of a common system, plan or scheme. *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000).[8]

D. Sentence

Cumper asserts that the trial court improperly scored 10 points under Offense Variable 4 (OV 4).[9] MCL 777.34 states that 10 points should be scored if "[s]erious psychological injury requiring professional treatment occurred to the victim." However, under the statute, "[t]here is no requirement that the victim actually receive psychological treatment." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004). As the prosecutor points out, FB stated the following at the sentencing hearing:

> What has happened to me, I don't want it to happen ever again. I don't want kids to actually sit there and hide in the corner because of -- people are doing things to them. I have been trying to change my outer and inner sides, and

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[7] The decision whether to admit evidence is within the trial court's discretion and will be reversed only where there has been an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). MRE 404 (b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

[8] Cumper also complains that the trial court improperly admitted Renee Buerke's testimony. Buerke testified that Cumper admitted to her that he sodomized Buerke's minor nephew. As the prosecutor correctly points out, this evidence does not fall under MRE 404(b), but was admissible as an admission by a party opponent under MRE 801(d)(2).

[9] "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). " 'Scoring decisions for which there is any evidence in support will be upheld.' " *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). "The proper interpretation and application of the legislative sentencing guidelines are questions of law, which this Court reviews de novo." *People v Cannon*, 481 Mich 152, 156; 749 NW2d 257 (2008).

> it's not going to help. What they have done to me has actually hurt me from the inside out.

This Court has held that 10 points is an appropriate score under OV 4 where the victim expressed fearfulness, *Apgar, supra* at 329, where the victim suffered nightmares and life disruptions, *People v Drohan*, 264 Mich App 77, 90; 689 NW2d 750 (2004), and where the defendant's conduct caused anxiety, altered the victim's demeanor and caused the victim to withdraw, *People v Wilkens*, 267 Mich App 728, 740; 705 NW2d 728 (2005). In light of this precedent, FB's statement reflects that he suffered serious psychological injury because of Cumper's conduct. FB stated that the assaults caused him significant internal pain and his comments suggest that he isolated himself because of the abuse. Accordingly, we affirm the trial court's score of 10 points for OV 4.

Cumper also claims that the trial court erroneously scored OV 10 at 15 points. MCL 777.40 provides that 15 points should be scored if "predatory conduct was involved." Predatory conduct is "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Points should be assessed under OV 10 when it is clear that, either because of age, disability, or authority status, a victim was "vulnerable." *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008). In *Cannon*, our Supreme Court explained the parameters of OV 10:

> To aid lower courts in determining whether 15 points are properly assessed under OV 10, we set forth the following analytical questions:
>
> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct?
>
> If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40. [*Cannon, supra* at 161-162.]

We hold that the trial court correctly scored OV 10 at 15 points. FB testified that Cumper was an authority figure and that he went to the farm as a minor because he needed behavioral rehabilitation. FB also testified that Cumper repeatedly told him that he could not see his girlfriend until he had sex with Cumper. FB declined but, according to FB, Cumper continued to harass him and FB finally submitted to Cumper's demand so that Cumper would stop bothering him. In light of FB's age, Cumper's position of authority, and Cumper's quid pro quo pressure, there was sufficient evidence for the trial court to assess 15 points for OV 10.

Cumper contends that the trial court erroneously relied on Cumper's prior, uncharged conduct to increase his sentence and that this conduct cannot constitute a substantial and

compelling reason for a departure from the sentencing guidelines. At sentencing, the trial court observed that Cumper sexually abused another child, DG, and that Cumper admitted he did so. This Court has held that, in departing from the guidelines, "[a] sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and acquittals." *People v Coulter*, 205 Mich App 453, 456; 517 NW2d 827 (1994). Though Cumper cites MCL 777.50 to support his argument that a trial court may not use convictions that occurred more than 10 years before his sentencing conviction, the statute applies to prior *convictions*, and relates only to the scoring of prior record variables. Cumper cites no law that would prevent the trial court from considering his prior, uncharged conduct in its finding of substantial and compelling reasons to depart. We also observe that defendant fails to recognize that the trial court cited other reasons for the upward departure and he does not raise arguments about whether those reasons were objective, verifiable, substantial and compelling. Accordingly, we affirm Cumper's sentences.[10]

