STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 23, 2002
V	No. 223286 Benzie Circuit Court
PETER DAVID CRANDON, Defendant-Appellant.	LC No. 98-001627-FC

Before: Wilder, P.J., and Griffin, and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(A). He was sentenced to eleven to twenty-four years' imprisonment. We affirm.

I. Facts and Proceedings

Defendant's conviction arose from defendant's sexual assault of his son's twelve-year-old girlfriend, who was a passenger on the school bus defendant drove. At trial, the victim testified that she sat directly behind defendant's while riding on the school bus. The victim also testified that she and her friend would talk to defendant while traveling to and from school on the bus and that defendant would give her packages of gum, cassettes, and poems. According to the victim, the conversations and the poems were about sex. The victim also testified she thought she was in love with defendant and that on one occasion while she was riding on the bus, defendant asked her to lean over so that he could see down her shirt. Testimony from the victim and the playground monitor also established that defendant and the victim would talk through the playground fence everyday during recess. The playground monitor also testified that defendant would wait in his car until the victim came outside for recess, at which point he would come over to the fence and talk to her.

On May 10, 1996, the victim spent the night at a friend's house, which was located right down the road from defendant. The victim testified that defendant had requested that she sneak out of the home so that they could have sex. However, because the victim did not wake up, she never met defendant that evening. The following day, the victim called her parents to inform them that she was going to spend the night at the same friend's house again, however, the victim knew that she could not stay at her friend's house that evening, and instead, she went to

defendant's house. There, the victim, defendant, and defendant's son watched television and later, the victim and defendant went to defendant's bedroom. The victim also testified that once in the bedroom, she and defendant engaged in oral sex, and that defendant tried to engage in sexual intercourse but stopped after she informed him that it hurt. According to the victim, defendant then retrieved some Vaseline and tried to engage in sexual intercourse again, but that he again stopped because it hurt. The victim testified that on each of these attempts at intercourse defendant's penis penetrated her vagina, and that before she fell asleep she noticed that she was bleeding in her genital area. The victim informed defendant about the bleeding, and he responded that he "shouldn't have done that," that maybe she had started her menstrual cycle, and that she could not tell anyone about what had occurred between them.

The victim further testified that after the encounter, she went to sleep with defendant's daughter in the daughter's bedroom, but that just before dawn, defendant woke her up, took her downstairs, and performed oral sex on her. Defendant's daughter testified that she was a very light sleeper and that because her bedroom did not have a door, but instead a piece of drywall and a blanket, she would have known if defendant had entered her bedroom in order to awaken the victim.

After arriving at home, the victim told her parents that defendant had picked her up from her friend's house at around midnight. The victim's father testified that he then called defendant and "asked him what in the hell he was doing picking [his] daughter up," and that defendant replied, "I didn't touch her, I didn't touch." The victim's father then testified that he notified the school and the police. When initially interviewed by the police, the victim denied any sexual abuse. Eventually, after an investigation by the school in which the victim again denied any sexual activity between herself and defendant, the victim informed two of her friends and a teacher at her school that she had engaged in sexual acts with defendant.

The Michigan State Police were contacted, and the State Police investigation resulted in the arrest of defendant for criminal sexual conduct involving penetration of a person under the age of thirteen, CSC I, MCL 750.520b(1)(A). The investigating officer testified that during the investigation she interviewed the victim three times, and each time the victim indicated that defendant sexually assaulted her. However, the investigating officer also testified that the victim's recount of the sexual abuse had minor inconsistencies.

At trial, Barbara Cross, a licensed social worker, testified that the victim had received counseling after the alleged sexual incidents with defendant, and that it was common for child sexual abuse victims to deny or delay reporting sexual abuse, and to have inconsistencies in their stories. According to Cross, this denial or delay happens because of the victim's guilt, fear, embarrassment, or belief that no one would believe that the sexual abuse occurred, or out of the victim's desire to protect the offender. Cross' testimony also established that when sexual abuse is reported by the victim, it is common for the victim to report it to a member of their peer group or to someone outside of their family. She also testified that it is not uncommon for a victim of sexual abuse to express feelings of love and affection toward the abuser. On cross-examination, defense counsel asked Cross if it was unusual for victims to give inconsistent statements after only one act of sexual abuse. Cross conceded that when there is a single act of sexual abuse, it is

more likely that the victim would provide consistent statements, however, she still stated that inconsistencies can occur even when there was only one single act of sexual abuse.

Following defendant's cross-examination of Cross, the prosecutor moved to recall the victim in order to allow her to testify about other sexual acts between herself and defendant. The prosecutor argued that defendant's cross-examination of Cross gave the jury the erroneous impression that there had been only one act of sexual abuse between the victim and defendant. The trial court permitted the victim to be recalled. On redirect examination, the victim testified that on three separate occasions before the charged offense, she had (1) rubbed her elbow back and forth over defendant's clothed penis, (2) performed oral sex on defendant, and (3) manually stimulated defendant's penis. In addition, the victim testified that defendant had digitally penetrated her vagina on one occasion, and that on yet another occasion, defendant had fondled her breasts. The victim testified that most of these sexual acts occurred either at the skating rink or while they were on their way home from the skating rink. The victim testified that defendant fondled her breasts at a movie theater. Defendant's son and the victim's friend subsequently testified that they never saw any sexual activity occur between defendant and the victim at the skating rink, on the way home from the skating rink, or at the movie theater.

