STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 4, 2004
v	No. 245172 Wayne Circuit Court
GREGORY GILBERT GATTONI, Defendant-Appellant.	LC No. 02-029760-01

Before: Cooper, P.J., and Griffin and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts third-degree criminal sexual conduct, MCL 750.520d(1)(a), and one count fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). Defendant was sentenced to forty-eight months to fifteen years for each third-degree criminal sexual conduct conviction and twelve to twenty-four months for the fourth-degree criminal sexual conduct conviction. Defendant appeals as of right. We affirm.

Defendant first claims that he was denied his constitutional right to confrontation when the trial court refused to allow him to cross-examine the complaining witness about potential inconsistent statements. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant contends that prior false statements were improperly excluded. These statements involved (1) the victim alleging to have told a friend that she had told a counselor at school that defendant had improperly touched her, and (2) that she told another friend that she suffered two previous miscarriages, and (3) that the victim told a friend that a teacher was touching her in a way she did not like, but later told an investigator that the teacher was only making her feel uncomfortable.

In denying the statements to be admitted, the trial court held:

> I can't pass on something like what I might think was a false statement made, the conditions, whether it was-what the surrounding circumstances [were]. You'd be asking me to make a judgment on, first of all, the statements were made, and two, that they were not true. I don't know any of that. All I know is there had been no complaint ever filed against anybody, and the recantation of that.

> Anything other that that, about a conversation that was being held between people, where they would talk about something or brag about something, is not relevant. It doesn't go to show anything. So I believe that under the circumstances, that that should not be allowed for two reasons. One, is that it is not relevant; and the other things is, well I guess we can't argue the Rape Shield, only because there hasn't been any accusation that there were any prior contacts.

For the reasons set forth infra, we agree with the analysis of the trial court.

Defendant initially argues that the statements he tried to admit were admissible as prior false accusations in order to impeach the victim. Defendant seemingly also argued that they should be admitted as prior inconsistent statements. We disagree.

The right of cross-examination is not without limits. Neither the Confrontation Clause nor due process confers an unlimited right to cross-examine on all relevant evidence or subjects. *People v Abramski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). The right of cross-examination may bow to accommodate other legitimate interests. *Id*. at 138. Examples of such interests are the interests protected by the rape shield statute. Given the minimal relevance of this type of evidence in most cases, the prohibition of its use does not significantly diminish a defendant's right to confrontation. *People v Hackett*, 421 Mich 338, 345; 365 NW2d 120 (1984), quoting *People v Arenda*, 416 Mich 1, 8-11; 330 NW2d 814 (1982).

Our Supreme Court stated that while prior sexual conduct is irrelevant to generally impeach, it may be admitted to show prior false allegations. *People v Stanaway*, 446 Mich 643, 682 n 43; 521 NW2d 557 (1994). A defendant seeking to admit a prior false accusation must make a sufficient offer of proof. This offer of proof must make a showing of falsity. *Abramski*, *supra*, 198 Mich App 142. In this case, appellate counsel was forced to admit that trial counsel failed to make a sufficient offer of proof to demonstrate that these statements were made or that they were false. Therefore, the trial court did not abuse its discretion in not allowing defendant to use these statements, and it is questionable whether this issue has been properly preserved for appeal.

Defendant failed to present any evidence showing that any of the alleged statements were false. Otherwise the trial court would have conducted a trial within a trial to determine if the alleged statement was false. *Id*. at 274. This is exactly what defendant sought here. However, the defendant having failed to offer proof that the statements were false, failed to even prove that the statements were ever made. Consequently, the trial court was correct in its ruling that there was no evidence before it to presuppose that (1) any such statements were made, or (2) the validity of the statements. Therefore, the trial court properly excluded this hearsay evidence.

Further, one of the statements that defendant wished to use, dealt with potential miscarriages suffered by the complaining witness. We find, contrary to the holding of the trial court, that these statements clearly fall within the Rape Shield Statute. "The rape-shield statute acts as a bar to testimony regarding sexual subjects involving the complainant, unless such testimony falls outside the scope of the statute." *People v Ivers*, 459 Mich 320, 328; 587 NW2d 10 (1998). Defendant sights no reason why this subject would fall outside the scope of the statute besides false accusation. But there is no false acquisition of any kind in these statements.