E. Double Jeopardy

Cumper alleges that his three convictions for CSC II violate his double jeopardy protections.[11] The United States and Michigan Constitutions prohibit placing a defendant twice in jeopardy for a single offense. US Const, Am V; Const 1963, art 1, § 15. Cumper takes issue with his three convictions for CSC II because he claims all three were part of the same criminal incident, specifically, when Cumper and Fletcher both sexually assaulted JN in their bedroom in the farm house. The verdict form states that counts I, II and III for second-degree CSC were "[a]lleged to have happened in house, in bedroom, all three in bed, Defendant's hand, [JN's] penis." Cumper is correct that the verdict form and the prosecutor's description of the three CSC II charges in her closing argument differed. However, Cumper raised no objection to the prosecutor's statement about the individual charges, nor to the verdict form as submitted to the jury.

The parties discussed the charges against Cumper extensively on the record. The prosecutor took the position that JN testified that molestations by Cumper and Fletcher in their bedroom took place numerous times. Cumper took the position that JN only testified that Fletcher's assaults took place multiple times. The trial court agreed with Cumper, but ultimately decided to let the jury determine what occurred. Cumper's attorney conceded to the trial court that one count of CSC II could refer to Cumper's act of touching JN's penis with his hand, and another count could refer to Cumper's act of touching JN's penis with his mouth. However, the jury verdict form only referred to three incidents of Cumper touching JN's penis with his hand. Therefore, the only way the jury could convict Cumper of *three* counts of CSC II would be if the

[10] We reject Cumper's argument that the trial court violated his constitutional rights by increasing his sentence based on facts that were not found by a jury beyond a reasonable doubt. Our Supreme Court has ruled that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004) does not apply to Michigan's indeterminate sentencing scheme and, therefore, defendant's argument on this issue is without merit. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006).

[11] "A double-jeopardy challenge presents a question of constitutional law that this Court reviews de novo." *People v Smith*, 478 Mich 292, 298; 733 NW2d 351 (2007), citing *Nutt*, *supra* at 573.

jury believed that JN testified that the incident in the bedroom involving both Fletcher and Cumper happened at least three times.

A fair reading of JN's testimony suggests that Fletcher and Cumper molested JN in the bedroom on numerous occasions during the months he lived at the farm. The trial judge did not agree, but he permitted the jury to decide the issue. We hold that the jury's verdict was did not violate the Double Jeopardy Clause. It does not appear that Cumper demanded more specificity of the dates of the incidents charged. In any case, the precise time of the assaults is not a material element of the crimes in criminal sexual conduct cases involving children. *People v Dobek*, 274 Mich App 58, 83; 732 NW2d 546 (2007). And, we believe that JN's testimony about the same conduct occurring on multiple occasions during the months he was at the farm is sufficient to support the multiple convictions.

II. Gerald Fletcher

A. Limitation of Witnesses and Cross-Examination

Fletcher complains that the trial court erred when it limited the number of character witnesses he could present and when it limited his cross-examination of witnesses.[12] MCL 768.29 provides that '[i]t shall be the duty of the judge to control all proceedings during the trial, and to limit the introduction of evidence and the argument of counsel to relevant and material matters, with a view to the expeditious and effective ascertainment of the truth regarding the matters involved." To that end, it is within the trial court's discretion to limit the number of character witnesses a defendant may call at trial. *People v Nemer*, 218 Mich 163, 167-168; 187 NW 315 (1922), Further, "a trial court is given wide latitude to limit cross-examination." *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