Defendant also elicited testimony from the victim's friends that the victim had denied being sexually involved or sexually abused by defendant. In rebuttal, another of the victim's friend's was permitted to testify that the victim told him she and defendant had engaged in oral sex, and that defendant tried to penetrate her vagina with his penis but was not physically able to do so.

Following deliberations, the jury convicted defendant as charged and the trial court sentenced defendant to eleven to twenty-four years imprisonment. Defendant now appeals.

II. Other Acts Evidence

Defendant first argues that the trial court should have excluded testimony of other sexual contact between himself and the victim because the testimony was offered to show that he acted in conformity with his alleged previous behavior and that the testimony denied him a fair trial. We disagree. This Court reviews a trial court's decision to admit other acts evidence pursuant to MRE 404(b) for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998); *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000). An abuse of discretion is found when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *Id.*; *People v Ullah*, 216 Mich 669, 673; 550 NW2d 568 (1996).

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

> crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in this case.

In *People v VanderVliet*, 444 Mich 52, 74-75; 408 NW2d 114 (1993), our Supreme Court held that for evidence of other crimes, wrongs, or acts to be admissible under MRE 404(b) it must be (1) offered for a proper purpose rather than to prove the defendant's character or propensity to commit a crime, (2) relevant to an issue or fact of consequence at trial and (3) sufficiently probative to prevail under the balancing test of MRE 403. See also *People v Smith*, 243 Mich App 657, 670; 625 NW2d 96 (2000). In addition, if the evidence is admitted, either party may request a limiting instruction. *Id.*; *VanderVliet*, *supra*. Further, MRE 404(b)(1) is a rule of inclusion that includes a nonexclusive list of grounds on which evidence may be admitted. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); see also *People v Katt*, 248 Mich App 282, 303-304; ___ NW2d ___ (2002). Thus, MRE 404(b)(1) permits the admission of evidence on any ground that does not risk impermissible inferences of character to conduct, *id*, and the proper inquiry is not whether the testimony would be more prejudicial than probative, but rather "whether the probative value is substantially outweighed by the risk of unfair prejudice." *Starr*, *supra* at 499. In *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 NW2d 97 (1973), our Supreme Court observed that "[t]he probative value outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." See also *People v Sabin (After Remand)*, 463 Mich 43, 69-70; 614 NW2d 888 (2000).

In the instant case, defendant impeached the victim's testimony by eliciting testimony from Cross that it is less likely for sexual abuse victims to give inconsistent statements after only one instance of sexual abuse – thereby implying that the victim was not credible because she gave inconsistent statements about the only charged sexual incident between the victim and defendant. In response to this proper cross-examination, the prosecutor moved for the admission of similar-acts evidence between defendant and the victim in order to corroborate the victim's previous testimony and to dispel the notion that the victim's testimony was "incredible." *Sabin*, *supra* at 69-70; *DerMartzex*, *supra* at 413-414. The evidence was appropriately admitted because it was not introduced to show that the defendant must be guilty of the charged offense or because he is a bad person, *People v Jones*, 417 Mich 285, 287; 335 NW2d 465 (1983); *DerMartzex*, *supra* at 413-414; *People v Dreyer*, 177 Mich App 735, 738; 442 NW2d 764 (1989). Further, we note that the trial court provided the jury with the following cautionary instruction:

> You have heard evidence that was introduced to show that the defendant committed improper acts for which he is not on trial. If you believe this evidence, you must be very careful only to consider it for certain purposes. You may only think about whether this evidence tends to show (A) [t]hat any inconsistencies in [the victim's] testimony about the charged offense might be the result of there being more sexual incidents that are charged. (B) Whether [the victim's] denial of a sexual relationship might be the result of her investment in her alleged relationship with the defendant. And (C) [t]o held you judge the believability of the testimony regarding the acts for which the defendant in now on trial. *You must not consider this evidence for any other purpose.*

> *For example, you must not decide that it shows that the defendant is a bad person or that he is likely to commit crimes. You must not convict the defendant here because you think he is guilty of other improper conduct.* [Emphasis added.]

Therefore, because the victim's testimony regarding prior sexual acts between herself and defendant was "'part of the "principal transaction" necessary for the jury to weigh the victim's testimony,'" *Sabin*, *supra* at 70, quoting *Jones*, *supra* at 289, and since the jury was provided with a cautionary instruction mandating that the testimony could only be used in order to determine whether the victim's testimony was truthful and credible, *Starr*, *supra* at 496, 498, we conclude that the probative value of the victim's testimony regarding other instances of sexual intimacy with defendant was not substantially outweighed by the risk of unfair prejudice, *Starr*, supra at 499; *DerMartzex*, *supra* at 413-414. Consequently, the trial court did not abuse its discretion in admitted the prior acts evidence.

