STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2010
v	No. 293279 Oakland Circuit Court
JOHN PHILLIP BEVERLEY, Defendant-Appellant.	LC No. 2008-222521-FC

Before: MURRAY, P.J., and K.F. KELLY and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to 20 to 40 years' imprisonment for each of the first-degree criminal sexual conduct convictions and 10 to 30 years' imprisonment for the second-degree criminal sexual conduct conviction. Because none of defendant's arguments on appeal are persuasive, we affirm.

This case arises out of the sexual assault of a ten-year-old girl, C.L., in Novi, Michigan, in 2002. C.L. lived in a trailer with her mother and sister. Defendant lived in a neighboring trailer. C.L. testified that during the summer of 2002, prior to her starting the sixth grade, an incident occurred between her and defendant. C.L. believed the incident occurred during the summer because it was warm and sunny and she did not remember any snow on the ground. C.L. also testified that she was sure that the incident happened in June, July, or August.

C.L. recalled that at the time of the incident she was on the couch in the living room of defendant's trailer playing a video game, while defendant was on the floor. Defendant told C.L. that he wanted to do something more fun. Defendant then sat on the couch and started touching her with his fingers over her pants around her vagina, then underneath her pants, but over her underwear, then underneath her underwear. Defendant then put a blanket over C.L.'s lap, pulled down her pants and underwear and put his head under the blanket. C.L. felt something wet touch her vaginal area, which she believed was defendant's tongue. C.L. told defendant to get away. Defendant did so, and went into the kitchen, but returned, and unzipped his pants and asked C.L. if she wanted to see his "private parts." C.L. refused.

Defendant first argues that the trial court erred in excluding evidence of a past allegation of sexual assault made by the victim. Defendant contends that the plain language of the rape shield statute does not bar evidence of past allegations of criminal sexual conduct because the phrase "sexual conduct" in the statute does not encompass allegations of criminal sexual conduct. We review for an abuse of discretion a trial court's decision to preclude evidence under the rape shield statute. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MCL 750.520j provides, in pertinent part:

> (1) Evidence of specific instances of the victim's sexual conduct . . . shall not be admitted under [MCL 750.520b to 750.520g] unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Defendant's position, that the rape shield statute does not encompass evidence of allegations of prior sexual abuse, which defendant contends is involuntary and not a person's behavior, is supported by at least one justice on the Michigan Supreme Court. See *People v Piscopo*, 480 Mich 966, 970; 741 NW2d 826 (2007) (Markman, J., dissenting). However, the Michigan Supreme Court has not adopted this position, and at least one other justice has written contrary to this position. See *People v Parks*, 483 Mich 1040, 1049; 766 NW2d 650 (2009) (Young, J., concurring) (noting that "there is a strong textual basis for concluding that the term 'conduct,' as it is used in the rape shield statute, encompasses both voluntary and involuntary behavior"). Further, in *People v Arenda*, 416 Mich 1, 6; 330 NW2d 814 (1982), the Michigan Supreme Court prohibited the admission, under the rape shield statute, of "any evidence of sexual conduct between the victim [an eight-year-old boy] and any person other than defendant." Moreover, this Court has stated "[i]n Michigan, as in our sister states, rape-shield statutes are typically invoked where the victim is an adult. However, our courts and others have ruled on the applicability of rape-shield statutes in cases of child sexual abuse." *People v Morse*, 231 Mich App 424, 430; 586 NW2d 555 (1998). Thus, because the rape shield statute applies in instances of child sexual abuse, and the victim's allegations did not fall into any of the exceptions under the rape shield statute, the trial court did not abuse its discretion in applying it.

Nevertheless, as defendant also argues, the rape shield statute cannot bar the admission of evidence necessary to satisfy defendant's constitutional rights to confrontation. Defendant contends that an acquittal of a classmate that the victim also accused of sexual assault is sufficient to establish that the victim's allegation was false, and thus, the trial court should have admitted this evidence in order to satisfy defendant's confrontational right and his right to present a defense. Whether a defendant's Sixth Amendment right of confrontation was violated is a question of constitutional law that we review de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). We also review de novo whether a defendant was denied his

constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Testimony concerning prior false allegations does not implicate the rape shield statute. *People v Jackson*, 477 Mich 1019; 726 NW2d 727 (2007). The Michigan Supreme Court held in *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1984):

> We recognize that in certain limited situations, such evidence [of past sexual conduct] may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. [(Internal citations omitted.)]

