STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 10, 2011
v	No. 294899 Livingston Circuit Court
RANDY WILLIAM STRONG, Defendant-Appellant.	LC No. 08-017538-FH

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim younger than 13). The trial court sentenced defendant to a term of five years' probation, with one year to be served in jail. Defendant appeals as of right. We affirm.

The victim, who was 18 years of age at the time of trial, testified that defendant had commenced a pattern of sexual contact with the victim on December 31, 2001 or January 1 2002, when the victim was 10-years-old. At either age nine or ten, the victim met defendant, who had a lengthy friendship with the victim's father; defendant initially began visiting often and spending some nights at the victim's house, and shortly thereafter defendant moved into the same house as the victim and his parents, for at least a month or so.[1] Defendant first slept on a couch, and later moved into the victim's bedroom, where he occupied a lower bunk bed.

The victim and defendant shared a friendly relationship and spent a lot of time together. The victim described defendant "[]as . . . one of my best friends for awhile," "[h]e used to take me places, buy me anything I really wanted. Always was there to talk with me. Always nice to me." The victim explained that he slept in the same bunk as defendant on some occasions, usually because the victim "would play video games . . . on the bottom bunk and there's many times where I would fall asleep on the bottom bunk." Defendant initiated physical contact with the victim in the form of frequent "back massages and foot massages," which the victim enjoyed.

[1] At trial, the victim estimated that defendant had "stayed [overnight] frequently for about a year and he didn't live there long. He just lived there for probably around a month."

The victim recalled as follows at trial the first instance of inappropriate contact by defendant, which took place when the victim was in fifth grade:

> Well, it was on a New Year's and I was laying on the bottom bunk with [defendant]. And . . . he was massaging my back like he always did 'cause he . . . did it like quite a bit. And then he like started going like under my clothes and started getting' closer to my like groin area. And then he started massaging my penis. And I remember him telling me specifically not to say anything to my parents. And I listened to him 'cause I thought he was my friend and should trust him. But that's when it all first started.

In the victim's estimation, defendant made similar contacts with the victim's penis "[d]efinitely 10 or more times."[2]

The victim testified that he "didn't know what was right or wrong," and that he did not reveal the sexual contacts to his parents because he "thought . . . [defendant] was [his] friend and . . . to trust him." However, at age 12 or 13 the victim did reveal the sexual contact to a trusted friend, then to his "first real girlfriend," his best friend, and his second girlfriend; the victim asked each of his friends "not to say anything 'cause I was embarrassed about it." The first adult the victim told was a counselor with whom he felt comfortable, and at her urging the victim informed his parents of defendant's sexual contacts. Not long after the inappropriate contacts with the victim, defendant moved out of the house, and the victim did not see defendant again until the CSC II charge at issue arose.

Defendant detailed at trial his relationship with the victim's father and his reacquaintance with the victim's parents around April 2000, after which defendant visited the victim's parents on approximately a weekly basis. Defendant testified that he slept overnight at the victim's parents' house "[a] total of probably six times over a two year period," initially on a living room couch, and then on a bottom bunk in the victim's room. According to defendant, on two occasions he awoke to find the victim in bed with him, he related his discomfort about the instances to the victim's parents, and he ceased spending nights at the residence until September 2002, when he moved in with the family for a two-week period because he "couldn't generate enough money for rent" elsewhere. After moving in with the victim's family, defendant denied ever having gone "up to [the victim's] room," but averred that the victim came down to the basement and climbed into bed with defendant as he slept, and defendant ordered the victim back upstairs. Defendant also disputed that he had ever inappropriately touched the victim.[3]

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[2] At some point during defendant's residency at the victim's house, the victim's and defendant's bedroom was relocated to the basement of the house. The victim believed that inappropriate touchings had occurred in both the upstairs and basement bedrooms.

[3] Defendant testified that at some point while at the victim's house, the victim's parents "were going through marital problems and [the victim] was very upset," so defendant "would hug [the victim] in comfort at times when he was upset and he put his arm around me too." Defendant denied telling a deputy who interviewed him after the sexual contact allegations surfaced that he

Defendant left the victim's family's house permanently when he received a note from the victim's father advising him to "either . . . pay rent or move out." On December 31, 2001, defendant lived in Fenton and did not have contact with any members of the victim's family on that date or the next day, and on December 31, 2002, defendant lived in a Detroit house that his brother owned.

Defendant first challenges the sufficiency of the evidence supporting his CSC II conviction, primarily on the ground that "[t]he cumulative effect of the [victim's] uncertain testimony," especially with respect to the potential alleged offense dates, "casts a cloud of doubt over the assertion that this act ever occurred." Defendant moved for a directed verdict of acquittal at the close of the prosecutor's case in chief, which the circuit court denied. In reviewing a criminal defendant's challenge to the sufficiency of the evidence, or a court's denial of a motion for a directed verdict of acquittal, this Court considers de novo the evidence presented in the light most favorable to the prosecution to determine whether a reasonable juror could find the defendant's guilt was proven beyond a reasonable doubt. *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003); *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000). This Court must draw all reasonable inferences and make credibility choices in support of the jury's verdict, and will not interfere with the factfinder's role in determining witness credibility or the weight of the evidence. *Id.* at 400; *People v Elkhoja*, 251 Mich App 417, 442; 651 NW2d 408 (2002), vacated in part on other grounds 467 Mich 916 (2003).