Further, we reject defendant's argument that because the prosecutor failed to notify defendant of its intent to use the other acts evidence pursuant to MRE 404(b)(2), the evidence should have been excluded. MRE 404(b)(2) states that the prosecution "shall provide reasonable notice in advance of trial, *or during trial if the court excuses pretrial notice on good cause shown*. . . ." Because the prosecutor sought to introduce the evidence only after the victim's testimony on cross-examination could have left the implication that the victim was not credible, we conclude that the trial court properly excused pretrial notice for good cause shown.

II. Hearsay and Rebuttal Testimony

Defendant next argues that the trial court abused its discretion by allowing one of the victim's friends to testify on rebuttal about a prior statement the victim made that she and defendant had engaged in oral sex and that defendant attempted to penetrate her vagina with his penis. Defendant claims that the rebuttal testimony was hearsay and also asserts that the prosecution "set up" the victim's testimony so that it could offer rebuttal testimony. We disagree. Because the rebuttal witness' testimony was not offered to prove the truth of the matter asserted (i.e., that the victim and defendant engaged in sexual acts), but rather to rehabilitate the victim's impeached credibility and to repel defendant's theory that the victim must have fabricated the allegations because she initially denied any sexual abuse, it was not hearsay. Instead, it was proper rebuttal testimony. *People v Pesquera*, 244 Mich App 305, 314-316; 625 NW2d 407 (2001); *People v Ortiz-Kehoe*, 237 Mich App 508, 519; 603 NW2d 802 (2000); *People v Griffin*, 235 Mich App 27, 38-39; 597 NW2d 176 (1999).

The crux of defendant's argument that the prosecution "set up" the testimony so it could offer rebuttal testimony seems to focus on the fact that the prosecutor failed to develop the evidence that the victim initially denied any sexual abuse during direct examination of the victim. While the prosecution may have a duty to provide defendant with any impeachment or exculpatory evidence "that might lead a jury to entertain a reasonable doubt about a defendant's guilt," *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998), citing *Brady v Maryland*, 373 US 83, 83 S Ct 1194; 10 L Ed 2d 215 (1963), *Giglio v United States*, 405 US 150, 154; 92 S Ct 763; 31 L Ed 2d 104 (1972), and *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481 (1985), such duty including the obligation to "disclose any information that would materially affect the credibility" of the witnesses, *Lester*, *supra* at 281,

citing *United States v Smith*, 316 US App DC 199, 202; 77 F3d 511 (1996), and *People v Murray*, 54 Mich App 723; 221 NW2d 468 (1974), defendant cites no case and we have not found one that requires the prosecution to use that evidence in its case in chief. Rather, the prosecution's duty is met by ensuring that the defense is aware of any evidence that "'may make the difference between conviction and acquittal.'" *Lester*, *supra*, quoting *Bagley*, *supra* at 676. It is for the defense to decide how to use that evidence in its trial strategy. See *People v Paris*, 166 Mich App 276, 279-280; 420 NW2d 184 (1988).

In the instant case, defendant's trial strategy was to undermine the reliability of the victim by calling friends of the victim to testify that she had denied being sexually involved with defendant. As a result, the prosecution presented testimony that was responsive to defendant's theory that the victim's testimony was unreliable, *Pesquera*, *supra* at 314, quoting *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996), and this testimony was "properly classified as rebuttal," *Figgures*, *supra.* The fact that the evidence tended to overlap the prosecution's case in chief does not prevent the rebuttal testimony from being presented. *Id*; see also *Pesquera*, *supra*, *Ortiz-Kehoe*, *supra*, and *Griffin*, *supra*, quoting *Figgures*, *supra*.

III. Sentencing

Finally, defendant argues that his eleven to twenty-four year sentence is disproportionate.[1] We disagree. This Court reviews sentencing proportionality issues for an abuse of discretion. *People v Cain*, 238 Mich App 95, 130; 605 NW2d 28 (1999), lv den 463 Mich 853 (2000). Here, the sentencing guidelines suggested a minimum sentence of eight to twenty years' imprisonment. Because defendant's minimum sentence of eleven years falls within the recommended guideline range, it is "presumptively neither severe nor unfairly disparate." *People v Lee*, 243 Mich App 163, 187; 622 NW2d 71 (2000), quoting *People v St John*, 230 Mich App 644, 650; 585 NW2d 849 (1998). In addition, we note that defendant's sentence adequately reflects the seriousness and nature of the crime committed, *People v Oliver*, 242 Mich App 92, 98; 617 Nw2d 721 (2000); *People v Rice (On Remand)*, 235 Mich App 429, 446; 597 NW2d 843 (1999), and that defendant has offered no unusual circumstances that would overcome the presumption of proportionality. *Lee*, *supra* at 187-188, citing *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Thus, the trial court properly exercised its discretion when it sentenced defendant to eleven to twenty-four years imprisonment.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski

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[1] Because defendant's charged offense occurred before January 1, 1999, defendant's sentence is controlled by the judicial guidelines, not the legislative guidelines. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).