Defendant asserts that the facts that the classmate subject to the victim's prior allegations was acquitted and that students at the school believed the victim was lying about these prior allegations establish the falsity of the victim's past accusations. However, the fact of acquittal alone does not establish the falsity of the victim's allegations. See *People v Yarger*, 193 Mich App 532, 538; 485 NW2d 119 (1992), overruled on other grounds *People v Cooks*, 446 Mich 503, 530; 521 NW2d 275 (1994). ("The bare facts that one of the subjects of an accusation was not bound over for trial and that no investigation was conducted in the other incident do not show that the accusations were false.") And, here, there is no evidence that the victim ever recanted her allegations. In fact, at the evidentiary hearing she again reaffirmed her prior allegations. Further, the purported consensus of unidentified individuals, who were not a part of the evidentiary hearing on this issue, does not constitute a showing of falsity. Thus, because defendant never established that the prior allegations were false, defendant was not denied his right to confrontation by the exclusion of this evidence. Additionally, defendant was not denied his right to present a defense. Defendant cross-examined the victim and presented the theory that she made the allegations against defendant at a time when she was receiving a great deal of hostility from other students at school. The trial court did not err in excluding evidence of the victim's prior allegations.

Next, defendant argues that the instruction from the trial court that time of the offense is not an element in a criminal sexual conduct case where the victim is a child was not warranted because the victim testified unequivocally that the incident happened during the summer of 2002. Defendant also contends that the instruction was improper because it denied him his right to present an alibi defense. Claims of instructional error that involve questions of law are also reviewed de novo, but the trial court's determination of whether a particular instruction was applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). We also review de novo whether a defendant was denied his constitutional right to present a defense. *Kurr*, 253 Mich App at 327.

As a part of its instructions to the jury, the trial court gave the instruction that "[t]ime of the offense is not an element in a criminal sexual conduct case where the victim is a child."

MCL 767.45(1)(b) provides that an information is required to contain the "[t]he time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense." But time is not of the essence or a material element in a criminal sexual conduct prosecution involving a child victim. *People v Dobek*, 274 Mich App 58, 82-83; 732 NW2d 546 (2007). An alibi defense does not make time of the essence. *Id*. at 83. The only time issue applicable to the offenses was that the prosecutor needed to prove that they happened before the victim was 13 years old. See *id*.

As the prosecution argues, because this is a criminal sexual conduct case involving a child victim, the trial court's instruction that time of the offense is not an element of the charged crimes was an accurate statement of the law. The mere fact that the victim testified that she was certain that the offense occurred between June and August of 2002, does not somehow delegitimize the notion that time is not of the essence or a material element in a criminal sexual conduct prosecution involving a child victim. Further, this case involves only one instance of sexual abuse, and thus, as the prosecution argues, it does not present the risk that the jury convicted defendant of an offense other than the one that was charged. See *People v Smith*, 58 Mich App 76, 90-91; 227 NW2d 233 (1975). Moreover, this instruction did not deny defendant an opportunity to present a defense because an alibi defense does not make time of the essence. *Dobek*, 274 Mich App at 83. In addition, a defendant should not be permitted to use an alibi defense to avoid prosecution because a child is confused with respect to the date of an alleged assault. *People v Naugle*, 152 Mich App 227, 234; 393 NW2d 592 (1986). The trial court did not err in giving this instruction.

Defendant also argues that the trial court violated MCR 6.414(J) by denying the jury's request to review the victim's testimony and foreclosing the opportunity to do so later on. A trial court's response to a jury's request to review testimony is reviewed for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996).

In response to a note from the jury requesting to review the testimony of the victim, the trial court instructed the jury as follows:

> Members of the jury, the Court received a note from the jury as follows: Review testimony of [the victim]. In that regard the Court instructs the jury to rely on your collective memories at this time in determining what [the victim's] testimony was. That's the instruction that the jury (phonetic) gives you as it relates to the request to review the testimony of [the victim].

