STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of CHRISTOPHER MARTIN LARKINS, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER MARTIN LARKINS,

Defendant-Appellant.

UNPUBLISHED
September 28, 1999

No. 206684
Wayne Juvenile Court
LC No. 96-344879

Before: Whitbeck, P.J., and Saad and Hoekstra, JJ.

PER CURIAM.

I. Introduction

The juvenile[1] defendant was originally charged with one count of assault with intent to rob while armed, MCL 750.89; MSA 28.284, one count of second-degree criminal sexual conduct (while armed), MCL 750.520c(1)(e); MSA 28.788(3)(1)(e), and one count of first-degree home invasion, MCL 750.110a(2)(b); MSA 28.305(a)(2)(b). During his pretrial appearance before a juvenile division referee, defendant pleaded guilty to the charge of second-degree criminal sexual conduct, and the other charges were dismissed. The trial court ordered defendant to serve a term of intensive probation. He appeals as of right, claiming (1) that the trial court committed error requiring reversal by accepting his admission of guilt when there was an insufficient factual basis to support the plea; (2) that the trial court committed error requiring reversal by proceeding to the dispositional stage of the hearing without the presence of his counsel and by appointing stand-in counsel to represent him in the absence of good cause; and (3) that the trial court committed error requiring reversal at the dispositional hearing by permitting several persons to make unsworn statements concerning the incident and permitting these persons to assist the victim in making her statement. We affirm.

II. Basic Facts And Procedural History

A. Background

As part of the plea proceedings at the pretrial hearing in October of 1996, defendant was questioned under oath. He testified that, in August of 1996, he was in Garden City visiting at his cousin's house. He left that house and was riding his bike to a grocery store when he saw the victim, who lived "around the corner" from his cousin, walking in the same direction. Defendant testified that the victim began calling him names, such as "punk," "black punk," and "nigger." Defendant testified that he went to Rite Aid and then to Kroger, where he again saw the victim. After defendant purchased something at Kroger, he returned to his cousin's house and told his cousin what had happened. She instructed defendant to go to the park, where her husband was. After some time at the park, defendant testified, he returned to his cousin's house before going to the victim's home, where he began banging on her door.

B. The Plea Colloquy

Defendant explained to the trial court that he began screaming at the victim when she answered her door. Through questioning by the court, defendant revealed that, next, he called the victim a "honkey" and she raced to the kitchen to grab a knife. Defendant admitted that he took the knife from the victim to gain entry to the home without permission, but that he never pointed the knife at her or threatened her with it. Defendant stated that the victim "was cussing at first and [then] she was on the ground. Then, I touched her." Defendant denied touching the victim's breast for the purpose of sexual gratification, instead claiming that he touched her because of "all the racial stuff she called me." At that point, the trial court rejected the guilty plea noting that "we are very far from a plea on Armed CSC II."

After conferring with his attorney, defendant once again took the witness stand. This time defense counsel elicited additional details of the offense. Defendant admitted going to the victim's house and grabbing the knife specifically to scare her. When asked why he touched the victim's breast, defendant replied, "Pleasure." He repeated that his purpose was "pleasure" two additional times. When the court asked defendant, "Who's [sic] pleasure," defendant responded, "Mine." The court then questioned defendant regarding his knowledge of the victim and his motivation for his actions. Defendant stated that he knew that the victim was a resident of a group home, that she had special needs, and that he did not have an explanation for what he did. The court accepted defendant's guilty plea to second-degree criminal sexual conduct, but dismissed the remaining charges.

C. Statements By The Victim's Sisters

After a statement by defendant's mother that she "never could have imagined anything like that happening; and found it hard to believe until [defendant] admitted it, that . . . he took part it anything like that," the prosecutor then asked if the victim's sisters could make a statement. The trial court asked defense counsel if she objected, and she responded that she did not. Both sisters gave statements that recounted the effect of the incident on the victim.

