STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN TRENT WOLTZ,

Defendant-Appellant.

UNPUBLISHED
August 14, 1998

No. 199971
Marquette Circuit Court
LC No. 96-031720 FC

Before: Markman, P.J., Griffin and Whitbeck, JJ.

PER CURIAM.

Defendant appeals by right from an order of sentence of nine to twenty years' imprisonment imposed after a jury convicted defendant of one count of second-degree criminal sexual conduct (CSC II) against his twelve-year-old daughter, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court found that defendant qualified as an habitual offender second offense and enhanced his sentence pursuant to MCL 769.10; MSA 28.1082. We affirm.

Defendant first contends that the trial court erroneously concluded that the nine-month period that elapsed between his December 1995 arrest and September 1996 trial did not violate the 180-day rule. We disagree. The 180-day rule requires that a prosecutor bring an inmate incarcerated by the Michigan Department of Corrections to trial on any charges, discovered by the prosecutor during such incarceration, within 180 days of the discovery of the charges. MCL 780.131(1); MSA 28.969(1)(1), MCR 6.004(D)(1). According to MCR 6.004(D)(1), the prosecutor "must make a good faith effort to bring a criminal charge to trial within 180 days." Although more than 180 days elapsed between defendant's arrest in the instant case and the beginning of his trial, this delay did not arise from non-"good faith" actions of the prosecutor. Although defendant argues that much pretrial delay resulted from the prosecutor's "bad faith" failure to comply with defendant's legitimate discovery requests, the prosecutor encountered difficulties beyond his control in seeking a particular report requested by defendant. We conclude, therefore, that the trial court did not clearly err by finding that the prosecutor-- who eventually produced the report defendant requested-- acted in good faith in responding to defendant's discovery request. Nor is there any indication that the prosecutor filed any frivolous pretrial motions or undertook any other delaying actions. Indeed, several pretrial motions by defendant himself

contributed significantly to the delay in the commencement of his trial. "Delays

attributable to a defendant have been held to negate a violation of the 180-day rule." *People v Crawford*, 161 Mich App 77, 83; 409 NW2d 729 (1987). We conclude that the trial court did not clearly err when it determined that no 180-day rule violation had occurred.

Defendant next argues that the prosecutor's delay of more than one year between learning of the charges against defendant and arresting him prejudiced his defense. We disagree. "[W]ith regard to pre-arrest delay . . . once a defendant has shown some prejudice, the prosecution bears the burden of persuading the court that the reason for the delay is sufficient to justify whatever prejudice resulted." *People v McCullum*, 172 Mich App 30, 37; 431 NW2d 451 (1988). Defendant argues that pre-arrest delay deprived him (a) of the opportunity to discuss his case with an investigator; (b) of testimony by the victim's grandfather; and (c) of other potential alibi evidence. However, defendant has made no allegations regarding what specific prejudice he suffered from his failure to interview the investigator before trial; regarding what specific issues the victim's grandparent would have testified to; or regarding what specific alibi evidence was lost. Since defendant has "not [met] his burden of showing some prejudice, the prosecutor was not required to show reasonableness in the delay." *Id*. Therefore, we conclude that the trial court did not err in rejecting defendant's pre-arrest delay argument.

Third, defendant alleges that the trial court's refusal to order an in camera inspection of the victim's counseling records so that he could locate inconsistencies with the victim's other testimony constituted error requiring reversal. Again we disagree. This Court reviews a decision to order in camera review of privileged materials pursuant to MCR 6.201 for an abuse of discretion. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). MCR 6.201(C)(2) requires that a court inspect in camera otherwise privileged communications "[i]f a defendant demonstrates a good faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense." A "specific justification is necessary to overcome the privilege." *People v Stanaway*, 446 Mich 643, 681-682; 521 NW2d 557 (1994).

Defendant argues that he believed the victim, his daughter, fabricated the allegations against him, and that her counseling records would likely contain information regarding her fabrications and inconsistencies. Defendant produced evidence of discord between himself and his ex-wife, the victim's mother, as well as a statement by the victim's sister that she believed the victim had invented the allegations. However, defendant has set forth no specific facts explaining why he believed the victim's counseling records would contain inconsistent statements with those offered at trial or how he believed these statements would aid his defense. Thus, we conclude that the trial court did not abuse its discretion by refusing to order an in camera inspection of the victim's privileged counseling records.

Fourth, defendant insists that the trial court committed error requiring reversal by allowing the prosecutor to call his employer as a rebuttal witness. We disagree. "Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

> Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the

same." The question whether rebuttal is proper depends on what proofs the defendant introduced and not on merely what the defendant testified about on cross-examination.

> [T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief. [*Id*. at 399.]

