

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BENNETT SIPES,

Defendant-Appellant.

UNPUBLISHED
October 10, 2000

No. 212330
Oakland Circuit Court
LC No. 96-144186-FH

Before: O'Connell, P.J., and Kelly and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of second-degree criminal sexual conduct (CSC), MCL 750.520c; MSA 28.788(3), and two counts of fourth-degree CSC, MCL 750.520e; MSA 28.788(5). He was sentenced to concurrent prison terms of four to fifteen years each for the second-degree CSC convictions and 1-1/2 to 2 years each for the fourth-degree CSC convictions. He appeals as of right. We affirm the convictions and the sentences imposed for the second-degree convictions, but reverse in part and remand for resentencing for the fourth-degree CSC convictions.

Defendant was convicted of engaging in several acts of sexual contact with the victim, three of which occurred when the victim was under thirteen years of age and two when she was between the ages of thirteen and sixteen.

I

We first consider defendant's claim that reversal is required because of the admission of evidence concerning the victim's two conversations with friends before the last charged CSC incident, the victim's argument with her mother after that incident, and the victim's participation in counseling after the last incident. We find no basis for relief.

With regard to the evidence of the victim's conversations with friends, we conclude that defendant failed to preserve his claims that the evidence violated the trial court's pretrial ruling, or was otherwise inadmissible, because defendant neither objected to the testimony nor moved to strike the

testimony when it was introduced. MRE 103(a)(1). If defense counsel believed that the pretrial ruling was violated, a timely objection could have precluded the prosecutor's further questioning. *People v Badour*, 167 Mich App 186, 197; 421 NW2d 624 (1988), rev'd on other grounds 434 Mich 691 (1990).

Further, we hold that defendant has not established plain error affecting his substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). We construe the trial court's ruling that it was bound by *People v Rodriguez (On Remand)*, 216 Mich App 329, 549 NW2d 359 (1996), as precluding the prosecutor from introducing prior consistent statements of the victim to her friends for a rebuttal purpose related to recent fabrication or improper influence or motive under MRE 801(d)(1)(B).¹ A statement is an oral or written assertion, or nonverbal conduct, intended by the person as an assertion. MRE 801(a). The trial court's ruling did not identify the specific testimony that was excluded as an inadmissible prior statement under *Rodriguez (On Remand)*, *supra*. Further, the trial court did not exclude evidence about the conversations for any or all purposes. We consider the limited nature of the trial court's ruling on the record significant, because an important consideration when evidence is challenged is the purpose for the evidence. Evidence inadmissible for one purpose may be admitted for another purpose. *People v Bell*, 88 Mich App 345, 350; 276 NW2d 605 (1979); See also MRE 105; *People v Bahoda*, 448 Mich 261, 291 n 61; 531 NW2d 659 (1995).

In any event, the material question before us is whether admitting that the victim had conversations with her friends about defendant, without disclosing the specific content of those conversations, constituted plain error affecting substantial rights. *Carines, supra*. Giving due regard to the fact that the delayed manner in which the victim came forward with her accusations was used to attack her credibility (e.g., defense counsel remarked during closing argument, "[w]hy the wait to tell somebody that something happened"), as well as defense counsel's references during closing argument to evidence that a "skeleton in the closet" game was played during the first conversation to argue that "one lie led to another" when the victim started playing this game, we conclude that defendant has not established plain error, that is, an error that is clear or obvious. *Id.* at 763; and see *People v Wright*, 161 Mich App 682, 688; 411 NW2d 826 (1987). Without the evidence, the jury likely would have been left with a chronological and conceptual void regarding events that led to the accusations made by the victim. Cf. *People v Starr*, 457 Mich 490, 502; 577 NW2d 673 (1998), quoting *People v Vandervliet*, 444 Mich 52, 81; 508 NW2d 114 (1993). Furthermore, even if a plain error were shown, in light of defense counsel's use of the challenged evidence, and upon consideration of the trial evidence in its entirety, we are not persuaded that defendant has established that his substantial rights

¹ Defendant's assertion that a prior consistent statement must be made before the existence of any fact which could cause bias is incorrect. When evidence is offered to rebut a claim of improper motive under MRE 801(d)(1)(B), the prior consistent statement must be made before the time of that supposed motive to testify. *People v Jones*, 240 Mich App 704, 712; 613 NW2d 411 (2000). However, because our disposition of this issue is not dependent on whether the trial court's evidentiary ruling was correct, we need not address this precise issue.

were affected by the evidence in question. Cf. *People v Smith*, 456 Mich 543, 549, 554-555; 581 NW2d 654 (1998).

