STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN ERSEL LEEDY,

Defendant-Appellant.

UNPUBLISHED
March 4, 1997

No. 186307
Hillsdale Circuit Court
LC Nos. 00187164,
00187131

Before: Fitzgerald, P.J., and MacKenzie and A. P. Hathaway*, JJ.

PER CURIAM.

Defendant appeals as of right from convictions, in separate trials, of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced to eight to twenty years' imprisonment for CSC I and to three to fifteen years' imprisonment for CSC II. These cases were consolidated on appeal. We affirm.

On June 28, 1994, Nadine Leedy, defendant's daughter who was then twelve years old, telephoned the Department of Social Services (DSS) with the information that defendant had been sexually abusing her and her ten-year-old sister, April Leedy. That day, the girls described several instances of sexual abuse to DSS worker John Beck and Michigan State Police Trooper Mitchell Krugielki. The following day, Nadine told Beck that she was mistaken and that the abuse was just a dream. Consequently, Beck and Krugielki visited her home, and at that time she said that the abuse was not a dream and that her allegations of abuse were true. Upon further investigation, including medical examinations of the girls, it was determined that there was physical evidence to support the allegations, and charges were brought against defendant.

I. Defendant's CSC I Trial Involving Nadine

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

Defendant first asserts that the prosecutor committed misconduct by continuing to ask leading questions of his own witnesses, even after defense counsel's objections on this basis were sustained. On each of the occasions cited by defendant, the prosecutor properly rephrased the question. This conduct did not deny defendant a fair and impartial trial and did not constitute prosecutorial misconduct. *People v Kulick*, 209 Mich App 258, 259-260; 530 NW2d 163 (1995).

Defendant also argues that the prosecutor attempted to elicit hearsay testimony from certain witnesses. However, defendant has provided no citations to the portions of the record where he alleged that this occurred, and we find no support in the record for this argument.

Defendant states that the prosecutor committed misconduct by eliciting responses from Nadine that suggested that defendant had sexually abused both sisters. Although Nadine did refer to "us" in her answers, the prosecutor asked Nadine only about defendant's behavior toward her. Rather than eliminating the prejudicial effect of this testimony, a curative instruction would have drawn the jury's attention to it. Moreover, this testimony did not deny defendant a fair and impartial trial because the evidence against defendant was overwhelming. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant incorrectly asserts that the prosecutor attempted to interject issues beyond those relevant to the trial by asking the physician who examined Nadine whether Nadine had reported that the abuse had occurred over a long period and by asking Officer Krugielki how Nadine's mother reacted to Nadine's allegations. These issues were relevant to the trial because they tended to reinforce Nadine's credibility by explaining that the abuse had gone on for some time and that Nadine had not told her mother because she correctly did not think her mother would believe her; therefore, the prosecutor committed no misconduct by raising them. See MRE 401. Defendant also argues that the prosecutor reinforced these improper statements in closing argument by denigrating the defense, highlighting hearsay testimony and shifting the burden of proof to defendant by forcing him to produce evidence to counter that presented by the prosecution. The record does not support these assertions. The mere presentation of evidence does not shift the burden of proof to the defendant. *People v Kayne*, 286 Mich 571, 579; 282 NW2d 248 (1938).

Defendant also argues that the testimony of Dr. Diane Marshall-Reed, an expert witness in child psychology, exceeded the permissible scope when she stated that if a hypothetical child in a situation almost identical to Nadine's were to make allegations of abuse, recant, and then repeat the allegations, then she would believe the child. As defendant correctly points out, an expert may not state whether the complainant's behavior indicates that the abuse occurred, that the complainant told the truth, or that the defendant is guilty. *People v Beckley*, 434 Mich 691, 725; 456 NW2d 391 (1990); *People v Peterson*, 450 Mich 349, 369; 537 NW2d 857 (1995). However, the prosecutor did not commit error requiring reversal since he elicited this testimony in response to a similar series of questions posed by defense counsel and was therefore free to address this issue. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

Defendant incorrectly asserts that the presentation of this expert witness impermissibly shifted the burden of proof to defendant. The presentation of this witness did nothing more than question the inference, raised by defendant, that Nadine's behavior was inconsistent with that of other abuse victims. This did not force defendant to prove his innocence and therefore is not a ground for reversal. *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995).

Moreover, defendant incorrectly argues that because he had no notice that this witness might be presented, he had no opportunity to prepare for her testimony. In fact, since this issue was discussed by the parties at the pretrial conference and since the trial court issued an order stating that it would allow the prosecution to present expert testimony on this issue, defendant knew three months before trial that this testimony could be forthcoming.