At a motion hearing on March 27, 2006, the trial court indicated that, unless defense counsel presented case law that would compel a different ruling, each defendant could present two or three character witnesses. The court then clarified that each defendant could present two character witnesses and two witnesses who would impeach each of the complainants. The record does not indicate that Fletcher's counsel reiterated his argument for additional character witnesses or advised the trial court of any authority that would require it to admit further character testimony. Further, on appeal, Fletcher fails to set forth what witnesses he intended to call but could not because of the trial court's ruling. Moreover, he fails to explain what testimony he would have elicited from other character witnesses or how they would provide additional, different support for his defense. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). For these reasons, we reject Fletcher's claim of error.

[12] "This Court reviews a trial court's admission of evidence under the abuse of discretion standard." *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997).

With regard to the cross-examination of the victims, the prosecutor is correct that the trial court only limited the cross-examination by Cumper's attorney, not Fletcher's attorney. Further, contrary to Fletcher's claims, the trial court allowed the attorneys to fully explore Fletcher's role as a disciplinarian. Fletcher is correct that his counsel expressed an interest in cross-examining JN about his anger toward Fletcher because Fletcher controlled JN's behavior. The trial court permitted testimony on this issue, but asked counsel not to repetitively present cumulative testimony. The trial court's ruling was not an abuse of discretion.

Fletcher complains that the trial court would not permit cross-examination on JN's prior involvement with a crime. However, defense counsel erroneously suggested that the JN was convicted of aiding in a burglary, when there was no conviction. This Court has held that "evidence of arrests not resulting in convictions is inadmissible to impeach the credibility of a witness" except under limited circumstances not at issue here. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). Accordingly, the trial court did not abuse its discretion in limiting cross-examination on this issue.

Fletcher further argues that the trial court erroneously limited the cross-examination of JN about why he belatedly admitted he was sexually abused. The record reflects that Cumper's attorney asked JN numerous questions to expose whether he told counselors about the sexual abuse in order to be released early from Star Commonwealth, a residential program for juvenile delinquents. On recross, Cumper's counsel began to ask questions that were not covered on cross and the trial judge discussed the issue on the record. After some discussion with Cumper's attorney, the trial judge ruled that he would permit Cumper's attorney to explore his theory, but warned that, if the questioning became irrelevant, he would sustain an objection to it. This was not an abuse of discretion. As noted, it is within the trial court's discretion to limit testimony to relevant matters. MCL 768.29. The trial court permitted counsel to elicit testimony relevant to his theory of the case, but properly restricted irrelevant testimony.

B. Prosecutorial Misconduct

Fletcher contends that the prosecutor denied him a fair trial by making improper comments during closing arguments.[13] Specifically, Fletcher maintains that the prosecutor shifted the burden of proof to Fletcher when she made comments about the testimony of Brett Peltz. Peltz testified that he heard Fletcher in the bathroom when JN was taking a shower and he

[13] As this Court explained in *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005):

> Claims of prosecutorial misconduct are reviewed on a case-by-case basis. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). A prosecutor's remarks must be examined in context and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial to determine whether a defendant was denied a fair and impartial trial. *Id.*; *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

recalled that the two had a normal-sounding conversation. During her closing argument, the prosecutor stated:

> You've heard evidence from [JN] that he was molested on a continuous basis. There's no evidence that contradicts that. Sure, Brett Peltz testified that he was in the next room during the shower incident. He couldn't see what was going on in that bathroom. All he can tell you was, well, I heard normal conversation. [JN] never said he screamed. [JN] never said that he fought. So, actually, what Brett is saying probably did occur. He heard normal conversation. But he didn't know what was going on within that bathroom, and he didn't know that [JN] was being molested and touched by Fletcher.

