STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEWIS ARTHUR MORAN,

Defendant-Appellant.

UNPUBLISHED
June 27, 1997

No. 178560
Macomb Circuit Court
LC Nos. 93-000194-FC;
93-000195-FC;
93-000196-FC;
93-000197-FC

Before: Markman, P.J., and Holbrook, Jr. and O'Connell, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c; MSA 28.788(3), which were charged in four separate cases. These convictions resulted from sexual misconduct on the part of defendant with four children under the age of eight living in his neighborhood. Defendant was sentenced to concurrent terms of twenty-five to fifty years' imprisonment for each CSC I conviction and ten to fifteen years' imprisonment for each CSC II conviction. We affirm defendant's convictions and sentences in each of these cases with the exception of case no. 93-000195-FC which we reverse and remand for further proceedings.

Defendant first contends that the trial court erred by precluding his attorney from questioning a defense witness about the sexual behavior of two children (not among the victims in these cases) who resided in a home located next to defendant's home. The decision whether to admit evidence is within the discretion of the trial court. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts upon which the trial court acted, would say there was no justification or excuse for the ruling. *Id*. The burden of establishing a proper foundation for the evidence rests with the party seeking admission. *People v Burton*, 433 Mich 268, 304 n 16; 445 NW2d 133 (1989). Error cannot be predicated upon a ruling that excludes evidence unless a substantial right of the party was affected. MRE 103(a).

Although we do not entirely agree with the trial court's rationale for excluding the proffered testimony in the case at bar, we find that the trial court reached the correct result. The crucial issue was not whether the prosecution would be placed in a position of having to call the children as rebuttal witnesses but rather whether the threshold requirement of an adequate foundation on the relevancy of the proffered testimony had been established by defendant.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Two separate questions must be answered to determine relevancy under this definition: 1) the materiality of the evidence, i.e., whether the evidence was of consequence to the determination of the action, and 2) its probative force, i.e., whether the evidence made the existence of a fact of consequence more or less probable than it would have been without the evidence. *People v Brooks*, 453 Mich 511, 517-518; 557 NW2d 106 (1996).

Here, the sexual behavior of the two children was not within the range of the litigated matters in controversy at time of defendant's offer of proof. Further, defendant failed to establish any adequate foundation for the relevancy of the proffered testimony. Although the proffered testimony, if believed, established that the witness observed the children engage in inappropriate sexual behavior, no proofs were proffered by defendant to link the witness' observations, directly or circumstantially through other proofs, to the issue whether defendant committed acts of criminal sexual conduct against the four victims underlying the charges at trial. Consequently, the trial court should have excluded the proposed testimony pursuant to MRE 401 and 402 on the ground that defendant failed to establish the relevancy of the proffered testimony, rather than excluding the testimony based on its concern for the children's welfare in the event that they were called as rebuttal witnesses by the prosecution. We find that the trial court reached the correct result in excluding the evidence. See *People v Vandelinder*, 192 Mich App 447, 454; 481 NW2d 787 (1992).

Defendant next contends that the trial court erred in denying his motion for a directed verdict on the charge of CSC I relative to the victim in lower court case no. 93-000195-FC. "To review a trial court's ruling with regard to a motion for a directed verdict, this Court considers the evidence presented in the light most favorable to the prosecution to determine whether a rational factfinder could find that the essential elements of the charged crimes were proved beyond a reasonable doubt." *People v Davis*, 216 Mich App 47, 52-53; 549 NW2d 1 (1996). This Court reviews questions of law de novo. *People v Medlyn*, 215 Mich App 338, 340-341; 544 NW2d 759 (1996).

Sexual penetration with another person under the age of thirteen constitutes CSC I. MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). MCL 750.520a(l); MSA 28.788(1)(l) defines sexual penetration:

> "Sexual penetration" means 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.