Defendant also contends that the prosecutor impermissibly elicited irrelevant, hearsay testimony from Nadine establishing that she told Beck that defendant had sexually abused her. This testimony was relevant because the fact that Nadine had recanted tended to make it more probable that she had fabricated the allegations and that defendant was innocent. Evidence is relevant if it tends to make a fact of consequence in the determination of the action more or less probable. MRE 401. This testimony was not hearsay because, rather than to prove the truth of the matter asserted, i.e., that defendant had sexually abused Nadine, the testimony was presented to show that Nadine reported the abuse, recanted, and then repeated her allegations. See MRE 801(c). Thus, because this testimony was not hearsay pursuant to MRE 801(c), it was admissible and the prosecutor committed no error in introducing it.

In addition, defendant argues that because defense counsel failed to object to these alleged errors addressed above, counsel's assistance was ineffective. The failure to object to inadmissible testimony may be proper if an objection would serve to draw the jury's attention to the error. Such a decision constitutes sound trial strategy that this Court will not second-guess. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Moreover, defense counsel properly declined to object because, as discussed above, there were no valid grounds for objection.

Defendant also argues that the trial court abused its discretion by sentencing defendant outside the range suggested by the Michigan Sentencing Guidelines and by ignoring mitigating circumstances. In fact, contrary to defendant's representations, the recommended range under the sentencing guidelines based on defendant's score was a minimum term of three to eight years. Thus, by sentencing defendant to a minimum term of eight years, the trial court did not exceed the recommended range. Moreover, the trial court did not ignore the factors that defendant asserted as mitigating circumstances, which indicated that defendant was forty-four years old, had served in the military, was educated, had been steadily employed, and had supportive friends and family. Rather, the court viewed these factors as aggravating circumstances, stating that it had little sympathy for a person of defendant's maturity who engaged in sexual acts with his ten-year-old daughter. It was logical for the trial court to consider these factors as aggravating circumstances in this case; thus, the trial court did not act inappropriately in so doing. See *Lewis v Jeffers*, 497 US 764, 783; 110 S Ct 3092; 111 L Ed 2d 606 (1990). Therefore, the court did not abuse its discretion by imposing the maximum possible sentence within the guidelines' range.

II. Defendant's CSC II Trial Involving April

Defendant incorrectly argues that the prosecutor elicited hearsay testimony from April each time that April consulted the notes that she and the prosecutor had prepared. A witness may review notes to refresh her recollection. Her testimony that follows is not hearsay; however, the substance of her notes is inadmissible hearsay. *People v Favors*, 121 Mich App 98, 109; 328 NW2d 585 (1982). April read a portion of her notes into evidence in response to the prosecutor's question regarding the date that the incident took place. While this was improper, it did not improve her credibility, rather, it emphasized that she could not remember the date this incident took place and thus, may have been helpful to the defense. Therefore, this error was harmless and does not warrant reversal of defendant's conviction. MCR 2.613(A).

Defendant next contends that the trial court abused its discretion by admitting evidence of other instances of sexual contact between defendant and April. Defendant incorrectly maintains that when the prosecution moved in limine for the admission of this evidence, he did not specify the acts to be discussed or the purpose for which this evidence was to be introduced. In fact, the prosecutor properly identified the nature of the evidence and indicated that the evidence would be used to bolster April's credibility. Thus, the trial court did not abuse its discretion by granting this motion. See *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973). Moreover, the trial court properly limited the evidence to acts that occurred between defendant and April, thereby excluding evidence of acts between defendant and Nadine. *Id*. Where a defendant and complainant are members of the same household, other sexual acts between the complainant and the defendant are relevant and admissible, while other crimes are barred except to impeach the defendant's credibility. *Id.*, 413-415. In addition, the prosecutor did not commit misconduct by presenting this evidence, since the prosecutor acted in compliance with the trial court's order.

Defendant also argues that the trial court erred by failing to read the instructions found in CJI2d 20.28 and CJI2d 20.29 to the jury. Since the trial court read these instructions, this argument is entirely without merit.

Finally, defendant contends that defense counsel's assistance was ineffective because counsel failed to object when April consulted her notes and failed to request that the trial court read the cautionary instructions found in CJI2d 20.28 and CJI2d 20.29 to the jury. These assertions are also meritless. With regard to the jury instructions, defense counsel requested that CJI2d 20.28 and CJI2d 20.29 be read and these instructions were read to the jury. Moreover, as indicated above, no error occurred in the single instance when April consulted her notes to refresh her recollection. Notably, on that occasion, an objection would not have been favorable to the defense because by reading from her notes, April reinforced the impression that she had fabricated the allegations, an impression defendant sought to create. By refraining from objecting, defense counsel exercised sound trial strategy, which we will not second-guess. *Barnett*, *supra*, 163 Mich App 338.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Amy Patricia Hathaway