S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 24, 2005
v	No. 252302 Ogemaw Circuit Court
STEPHEN FRANCIS CARROLL, Defendant-Appellant.	LC No. 03-002121-FC

Before: Markey, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Defendant appeals by right his conviction after jury trial of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant argues the prosecutor failed to present sufficient evidence to sustain his conviction and that he was denied a fair trial when the trial court excluded evidence that the victim's brother had been investigated for inappropriate sexual conduct. Defendant also argues his sentence within accurately scored guidelines of ten to thirty years imprisonment constitutes cruel or unusual punishment prohibited by the Michigan and United States Constitutions. US Const, Amend VIII; Mich Const 1963, art 1, § 16. We affirm.

Defendant was charged with "placing [his] mouth on the genital opening" of the female victim who was not yet 13 years old. A person commits first-degree criminal sexual conduct when "he or she engages in sexual penetration with another person and . . . [the] other person is under 13 years of age." MCL 750.520b(1)(a). "Sexual penetration" includes "cunnilingus . . . 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." MCL 750.520a(o). The Legislature has not defined the term "cunnilingus" but this Court in *People v Harris*, 158 Mich App 463, 469-470; 404 NW2d 779 (1987), after consulting medical and legal dictionaries, opined "it is evident that cunnilingus requires the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself, or the mons pubes." *Id*. at 470. Thus, when a person places his or her mouth on the external genitals of a female that person has by definition engaged in cunnilingus; no further penetration is required to prove "sexual penetration." *People v Lemons,* 454 Mich 234, 254-255; 562 NW2d 447 (1997); *Harris, supra* at 467. See, also, *People v Legg*, 197 Mich App 131, 132; 494 NW2d 767 (1992).

Defendant argues that the eleven-year-old victim's testimony that defendant "took my shorts and my underwear down," and "he licked my private parts and put my shirt up and

touched my boobs," was insufficient to prove his guilt beyond a reasonable doubt. He asserts that when the victim used the term "private parts," she could have been referring to her anus, her vagina, or other body part, including upper leg or lower abdomen.

When reviewing a claim that the evidence in a criminal case was not the sufficient, "we view the evidence in a light most favorable to the prosecution and determine whether a rational factfinder could conclude that the essential elements of the crime were proved beyond a reasonable doubt. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997), citing *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended on other grounds 441 Mich 1201 (1992). We cannot interfere with the jury's role of determining the weight of evidence or the credibility of witnesses. *Id*. at 514. Moreover, the jury determines rather than this Court what inferences can be fairly drawn from the evidence and what weight those inferences are to be accorded. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Thus, a prosecutor need not negate every reasonable theory consistent with innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Nowack,* 462 Mich 392, 400; 614 NW2d 78 (2000). In sum, our review is deferential; we must "draw all reasonable inferences and make credibility choices in support of the jury verdict." *Id*.

Although defendant is correct that the term "private parts" or "private part" may, in context, refer to other body parts besides internal or external human genitalia, his argument fails under the deferential standard of review we must employ. Here, the victim acknowledged that her "privates" referred to where she went "potty" and testified that defendant "grabbed me and put me on a mattress . . . pulled my shorts and underwear down and started licking at my privates . . . ." Further, the victim testified that defendant "had his tongue on my private parts." From this testimony, a rational jury could reasonably infer that defendant placed his mouth and tongue on the area of the victim's urethra. In other words, the jury could reasonably infer that defendant engaged in cunnilingus or "oral sex" with the underage victim. *Harris, supra* at 469-470. Accordingly, when viewed in the light most favorable to the prosecution, the evidence was sufficient to sustain defendant's conviction. *Hardiman, supra* at 428; *Terry, supra* at 452.

Next, defendant argues he was denied his constitutional right to present a defense by the trial court's excluding evidence that the victim's brother had been investigated for alleged sexual misconduct. Specifically, defendant argues the trial court's ruling precluded him from presenting the alternate theory that the victim's brother committed the crime. We conclude that the trial court did not abuse its discretion by ruling the evidence was inadmissible because it was not relevant to the defense raised at trial; defendant never sought to prove at trial that the victim's brother committed the instant offense. Accordingly, the record does not support defendant's claim on appeal that he was denied the opportunity to present that alternative theory at trial.