As reflected in the plain statutory language comprising MCL 750.520c(1)(a), "[t]he crime of second-degree criminal sexual conduct requires the prosecution to show that respondent engaged in sexual contact with a person under the age of thirteen years." *In re Ayres*, 239 Mich App 8, 24; 608 NW2d 132 (1999). In MCL 750.520a(q), the Legislature defined "sexual contact," in pertinent part, as

> includ[ing] the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, [or] done for a sexual purpose . . . .

Viewed in the light most favorable to the prosecution, the victim's trial recitation of the first occasion on which defendant massaged the victim's penis amply allowed a rational jury to find beyond a reasonable doubt that defendant intentionally touched the 10-year-old victim's penis "for the purpose of sexual arousal or gratification." MCL 750.520a(q); *Riley*, 468 Mich at 139-140; *Nowack*, 462 Mich at 399-400. Notably, the victim's trial testimony substantiating the details of defendant's sexual contacts remained consistent, and the victim insisted that the sexual contact occurred at least 10 times, all before he reached the age of 13.

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rubbed the victim's back, insisting at trial that "I told [the deputy] that when I hug I have a habit of rubbing."

In defendant's view, the victim's inability to pinpoint the year of the charged abuse or estimate the duration of defendant's tenancy in the same house as the victim entirely undercut the probative value of the victim's testimony, especially in light of the alibi evidence defendant introduced. At trial, in the course of defense counsel's many inquiries about various time periods, the victim wavered only once from his belief that the first instance of defendant's massaging of his penis occurred on either December 31, 2001 or January 1, 2002, and that the subsequent sexual contacts took place in 2002. Defendant highlights on appeal discrepancies between the victim's preliminary examination recollections that defendant's abuse began at a later date, on either December 31, 2002 or January 1, 2003, and that defendant lived with the victim's family for six months, instead of a month as the victim remembered at trial. During cross-examination at trial, the victim explained giving the wrong first abuse date at the preliminary examination, "I really don't know the exact time. . . . [T]hen [at the preliminary examination] it was just like me assuming . . . when it could happen. I never really thought about it too hard about the exact date." He added that at the time of the preliminary examination he had not yet "really review[ed] the facts to [sic] well," but that since then he "ha[d] put a lot more facts into my head and . . . I've thought about it a lot more clearly . . . ." Furthermore, the testimony of each of the victim's parents confirmed the general period in which defendant reappeared in their lives, began visiting and staying overnight, and eventually moved in for a brief time. The parents also echoed the victim's trial testimony that defendant had slept in the victim's room, and that they had seen the victim and defendant sleeping in the same bunk bed. The prosecutor additionally introduced testimony from the four friends to whom the victim had first revealed an allegation against defendant.

"[U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998) (internal quotation omitted). In this case, the victim maintained a consistent account of defendant's sexual contacts with him, and the victim's parents confirmed many aspects of the victim's testimony. The fact that defense counsel elicited moments of inconsistency from the victim about the precise date of defendant's sexual contacts did not "deprive[] [the victim's testimony] of all probative value," and no indication exists that the testimony "contradicted indisputable physical facts or defied physical realities." *Id*. at 646. The jury thus properly weighed the credibility of the victim's account and defendant's denials and alibi testimony, and we will not revisit the jury's credibility determinations. In summary, the trial court correctly denied defendant's motion for a directed verdict, and sufficient evidence supported defendant's CSC II conviction.

In a related appellate contention, defendant asserts that the trial court injected error requiring reversal when it "instructed the jury that the prosecution doesn't have to prove [the] time [and offense date] beyond a reasonable doubt." "Claims of instructional error are generally reviewed de novo by this Court, but the trial court's determination that a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

In another CSC case involving a child victim, this Court reemphasized the following pertinent principles concerning the offense date and time:

> An information is required to contain the "time of the offense as near as may be"; however, "(n)o variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.45(1)(b). Time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990); *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987); *People v McConnell*, 122 Mich App 208, 212; 332 NW2d 408 (1982), rev'd on other grounds 420 Mich 852 (1984); *People v Bowyer*, 108 Mich App 517, 523; 310 NW2d 445 (1981).[13] Moreover, an alibi defense does not make time of the essence. *McConnell*, *supra* at 212-213, citing *People v Smith*, 58 Mich App 76; 227 NW2d 233 (1975).

[13] Additional support for our ruling is found in *People v Naugle*, 152 Mich App 227, 235; 393 NW2d 592 (1986) (rejecting argument that the prosecution failed to establish dates of offenses beyond a reasonable doubt because time is not an element in sexual assault offenses), and *People v Miller*, 165 Mich App 32, 47; 418 NW2d 668 (1987), aff'd on remand 186 Mich App 660 (1991) (because time is not an element in sexual assault offenses, the defendant was not prejudiced in preparing a defense). [*Dobek*, 274 Mich App at 83.]

