STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN TEDDY CONSTABLE,

Defendant-Appellant.

UNPUBLISHED
December 12, 1997

No. 186463
Genesee Circuit Court
LC Nos. 94-051171-FC
94-051332-FC

Before: Hood, P.J., and McDonald and White, JJ.

PER CURIAM.

Defendant was convicted of seven counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2) (four counts in case no. 94-051171-FC and three counts in case no. 94-051332-FC), and of two counts of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3) (case no. 94-051332-FC). Defendant was sentenced to life in prison for each CSC I conviction and ten to fifteen years in prison for each CSC II conviction. He appeals as of right. We affirm.

Defendant first argues that his Sixth Amendment rights to confrontation and to present a defense were violated when the trial court excluded evidence that one of the two victims in these cases told her cousins about a sexual experience with a third person[1]. Whether exclusion of this evidence violated defendant's Sixth Amendment rights is a constitutional question. Constitutional questions are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). The trial court properly excluded the testimony. A defendant's rights to confrontation and to present a defense do not extend to irrelevant evidence. *People v Hackett*, 421 Mich 338, 344; 365 NW2d 120 (1984). In this case, the testimony at issue was irrelevant. The victim testified that she did not tell defendant's relatives about what happened because she did not feel comfortable telling them. Defendant wanted to produce some of his relatives, the victim's cousins, to testify that the victim told them about a sexual experience with a third person. Defendant contends that the testimony was relevant to rebut the victim's testimony that she was uncomfortable discussing the sexual abuse with them. Defendant argues that the evidence would undermine her credibility.

"'Relevant evidence' means 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. Here, the proposed testimony does not rebut the victim's statement that she was uncomfortable discussing the sexual abuse with defendant's relatives. While both matters involve sexual conduct, they are different in significant respects. One situation involves incest; the other does not. One situation involves rape; the other does not. One situation involves a serious accusation of criminal conduct committed by her cousins' relative; the other does not. The fact that the victim felt comfortable discussing consensual sexual conduct with her cousins is simply too far removed from the pertinent issues, including credibility, involved here. Because the proffered evidence was not relevant, its exclusion does not unduly abridge defendant's constitutional rights of confrontation and to present a defense.

Defendant next argues that he was denied a fair trial when the prosecutor vouched for the credibility of the two victims by repeatedly asking them whether they understood the importance of telling the truth, whether they had agreed to tell the truth and, in fact, were telling the truth, and whether they had told the truth to the police. We disagree. Defendant failed to object below or to request a curative instruction. For that reason, we will not review this issue "unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). A "prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Here, the prosecutor's questioning of the victims did not constitute improper vouching. Moreover, to the extent that the questioning was improper, any prejudice was dispelled by the trial court's instruction to the jury that the lawyers' statements, arguments, and questions are not evidence. *People v Turner*, 213 Mich App 558, 585; 540 NW2d 728 (1995).

Defendant next argues that the trial court improperly based defendant's sentences on defendant's refusal to accept a plea bargain and admit his guilt. Defendant failed to raise this issue below. Nevertheless, we will review it because it involves a significant constitutional question. See *People v Sean Jones (On Reh)*, 201 Mich App 449, 452; 506 NW2d 542 (1993). "A court cannot base its sentence even in part on a defendant's refusal to admit guilt." *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977); *People v Hicks*, 149 Mich App 737, 748; 386 NW2d 657 (1986). Here, there is no basis in the record to support defendant's allegations that the court considered his refusal to admit guilt when sentencing him. Prior to trial, the court thoroughly explained defendant's options of accepting a plea of no contest to lesser charges or proceeding to trial. In doing so, the trial court articulated numerous considerations for defendant to contemplate prior to making his decision. The trial court's conduct was not improper as there was no indication that the trial court was threatening or coercing defendant to accept the plea in any way. Moreover, at the sentencing hearing the court did not refer to defendant's refusal to accept the plea bargain and did not say or do anything to suggest that it was taking into account defendant's refusal to admit guilt by accepting the plea. The mere fact that defendant's sentence after conviction of the charged offense greatly exceeded the guidelines applicable

to the lesser offense the prosecutor offered to accept a plea to does not establish that the sentence was punitive. Defendant's argument is without merit.