We review the trial court's decision to admit or exclude evidence for clear abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). We review de novo questions of law related to the admission or exclusion of evidence, including defendant's claim that he was denied his

constitutional right to present a defense. *Layher, supra; People v Kurr*, 253 Mich App 317, 320 n 2; 654 NW2d 651 (2002).

In this case, the crime was alleged to have occurred on March 19, 2003 while defendant, a friend of the victim's father, babysat her in defendant's own home in West Branch. The allegations regarding the victim's brother are unclear. After the victim testified and in the absence of the jury, the trial court noted that defense counsel wanted to raise an evidentiary issue. Defense counsel stated that the victim's brother "was actually investigated in Roscommon[1] for inappropriate sexual conduct." Counsel did not elaborate on the allegation other than to note the victim's brother was assessed at a clinic "once this matter kicked in." But defense counsel's cross-examination of the victim's father at the preliminary examination suggested that defendant was the source of the allegation:

> *Q*. Isn't it true that when these allegations came to be, that you and [defendant] weren't getting along at that time?
>
> *A*. Pardon me? We wasn't?
>
> *Q*. That you and [defendant] weren't getting along at that time?
>
> *A*. Yes we were.
>
> *Q*. Had he made allegations to you about your son's inappropriate conduct?
>
> *A*. Oh, yes he kind of did.
>
> * * *
>
> *Q*. I mean, so you, it didn't strain your relationship that he was making allegations that your son was conducting inappropriate sexual conduct?
>
> *A*. Well, what was said was, I don't believe, because I was asked, I asked my daughter about that and she said, it never happened.
>
> * **
>
> *Q*. Did that strain your relationship with [defendant]?
>
> *A*. No.

As the preliminary examination colloquy indicates, defense counsel apparently sought to admit the evidence to show a strained relationship between defendant and the victim's father. In

[1] It is not known whether "Roscommon" referred to the county situated immediately to the west of Ogemaw County, or to the city of Roscommon, situated about 25 miles northwest of West Branch.

argument before the trial court, counsel specifically stated: "I am not introducing it to say that [the victim's brother] did or didn't do it in the past." Counsel asserted the evidence was probative of an alternative theory, which counsel attempted to explain as follows:

> Well, if her father, the father of these two children, told my client not to have the two kids together, thinking there is a potential that it could have been perpetrated by the other child or the tension between my client and the other father could have encouraged him to have his daughter lie to get him in trouble.

The prosecutor responded that the victim's father denied any tension existed between him and defendant. Further, the prosecutor stated the allegation about the victim's brother was "a red herring" that "we have investigated it and found no basis for it." The prosecutor argued that even if the victim's father asked defendant to keep the children apart, proof of such statement was not relevant but if it was, it should be excluded because of the danger of unfair prejudice.

When the trial court asked counsel to explain his theory of relevance, counsel stated: "The fact that my client and victim's father were at odds that my client expressed - -"

The trial court ruled that the proposed evidence was not relevant but to the extent it was it should be excluded under MRE 403. The trial court reasoned that:

> [T]he issue here is, I don't find it to be relevant, one. Even if it were traumatic [sic] would be excluded under 403, and any probative value is substantially outweighed by the danger of unfair prejudice because what you are doing is you are going to base - - the brother may have sexual tendency that may not be socially acceptable, then you can't believe her. That is not proper impeachment.
>
> No allegation that he did anything, did she ever indicate that the brother did it, not [defendant]. Then, yeah, you could bring that in. But that is never at issue. So 403 would - - its unfair prejudice, confusion of the issues, misleading a jury. I think it is excludable.