Defendant and his wife testified during his case in chief that they did not learn the time period during which the alleged sexual assaulted occurred until his January 1996 preliminary examination. Defendant also testified that, in order to assist himself and his wife prepare an alibi defense, he requested several weeks of time cards from his employer. The trial court permitted the prosecutor to call defendant's employer, who had also testified during defendant's case-in-chief, to testify that when defendant had first approached him several months before defendant's preliminary examination, he had requested his time card for the specific week during which the victim alleged the sexual assault. Because this testimony directly contradicted and impeached testimony introduced by defendant during his case-in-chief, we conclude that the trial court did not abuse its discretion in permitting this testimony on rebuttal.

Fifth, defendant contends that the trial court's refusal to permit him to question the victim's stepsister regarding an inquiry the victim allegedly made to her constituted an abuse of discretion. We disagree. This Court reviews the decision of a trial court regarding whether to admit evidence for an abuse of discretion. *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). During trial, defendant asked the stepsister whether the victim had "ever talk[ed] to you about anything involving sex?" When she responded affirmatively, defendant asked her what the victim had told her. However, before she could answer, an objection to her statement was sustained. Defendant profferred that he expected the stepsister to say that the victim had asked her whether she had ever entertained a sexual fantasy; defendant alleged that this testimony was relevant to his theory that the victim fabricated her allegations.

MRE 608 governs the admissibility of character evidence for witness impeachment:

> **(b) Specific Instances of Conduct**. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility … may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Eliciting this testimony from her stepsister represents an attempt by defendant to impeach the victim's credibility. However, MRE 608(b) forbids defendant's attempt to impeach the victim's credibility by

questioning a witness regarding a specific instance of the victim's conduct, without the witness first having testified regarding the victim's credibility, because such questioning represents an attempt to prove the victim's character by extrinsic evidence. Therefore, the court did not abuse its discretion by refusing to permit defendant's questioning of the victim's stepsister. If there was error, we find that it was harmless error in the instant circumstances.

Sixth, defendant argues that the trial court abused its discretion in addressing the admissibility of his offer of an application and order for ex parte suspension of visitation by his ex-wife. We disagree. Defendant wished to enter the application and order to establish how and when he first learned of the victim's allegations. However, testimony by defendant's wife had already established when she and defendant learned of the victim's allegations and that they learned of the allegations through the offered application and order. Therefore, we conclude that the trial court did not abuse its discretion by determining that the application and order themselves added nothing to defendant's wife's testimony and were therefore repetitive. MRE 403.

Seventh, defendant claims that the trial court erred when it denied his motion for a new trial. We disagree. A motion for new trial should be denied when competent evidence supports the jury's verdict. *King v Taylor Chrysler-Plymouth, Inc*, 184 Mich App 204, 210; 457 NW2d 42 (1990). The victim's testimony by itself represents competent evidence to support the jury's conviction of defendant on one count of CSC II. Although defendant presented alibi evidence contradicting the victim's accounts, the jury apparently found at least some of the victim's testimony credible. "In reviewing [the question whether a conviction is against the great weight of the evidence] on appeal, this Court looks to whether there was an abuse of discretion in denying the motion for a new trial rather than resolving credibility issues anew." *In re Robinson*, 180 Mich App 454, 463-464; 447 NW2d 765 (1989). The jury properly decides the issue of credibility. *Id*. at 464. Therefore, because competent evidence supported the jury's verdict, we conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Eighth, defendant suggests that the trial court erroneously neglected to instruct the jury according to CJI2d 4.5 regarding prior inconsistent statements. However, the record of defendant's objection on this ground does not reflect to what specific prior inconsistent statements defendant referred. Nor does defendant offer specific examples of prior inconsistent statements in his brief on appeal or cite any authority in support of his argument. Thus, because defendant has not produced sufficient evidence to permit this Court to review his argument, we decline to address this issue. *Joerger v Gordon Food, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997).

Ninth, defendant contends that the trial court erroneously instructed the jury pursuant to CJI2d 4.12 regarding the time of the alleged offense. We disagree. Because defendant failed to object below to the trial court's reading of this instruction to the jury, we need only review defendant's argument if failure to do so would result in manifest injustice. *People v Flowers*, 222 Mich App 732, 735; 565 NW2d 12 (1997). "Manifest injustice occurs where the erroneous or omitted instructions pertain to a basic and controlling issue in the case." *People v Johnson*, 187 Mich App 621, 628; 468 NW2d 307 (1991).

Defendant predicates his argument that the trial court erred by reading CJI2d 4.12-- which states that a prosecutor need not prove that a crime occurred on a particular date but only reasonably near that date-- on a use note regarding this instruction which suggests that courts should refrain from delivering it in cases involving clear evidence that the crime occurred at a particular time *and* where the case involves an alibi defense. Because the allegedly erroneous instruction relates to a dispositive issue, i.e., the alibi defense, manifest injustice would result from our failure to review defendant's argument. However, because the trial court subsequently instructed the jury regarding the requirement that the prosecutor prove beyond a reasonable doubt defendant's presence at the scene of the crime at the time the crimes were committed, we conclude that the instructions as a whole fairly presented the law regarding defendant's alibi and sufficiently protected his rights. Therefore, the trial court did not err by instructing the jury pursuant to CJI2d 4.12. *People v Perez-DeLeon*, 224 Mich App 43, 53; 568 NW2d 324 (1997).