Defendant also argues that his sentences violate the principle of proportionality. We disagree. The evidence showed that defendant engaged in sexual misconduct with his twelve-year-old and fifteen-year-old daughters and used bribery, threats and insults against them. Under the circumstances, we find that the sentences imposed were proportionate to the offenses and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). See *People v Austin, supra*, 209 Mich App 564, 571; 531 NW2d 811 (1995), aff'd 455 Mich 439 (1997), where sentences of life in prison for each of two CSC I convictions were proportionate given the defendant's criminal history and the psychological impact of the crimes upon the victims.

Defendant next argues that the trial court erred in allowing testimony from one of the victims that she did not tell anyone about defendant's sexual abuse because she was afraid that defendant might hurt her mother as he previously had done. Defendant failed to preserve this issue below by objecting or moving to strike the testimony that he had hurt his wife before. MRE 103(a)(1). Moreover, admission of this testimony does not constitute plain error. MRE 103(d). Therefore, we need not review the issue. Were we to review it, we would hold that the evidence did not violate MRE 404(b) because it was not elicited to show that defendant had a bad character or to demonstrate a characteristic "for the purpose of proving action in conformity therewith." Rather, the testimony came out on direct examination when the prosecutor asked the victim why she had not come forward with her allegations sooner. Defendant's theory was that the victim's fabricated the sexual misconduct and only brought charges because they were angry with him. Defendant's counsel previously cross-examined the other victim with regard to whether she had come forward and informed her relatives about the abuse. In *People v Yarger*, 193 Mich App 532, 538-539; 485 NW2d 119 (1992), this Court did not find error where a witness testified that she feared that the defendant would beat her if she confronted him after observing him improperly touching the victim. The testimony was not admitted in error.

Defendant next argues that the trial court precluded the jury from rehearing the recorded testimony of one of the victims and in doing so, committed error requiring reversal. We disagree. When a jury requests to rehear testimony, the trial court abuses its discretion only when it denies the request *and* forecloses the possibility that such a rehearing will ever be granted. *People v Robbins*, 132 Mich App 616, 621; 347 NW2d 765 (1984). In this case, at the end of the first day of deliberation, the jury indicated that it wished to rehear testimony. The trial court took the request under advisement and informed the jury that it would make a decision the following morning. When the case was back on the record the next morning, the jury had reached its verdict. Defendant speculates that the judge engaged in an off the record consultation with the jury and foreclosed the possibility that it could rehear the testimony. The record does not support a finding that the trial judge foreclosed the possibility of rehearing testimony. Rather, it appears that the jury was able to reach a verdict without having the testimony replayed. Here, the record does not support a finding that the trial judge foreclosed the possibility of rehearing testimony. Moreover, defendant failed to object below and thus, this issue is not preserved for appeal.

Defendant also argues that the prosecutor improperly failed to produce endorsed witnesses and, in doing so, violated his right to confront the witnesses against him. The record does not support this claim. In fact, the prosecution made all of the endorsed witnesses available to the defense. In addition, we note that the testimony of the victims concerning statements made by out of court declarants, including defendant's neighbor who did not testify, did not constitute hearsay. MRE 801(c). The out of court statements contained in the victims' testimony were not offered to prove the truth of the matters asserted, but rather to explain what prompted each victim to tell the neighbor that defendant was abusing her.

Defendant's final argument is that the trial court committed instructional error. Defendant claims that the trial court omitted the element of personal injury in its instruction on CSC I, and that the court failed to instruct on CSC IV as a lesser included offense of CSC II. Because defendant failed to object below, our review is "limited to the issue whether relief is necessary to avoid manifest injustice to defendant." *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). Relief is not necessary to avoid manifest injustice. The provisions of the CSC I statute under which he was charged, MCL 750.520b(1)(a) and (b)(ii); MSA 28.788(2)(1)(a) and (b)(ii), do not require proof of personal injury. In addition, CSC IV is not a lesser included offense of CSC II in this case. Under the facts of the case, defendant could have committed "the greater offense of second-degree criminal sexual conduct without committing the lesser offense of fourth-degree criminal sexual conduct". *People v Norman*, 184 Mich App 255, 260-261; 457 NW2d 136 (1990). Therefore, the latter is not a necessarily included offense of the former and defendant was not entitled to an instruction on fourth-degree criminal sexual conduct as a lesser included offense on the second-degree criminal sexual conduct charge. *Id.*

Affirmed.

/s/ Harold Hood
/s/ Gary R. McDonald
/s/ Helene N. White

[1] The victim involved in this issue on appeal is defendant's adopted daughter. The other victim is defendant's natural daughter.