

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT EARL CARTER,

Defendant-Appellant.

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UNPUBLISHED

April 25, 1997

No. 191221

Kent Circuit Court

LC No. 94-001827-FC

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). Defendant then pleaded guilty to being a second habitual offender, MCL 769.10; MSA 28.1082. Defendant was sentenced to concurrent prison terms of twenty to thirty years for each conviction. He appeals as of right and we affirm.

Defendant first argues that the trial court abused its discretion by denying defendant's motion for a mistrial. This Court will not reverse a trial court's grant or denial of a mistrial in the absence of an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Id.*

At trial, Dr. Edward Cox, the physician who examined the eight-year-old complainant one week after the incident, testified that he diagnosed the complainant as a victim of child sexual abuse. Subsequently, the trial court instructed the jurors that they should disregard Dr. Cox's testimony regarding his diagnosis, and that they were the sole judges of witness credibility. Defendant moved for a mistrial on the grounds that the cautionary instruction did not cure the prejudice resulting from Dr. Cox's testimony. The trial court denied the motion.

Defendant correctly asserts that admission of the testimony at issue was erroneous. See *People v Beckley*, 434 Mich 691, 725; 456 NW2d 391 (1990). At issue, however, is whether the cautionary instruction given to the jurors cured the error. Jurors are presumed to have followed a court's instructions until the contrary is clearly shown. *People v McAlister*, 203 Mich App 495, 504; 513

NW2d 431 (1994). In the case at hand, defendant has failed to clearly demonstrate that the jurors disregarded the trial court's curative instruction regarding the testimony at issue. The curative instruction given clearly informed the jurors that they were to ignore Dr. Cox's statement regarding his diagnosis that the complainant had been sexually abused and that they were the sole judge of the witness' credibility. Next, the prosecutor did not refer to the testimony at issue during closing argument. Finally, the trial court also instructed the jurors that they were not to consider evidence that was stricken from the record. Thus, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant next argues that the trial court abused its discretion by admitting, pursuant to MRE 803A, testimony of the complainant's mother regarding complainant's statements concerning the incident. Specifically, defendant claims that complainant's statement to her mother was not spontaneous. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Although the term "spontaneous" has not been clearly defined in the context of MRE 803A, this Court, in *People v Dunham*, 220 Mich App 268; \_\_\_ NW2d \_\_\_(1996), found that statements in response to customary, open-ended questions were spontaneous and properly admitted pursuant to MRE 803A. In *Dunham*, the six-year-old victim uttered the statements at issue to a Friend of the Court mediator in response to questions asked of all children of divorcing parents concerning things the child liked and disliked of both parents. *Id.*, slip op 2. Furthermore, the Washington Court of Appeals, in *In re Dependency of S S*, 814 P2d 204, 210 (Wash App, 1991), held that "for purposes of determining the reliability of a statement made by a child victim of sexual abuse, any statements made that are not the result of leading or suggestive questions are spontaneous." This definition of spontaneous is consistent with this Court's application of the word in *Dunham*. Thus, in the case at hand, because the statement at issue was the result of an open-ended question, it was spontaneous. Accordingly, the trial court did not abuse its discretion in admitting the statement pursuant to MRE 803A.

Defendant also argues that the prosecutor improperly referred to the complainant's out-of-court identification of photographs of defendant's apartment during closing argument. The failure of the defendant to object to the prosecutor's remarks precludes this Court from reviewing the matter unless a miscarriage of justice will result or a cautionary instruction could not cure the prejudicial effect. *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1994).

Viewed in context, the prosecutor's remark at issue was an attempt to bolster the complainant's credibility. A prosecutor "cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Here, however, because the prosecutor was not arguing that he had special knowledge regarding the complainant's truthfulness, such error does not warrant reversal. *Id.*, 277. Moreover, the trial court's instruction to the jurors that arguments of attorneys are not evidence dispelled any prejudice. *Id.*, 281.

Finally, defendant argues that his sentence is disproportionate. Contrary to defendant's claim, a life sentence, with the possibility of parole in fifteen years, rather than the minimum twenty-year term, would not better serve the purposes of sentencing. See *People v Merriweather*, 447 Mich 799, 808-811; 527 NW2d 460 (1994). Moreover, defendant's sentence fits him and his offense. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). Defendant's sentence does not violate the principle of proportionality. *People v Kelly*, 213 Mich App 8, 16-17; 539 NW2d 538 (1995).

Affirmed.

/s/ Joel P. Hoekstra

/s/ William B. Murphy

/s/ Michael R. Smolenski