On appeal, defendant has not briefed the theory of admissibility defense counsel advanced in the trial court. So, he has abandoned those arguments. See *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *People v Kent*, 194 Mich App 206, 209-210, 486 NW2d 110 (1992). Further, to the extent defendant's argument on appeal incorporates the arguments defense counsel raised in the trial court, we find no abuse of discretion by the trial court. Defendant never established a logical link between the alleged abuse by her brother and the victim's credibility, or between the alleged abuse and animosity between the victim's father and defendant. Interestingly, both defendant and his girl friend were permitted to testify that tension existed between defendant and the victim's father but defendant disclaimed this as the reason for the victim to lie. Rather, defendant believed that the victim fabricated the allegations to receive more attention from her father who devoted more time to his son, "who gets in trouble in school." The victim's father admitted that he was required to devote more attention to his son's schooling because his son suffered from ADHD (Attention Deficit Hyperactivity Disorder).

Moreover, we find no abuse in the trial court's conclusion that even if relevant the evidence should be excluded because of the danger of unfair prejudice, confusion of the issues, or misleading the jury. MRE 403. The trial court is in the best position to employ the balancing test required by MRE 403 by making a contemporaneous assessment of the presentation, credibility, and effect of testimony. *People v Bahoda*, 448 Mich 261, 291; 531 NW2d 659 (1995); *People v Magyar*, 250 Mich App 408, 416; 648 NW2d 215 (2002). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). Here, aside from the potential for unfair prejudice by diverting the jury from material to irrelevant issues, the likelihood of confusion and misleading the jury is forecast by defense counsel's struggle to cogently identify the alleged logical relevance of the evidence. See, e.g., *Rockwell v Yukins*, 341 F3d 507, 512 (CA 6, 2003), where the Sixth Circuit held evidence of sexual abuse alleged to have been committed by the murder-conspiracy victim would have "presented a risk of undue delay and confusion of the issues" and the "tangential dispute would have complicated the trial and could have tended to mislead the jury." In sum, we cannot conclude that an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the trial court's ruling. *Ullah, supra* at 673.

With respect to defendant's appellate claim that the evidence was admissible because it was logically relevant to show that someone other than defendant committed the crime, we can find no abuse of discretion by the trial court because defense counsel did not present that theory below. *People v Rice (On Remand)*, 235 Mich App 429, 438-439; 597 NW2d 843 (1999). "[T]here can be no abuse of discretion where the trial court's discretion has not been invoked in the first place." *Id*. Further, defendant failed to preserve his constitutional claim by arguing below that the evidence was necessary to enable him to present a defense. Consequently, our review is limited to plain error affecting defendant's substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 764, 774; 597 NW2d 130 (1999). A defendant may obtain relief only if clear, plain, or obvious error occurred that affected the outcome of the proceedings, and the error either resulted in the conviction of an innocent person or seriously affected the fairness, integrity or public reputation of the proceedings independent of guilt or innocence. *Id*. at *763-764*, citing *United States v Olano*, 507 US 725, 731-734, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

It is well settled that a person accused of committing a crime has a state and federal constitutional right to present a defense. *People v Hayes*, 421 Mich 271, 278; 364 NW2d 635 (1984). Indeed, the constitutional right of a criminal defendant to present a complete defense emanates from several state and federal constitutional provisions. *Id*.; *Crane v Kentucky*, 476 US 683, 690; 106 S Ct 2142; 90 L Ed 2d 636 (1986)(citations omitted). The right to present a defense is a fundamental element of due process, but it is not an absolute right. *Hayes, supra* at 279. "The accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id*., citing and quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). Thus, a defendant "'does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.'" *Rockwell, supra* at 512, quoting *Taylor v Illinois*, 484 US 400, 410; 108 S Ct 646; 98 L Ed 2d 798 (1988).

