STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK WILLIAM FLYNN,

Defendant-Appellant.

UNPUBLISHED
March 4, 1997

No. 185675
Calhoun Circuit Court
LC No. 94-3115-FH

Before: Murphy, P.J., and Markey and A.A. Monton,* JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), one count of third-degree CSC, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), and soliciting, MCL 750.448; MSA 28.703. Defendant received concurrent sentences of eleven to twenty-five years for the first-degree CSC convictions, six to fifteen years for the third-degree CSC conviction, and ninety days' imprisonment for the soliciting conviction. We affirm.

I

Defendant first argues that the trial court erred in denying his motion for the production of various confidential and statutorily privileged records. Defendant claims that he presented a good-faith basis that such records were necessary to the preparation of his defense, and that in refusing to even conduct an in camera review of the documents, the lower court denied him his only source of impeachment. We disagree.

Criminal defendants do not have a constitutional right to discovery, MCR 6.001; *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994), cert den sub nom *People v Caruso*, 513 US __; 115 S Ct 923; 130 L Ed 2d 802 (1995), and the trial court has the discretion to grant or deny any request for discovery, *id*; *People v Graham*, 173 Mich App 473, 477; 434 NW2d 165 (1988). Discovery should be granted where the information sought is necessary to a fair trial and a proper

* Circuit judge, sitting on the Court of Appeals by assignment.

preparation of a defense; it should not be granted where, as here, to do so would be to sanction a "fishing expedition," *Stanaway, supra*, 680.

First, because the records requested by defendant contained confidential communications between an alleged sexual assault victim and his counselor and/or psychiatrist, they are privileged and undiscoverable documents according to the language of Michigan's sexual assault counselor-victim privilege, MCL 600.2157a(2); MSA 27A.2157(1)(2), or the psychologist-patient privilege, MCL 330.1750; MSA 14.800(750). However, in an attempt to balance the defendant's right to a fair trial with the complainant's interest in confidential therapy, our Supreme Court held in *Stanaway, supra*, 679:

> [I]n an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense.
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> Only after the court has conducted the in camera inspection and is satisfied that the records reveal evidence necessary to the defense is the evidence to be supplied to defense counsel.

The Court explained that a "generalized assertion of the need to attack the credibility of [an] accuser did not establish the threshold showing of a reasonable probability that the records contain information material to [a defendant's] defense sufficient to overcome the various statutory privileges." *Id*., 650. The Court further stated that such a need is likely to exist in every case involving an accusation of CSC, and without any specific articulable fact or good-faith showing that such statements are actually contained within the documents themselves, a defendant is merely "fishing" for potential exculpatory evidence. *Id*., 681.

We find that defendant, too, was fishing. After reviewing defendant's request for discovery, it is apparent that defendant was uncertain as to what evidence he expected to find in the documents, but only that he hoped to find something that he could use for impeachment purposes. We conclude that defendant did nothing more than advance mere generalities and amorphous contentions, and thus failed to make the requisite showing for an in camera review, let alone a complete surrender of the privileged documents. We find that the trial court did not abuse its discretion in denying defendant's discovery request.

II

Defendant next argues that he was denied a fair trial because the victim's mother was improperly allowed to testify concerning her son's academic performance and his tendency to hide his feelings. Although this issue was not properly preserved due to defendant's failure to object to its

admission during trial, MRE 103(a)(1), we nonetheless find that the witness rendered a legitimate lay opinion in accordance with MRE 701, and that her other testimony was otherwise harmless.

III

Third, defendant contends that he was denied a fair trial as the result of prosecutorial misconduct, specifically citing the prosecutor's statement that defendant was a pedophile in his opening statement and subsequent related questioning. Because defendant failed to raise an objection to the prosecutor's statements and/or questions, he has failed to preserve this issue for our review absent a miscarriage of justice. *Stanaway, supra*, 687. We find no injustice.

In concluding his opening statement, after reviewing the alleged incidents in detail, the prosecutor stated, "This man [defendant] is guilty of being a pedophile. This man will be guilty at the conclusion of proofs of being a predator who prayed [sic] on a twelve year old boy and abused the trust that he had in that person." In so stating, we find that the prosecutor was merely noting, even if not in the least prejudicial or blandest terms, what the evidence at trial would show. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (indicating that the prosecutor is free to argue the evidence and all reasonable inferences arising from it to the jury.) In other words, if the jury were to find that defendant indeed took advantage of the young victims to satisfy his sexual pleasures, defendant could rightfully be characterized as a pedophile, just as one who wrongfully kills another can rightfully be referred to as a murderer. It is clear that the prosecutor was not, as defendant contends on appeal, stating that defendant was guilty of the present crimes because he was a pedophile; but instead, the prosecutor argued that the evidence presented at trial, if found true, established defendant as such.