In *People v Bruce Johnson*, 432 Mich 931; 442 NW2d 625 (1989), the Michigan Supreme Court reversed the defendant's conviction of third-degree criminal sexual conduct (CSC III) "for the reasons stated by Judge Kelly in his dissent in the Court of Appeals."[1] In his dissent in *People v Johnson*, 164 Mich App 634, 646-649; 418 NW2d 117 (1987), Judge Kelly considered whether kissing a penis constituted "sexual penetration" under § 520a(l). He contrasted § 520a(l)'s definition of "sexual penetration, which requires "intrusion, however slight" with § 520a(k)'s definition of "sexual contact," which requires "intentional touching." *Id*. at 647-648. He stated that fellatio is the act of "taking the penis into the mouth" and that it includes the necessity of a penetration. *Id*. at 647. He concluded that kissing a penis did not amount to fellatio and constituted sexual contact, but not sexual penetration. *Id*. at 648. Here, viewing the evidence in a light most favorable to the prosecution, the victim's testimony indicated that defendant *kissed* the victim's "private" with his lips. Under the Michigan Supreme Court's opinion in *Johnson*, kissing a penis clearly constitutes sexual contact but not sexual penetration. Accordingly, we must vacate the conviction and sentence for CSC I in lower court case no. 93-000195-FC and remand to give the prosecutor the opportunity to try defendant on a charge of CSC II, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), which requires only sexual contact and not sexual penetration.[2]

Defendant's final contention is that his sentences are disproportionate. Based on our review of the sentencing record, we are satisfied that the sentences of twenty-five to fifty years' imprisonment for the CSC I convictions are proportionate to the seriousness of the circumstances surrounding defendant and the offenses. *People v Houston*, 448 Mich 312, 319-321; 532 NW2d 508 (1995); *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). In view of our affirmation of these sentences, we need not decide if the concurrent sentences of ten to fifteen years' imprisonment for the CSC II convictions are disproportionate. Even if we were to hold that these sentences are disproportionate, such a decision would afford defendant no relief in view of our affirmation of the lengthier sentences. *People v Sharp*, 192 Mich App 501, 506; 481 NW2d 773 (1992).

Further, we find that defendant's argument regarding the statutory invalidity of his sentences for the CSC I convictions under *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), is not properly before us because this argument is not identified in defendant's statement of questions. *In re Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992). In any event, the sentences are valid. *People v Kelly*, 213 Mich App 8, 12-13; 539 NW2d 538 (1995). We conclude that defendant has established no basis for resentencing. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997); *In re Dana Jenkins*, 438 Mich 364, 369 n 3; 475 NW2d 279 (1991).

Defendant's conviction and sentence in lower court case no. 93-000195-FC is vacated and the matter is remanded for further proceedings consistent with this opinion. Defendant's convictions and sentences in the other three lower court cases are affirmed.

/s/ Stephen J. Markman
/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell

[1] This summary disposition of the defendant's application for leave to appeal is binding precedent because it was a final Supreme Court disposition of an application and, by reference to Judge Kelly's Court of Appeals dissent, included a concise statement of the applicable facts and reason for the decision. See Const 1963, art 6, § 6; *People v Crall*, 444 Mich 463, 464, n 8; 510 NW2d 182 (1993).

[2] While we are constrained to follow the Michigan Supreme Court's holding in *Johnson*, Judges Markman and O'Connell respectfully disagree with Judge Kelly's dissent. Section 520a(l)'s definition of "sexual penetration" lists four acts that constitute "sexual penetration" --sexual intercourse, cunnilingus, fellatio, and anal intercourse-- then continues "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.) In Judge Kelly's dissent, he looked to the "intrusion, however slight" language to determine whether kissing a penis constitutes fellatio and, ultimately, whether it constitutes "sexual penetration" under § 520a(l). However, by its terms, the "intrusion" language relates to intrusion into the genital or anal openings. Accordingly, § 520a(l) does not indicate that intrusion into the mouth is necessary for oral contact to constitute "sexual penetration." Judge Kelly acknowledged that cunnilingus constitutes "sexual penetration" under § 520a(l) regardless of whether there is intrusion because, by definition, cunnilingus does not require penetration. *Johnson*, 164 Mich App 649, n 1. Similarly, Judges Markman and O'Connell believe that fellatio, by definition, does not require intrusion. *Random House Webster's College Dictionary* (1992) defines fellatio as "oral stimulation of the penis." This definition, unlike that used by Judge Kelly, does not necessarily require a penetration into the mouth. Under this definition, kissing a penis would constitute fellatio and therefore would constitute "sexual penetration" under § 520a(l).