MCR 6.414(J) provides:

> If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

The trial court did not foreclose the possibility that the jury would be able to review the testimony at a later time because it specifically stated that the jury was to rely on its collective

memory "at this time." See *Davis*, 216 Mich App at 57 (holding that an instruction to the jury to rely on its memory "at this time" did not foreclose the possibility of having the testimony reread at a later juncture). Thus, because the trial court complied with the mandate of MCR 6.414(J) by ordering the jury to deliberate further without providing the requested transcript, but did not foreclose the possibility of having the testimony reviewed at a later time, it did not err.

Next, defendant argues that he is entitled to a new trial because the trial court improperly admitted evidence of his possession of child pornography and allegations from two other minors of sexual assault under MCL 768.27a. Defendant contends that because these acts occurred prior to the adoption of MCL 768.27a, as applied to him, this statute constitutes an unconstitutional ex post facto law. We review constitutional questions de novo. *People v Callon*, 256 Mich App 312, 315; 662 NW2d 501 (2003).

As defendant recognizes, this Court already has concluded otherwise in *People v Pattison*, 276 Mich App 613, 618-619; 741 NW2d 558 (2007). In *Pattinson*, this Court stated:

> When a defendant is charged with a sexual offense against a minor, MCL 768.27a allows prosecutors to introduce evidence of a defendant's uncharged sexual offenses against minors without having to justify their admissibility under MRE 404(b). In many cases, it allows evidence that previously would have been inadmissible, because it allows what may have been categorized as propensity evidence to be admitted in this limited context. However, the altered standard does not lower the quantum of proof or value of the evidence needed to convict a defendant. In this case, for example, defendant could have been tried and convicted before this statute was enacted solely on the basis of his daughter's proposed testimony. That same testimony, if presented as it appears in the record, remains legally sufficient to support his conviction at his upcoming trial. Therefore, the standard for obtaining a conviction against defendant has not changed, and the application of MCL 768.27a to this case does not violate the Ex Post Facto Clause [Const 1963, art 1, § 10]. [*Id.*]

Because the doctrine of stare decisis and the Michigan Court Rules obligate us to adhere to *Pattison's* analysis of this issue, defendant's constitutional claim lacks merit. MCR 7.215(C)(2), (J)(1).

Defendant also argues that the trial court erred by scoring Prior Record Variable ("PRV") 6 at ten points because there was not sufficient evidence to show that he was on probation at the time of the instant crimes. We review "a sentencing court's scoring decision to determine whether the trial court properly exercised its discretion and whether the record evidence adequately supports a particular score." *People v Wilson*, 265 Mich App 386, 397; 695 NW2d 351 (2005) (citations omitted).

PRV 6 is properly scored at ten points if, at the time of the crime, the offender is on parole, probation, or delayed sentence status, or on bond awaiting adjudication or sentencing for a felony. MCL 777.56(1)(c). "A trial court determines the sentencing variables by reference to the record, using the standard of preponderance of the evidence." *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008). There is no dispute that defendant was on probation from May 9, 2002, until May 17, 2004, for an offense involving possession of cocaine. The

victim testified that the offenses in the instant case occurred during the summer of 2002, some time in the months of June, July, or August. Although the prosecution did not need to prove when the offenses occurred (other than that they took place before the victim turned 13 years old) and defendant presented evidence showing that he had moved away from the trailer park where the victim lived prior to the summer of 2002, the victim's testimony is sufficient evidence to establish that the offense occurred while defendant was on probation. The trial court did not abuse its discretion by scoring PRV 6 at ten points.

Finally, defendant argues that this case should be remanded in order for the Sentencing Information Report ("SIR") to be amended to reflect that offense variable ("OV") 13 was scored at 25 points, not 50 points. The trial court found that OV 13 should be scored at 25 points, but the SIR in the lower court file reflects a score of 50 points. However, the SIR submitted by the prosecution, which it obtained from the probation department, reflects that OV 13 was scored at 25 points. Because the alleged error appears to have been corrected, remand is unnecessary.

Affirmed.

/s/ Christopher M. Murray
/s/ Kirsten Frank Kelly
/s/ Pat M. Donofrio