STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant	UNPUBLISHED March 6, 2001
v	No. 218811 Otsego Circuit Court
JAMES EDWARD STRUBLE, Defendant-Appellee.	LC No. 98-002330-FC

Before: Murphy, P.J., and Griffin and Wilder, 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), involving his ten-year-old adopted daughter. The trial court sentenced defendant to concurrent terms of eight to twenty-five years' imprisonment on each count. Defendant appeals by right, and we affirm.

Defendant argues that the trial court abused its discretion by admitting hearsay testimony from the victim's cousin as a prior consistent statement under MRE 801(d)(1)(B).[1] We disagree.

At trial, the victim's cousin testified that during a conversation with the victim during which they were discussing their relationships with their fathers, the victim stated "you don't know what it is like to be abused" and "at least your father doesn't abuse you." The victim made these statements in response to her cousin's complaints about how poor her own relationship with her father was. Defendant objected and the trial court admitted the testimony under MRE 801(d)(1)(B), finding that the testimony was offered to rebut the express or implied charge of improper influence or motive by defendant.

The decision whether to admit or exclude evidence is within the trial court's sound discretion and will not be disturbed absent an abuse of that discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would conclude there is no

[1] Defendant also argues at length that the victim's cousin's testimony was inadmissible under MRE 803A, the tender years exception to the hearsay rule; however, because the trial court did not admit the testimony pursuant to that rule, we decline to address that argument.

justification or excuse for the ruling made. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

MRE 801(d)(1) provides:

> (d) A statement is not hearsay if –
>
> (1) The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) *consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive*, or (C) one of identification of a person made after perceiving the person . . . . [Emphasis added.]

Prior consistent statements of a witness are generally not admissible as substantive evidence. *People v Miller*, 165 Mich App 32, 49; 418 NW2d 668 (1987). Three exceptions to this rule exist where: (1) a statement is used to rebut a charge of influence, (2) there is a question whether a prior inconsistent statement was made, and (3) a witness has been impeached with a charge of recent fabrication. *People v Stricklin*, 162 Mich App 623, 628-629; 413 NW2d 457 (1987); *People v Davis*, 106 Mich App 351, 355; 308 NW2d 206 (1981).

Defendant contends that admission of the cousin's testimony was improper because the defense counsel did not allege a recent fabrication or improper influence. However, defendant's theory of the case was that the victim fabricated the entire incident at the behest of her mother. This theory was borne out by the testimony of a police officer who revealed that, during an interview of defendant, defendant expressed his belief that the victim's mother "put her up to it [the allegation]." In addition, other defense witnesses testified that the victim acted normally around defendant well after the alleged incident occurred, implying that the victim fabricated the allegations.

Defendant also argues that the victim's statements to her cousin were before the victim had a motive to fabricate. However, as the prosecutor correctly points out, the victim made the statement to her cousin in April 1997, about one and a half years before she told her mother about the alleged incident over Labor Day weekend in 1998. Further, although the victim's mother filed for divorce from defendant in January 1997, she was back together with defendant from September 1997 until January 1998. Thus, we conclude that the statement was made before the victim had any motive to fabricate at her mother's urging, and the trial court did not abuse its discretion in allowing the testimony.

Next, defendant argues that he was deprived of a fair trial when the prosecutor elicited unduly prejudicial testimony from the victim, her mother, and two police officers. We disagree.

Instances of alleged prosecutorial misconduct are reviewed to determined whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d

659 (1995); *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). Absent an objection to alleged prosecutorial misconduct at trial, this Court's review is foreclosed unless the prejudicial effect of the conduct is so serious that an objection or instruction would not have cured the prejudicial effect or a miscarriage of justice would result. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977).

Generally, prosecutors are accorded great latitude regarding arguments and conduct. *People v Rohn*, 98 Mich App 593, 596; 296 NW2d 315 (1980), overruled on other grounds *People v Perry*, 460 Mich 55, 64; 594 NW2d 477 (1999). Evidence offered against a party, by its very nature, is prejudicial or there would be no point in presenting it. *People v Fisher*, 449 Mich 441, 451; 537 NW2d 577 (1995). The pivotal consideration is whether the probative value of the testimony is substantially outweighed by unfair prejudice. *Id.* It is not prosecutorial misconduct to elicit admissible testimony. *People v Curry*, 175 Mich App 33, 44; 437 NW2d 310 (1989), *People v Thompson*, 111 Mich App 324, 333; 314 NW2d 606 (1981).