With regard to evidence concerning the victim's argument with her mother two days after the last charged CSC incident, we likewise find that defendant failed to properly preserve the issue with an appropriate objection or motion to strike. MRE 103(a)(1). Defendant has not shown plain error affecting his substantial rights. MRE 103(d); *Carines, supra* at 774. Plain error has not been shown because the record indicates that the delayed manner in which the victim made her accusation was an issue at trial. *Wright, supra* at 688. Further, defense counsel's use of the challenged evidence in closing argument, to suggest that the argument led the victim to make a false accusation (i.e., that the victim was going to get even with her mother) belies any claim that the evidence affected defendant's substantial rights.

Finally, we find no merit to defendant's claim that the prosecutor improperly elicited testimony that the victim began counseling after the last charged CSC incident for the purpose of suggesting that the victim had been sexually abused. Rather, the record discloses that this evidence was elicited by the trial court, without objection, in response to a juror's question. Further, we find that defendant has not established any plain error affecting his substantial rights. MRE 103(d); *Carines, supra* at 774. Regardless of the purpose of the juror's question, it is plain from the subsequent testimony of the victim's mother that the evidence concerning when the victim began counseling was related to credibility. Cf. *People v Watts*, 145 Mich App 760, 762-764; 378 NW2d 787 (1985); and see *Wright, supra* at 688. Indeed, defense counsel attacked the testimony of both the victim and the victim's mother at trial, using the mother's own alleged delay in acting on the victim's behalf upon learning of the accusations to support his argument.² Thus, having considered the record in its entirety, we conclude that defendant has not met his burden of showing that this unpreserved issue warrants relief.

II

Defendant next claims that reversal is required because of prosecutorial misconduct during both closing and rebuttal arguments. We disagree. The record reveals that defendant objected only to the prosecutor's remarks concerning the victim's conversations with her friends. We find that the trial court's instruction that the jurors rely on "their collective memories as to what the evidence is," which was given at the time of defense counsel's objection, and subsequent instruction that the lawyer's statements and arguments are not evidence, were sufficient to dispel any perceived error. The argument did not deprive defendant of a fair trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant's remaining allegations of error stemming from the prosecutor's remarks were not preserved for appeal because defendant did not object to the challenged remarks at trial. Examined in

² E.g., defense counsel remarked during closing argument, "why didn't she do something right away? Why didn't she call the police? Why didn't she take [the victim] to a doctor? Why didn't she go to a minister or a priest and say I've got this problem".

context, the challenged remarks do not afford a basis for relief. *Carines, supra* at 774; *Noble, supra* at 660. In particular, there is no basis for defendant's claim that the prosecutor's comments attacking the credibility of defendant's brother, Tim Sipes, lacked evidentiary support. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); see also *People v Johnson*, 174 Mich App 108, 112; 435 NW2d 465 (1989) (witness's relationship to party proper factor to consider on credibility issue). It was proper for the prosecutor to comment on the weakness of defendant's claim of alibi involving the last charged CSC incident. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). The record does not support defendant's claim that the prosecutor made an improper burden-shifting argument or misstated the law. In any event, the trial court's instructions addressing the jury's responsibility for deciding which witnesses to believe and the prosecutor's burden to "prove beyond a reasonable doubt that defendant was actually there when the alleged crime occurred" were sufficient to cure any perceived error. Cf. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). Finally, defendant's claim based on *People v Alexander*, 188 Mich App 96; 469 NW2d 10 (1991), lacks merit. The challenged remarks involved commentary on defendant's trial testimony, not the invocation of a Fifth Amendment right to remain silent. A prosecutor is free to argue the evidence and all reasonable inferences from the evidence." *Bahoda, supra* at 282, quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

III

Defendant also claims that he was denied a fair trial because the trial court pushed the jury to rush in its deliberations, thereby preventing it from giving the case the required scrutiny. We disagree. Defendant failed to preserve this issue by objecting at trial to the manner in which the court handled deliberations. Further, defendant has not shown any plain error affecting his substantial rights. *Carines, supra* at 774. The circumstances do not suggest that the trial court coerced a jury verdict. *People v Younger*, 380 Mich 678, 685; 158 NW2d 493 (1968); *People v Turner*, 213 Mich App 558, 583; 540 NW2d 728 (1995).³

