STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE EDWIN WEBSTER,

Defendant-Appellant.

UNPUBLISHED
June 9, 2000

No. 207046
Macomb Circuit Court
LC No. 96-002608-FC

Before: Holbrook, Jr., P.J., and Kelly and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced to fifteen to thirty years' imprisonment for one count of first-degree criminal sexual conduct. The trial court incorrectly sentenced defendant on the second count of first-degree criminal sexual conduct, as if defendant were convicted of second-degree criminal sexual conduct, to a term of ten to fifteen years' imprisonment.[1] We affirm.

Defendant's first argument on appeal is that insufficient evidence was introduced at trial to support his convictions of first-degree criminal sexual conduct. We disagree. This Court reviews an insufficiency of the evidence claim to determine whether the evidence, viewed in a light most favorable to the prosecution, was sufficient to justify a rational trier of fact in finding that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999); *People v Jones (On Rehearing)*, 201 Mich App 449, 451; 506 NW2d 542 (1993).

Defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), which provides, in pertinent part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> (a) That other person is under 13 years of age.

Here, the only element at issue on appeal is whether defendant engaged in sexual penetration with the complainant, his daughter, who was four years old at the time of the alleged incidents..

At trial, the then six-year-old complainant testified that she and her younger brother would visit defendant on Sundays at his residence. The complainant testified that while she was visiting defendant, he "stuck his finger up my pants" and "stuck his finger up my private." When asked to identify where her private parts are, the complainant pointed to the area of her vagina. The complainant further testified that her father took a bath with her and that he put his hand under the water and "stuck his one finger up my private." She testified that it hurt. The complainant then testified that while in the defendant's bedroom, defendant made the complainant "touch his privates" with her hand and with her mouth. The doctor who examined the complainant testified that he observed a "little notch" in the lining of her vagina that he considered to be a suspicious finding consistent with sexual abuse, but acknowledged that he could not conclude that the complainant had or had not been sexually abused based on that evidence. Although defendant contends that inconsistencies in the complainant's testimony render it incredible, credibility determinations are for the finder of fact and will not be resolved anew by this Court. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Given the testimony at trial, we find that the evidence was sufficient to allow a rational trier of fact to conclude that the elements of first-degree criminal sexual conduct were proven beyond a reasonable doubt.

Defendant next contends that the trial court erred in allowing the prosecutor to question Adrian Bullock regarding items recovered pursuant to a search warrant executed at the home where defendant and his girlfriend, Denise Fraser, were living. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1988). An abuse of discretion exists if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

At trial, the complainant testified that Fraser had videotaped defendant's sexual acts with the complainant. On direct examination by defense counsel, Bullock, Fraser's fifteen-year-old son, testified that he never saw a video camera at defendant's home. On cross-examination, after Bullock testified that there was no place in defendant's bedroom that a video camera could be hidden, the prosecutor questioned Bullock as to whether he was aware of the presence of twenty-five to thirty adult videos and marijuana that were discovered pursuant to a search warrant in defendant's bedroom. Defendant objected to the proposed line of questioning, but the trial court ruled that defendant "opened the door" by asking Bullock if there was a video camera in the house and found that the probative value of the testimony outweighed the prejudicial effect.

We conclude that the probative value of the challenged evidence, although slight, was not substantially outweighed by the danger of unfair prejudice. See MRE 401; MRE 403. We agree with the trial court that defendant opened the door with questions pertaining to Bullock's knowledge of what was in the house. Moreover, prior to closing arguments, the prosecutor read a stipulation to the jury stating that, at the time the search warrant was executed and the X-rated videos and marijuana were found in the bedroom, defendant was not living in the home. Additionally, when instructing the jury prior to its deliberations, the trial court gave the following instruction:

> You have heard testimony referring to X-rated videos and drugs, to wit, marijuana that were alleged to be found in Defendant's home. You are not to use this evidence to decide the guilt of the Defendant in this case. This evidence can only be used to show the extent to which Adrian Bullock knew the contents of the locked bedroom. Once again, you cannot use this evidence to determine whether or not the Defendant is guilty of the crime charged.

While we acknowledge that the challenged evidence was prejudicial, given the prosecutor's stipulation and the trial court's instruction regarding the proper use of the evidence, we do not believe that admission of the evidence resulted in unfair prejudice. See *People v Nelson*, 234 Mich App 454, 463; 594 NW2d 114 (1999). Jurors are presumed to follow the instructions they are given. *People v Torres*, 222 Mich App 411, 423; 564 NW2d 149 (1997). We conclude that while the trial court's decision was necessarily a close evidentiary question, it did not amount to an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Defendant next contends that the prosecutor's remarks during her opening statement regarding defendant and complainant's mother's former drug use constituted prosecutorial misconduct that deprived him of a fair trial. This Court reviews the prosecutor's remarks in context to determine whether defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

During her opening statement, the prosecutor made the following comments:

> Now, you're going to have to hear that her mother, [], has a voluminous amount of problems. She was addicted to drugs, as was the father. They had ongoing drug problems and disputes that have occurred, but none of that has any relevancy unless you believe somehow that has influenced this child to make up this story.

Following defense counsel's opening statement, the court instructed the jury, as it did prior to opening statements, that the attorneys' statements are not evidence. The next day, the court gave the following cautionary instruction to the jury:

> During the opening statement the Assistant Prosecuting Attorney commented about alleged drug use and domestic violence. The statements of the attorneys are not evidence. Only the sworn testimony you hear from the witness stand is the testimony. Is that clear with everybody?

Although the prosecutor's reference to defendant's drug usage was improper, we conclude that the court's instructions cured any resulting prejudice. See *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994). Accordingly, defendant was not denied a fair trial on the basis of prosecutorial misconduct.

Defendant's final argument on appeal is his sentence is disproportionate. We review the proportionality of a sentence for an abuse of discretion. *People v Phillips (On Rehearing)*, 203 Mich App 287, 290; 512 NW2d 62 (1994). A sentence constitutes an abuse of discretion when it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Honeyman*, 215 Mich App 687, 697; 546 NW2d 719 (1996). Sentences that fall within the recommended guidelines range are presumptively valid. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

Defendant contends that the trial court failed to consider several mitigating factors in sentencing him. Specifically, as the trial court noted at sentencing, several letters were written on behalf of defendant from friends, relatives, neighbors, and former employers. Additionally, defendant only has one prior misdemeanor as an adult, has a clean juvenile record, and is a high school graduate. However, the minimum term of defendant's sentence, fifteen years, is on the low end of the recommended guidelines range of ten to twenty-five years and is therefore presumptively valid. Moreover, in sentencing defendant, the court noted defendant's predatory behavior, the effect of that behavior on the victim, that defendant presents a threat to the community, and that he took advantage of a four-year-old. Given these considerations, we do not believe that the mitigating factors argued by defendant overcome the presumption that his sentences were valid and we conclude that defendant's sentence is not disproportionate.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Michael J. Kelly
/s/ Jeffrey G. Collins

[1] In its brief on appeal, the prosecution notes but does not challenge the sentencing error.