Nonetheless, even if the prosecutor's statements, or the testimony he elicited indicating that defendant spent a lot of his free time coaching a boys' soccer league, was at all questionable, a miscarriage of justice will not be found where, as here, any potential prejudice could have been cured by a timely instruction requested by the defense. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

IV

Defendant next argues that he is entitled to a new trial because his convictions were not supported by sufficient evidence, but rather, were against the great weight of the evidence presented during trial. We again disagree.

In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proven beyond a reasonable doubt, and must refrain from interfering with the jury's role of determining the weight of the evidence or the credibility of the witnesses. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992).

> In testing this case we are not required to take that which respondent relies upon and that which would tend against him, and from a comparison thereof determine which was the stronger and better, or deducting the one from the other, say what, if anything, was left. This would be but a weighing of the evidence and was entirely within the province of the jury. Nor are we to take the evidence in the order, question and

> answer, in which it was given, but finding it where we may, and putting what was most favorable to the prosecution together, and discarding all other, can this Court say it fairly tended to establish the charge made? [*Id.*, citing *People v Howard*, 50 Mich 239, 242; 15 NW 101 (1883).]

In the present case, in arguing that there is insufficient to support his convictions, defendant specifically challenges the credibility of the victims' testimony, and notes the lack of adequate corroboration. However, when leaving the matter of credibility to the jury, *People v Daniel*, 172 Mich App 374, 378; 431 NW2d 846 (1988), looking only to the evidence favorable to the prosecution, to the exclusion of all other, and keeping in mind that the testimony of a CSC victim need not be corroborated, MCL 750.520h; MSA 28.788(8), we find that a reasonable jury could conclude that elements of the crimes charged had been met.

Defendant was convicted of two counts of first-degree CSC, contrary to MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), which requires a showing that defendant engaged in sexual penetration with a person under the age of thirteen. At trial, the victim testified that in December 1992, when he was twelve years old, defendant penetrated the victim's rectum with his penis, and that in January 1993, when he was still twelve years old, defendant penetrated the victim's rectum with his finger. Defendant was also convicted of one count of third-degree CSC, contrary to MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), which requires a showing that defendant engaged in sexual penetration with a person between the ages of thirteen and fifteen. Again, at trial, the victim testified concerning a third incident that occurred in May 1994, when he was fourteen years old, wherein defendant placed his mouth around the victim's penis.

Last, defendant was convicted of one count of accosting and soliciting, contrary to MCL 750.448; MSA 28.703, which requires, in pertinent part, a showing that defendant solicited or invited another, by word or gesture or any other means, to commit a lewd or immoral act. At trial, both the victim and another witness testified that on the same day that defendant placed his mouth around the victim's penis, defendant offered money to the other witness to do the same to defendant.

Next, determining whether a verdict is against the great weight of the evidence requires a review of the whole body of proofs, *People v Herbert*, 444 Mich 466, 475; 511 NW2d 654 (1993), with the test being whether the verdict is against the overwhelming weight of the evidence, *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990). Although it is in the trial court's discretion to grant or deny a new trial, *Herbert, supra*, 477, the jury's verdict should not be set aside where there is competent evidence to support it; the trial court cannot substitute its judgment for that of the factfinder, *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990).

The issue generally involves matters of credibility or circumstantial evidence, *In re Robinson*, 180 Mich App 454, 463; 447 NW2d 765 (1989), but again, as with a sufficiency of the evidence claim, if there is conflicting evidence, the question of credibility must always be left for the factfinder, *Rossien v Berry*, 305 Mich 693, 701; 9 NW2d 895 (1943).

On appeal, defendant simply challenges his conviction based on the contention that the victim's and other witness' testimony was inconsistent and unbelievable. In denying defendant's motion for a new trial, it is apparent that the lower court concurred with the jury's assessment of the witnesses' credibility and that their testimony satisfied the elements of the crimes charged, and because the case was essentially a credibility contest, this Court has no basis upon which to dispute the lower court's assessment. We find that the record contains nothing to suggest that the court's decision to deny defendant's motion for a new trial was an abuse of discretion.

V

Last, defendant argues that he was denied effective assistance of counsel. We disagree, either because defendant faults counsel for things that did not constitute error, or because, due to a lack in the record, we are unable to effectively assess the propriety of defense counsel's actions. In each instance, the action defendant suggests that counsel should have taken would have either been futile, a matter of trial strategy that this Court is unwilling to second-guess on appeal, or indeterminable without further facts or an explanation from counsel. The record provides no support for defendant's proposition that counsel's assistance fell below the objective standard of reasonableness, nor that defendant was in any way prejudiced by counsel's assistance. See *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989).

Affirmed.

/s/ William B. Murphy
/s/ Jane E. Markey
/s/ Anthony A. Monton