

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDDIE L. SYKES III,

Defendant-Appellant.

UNPUBLISHED

June 3, 1997

No. 187247

Oakland Circuit Court

LC No. 94-133360

Before: Michael J. Kelly, P.J., and Wahls, and Gage, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced to ten to twenty years' imprisonment and appeals as of right. We affirm.

Defendant first argues that the trial court erred by allowing the prosecutor to introduce evidence of the victim's prior consistent statements describing the sexual assault. We disagree. Defendant did not object at trial to the admission of this evidence. Moreover, the evidence was admissible even if it was hearsay. The testimony of the victim's parents was admissible because it described an excited utterance made by the victim. The statement made by the victim, arose out of a startling occasion, was made before there had been time to contrive and misrepresent, and related to the circumstances of the startling occasion. Hence, the testimony was admissible under MRE 803(2). *People v Hackney*, 183 Mich App 516, 522-523; 455 NW2d 358 (1990). Furthermore, the testimony of Officer Clark was admissible because it came after defendant attempted to impeach the victim's credibility by introducing inconsistencies between her testimony and prior statements. In such a situation, "the prosecution must be allowed to explore the extent of the inconsistencies by showing how those same statements were consistent with the [victim's] trial testimony." *People v Sayles*, 200 Mich App 594, 595; 504 NW2d 738 (1993). Therefore, Officer Clark's testimony was admissible.

Next, defendant objects to a polygraph reference made by a prosecution witness on cross-examination. We find that this reference was brief, inadvertent, and harmless, and would not have been

grounds for a mistrial had defendant made such a request. *People v Kosters*, 175 Mich App 748, 754; 438 NW2d 651 (1989).

Next, defendant argues that he was denied a fair trial by the way in which the trial court questioned the victim regarding her competency to testify. Defendant did not object to these questions at trial and, therefore, reversal is not required unless the error resulted in a miscarriage of justice. *People v Houghteling*, 183 Mich App 805, 808; 455 NW2d 440 (1990). In the present case, the trial court explicitly instructed the jury that the court at no time intended to convey its opinion of the merits of the case, and that the jurors should pay no attention to any indication to the contrary. In this context, no miscarriage of justice can result and we decline to review this issue.

Next, defendant argues that he was denied a fair trial by prosecutorial misconduct because the prosecutor improperly introduced inadmissible testimony of the victim's prior consistent statements. As discussed above, however, this evidence was admissible. Defendant also claims that the prosecutor asked the jury to convict out of sympathy for the victim. Defendant did not object at trial to these comments and, therefore, review is precluded if a timely requested limiting instruction could have cured the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 527 (1994). We conclude that the prosecutor's argument in this case was no different from that in *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988), which this Court found to have been curable with a timely requested limiting instruction. Therefore, defendant is not entitled to relief on this basis.

Defendant also claims that the prosecutor improperly elicited testimony that defendant's sister told the victim not to testify in court against defendant, and testimony regarding defendant's driving record. We agree that such evidence was not admissible. However, in light of the overwhelming evidence against defendant, any error was harmless. *People v Wesley (On Remand)*, 179 Mich App 150, 153; 445 NW2d 173 (1989). Therefore, defendant was not denied a fair trial by the prosecutor's conduct.

Finally, defendant argues that his sentence should be vacated and the case remanded because the trial court failed to sufficiently articulate its findings of fact and conclusions of law in support of its decision to sentence defendant as an adult. The people argue that the trial court's findings were adequate, but claim that if they were not, the proper remedy would not be resentencing but remand for articulation of reasons for the court's decision. Cf *People v Simon*, 189 Mich App 565; 473 NW2d 785 (1991); *People v Triplett*, 432 Mich 568; 442 NW2d 622 (1989). We affirm. The trial court's findings revealed that she was aware of the issues to be resolved and resolved them for very good reasons in favor of sentencing defendant as an adult. Defendant was eighteen at the time of sentencing, he was only three days short of eighteen when the crime was committed and had a life-long history of difficulty with conforming his behavior to civilized standards. The DSS intake worker and the probation officer both recommended sentencing as an adult. The trial court stated:

I do think that it [lack of remorse] is a consideration of sentencing. There was overwhelming evidence of his guilt and I can understand, based upon the interviews that

I've seen, why it is necessary for him to maintain his innocence, not only for himself, but I would assume in order to face perhaps members of his family.

The problem with the non-acceptance isn't his exercise of his Constitutional Rights. The problem with the non-acceptance is what programs are going to be available to him. And one of the considerations under the sentencing rules, under 6.931, is that there be programs available to him.

Now the testimony that the Court finds interesting, is that the system, the juvenile system is overcrowded and based upon the programs that are available, this non-acceptance makes him unavailable for these programs. He has the right to maintain his innocence, and that shouldn't be and isn't really the basis of the decision. But when you do think about the programs that are available under the juvenile system as opposed to the programs that are available under the adult system, their system is not set up to treat someone who is not accepting of this particular responsibility.

But moreover, that is just a factor. The other factors, is that their system isn't set up to treat Mr. Sykes, period, based upon the fact that he was three days below his adult age when this offense occurred. He is now a legal adult, and their [sic] going to have a lot of problems in the juvenile system treating him as a juvenile, when he is an adult. So that's another one of the problems. They cannot find a suitable placement for him due to his age now, and perhaps his age at the date of the offense.

That is a very fine or important consideration. There are programs that we know of, it doesn't really matter whether the probation officer is aware of the contents of them. I know that there are programs at Ionia for sexual offenders. There is treatment available to him in the adult system. And also, due to the absolute heinous nature of the particular offense, I don't think that and the fact that there is not suitable placement for him in the juvenile facilities, I believe that he is more properly sentenced as an adult in the adult system.

The conviction and sentencing are affirmed.

/s/ Michael J. Kelly

/s/ Myron H. Wahls

/s/ Hilda R. Gage