MRE 404 governs defendant's appellate theory of admissibility: that evidence that the victim's brother may have committed acts similar to the charged offense were admissible to prove that the "brother not defendant committed the alleged offense[]." *People v Smith,* 243 Mich App 657; 625 NW2d 46 (2000), rem'd 465 Mich 928; 639 NW2d 255 (2001), on rem 249 Mich App 728; 643 NW2d 607 (2002); *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). "MRE 404(b) applies to the admissibility of evidence of other acts of *any* person, such as a defendant, a plaintiff, or a witness." *Id*. Although MRE 404(b) is a rule of inclusion, it states the general rule prohibiting evidence of other acts of a person to prove the person's propensity to commit like acts. *Crawford, supra* at 383; *People v Martzke (On Remand)*, 251 Mich App 282, 289; 651 NW2d 490 (2002). "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). The proponent of such evidence bears the burden of showing the evidence is logically relevant to a material fact through some intermediate inference other than the prohibited inference of character to conduct. *Crawford, supra* at 391; see, also, *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993), modified 445 Mich 1205; 520 NW2d 338 (1994). When, as here, "the proponent's only theory of relevance is that the other act shows [the person's] inclination to wrongdoing in general to prove that the [person] committed the conduct in question, the evidence is not admissible." *Id*.

The application of MRE 404(b) to the case at bar does not deny defendant his constitutional right to present a defense. The exclusion of evidence does not "abridge an accused's right to present a defense so long as they are not arbitrary or disproportionate to the purposes they are designed to serve." *United States v Scheffer*, 523 US 303, 308; 118 S Ct 1261; 140 L Ed 2d 413 (1998)(citations and internal punctuation omitted). In that regard, MRE 404(b) is "designed to assure both fairness and reliability in the ascertainment of guilt and innocence," *Chambers, supra* at 302, because it is intended to limit admissible evidence to that which is both logically relevant and not unfairly prejudicial, *Crawford, supra* at 384-385. Moreover, as discussed above, the exclusion of evidence here did not preclude defendant from presenting a defense: the victim fabricated the offense to garner the attention of her father. So, we conclude that defendant has not established plain error requiring reversal. *Carines, supra* at 763-764.

Finally, defendant argues that his sentence of ten to thirty years' imprisonment constitutes cruel or unusual punishment under US Const, Am VIII and Const 1963, art 1, § 16. We review de novo this constitutional claim. *In re Ayres*, 239 Mich App 8, 10; 608 NW2d 132 (1999).

The sentence guidelines in this case recommended a minimum sentence of 81 to 168 months, so defendant's sentence was within the guidelines recommendation. Because defendant did not assert in the trial court nor on appeal that "an error in scoring the sentencing guidelines or inaccurate information [was] relied upon in determining the . . . sentence," MCL 769.34(10), the Legislature has decree that this Court must affirm his sentence. *Id*.; *People v Babcock*, 469 Mich 247, 261, 272; 666 NW2d 231 (2003). We recognize that the Legislature is constitutionally vested with the authority to regulate criminal sentencing, including appellate review thereof. Const 1963, art 4, § 45; *People v Garza*, 469 Mich 431, 434; 670 NW2d 662 (2003), citing *People v Hegwood*, 465 Mich 432, 436-437; 636 NW2d 127 (2001). But both the state and federal constitutions also prohibit the judiciary from imposing cruel or unusual punishments in individual cases. US Const, Am VIII and Const 1963, art 1, § 16. Consequently,

notwithstanding MCL 769.34(10), we conclude that we may consider defendant's constitutional challenge to his sentence.

Defendant's constitutional claim is without merit. In determining whether a sentence is cruel or unusual, this Court looks to the gravity of the offense and the harshness of the penalty, comparing the penalty to those imposed for other crimes in this state as well as the penalty imposed for the same offense by other states and considering the goal of rehabilitation. *Ayres*, *supra* at 13. The essence of defendant's argument is that the trial court did not adequately consider his potential for rehabilitation. But the focus of the constitutional prohibition against cruel or unusual is not on whether the trial court erred in an individual case in assessing the traditional sentencing factors.[2] Defendant presents no comparative analysis, nor does he present any meaningful argument that the penalty authorized and imposed here is not proportionate to the seriousness of the offense. Accordingly, defendant's argument fails. *People v Drohan*, 264 Mich App 77, 91-92; 689 NW2d 750 (2004).

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Peter D. O'Connell

[2] The traditional factors considered when imposing sentence include: (1) reformation of the offender, (2) protection of society, (3) punishment of the offender, and (4) deterrence of others from committing like offenses. *Rice, supra* at 446, citing *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972).