These statements do not involve an accusation of rape at all. They are just general comments on past sexual conduct and sexual subjects by the victim. Prior sexual conduct is irrelevant for general impeachment purposes. *Stanaway*, *supra*, 446 Mich 682 n 43. Therefore, this statement is covered by the rape shield law and was properly excluded. MCL 750.520j(1); *Ivers*, *supra*, 459 Mich 328; *Stanaway*, *supra*, 446 Mich 682 n 43. Given the minimal relevance of this evidence, the prohibition of its use does not significantly diminish defendant's right to confrontation. *Hackett*, *supra*, 421 Mich 345.

Defendant's second claim is that the trial court abused its discretion when it refused to grant a new trial based on the great weight of the evidence. We disagree. A trial court's decision on a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). "[A] trial court may grant a motion for a new trial based on the great weight of the evidence only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Id*. at 28.

Defendant's argument for this issue centers on the credibility of witnesses. It is well settled that this Court cannot delve into credibility issues. *Gadomski*, *supra*, 232 Mich App 28. Conflicting testimony is an insufficient ground for a new trial, unless the testimony was so far impeached it was deprived of all probative value. *People v Musser*, 259 Mich App 215, 220; 673 NW2d 800 (2003); lv den, 468 Mich 941; 664 NW2d 219 (2003). The inconsistencies in the victim's testimony and the testimony contradicting the victim's testimony did not rise to the level of depriving all her testimony of all probative value. Therefore, defendant's convictions cannot be said to be against the great weight of the evidence. *Musser*, *supra*. Further, the evidence stressed by defendant does not preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. Therefore, the trial court properly denied defendant's motion for a new trial based on the great weight of the evidence. *Gadomski*, *supra*, 232 Mich App 28. Because defendant bases his argument solely upon the credibility of the witnesses, we hold that the court's ruling was not an abuse of discretion.

Finally, defendant claims that this Court must remand for resentencing on the three third-degree criminal sexual conduct convictions because the lower court used an incorrect sentencing grid when imposing sentence. We disagree. Issues concerning the proper application of the sentencing provisions, including MCL 777.1 *et seq*. and MCL 769.34, are reviewed de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001).

MCL 769.34(2) states, in part, that defendant's sentence shall be within the appropriate sentence range under the version of those sentencing guidelines in effect on the date the crime was committed. In the year 2000, the Legislature amended MCL 777.16y. This amendment changed MCL 750.520d from a class C felony to a class B felony. This amendment became effective on October 1, 2000. (See MCL 777.16y.) In this case, this presents a unique problem because it is unclear exactly when the crimes occurred. But even assuming that defendant's contention is true, that all three crimes occurred before October 1, 2000, we still could not remand for resentencing.

MCL 769.34(10) states, in pertinent part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Defendant concedes that his sentences are within the guidelines range for both the class B range and the class C range. This means that this Court must affirm the sentences unless there was a scoring error or inaccurate information relied upon. Neither exception exists. Defendant does not challenge the actual scoring of the Offense Variables or Prior Record Variables, but concedes that the points scored are correct. Therefore, no error in scoring existed. This leaves only inaccurate information in determining defendant's sentences. But defendant does not raise a challenge to any of the information contained in the Presentence Information Report. At sentencing, defense counsel specifically stated: "No your Honor. We've review it [information contained in the report], it is factually accurate as far as the defendant's information is concerned." Given that there is no error in scoring the sentencing guidelines or inaccurate information relied upon in the sentencing report and that defendant's sentences are within the appropriate range, this Court must affirm the sentences. MCL 769.34(10).

Defendant also argues that there are clear indications that the trial court would have seriously considered shorter minimum sentences had it used the class C grid. The court's statements at sentencing do not support this contention. The trial court was concerned with a separate issue that might have raised defendant to a higher guidelines range. The court made clear that if the higher range had applied, it would have downwardly departed to the forty-eight month minimums it imposed. The trial court concluded by stating "[b]ut I believe the sentence of 48 months to 15 years is an appropriate one given the circumstances of the offense and the offender." These statements show that the trial court actually considered all of the factors raised by defendant and decided appropriate sentences. They indicate that, in fact, the court would not have given a lower sentence had it used the lower guidelines range. Given these comments, the sentences imposed on defendant were carefully considered and appropriate.

Affirmed.

/s/ Jessica R. Cooper
/s/ Richard Allen Griffin
/s/ Stephen L. Borrello