Tenth, defendant argues that the trial court erred when it instructed the jury according to CJI2d 20.28, entitled "Uncharged Acts in Child Criminal Sexual Conduct Cases." We disagree. The lower court record reflects the uncharged acts relied on by the trial court for its decision to read CJI2d 20.28. Thus, we conclude that the trial court did not err by instructing the jury regarding uncharged acts.

Eleventh, defendant claims that the trial court's failure to instruct the jury on the requirement that it reach unanimous agreement regarding the act defendant committed in order to properly convict defendant constituted error requiring reversal. Defendant failed to object below on this ground. However, because this allegedly erroneous instruction relates to a dispositive issue, namely a criminal defendant's right to a unanimous guilty verdict, manifest injustice would result in the absence of our review. *Johnson*, *supra* at 628. Defendant bases his argument on the Supreme Court's holding in *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994):

> [W]hen the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is a reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. When neither of these factors is present, as in the case at bar, a general instruction to the jury that its verdict must be unanimous does not deprive the defendant of his right to a unanimous verdict. [*Id*. at 530.]

The prosecutor charged defendant with three counts of CSC II and set forth three discrete incidents to support these counts. The *Cooks* holding addressing situations involving multiple acts supporting a single charge thus does not apply to the instant case. Therefore, we conclude that the trial court's general unanimity instruction sufficiently apprised the jury of the applicable law and thus sufficiently protected defendant's rights.

Finally, defendant contends that the trial court erroneously refused the deliberating jury's request for transcripts. Although defendant failed to object below to the trial court's refusal to provide such testimony to the jury, a similarly unpreserved argument was considered by the Supreme Court in *People*

v Howe, 392 Mich 670, 678; 221 NW2d 350 (1974). MCR 6.414(H) governs jury review of trial testimony during deliberations:

> If, after beginning deliberation, the jury requests 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.

In *Howe*, the Court stated, "A trial court must exercise its discretion to ensure fairness and to refuse unreasonable requests; but it cannot simply refuse to grant the jury's request for fear of placing too much emphasis on the testimony of one or two witnesses." *Id*. at 676. In *People v Henry Smith*, 396 Mich 109; 240 NW2d 202 (1976), the Court stated that it was error to "completely foreclose the opportunity of having testimony reread" and that the harmless error doctrine was inapplicable to such a situation. *Id*. at 111.

We conclude that the trial court did not err in its denial of the jury's transcript request. The trial court reasonably refused the jury's request four hours into deliberations when such transcripts did not yet exist. Further, unlike in *Smith*, where the trial judge instructed the jury that "I will not reread any testimony, so don't ask for that.", *id*. at 110, the trial court here emphasized only that "that would not be the normal procedure". Such a statement by the trial court does not preclude the application of the abnormal or atypical procedure and does not seem to preclude such testimony in as complete and as absolute a manner as did the trial court in *Smith*. See *People v Johnson*, 124 Mich App 80, 89-90; 333 NW2d 585 (1983)(trial court's admonition that it "routinely" denied requests to reread testimony did not "foreclose completely" the opportunity to have testimony reread.); *People v Rodriguez*, 103 Mich App 161, 164 (1981)(dissent of J. Cavanagh), rev'd 411 Mich 872 (trial court's statement that it was "not inclined… in any way" to read back testimony did not "completely foreclose the opportunity of having testimony reread.").[1] The trial court's subsequent statement that, "Unfortunately, we've made great progress in technology but not quite to that stage, at this point, in this courthouse" further appears to keep open at least the possibility that a transcript would be provided if one eventually became available.[2] Additionally, we find that a contrary decision by the trial court, i.e. to reread the requested testimony to the jurors (given the availability of the transcript), would not likely have altered the verdict. In the absence of listening a second time to this testimony, the jurors here arrived at a verdict consistent with the testimony and evidence introduced at trial. We do not find that the specific testimony requested here by the jurors would have cast doubt on the logic of the verdict. See *People v Martin*, 77 Mich App 76, 78; 257 NW2d 668 (1977).

Affirmed.

/s/ Stephen J. Markman
/s/ Richard A. Griffin
/s/ William C. Whitbeck

[1] The Supreme Court reversed the Court of Appeals judgment, reversing defendant's conviction, explicitly for the reasons stated in the dissent.

[2] The trial court also stated that "You will have to rely on the testimony you heard when those individuals were testifying, your memory of those-- of that testimony." Cf. *Rodriguez* (dissent of J. Cavanagh), *supra*, at 164 ("This comment [by the court] … clearly was intended to impress upon the jurors the importance of their paying attention to the testimony.")