The above comment did not shift the burden of proof to Fletcher. It is well-established that "[a] prosecutor's argument that inculpatory evidence is undisputed does not constitute improper comment." *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). Further, our courts have repeatedly held that " ' "it is not error to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely." ' " *People v Reid*, 233 Mich App 457, 478, 592 NW2d 767 (1999), quoting *People v Fields*, 450 Mich 94, 111 n 21, 538 NW2d 356 (1995), quoting *United States v Bright*, 630 F2d 804, 825 (CA 5, 1980). And "attacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). The prosecutor's remarks constituted proper comment on the evidence presented and in no way forced defendant to prove his innocence. Moreover, the trial court instructed the jury that the lawyer's comments are not evidence and that they should base their verdict on the proofs presented during trial.

Fletcher further asserts that the above remarks amounted to improper vouching. Specifically, Fletcher complains that the prosecutor suggested that JN testified truthfully because his testimony was consistent with Peltz's recollection that he heard normal conversation coming from the bathroom. However, it is not improper if "the challenged comments reflected arguments from the facts and testimony that the witnesses at issue were credible or worthy of belief." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). We do not read the above passage to support an argument that the prosecutor vouched for the credibility of JN. Rather, the prosecutor conceded that Peltz's testimony was probably accurate, and Peltz was a defense witness. In any case, to the extent the comments may be read to suggest that JN testified truthfully, it merely amounts to an observation that the testimony of both JN and Peltz was consistent. This was a fair comment from the facts and testimony and no error occurred.

Finally, Fletcher argues that he was denied a fair trial because, in her rebuttal argument, the prosecutor attempted to appeal to the sympathy of the jury by stating that the jury should "[s]tand up" for FB and JN. "Appeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). The prosecutor concedes that the remark arguably constitutes an improper appeal to the sympathy of the jurors. However, the prosecutor maintains that the trial court's instruction to the jury to disregard the comment cured any error and that the comment was not so lengthy or inflammatory that it denied Fletcher a fair trial. We agree with the prosecutor. The trial court specifically told the jury that the prosecutor's remark was improper and that they must base their verdict only on

the evidence presented. In light of that instruction and because the comment was isolated and not blatant or inflammatory, reversal is not required. *Id*. at 591-592.[14]

C. Sentence

Fletcher asserts that the trial court improperly scored OV 12 at 25 points. Scoring for OV 12 is set forth in MCL 777.42, which provides that 25 points should be scored if the defendant committed "[t]hree or more contemporaneous felonious criminal acts involving crimes against a person . . . ." The statute specifies that the contemporaneous felonious criminal acts must have occurred within 24 hours of the sentencing offense and they will not result in separate convictions. The prosecutor is correct that JN testified that Fletcher assaulted him almost every day and the presentence investigation report states that JN believed the abuse occurred "as much as five times per week." This evidence was sufficient to score OV 12 at 25 points under the reasoning of *People v Raby*, 218 Mich App 78; 554 NW2d 25 (1996), though the case has been superseded by statute on grounds not applicable to this case.

Fletcher further claims that the trial court erroneously scored OV 10 at 15 points because he did not engage in pre-offense conduct to victimize the complainants. As set forth above, MCL 777.40 provides that 15 points should be scored if "predatory conduct was involved." Fletcher's conduct fits into the "vulnerable victim" scenario. JN testified that Fletcher molested him many times, beginning when he first arrived at the farm when he was 12 years old. JN and FB were both minors who were sent to live at the farm with Fletcher and, by molesting the victims, Fletcher abused his status as an authority figure. With regard to whether there was predatory conduct, Fletcher engaged in such conduct by approaching JN when he was isolated, either in bed or in the shower, to commit the sexual assaults. As the trial court observed, Cumper and Fletcher necessarily had to plan their attacks in order to avoid suspicion by the numerous other residents at the farm. We hold that this is sufficient evidence to score OV 10 at 15 points.

Affirmed.

/s/ Henry William Saad
/s/ Karen M. Fort Hood
/s/ Stephen L. Borrello

[14] Though Fletcher argues that he was prejudiced by the cumulative effect of the prosecutor's improper comments, the only arguably improper comment was the last.