IV

Defendant also claims that the trial court erred in denying his motion for a new trial on the basis that the jury verdict was against the great weight of the evidence. We disagree. At the time of defendant's motion, the trial court was permitted to act as a "thirteenth juror" and independently evaluate the credibility of trial witnesses under *People v Herbert*, 444 Mich 466; 511 NW2d 654 (1993), although that approach was to be made with great trepidation and reserve. *People v Plummer*, 229 Mich App 293, 306; 581 NW2d 753 (1998), quoting *People v Bart (On Remand)*, 220 Mich App 1, 13; 558 NW2d 449 (1996). The verdict was to be vacated only where a trial court did not find reasonable support in the evidence for the verdict, but rather concluded that the verdict was "more likely attributable to factors outside the record, such as passion, prejudice, sympathy, or other extraneous considerations." *Plummer, supra* at 306. Before defendant was sentenced, our Supreme Court

³ Although not dispositive of our resolution of this issue, we note that the trial court also denied a new trial on this ground.

rejected the "thirteenth juror" standard in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998), and made its newly-adopted limitations on *Herbert* prospective to cases not yet final as of the date of its decision.

Neither *Herbert* nor *Lemmon* provides that this Court may make a credibility determination. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Regardless of whether the trial court's decision is analyzed under *Herbert* or *Lemmon*, it is apparent that the court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant's argument claiming that the victim gave vague testimony concerning the sexual nature of the touching for the three second-degree CSC charges suggests that he is also challenging the trial court's refusal to direct a verdict of acquittal on those charges. However, because defendant has not briefed the issue in the context of applicable sufficiency of the evidence standards, we deem this issue abandoned. *People v Kent*, 194 Mich App 206, 210; 486 NW2d 110 (1992). In any event, upon de novo review, we find no error in the trial court's denial of a directed verdict. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). Viewed most favorably to the prosecution, the victim's testimony was sufficient to enable a rational trier of fact to find beyond a reasonable doubt that defendant engaged in sexual contact with regard to each of the charged counts. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); see also MCL 750.520a(k); MSA 28.788(1)(k); *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997); *People v Fisher*, 77 Mich App 6, 12-13; 257 NW2d 250 (1977). The victim's testimony did not require corroboration. MCL 750.520h; MSA 28.788(8).

V

Finally, defendant's sentencing claims provide no basis for relief. Because defendant did not object to the information in the presentence report regarding the Canada matter on the basis of accuracy or relevancy, appellate review of that matter is foreclosed. *People v Lawrence*, 206 Mich App 378, 380; 522 NW2d 654 (1994); *People v Sharp*, 192 Mich App 501, 504; 481 NW2d 773 (1992). Defendant likewise failed to object when an attorney was allowed to speak on behalf of the victim at sentencing and, therefore, failed to preserve his claim of error in that regard. In any event, we are not persuaded that the trial court's decision to allow the attorney to speak entitles him to resentencing. *People v Albert*, 207 Mich App 73, 74-75; 523 NW2d 825 (1994).

Nevertheless, we find that the sentences imposed for the fourth-degree CSC convictions are invalid in that the minimum terms exceed two-thirds of the maximum sentence allowed by statute. MCL 750.520e; MSA 28.788(5); *People v Tanner*, 387 Mich 683, 690; 199 NW2d 202 (1972). "Where a court imposes a sentence that is partially invalid, the Legislature has provided that the sentence is not to be 'wholly reversed and annulled,' but rather is to be set aside only 'in respect to the unlawful excess.'" *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994), quoting MCL 769.24; MSA 28.1094.

Here, there was no abuse of discretion in regard to the sentence imposed for each of the second-degree CSC convictions. Our review of the sentencing record and the court's reasons for

imposing the sentences fails to reveal any invalid aspect of those sentences. There was no legal flaw in the maximum sentences imposed for the fourth-degree CSC convictions. The only aspect of the sentences that was unlawful and subject to correction was the minimum sentences imposed for the fourth-degree CSC convictions. In accord with “the longstanding practice of both the Court of Appeals and the Supreme Court in dealing with *Tanner* cases,” we remand this case to the trial court for imposition of sixteen-month minimum terms of imprisonment for the fourth-degree CSC convictions. *Thomas, supra* 394.

We affirm defendant’s convictions and the sentences imposed for the second-degree CSC convictions. We reverse in part the sentences imposed for the fourth-degree CSC convictions and remand for imposition of sixteen-month minimum terms.

/s/ Peter D. O’Connell

/s/ Michael J. Kelly

/s/ William D. Whitbeck