STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 26, 2002
v	No. 228314 St. Clair Circuit Court
JAMES HOWARD WINCHESTER, SR., Defendant-Appellant.	LC No. 99-002764-FC

Before: White, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of second-degree criminal sexual conduct (CSC II), MCL 750.520b(1)(c), and was sentenced to concurrent prison terms of four to fifteen years for each conviction. Defendant appeals as of right. We affirm.

Defendant argues first that the trial court impermissibly broadened the scope of the informations when it instructed the jury that it must find that the charged offenses were committed between 1987 and 1996. Defendant failed to object to the jury instructions and, therefore, review is forfeited absent manifest injustice. MCL 768.29; *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Here, the date range in the jury instructions matched that stated on the informations. Further, the information, which included more specific time frames for each of the counts, was read to the jury. Therefore, we find no manifest injustice.

Defendant also argues that the trial court erred by denying defendant's motion to quash the informations. We review the denial of a motion to quash an information for abuse of discretion. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986). The purpose of a criminal information is to apprise a defendant of the "offense with which he is charged." *People v Rios*, 386 Mich 172, 175; 191 NW2d 297 (1971). A criminal information must be as specific as possible after a reasonably thorough investigation. *Naugle, supra* at 234; see MCR 6.112(D); MCL 767.51. However, an imprecise time allegation is acceptable for sexual offenses involving children in light of their difficulty in recalling precise dates. *Naugle, supra* at 234 n 1. Further, time is not an element of a sexual assault offense. *Id.* at 235. The trial court's finding that the two to three year time frame in each information complied with the rule in *Naugle* is not grossly violative of fact and logic, *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996), and therefore we find that the trial court did not abuse its discretion by denying the motion to quash.

Defendant next argues that the court erred by denying him permission to ask the victims about the physical, emotional, and educational effects of his alleged assaults. We disagree. Injury to the victims is not an element of any of the charges against defendant and, therefore, this evidence was not relevant to any fact at issue. MRE 402. Hence, we find no abuse of discretion in the trial court's evidentiary ruling. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant next argues that the trial court erred by denying his request to instruct the jury on the cognate lesser included offense of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e. *People v Corbiere*, 220 Mich App 260, 264-265; 559 NW2d 666 (1996). We review a request for instruction on a cognate included lesser misdemeanor offense for abuse of discretion. *People v Stephens*, 416 Mich 252, 265; 330 NW2d 675 (1982).

Lesser included cognate offenses must be consistent with the evidence and the defendant's theory of the case. *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Here, the offense of CSC IV was consistent with the evidence. However, defendant's theory of the case was that the charges against him were "exaggerations and imaginations" and were too old to be proven or disproven, not that he had satisfied one or more elements of CSC IV but not CSC I and II. Therefore, CSC IV was not an appropriate cognate included lesser offense in this case, and the court did not abuse its discretion in refusing defendant's request.

Defendant next makes three arguments regarding evidentiary rulings of the trial court. First, defendant argues the court prevented him from rehabilitating a witness by introduction of her prior consistent testimony. Any error in failing to allow defendant to present the prior testimony was harmless under the circumstance that the clear import of the witness' testimony was that she did not remember a time when defendant and the girls slept at her house at the same time, although it was possible.

Second, defendant argues the court erred in preventing him from eliciting prior inconsistent statements of the victims from two non-victim witnesses. In both cases, the court ruled that defendant had to challenge the victims directly with their inconsistent statements before admitting third-party proof of those statements. Although a witness need no longer be confronted with a prior inconsistent statement before its introduction, MRE 613(b), that is still the preferred method and the trial court had discretion to require it. *People v Parker*, 230 Mich App 677, 683; 584 NW2d 753 (1998). We further note that as to one complainant any error would be harmless because the jury acquitted as to that complainant, and as to the other complainant defendant did not seek to recall the witness after the victim testified. Therefore, we find no abuse of discretion in the trial court's ruling.

Finally, defendant argues that admission of testimony by four witnesses regarding out of court statements made by three victims constituted improper bolstering of those victims' accusations and testimony. The court gave a curative instruction to the jury regarding one witness' testimony, thereby rendering any error in its admission harmless, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and the testimony of another witness was harmless because it did not include any statements by the victims. However, the two other witnesses did repeat out-of-court statements made by the victims, and the court admonished the witnesses and prosecutor in response to defendant's objections.

As a general rule, neither a prosecutor nor anyone else is permitted to bolster a witness' testimony by referring to prior consistent statements of that witness. *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). However, prior consistent statements are admissible to rebut a charge of recent fabrication or as evidence of whether a witness has made a prior inconsistent statement. *People v Washington*, 100 Mich App 628, 632; 300 NW2d 347 (1980). The hearsay statements of the victims do not fit either of these exceptions. Therefore, their admission was an error of law. *Rosales, supra* at 308.

Errors in the admission of evidence are nonconstitutional and subject to harmless error analysis. *People v Toma*, 462 Mich 281, 297; 613 NW2d 694 (2000). A defendant must show the error more probably than not caused a miscarriage of justice. *Carines, supra* at 774. A miscarriage of justice results when the reliability of the verdict has been undermined. *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001). Whether that has occurred depends on "the nature of the error in light of the weight and strength of the untainted evidence." *Id*.

In *People v Straight*, 430 Mich 418; 424 NW2d 257 (1988), the Supreme Court faced this issue in a similar context. The defendant was convicted of CSC II involving a four-year-old girl. *Id.* at 420. The victim testified to the assault, and her mother and father also testified regarding statements she had made one month after the alleged incident. *Id.* at 421, n 1. Because the case was a "one-to-one credibility contest between the child and [the] defendant," the Court found admission of the parents' testimony constituted a miscarriage of justice requiring reversal because it improperly bolstered the child's accusation. *Id.* at 427-428. In so finding, the Court noted that the prosecution had emphasized the prohibited hearsay in its closing. *Id.* at 426-427.

This case was similarly a credibility contest between defendant and the victims because there were no witnesses to the alleged assaults. However, the prohibited hearsay in this case amounted to a few general words, as opposed to the specific, detailed testimony by the child's parents in *Straight.* The strength of the parents' testimony in *Straight* outweighed the untainted testimony of their five-year-old child and placed the reliability of the verdict in question. *Whittaker, supra* at 427. The minor character of the hearsay in this case was more than offset by the untainted testimony of the teenage victims. Therefore, the reliability of the verdict was not placed in question, and the error was harmless. *Id.*; *Carines, supra* at 774.

Affirmed.

/s/ Helene N. White
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald