STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 29, 2010
v MATTHEW JAMES ALBERT LUJAN, Defendant-Appellant.	No. 289694 Wayne Circuit Court LC No. 08-009804-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v JASON LEE HUNT, Defendant-Appellant.	No. 289708 Wayne Circuit Court LC No. 08-009804-FC

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

In Docket No. 289694, defendant, Matthew James Albert Lujan, appeals as of right from his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13 years of age) (CSC I), one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13 years of age) (CSC II), and two counts of third-degree sexual conduct, MCL 750.520d(1)(a) (person at least 13 years of age and under 16 years of age) (CSC III). He was sentenced to concurrent prison terms of 148 months to 35 years for each CSC I conviction, 6 to 15 years for the CSC II conviction, and 6 to 15 years for each CSC III conviction. We vacate one of Lujan's convictions of CSC I and otherwise affirm.

In Docket No. 289708, defendant, Jason Lee Hunt,[1] appeals as of right from his October 28, 2008 jury trial convictions of two counts of CSC I (person under 13 years of age), one count of CSC II (person under 13 years of age), and two counts of CSC III (person at least 13 years of age and under 16 years of age). Hunt was sentenced to concurrent prison terms of 148 months to 35 years for each CSC I conviction, 6 to 15 years for the CSC II conviction, and 6 to 15 years for each CSC III conviction. We affirm.

Defendant Matthew James Albert Lujan

Lujan first argues on appeal that his right to due process was violated by the victim's testimony at trial to more acts of misconduct than he was charged with in the information. Lujan contends that his convictions may have been based on allegations not found in the information, amounting to an improper de facto amendment of the information. Lujan additionally argues that the trial court erred in denying his motion for a new trial on this ground. The decision of whether to grant a new trial is in the trial court's discretion and is, therefore, reviewed for an abuse of discretion. *People v Brown*, 279 Mich App 116, 127; 755 NW2d 664 (2008); *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

The information charges Lujan with three counts of CSC I—"penis in genital opening," "fellatio," and "cunnilingus," with a child under 13 years old; one count of CSC II—sexual contact with a child under 13 years old; and two counts of CSC III—"penis in genital opening," and "fellatio," with a child at least 13 years old but less than 16 years old. With respect to the CSC I counts, the victim testified specifically regarding multiple acts of vaginal intercourse and one act of cunnilingus with Lujan while she was 12 years old.[2] With respect to the CSC II count, the victim testified that Lujan kissed her on her breast while she was 12 years old. With respect to the CSC III counts, the victim testified specifically that she engaged in fellatio and vaginal intercourse with Lujan during the event that included both defendants, while she was 13 years old; she also testified that she had sex with Lujan more than once after she turned 13 years old but could not remember any other specifics. We find no evidence on the record of alleged acts not found in the information. Moreover, Lujan does not give any indication in what way his defense would have differed if not for this alleged de facto amendment. We find there were no charges added to the information and no attending due process violation.

Lujan next argues that there was a separate due process violation resulting from the possibility that the jury's verdict was not unanimous. He argues that because the victim testified to more acts than he was charged with, there was a danger that the jurors convicted him without unanimously agreeing with respect to which acts supported which convictions. In order to preserve an issue of instructional error, a party must object before the jury deliberates. MCR 2.516(C); *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). Lujan did not object to the jury instructions until his motion for a new trial. This unpreserved issue is reviewed

[1] Defendants were tried together before one jury. This Court consolidated defendants' cases on appeal. *People v Lujan*, unpublished order of the Court of Appeals, entered January 23, 2009 (Docket Nos. 289694 & 289708).

[2] We will address the lack of evidence in support of the CSC I (fellatio) conviction *infra*.

for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

> [W]hen the state offers evidence of multiple acts by a defendant, each of which would satisfy the actus reus element of a single charged offense, the trial court is required to instruct the jury that it must unanimously agree on the same specific act if the acts are materially distinct or if there is reason to believe the jurors may be confused or disagree about the factual basis of the defendant's guilt. [*People v Cooks*, 446 Mich 503, 530; 521 NW2d 275 (1994).]

Further, alternative acts are materially distinct "where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives." *Id*. at 524. Multiple identical acts may amount to a "continuous course of conduct," supporting a single charge. *Id*. at 522, 528. The Court in *Cooks* also indicated that alternative acts could be rendered materially distinct if the defendant offers a "separate defense or materially distinct evidence of impeachment regarding any particular act." *Id*. at 528.

The victim in this case testified to multiple instances of vaginal intercourse with Lujan, both while she was 12 years old and 13 years old, but Lujan was charged with one count of CSC I (vaginal penetration) and one count of CSC III (vaginal penetration).[3]

The victim testified in detail regarding the first time she had sex with Lujan at his house, while 12 years old. She further testified that they had sex from "two times a week" to "a few times a month" over the next several months. Details were not elicited regarding this testimony. She briefly testified to one instance of sex with Lujan at Hunt's house while she was 12 years old. Lujan's defense, generally, was that the victim was fabricating the entire story, as a fantasy. Lujan's father testified that he did not remember the victim being at Lujan's house, and that there was no furniture in the basement where the victim testified that she had sex with Lujan.

The victim's testimony was clearly regarding a course of conduct on the part of Lujan. Her testimony did not present materially distinct evidence of multiple instances of vaginal intercourse with Lujan; she described two specific instances and added that there were many additional times. The details of the two specific instances were not different; it was unforced vaginal intercourse with no other person present. Lujan presented specific impeachment evidence regarding the victim's presence in his house, and additionally tried to impeach other components of her testimony as inconsistent with her prior statements. Nevertheless, the purpose of both courses of impeachment was to establish that the victim was lying about everything. "[T]he sole task of the jury was to determine the credibility of the victim with respect to the pattern of alleged conduct." *Cooks*, 446 Mich at 528. There was no need for a specific unanimity instruction regarding the CSC I (vaginal penetration) charge.

The victim also testified in detail regarding the incident when she engaged in sexual acts with both defendants, including vaginal intercourse with Lujan, after she turned 13 years of age.

[3] We find no evidence of multiple acts corresponding to the other charges against Lujan.

Additionally, she testified that she had vaginal intercourse with Lujan after she turned 13 "more than once," but that she did not remember "every specific time in exact detail." Lujan did not present any specific evidence to rebut this testimony, relying entirely on the theory the victim fabricated the entire relationship.

Because the incident involving both defendants is significantly different from the ongoing course of conduct with Lujan, there is some danger that the jury could consider these acts separately and not reach a unanimous verdict with respect to this count. Nevertheless, this danger is significantly undermined by the fact that Lujan did not present any specific defense to either piece of testimony. See *Cooks*, 446 Mich at 528. Further, there was testimony regarding only one specific instance of vaginal intercourse while the victim was 13; *no* details whatsoever were elicited regarding other acts of intercourse during this time. Finally, the only evidence of an act of fellatio with Lujan while the victim was 13 years old was during the same event involving both defendants. The jury convicted Lujan of this charge of CSC III (fellatio) as well, dramatically decreasing the chance that the jury was confused about which testimony supported the conviction for vaginal penetration. Lujan has not come forward with any evidence from which to conclude that the jurors could have disagreed or been confused by the evidence in support of the CSC III (vaginal penetration) conviction.

Lujan next argues that the jury's verdict was against the great weight of the evidence. A trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id*.

Lujan argues that the jury's verdict was against the great weight of the evidence because the victim's credibility was impeached to the point of holding no probative value. Lujan primarily bases his argument on the contention that the trial court should have properly considered the victim's credibility when considering his motion for a new trial because of the extent to which her testimony was impeached, citing *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998).

As noted by the Court in *Lemmon*, a trial judge cannot sit as a thirteenth juror. *Lemmon*, 456 Mich at 645. Only in "extraordinary circumstances" should the trial court set aside a jury verdict. *People v Horn*, 279 Mich App 31, 41 n 4; 755 NW2d 212 (2008), citing *Lemmon*, 456 Mich at 645-646. Further, contrary to Lujan's reading of *Lemmon*, issues of witness credibility "must remain with the jury." *Lemmon*, 456 Mich at 645. A trial court is only invited to overturn a jury verdict when there is a "real concern that an innocent person may have been convicted." *Id*. at 644 (internal quotation omitted). In order to disregard testimony in support of a verdict, it must contradict indisputable physical facts or law, or be patently incredible. *Id*. at 647.

Lujan strenuously argues that the victim's testimony was patently incredible. He argues that defense counsel's impeachment of her testimony was so thorough that a reasonable juror could not have believed her testimony. It is true that the victim's testimony was impeached on several occasions. Primarily, defense counsel questioned the victim regarding inconsistencies in detail between her testimony at trial, her testimony at the preliminary examination, and her statement to the police. These details pertained mostly to the exact time and date of certain

events, and how many instances of sexual contact she had with each defendant. The strongest direct evidence against the victim's credibility was that she invented a story about a bubble bath in her original statement to the police. However, the victim herself corrected this false story and gave an explanation to the jury regarding why she fabricated it. Similarly, Lujan cites to his father's testimony that he did not see the victim at his house during the time in question.

Contrary to Lujan's argument, that the cumulative effect of this impeachment evidence renders the victim's testimony incredible, this is precisely the type of credibility issue for the jury. Impeachment evidence concerning the details of testimony does not directly undermine the factual plausibility of the testimony. Rather, it raises a mere question of credibility, against which the jury must measure all other evidence. *Lemmon*, 456 Mich at 645. Likewise, a direct conflict in testimony is to be resolved by the trier of fact. *Id*. at 646.

Nevertheless, we note that there was no evidence presented at trial that the victim and Lujan engaged in fellatio while the victim was 12 years old, in support of one of the CSC I charges. She testified that she engaged in fellatio with Lujan at Hunt's Cherrygrove house, and that Hunt moved to the Cherrygrove house after she turned 13. She further testified that there was "[never] a time where [Lujan] put his penis in [her] mouth any place other than at [Hunt's] Cherrygrove house." Lujan does not raise this issue, but in the absence of *any* evidence of such an act, it would be a miscarriage of justice to allow this conviction to stand. See *Unger*, 278 Mich App at 232. Therefore, this conviction is vacated. As discussed above, there was evidence presented with respect to all other counts against Lujan. Thus, the jury's verdict was not against the great weight of the evidence, with the exception of the CSC I (fellatio) conviction.

Lujan next argues that there was insufficient evidence to prove beyond a reasonable doubt that the victim was under 13 years of age at the time of events charged. This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Further, this Court must defer to the fact finder's role in determining the weight of the evidence and the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). "[C]onflicts in the evidence must be resolved in favor of the prosecution." *Id*.

"A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . that other person is under 13 years of age." *People v Elston*, 462 Mich 751, 774; 614 NW2d 595 (2000), quoting MCL 750.520b(a)(1). Sexual penetration means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520(a)(p); *People v Wilkens*, 267 Mich App 728, 738-739; 705 NW2d 728 (2005).

The elements of CSC II are (a) sexual contact, (b) with a person under 13 years of age. MCL 750.520c(1)(a); *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Sexual contact is defined as the intentional touching of the victim's intimate parts or the clothing covering the victim's intimate parts if the "touching can reasonably be construed as being for the purpose of sexual arousal or gratification." *People v Piper*, 223 Mich App 642, 645; 567 NW2d

483 (1997), quoting MCL 750.520a(q). Intimate parts "includes the primary genital area, groin, inner thigh, buttock, or breast." MCL 750.520a(e).

The victim specifically testified that Lujan had vaginal intercourse with her on October 22, 2005, and kissed her on her breast shortly before that, when she was 12 years old. She stated that she remembered that it was right before Halloween because it is "one of [her] favorite holidays." On cross-examination, it was brought out that the victim told the police that the first instance of intercourse happened after school, around 4:00 p.m., or about an hour after she got out of school. Defense counsel established that October 22, 2005, was in fact a Saturday. The victim then testified that the first encounter must have happened after a "Saturday detention." On redirect examination, the prosecutor elicited a clarification from the victim that she knew that it happened before Halloween 2005, but got the date wrong.

The victim also testified on direct examination that she was regularly visiting Lujan's house and making out with him in the days and weeks leading up to October 22, 2005. She testified that she would usually go over in the afternoon, after school. Further, she testified that this relationship started shortly after Hunt's wedding, which took place in August, 2005. The victim did not turn 13 years of age until the following July, 2006. The victim's mother testified that she told the police the relationship started in 2006, but that she did not question her daughter very carefully. Further, Lujan's father testified that the victim was only at his house during this period of time a handful of times.

There was no indication that the victim was confused regarding the year Lujan's conduct began, or how old she was at the time, despite her possible confusion over the exact date and time of certain events. No reasonable juror could interpret her testimony—on direct and cross-examination—as confusion over whether she was 12 years old at the time of the incident. To the extent that there was a credibility determination to be made to resolve conflicts in the testimony, that is the role of the jury. *Fletcher*, 260 Mich App at 562. Lujan has not demonstrated that, viewing the evidence in the light most favorable to the prosecutor, there was insufficient evidence to prove beyond a reasonable doubt that the victim was 12 years old at the time of Lujan's criminal conduct.

Defendant Jason Lee Hunt

Hunt argues on appeal that the trial court improperly limited the victim's testimony by excluding evidence, pursuant to MCL 750.520j(1), of the fact that the victim originally visited her school counselor—to whom she eventually disclosed defendants' behavior—because she feared she might be pregnant, by someone other than defendants.

A party must object to a trial court's evidentiary ruling at trial in order to preserve the issue for appeal. MRE 103(a)(1); *People v Smith*, 243 Mich App 657, 669; 625 NW2d 46 (2000). The ground for the objection on appeal must be the same as at trial. MRE 103(a)(1); *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). On appeal, the prosecutor argues that Hunt did not preserve this issue for review because Hunt's defense counsel stated that he had "no position" on the question during trial. While Hunt's counsel did not address this question before the trial court, Lujan's counsel objected and argued with respect to this issue. This Court has previously held that where a codefendant raises an objection and the trial court's ruling affects both defendants, this Court may "decline to regard the technicality of

[a] defendant's lawyer failing to join in the objection as failing to preserve [the] issue." *People v Griffin*, 235 Mich App 27, 41 n 4; 597 NW2d 176 (1999), overruled in part on other grounds by *People v Thompson*, 477 Mich 146 (2007). Further, this Court may consider a claim of constitutional error where the error could have been decisive of the outcome. *Id*. Thus, we elect to address this issue because it bears on Hunt's constitutional rights and the objection and ruling at trial pertained equally to both defendants in this case.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Constitutional questions and questions of statutory interpretation are questions of law reviewed de novo. *People v McCuller*, 479 Mich 672, 681; 739 NW2d 563 (2007). A court abuses its discretion when it selects a course outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).

On appeal, Hunt first contends that MCL 750.520j(1) was inapplicable because the proposed testimony was evidence of the victim's reason for disclosure rather than evidence of a specific instance of sexual conduct. Hunt neglects to consider the possibility that the testimony could be evidence of both. Clearly, evidence of a suspected pregnancy *is* evidence of, at least, a specific instance of sexual conduct.

Alternatively, Hunt argues that the exclusion of this evidence was a violation of due process because the prosecutor took advantage of the exclusion and argued to the jury that the victim's disclosure came as a result of pent-up feelings regarding defendants' conduct and that she suddenly felt compelled to confide in someone and told the counselor. Hunt argues that the jury should have been permitted to know that the victim only made disclosures regarding defendants after coming back to the counselor on a second day. Hunt argues that danger of a due process violation outweighs the applicability of MCL 750.520j(1) in this case.

The victim testified that she disclosed the events pertinent to defendants to the counselor because she had come to realize that Lujan did not really love her and that what he had done with her was wrong. She said that not telling anyone was "eating her on the inside." This was the proferred explanation for why the victim did not disclose for more than two years. The prosecutor argued directly from this evidence that the victim realized defendants' actions were wrong and felt compelled to finally disclose the events to her counselor.

The crux of Hunt's argument on appeal is that the testimony, as presented, might permit the jury to draw the mistaken impression that the victim told the counselor about the sexual incidents only because she was internally struggling with them. Hunt argues that, "she may have instead, after thinking overnight, gotten back at Lujan." We observe, however, that there is no necessary logical connection between the victim's testimony and her motivation, to be illuminated by the testimony in question. She could have been equally "getting back" at Lujan or Hunt by coming independently to the counselor or thinking of it after her first meeting with the counselor. There were no unspoken implications or intimations to be filled in by the jury about the victim's motivations created by the missing information regarding the first visit. Rather, the victim testified directly that her motivation for disclosing was that she realized the conduct was wrong and wanted to get it off her chest. The jury was free to disbelieve this testimony, but there was no hole in the testimony that invited unreasonable speculation by the jury. Therefore, we find Hunt's argument to be unavailing.

Hunt also briefly argues that he was denied the opportunity to fully confront the victim as a witness. He argues that because evidence of her original disclosure was relevant and material, it was a constitutional violation to exclude that evidence, despite the fact that it was excluded pursuant to statute. Hunt cites *People v Adamski*, 198 Mich App 133; 497 NW2d 546 (1993), in which this Court stated that the defendant's right of confrontation trumped the psychologist-patient privilege where defense counsel sought to impeach the victim with statements she made that seemed to exonerate the defendant. *Adamski*, 198 Mich App 137-138. However, Hunt has not demonstrated that the evidence he sought to have presented to the jury bore on the victim's credibility or motivation. There is no claim of direct impeachment, as in the *Adamski* case. This argument is also unavailing.

Affirmed with respect to Hunt. With respect to Lujan, affirmed in part, vacated in part, and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald