STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD WALTER ASHBURN,

Defendant-Appellant.

UNPUBLISHED
June 19, 1998

No. 199549
Muskegon Circuit Court
LC No. 96-139219 FH

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions for two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced to five and one-half to fifteen years' imprisonment on each count. We affirm.

I

Defendant first asserts that the trial court improperly allowed the prosecution to introduce evidence that defendant drank a substantial amount of alcohol and acted in an irrational manner during the period at issue. Defendant argues on appeal that this evidence was inadmissible character evidence. See MRE 404(b). However, at trial, defendant objected to the evidence on the basis of relevancy. An objection based on one ground at trial is insufficient to preserve an appellate attack based on another ground. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Accordingly, this issue is not preserved for appellate review. Even if defendant had objected that the evidence was inadmissible under MRE 404(b), we would find that the evidence was admissible. Evidence that is admissible for one purpose is not inadmissible because its use for a different purpose is precluded. *People v VanderVliet*, 444 Mich 52, 73; 508 NW2d 114 (1993). Evidence of prior bad acts is admissible as res gestae evidence where the acts are so blended or connected with the charged offense that proof of one necessarily involves the other or explains the circumstances of the crime. *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). Here, the testimony was properly admitted both to place the events of the weekend in context and to corroborate the complainant's testimony that defendant appeared intoxicated when the basement assault occurred. Furthermore, the

evidence regarding defendant's bizarre behavior was relevant to the testimony of the complainant and her mother that they delayed in reporting the assaults because they were afraid of defendant.

II

Defendant next contends that the verdict is contrary to the great weight of the evidence. A trial judge's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993). Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs. *Id*. at 475. A trial court may grant a new trial after finding that the testimony of the prosecutor's witnesses is not credible. See *id*. at 477.[1]

Defendant claims that the testimony presented at trial contains multiple inconsistencies. First, defendant asserts that the complainant could not recall with reasonable certainty what sexual acts defendant did to her in the basement on Saturday morning. However, although the complainant's testimony did contain some inconsistencies, it established that defendant engaged in sexual contact with her both in the basement and her bedroom. She testified that defendant took off her underwear and touched her vagina with his lips, tongue, and fingers when she was doing laundry in the basement. The complainant's testimony regarding the basement assault is inconsistent only as to whether defendant put his hand in her vagina.

Second, defendant argues that there was a discrepancy between the testimony of the complainant and that of her mother regarding one of the assaults. We disagree. On the contrary, the complainant's testimony was essentially corroborated by her mother, who testified that she found defendant lying naked on the floor next to the complainant at 1:30 a.m. on Sunday. Both the complainant and her mother stated that the latter argued with defendant after the discovery. The complainant's testimony did differ from her mother's testimony as to whether the complainant stayed upstairs or went downstairs after the incident. However, this is a minor inconsistency concerning an event that occurred after the assault.

Finally, defendant maintains that the complainant's mother could not recall with reasonable certainty when her daughter told her that she was sexually abused by defendant. However, when the evidence presented at trial is considered in its entirety, we do not believe that this inconsistency renders defendant's conviction against the great weight of the evidence.

In sum, we conclude that the trial court did not err in finding that the jury's verdict was not against the great weight of the evidence. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

III

Defendant also argues that the trial court erroneously allowed the admission of hearsay evidence that did not meet any exception or exclusion. The decision whether to admit or exclude evidence is

within the trial court's discretion. *People v McAlister*, 203 Mich App 495, 505; 513 NW2d 431 (1994).

A hearsay statement is an unsworn, out-of-court statement that is offered to establish the truth of its contents. *People v Jensen*, 222 Mich App 575, 580; 564 NW2d 192 (1997). Hearsay is inadmissible as substantive evidence except as the rules of evidence otherwise provide. MRE 802.

A

Defendant contends that the trial court erred in allowing the complainant's mother to testify that her children told her that defendant told them to throw salt in the air to get rid of demons, that she was not herself, and that the complainant was her mother. The prosecutor offered the testimony under the excited utterance exception to the hearsay rule, MRE 803(2). The two primary requirements for excited utterances are (1) there must be a startling event, and (2) the resulting statement must be made while under the excitement caused by the event. *People v Smith*, 456 Mich 543, 550; ___ NW2d ___ (1998). The focus of the excited utterance rule is the lack of capacity to fabricate. *Id*. at 551.

Although the length of time between the startling event and the children's statements does not appear in the record, the complainant's mother testified that defendant made the statements while she was making a telephone call next door, and the children told her about them when she returned. She stated that the children (aged 11, 9 and 1) appeared frightened, and "that this was something unordinary [sic] they had never been through." Under these facts, the trial court did not abuse its discretion in concluding that the children witnessed a startling event and were still under the stress of the event when they told their mother about it.

B

Defendant claims that the trial court erred by allowing the mother's statement to Calkins that defendant told her on the telephone that he was drinking "all the times that this happened." Because defendant did not object at trial, this issue is not preserved on appeal. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). In any event, the statement was admissible as a nonhearsay admission of a party opponent pursuant to MRE 801(d)(2)(A).

C

Defendant claims that the trial court erred by allowing statements by Calkins that the complainant's mother told him that defendant admitted to the sexual contacts with the complainant. We disagree. The testimony was elicited by the defense counsel on cross-examination, apparently in an attempt to impeach her testimony by highlighting her refusal to place a recording device on the telephone. Defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

IV

Defendant's final claim is that the trial court abused its discretion when it denied defense counsel's motion for adjournment to allow defendant to introduce evidence that the complainant was sexually abused by someone else. However, the record reveals that defendant waived this issue on appeal in an agreement with the prosecutor.[2] Defendant argues that the waiver was rendered ineffective because the prosecutor violated the agreement during closing arguments. However, defendant waived this claim by failing to object to the prosecutor's closing argument or to request a cautionary instruction to correct the error. See *People v Grant*, 445 Mich 535, 543; 520 NW2d 123 (1994). This Court will not allow defendant to harbor error as an appellate parachute. See *People v Hughes*, 217 Mich App 242, 247; 550 NW2d 871 (1996). Accordingly, we find no error requiring reversal.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

[1] The Supreme Court recently held that the "thirteenth juror" standard set forth in *Herbert* is erroneous. See *People v Lemmon*, 456 Mich 625, 627; ___NW2d ___ (1998). However, we review this issue under the *Herbert* standard because the rule adopted in *Lemmon* applies prospectively to cases not yet final as of the date of that decision. *Id*. at 648.

[2]The trial transcript contains the following passage:

> [THE PROSECUTOR]: Your Honor, I recognize that [defense counsel] is trying to find some witnesses, and I am willing to help him with that if he wants to find those people. I also suggested another alternative to it – to him, and that is that I would not make the argument in closing that this little child wouldn't know about these types of sexual touches, if he wanted to waive that argument here and for appellate purposes in terms of the introduction or the cross-examination of the victim in this case, and I think he is going to indicate that as long as I don't argue that in closing argument, he will waive that issue.
>
> [DEFENSE COUNSEL]: Your Honor, when I brought the motion in limine, I actually used that as an alternative either to allow us to bring the evidence in or to foreclose the prosecutor from making that argument in closing. If he is agreeing not to bring that up in closing, then we would not be proffering evidence on any prior sexual activities.
>
> THE COURT: All right. So you waive your right to the in-camera hearing?
>
> [DEFENSE COUNSEL]: That's correct, Your Honor.
>
> THE COURT: All right. Okay. That's fine. Thank you, gentlemen. All right. That agreement is noted on the record. We can bring the jury in.