Defendant contends that testimony from two police officers relating defendant's statements to them about the allegations had no probative value and was unfairly prejudicial. Officer Claeys testified that after defendant denied the allegations of sexual abuse, he informed the officer that he thought the victim fabricated the story because "[h]er mother put her up to it." Deputy Winkel testified that while defendant was in police custody, defendant made statements indicating that it was his wife's fault that he was in jail and that he was "gonna get even with her." Defendant objected to the testimony from Deputy Winkel, but did not object to Officer Claey's testimony.

Contrary to defendant's contention, we find that the officers' testimony was relevant to explain defendant's theory of the case, that is, why defendant believed the victim made the allegations of sexual assault against him. Further, the testimony was not so prejudicial as to render it inadmissible. The testimony did not implicate defendant's guilt; in fact, it tended to exculpate him. Thus, introduction of the testimony by the prosecutor was not improper.

Defendant also claims that the prosecutor improperly questioned the victim's mother regarding defendant's substance abuse problems and his conduct while he was intoxicated. However, this testimony was relevant because it substantiated the victim's testimony that defendant smelled of alcohol and marijuana at the time of the assault, and it provided an indication of how defendant behaved when intoxicated. Further, the testimony was not more prejudicial than probative because it did not necessarily lead to the conclusion that defendant must have assaulted the victim as she claimed.

With respect to the victim's mother's testimony that a protective services order prohibited their son from residing with defendant, defendant did not object to this testimony. In any event, we agree with the prosecution that this isolated statement was volunteered by the witness rather than elicited by the prosecutor and, thus, did not constitute prosecutorial misconduct. See *People v Gonzales*, 193 Mich App 263, 265-267; 483 NW2d 458 (1992); *People v Hackey*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Finally, the victim's mother's testimony that she was surprised to hear about the assault was relevant evidence that tends to refute defendant's theory that the victim fabricated the assault at the prompting of her mother or had a motive to lie.

Defendant also claims the prosecutor's improperly sought the victim's testimony that she feared defendant would "beat" her if she told anyone about the assault and her that her fear was justified because defendant had physically abused her before. Defendant did not object to this line of questioning and we find no miscarriage of justice. The victim's testimony on this subject was relevant to explain the reason for her delay in reporting the incident, see *People v Yarger*, 193 Mich App 532, 538; 485 NW2d 119 (1992), and was not unduly prejudicial. Accordingly, we reject defendant's claim of prosecutorial misconduct. *Curry, supra; Thompson, supra.*

Lastly, defendant argues that his eight year minimum sentence is disproportionate and thus an abuse of discretion under the circumstances. We disagree. Matters of sentencing are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id*. at 635-636. The key test of proportionality is whether the defendant's sentence reflects the seriousness of the crime. *People v Lemons*, 454 Mich 234, 260; 562 NW2d 447 (1997); *People v McIntire*, 232 Mich App 71, 117; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147; 599 NW2d 102 (1999). A sentence imposed within the applicable judicial sentencing guidelines' recommended range is presumed neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

In this case, the judicial sentencing guidelines suggested a range of thirty-six to ninety-six months (three to eight years). Defendant's minimum sentence was ninety-six months (eight years). Thus, the sentence was presumptively proportionate. *Broden, supra*. Further, defendant has failed to overcome the presumption of proportionality. This case involved two instances of sexual penetration of defendant's young daughter. The fact that defendant did not have any prior felony convictions does not detract from the severity and heinousness of the offense and the permanent scar he has left on the victim as a result his conduct. *People v Granderson*, 212 Mich App 673, 681; 538 NW2d 471 (1995). Defendant's sentence was proportionate.

Defendant also contends that the statutory sentencing guidelines are the most recent evidence of legislative intent and the judicial sentencing guidelines are no longer indicative of proportionality. This claim is without merit. The judicial sentencing guidelines remain applicable to offenses committed before January 1, 1999. *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). The offense of which defendant was convicted was committed well before January 1, 1999. Accordingly, the judicial sentencing guidelines remain a barometer of proportionality for defendant's sentence.

Affirmed.

/s/ William B. Murphy
/s/ Richard A. Griffin
/s/ Kurtis T. Wilder