Here, the trial court instructed the jury that the prosecutor bore the burden to prove all elements of the CSC II charge beyond a reasonable doubt, including that "the Defendant intentionally touched [the victim's] genital area, penis, or groin," "this was done for . . ., or could reasonably be construed as having been done, for sexual purposes," and the victim "was less than 13 years old at the time of the alleged act." The court clarified that "[w]ith respect to time, place and venue," "[t]he prosecutor must also prove beyond a reasonable doubt that the crime occurred within Livingston County. The prosecutor is not required to prove the time or date of a sexual assault offense beyond a reasonable doubt." The trial court's instructions accurately summarized the applicable law, as reflected in this Court's analysis in *Dobek* of the defendant's criticism that the trial court had erroneously advised the jury "time was not an element of the crime of criminal sexual conduct and that the prosecution need not prove the date or time of the offenses beyond a reasonable doubt," 274 Mich App at 82:

> In light of the caselaw and MCL 767.45(1)(b), we hold that, because this was a criminal sexual conduct case involving a child victim, there was no error relative to the trial court's multiple instructions to the jury regarding the dates of the offenses. We do observe that, in the context of this case, time was somewhat of the essence because the charges were based on the victim's being under the age of 13. There can be no dispute that the prosecutor had to prove beyond a reasonable doubt that the offenses occurred before the victim turned 13 years old. However, the jury was specifically instructed that the prosecution had that burden, and when the trial court addressed the jury's notes, it reminded the jury that it had to find that the elements of the crimes, as previously instructed, were proven beyond a reasonable doubt. The jury did not communicate any confusion regarding the date of offense instruction as it related to the instruction that the prosecutor was required to prove beyond a reasonable doubt that the victim was under 13 when the offenses occurred. Reversal is unwarranted. [*Id*. at 84.]

Under the circumstances of this case, no error requiring reversal exists because the trial court's instructions "sufficiently protected the rights of the defendant and fairly presented the triable issues to the jury." *Id*. at 82.

Defendant lastly complains that the court deprived him of "a fair trial by allowing [the victim's sister] to take the witness stand and testify after she sat in the courtroom and listened to the testimony of other prosecution witnesses and Defendant['s] . . . own testimony in violation of" a court sequestration order. When the prosecutor voiced at trial her intent to call the victim's sister as a rebuttal witness, defendant objected on the ground that the sister had spent most of trial in the courtroom gallery, but raised no constitutional objection to the sister's proposed rebuttal testimony. We therefore review for an abuse of discretion the trial court's ruling to permit the victim's sister's rebuttal testimony, but we consider defendant's unpreserved constitutional claim of error only to ascertain whether any plain error affected defendant's substantial rights. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996); *People v Williams*, 245 Mich App 427, 430-431; 628 NW2d 80 (2001).

Shortly before trial testimony began, the trial court ordered witness exclusion or sequestration, as contemplated in MRE 615: "At the request of a party the court may order witnesses excluded so that they cannot hear the testimony of other witnesses." "It is well settled that the decision to exclude the testimony of a witness who has *violated* a sequestration order is within the trial court's discretion. A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice has resulted." *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985) (emphasis added). Here, the victim's sister did not appear on either the prosecution or defense witness lists, the prosecutor maintained at trial that she had not anticipated calling the sister as a witness until hearing a portion of defendant's testimony at trial, and defendant does not suggest on appeal that the prosecutor knew or should have known she might have to present the sister's testimony. Because the victim's sister did not fall within the category of potential or anticipated trial witnesses, her attendance at trial did not violate the court's sequestration order.

"Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *Figgures*, 451 Mich at 398. "Rebuttal evidence is admissible to contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same. The question whether rebuttal is proper depends on what proofs the defendant introduced . . . ." *Id*. at 399 (internal quotation omitted). "[T]he test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. As long as evidence is responsive to material presented by the defense, it is properly classified as rebuttal, even if it overlaps evidence admitted in the prosecutor's case in chief." *Id*.

In the course of cross-examination at trial, defendant, a youth minister, denied ever having taken the victim and his sister to any church retreats. When defendant's testimony concluded, the prosecutor called the victim's sister to contradict defendant's denial. The prosecutor asked the victim's sister three questions on the topic of accompanying defendant on church-related events, to which the sister gave answers that tended to undercut defendant's declaration that he had never taken the victim or his sister on retreats. Because the sister's

abbreviated testimony properly responded to evidence introduced by defendant, we conclude that the trial court acted within its discretion by choosing to allow the sister to offer rebuttal testimony. *Figgures*, 451 Mich at 398-399. Even assuming some impropriety in the court's admission of the sister's testimony, we detect no evidentiary error requiring reversal and no plain error affecting defendant's right to a fair trial in light of the very brief nature of the rebuttal testimony and defendant's opportunity to further explain when his counsel subsequently recalled defendant to testify. MCL 769.26; *Williams*, 245 Mich App at 430-431.

Affirmed.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher
/s/ Douglas B. Shapiro