D. The Dispositional Hearing

The trial court held a dispositional hearing in December of 1996. Attorney David Groner appeared on defendant's behalf and explained that Sheila Johnson, defendant's previous counsel, had not appeared for the hearing:

> *Groner*: . . . I would state . . . that I am Emergency House Counsel, so I was not at all familiar with this file. I did read the . . . [Case History Report and psychological report] and spoke with the mother—
> *Trial Court*: —Well, I wonder where Sheila Johnson is.
>
> *Groner*: Apparently, she didn't check in or call, Your Honor. So, I'm prepared to go ahead. I think the mother doesn't have a problem with me handling the—
>
> *Trial Court*: I would note for the record that this was scheduled for nine and it's now ten. Mother, do you have any objection if Mr. Groner stands in at these proceedings?
>
> *Ms. Larkins*: No.
>
> *Trial Court*: Sheila Johnson; was that a retained attorney or appointed?
>
> *Court Officer*: Appointed.
>
> *Trial Court*: Do you have any objections, Christopher, if Mr. Groner is your attorney?
>
> *Defendant*: No.
>
> *Trial Court*: Okay.

Defense counsel noted that defendant's mother wished to make a correction to a statement in the case history report that "Chris states he attempted rape only because something got to him." Defendant's mother stated that "[t]here was never . . . a statement about rape." The trial court then indicated that it was going to allow statements pursuant to the Crime Victim's Rights Act and took statements from several of the victim's sisters. The trial court also took the statement of the victim, who apparently had an IQ of between 63 and 71. The victim's statement was somewhat garbled and, on several instances, one of the victim's sisters asked the victim questions, apparently intending to assist the victim in making her statement. In addition to making her own statement, the administrator of the victim's care facility also asked the victim a number of questions, again apparently to assist the victim in making her statement. Defendant and his mother both made statements expressing regret for the assault. Defense counsel noted that defendant had been on a tether since the pretrial hearing without any violations. The trial court adopted defense counsel's recommendations of placing defendant on probation with intensive counseling, a disposition also recommended by the probation department.

III. Defendant's Plea

A. Preservation Of The Issue And Standard Of Review

Defendant did not move in the trial court to withdraw his guilty plea. Therefore, this issue is not preserved for appeal. See *In re Zelzack*, 180 Mich App 117, 126; 446 NW2d 588 (1989). Had defendant properly preserved this issue for appeal by moving in the trial court to withdraw his guilty plea, we would review the trial court's decision in this regard for an abuse of discretion. See MCR 5.941(D).

B. An "Understanding" Plea

Defendant argues that the trial court erred in accepting his guilty plea because it was not "understanding" under MCR 5.941(A). We disagree.

There is no question that MCR 5.941 governs pleas of admission in all cases filed under the Juvenile Code. MCR 5.901(A); MCR 5.941. The trial court, before accepting the plea, must be satisfied that it is "accurate, voluntary, and understanding," MCR 5.941(A), and must comply with the "plea procedure" delineated in MCR 5.941(C). Defendant concedes that the trial court complied with the procedural requirements of MCR 5.941. Defendant argues, however, that the trial court should have gone further to ascertain whether defendant actually understood his constitutional rights. Defendant cites no authority to support the proposition that the trial court was required to ask him to explain his understanding of the specific words and phrases describing his rights, and this Court will not search for authority to support defendant's position. *People v Jensen (On Remand)*, 231 Mich App 439, 457; 586 NW2d 748 (1998).

Further, the record contradicts any conclusion that defendant did not understand the rights that he was waiving. After its recitation of defendant's rights pursuant to the procedural requirements of MCR 5.941(C), the trial court asked defendant several times if he understood what had been said; each time, defendant replied affirmatively. The trial court also asked defendant several direct questions regarding whether he wanted to tell the court that he was guilty and whether anyone had threatened him or made promises to encourage a guilty plea. Defendant responded appropriately to these questions, denying any improper influence on his decision to plead guilty. Defendant's mother also indicated that defendant was offering the plea of admission with her permission. The trial court was fully justified in finding that the plea was "understanding" as required by MCR 5.941(A).

C. Factual Basis For The Plea

Defendant argues that there was an insufficient factual basis to support his guilty plea. We again disagree.

"In reviewing the adequacy of the factual basis for a plea, this Court examines whether the factfinder could properly convict on the facts elicited from the defendant at the plea proceeding." *People v Hogan*, 225 Mich App 431, 433; 571 NW2d 737 (1997). A factual basis to support a plea exists if an inculpatory inference can be drawn from the facts presented. *People v Eloby (After Remand)*, 215 Mich App 472, 477-478; 547 NW2d 48 (1996). This holds true even if an exculpatory inference could also be drawn and the defendant asserts that the latter is the correct inference. *Id.*

Defendant pleaded guilty to second-degree criminal sexual conduct pursuant to MCL 750.520c(1)(e); MSA 28.788(3)(1)(e), which provides:

> (1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exist:
>
> * * *
>
> (e) The actor is armed with a weapon, or any article used or fashioned in a manner to lead a person to reasonably believe it to be a weapon.

"Sexual conduct" is defined as including "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." MCL 750.520a(k); MSA 28.788(1)(k). Criminal sexual conduct is a general intent crime. *People v Piper*, 223 Mich App 642, 646; 567 NW2d 483 (1997). However, "proof of intentional touching, alone, is insufficient to establish guilt. The statute further requires that the prosecution prove that the intentional touch could *'reasonably be construed* as being for [a] sexual purpose.'" *Id*. at 647, citing MCL 750.520a(k); MSA 28.788(1)(k) (emphasis in original).

Defendant specifically argues that there was an insufficient factual basis to support the inference that he touched the complainant for a sexual purpose. However, he admitted that after grabbing a knife from the complainant he touched her breast. While it is true that during the first round of questioning from the court he denied having touched the complainant for "purposes of sexual gratification," upon further questioning by *his* attorney defendant stated that he touched the complainant's breast for the purpose of "pleasure." "Even if the defendant denies an element of the crime, the court may properly accept the plea if an inculpatory inference can still be drawn from what the defendant says." *People v Sarres*, 188 Mich App 475, 476; 470 NW2d 86 (1991). Because an inference that defendant touched the complainant's breast for purposes of sexual arousal or gratification can reasonably be drawn from the facts as presented by defendant, the trial court properly accepted his guilty plea.

IV. Appointment Of Counsel

A. Preservation Of The Issue And Standard Of Review

In order to be preserved for appellate review, an issue must be raised before and addressed by the trial court. *People v Malone*, 193 Mich App 366, 371; 483 NW2d 470 (1992), aff'd on other grounds 445 Mich 369 (1994). Therefore, because defendant did not object to the appointment of substitute counsel at the dispositional hearing, this issue is not preserved for this Court's review. However, this Court may consider unpreserved issues where failure to do so would result in manifest injustice. *People v Metzler*, 193 Mich App 541, 548; 484 NW2d 695 (1992).

B. Adequate Preparation

Defendant argues that the trial court erred in proceeding to the dispositional stage without the presence of the attorney who represented defendant at pretrial, and by appointing stand-in counsel to represent him at the hearing. We disagree.

Defendant does not argue that substitute counsel's performance was deficient or prejudicial in any particular way. Rather, he merely argues that it was unlikely that counsel was "adequately prepared" for the hearing. However, there is absolutely no indication that stand-in counsel was unprepared for the dispositional hearing, and this Court's failure to review this issue will not result in manifest injustice. We additionally note that, although a juvenile in delinquency proceedings has the right to the assistance of an attorney at each stage of the proceedings, including disposition, MCR 5.915(A)(1), we are not aware of any requirement that a juvenile be represented at the dispositional hearing by the same lawyer who represented him at an earlier stage of the proceedings.

V. Statements At Dispositional Hearing

A. Preservation Of The Issue And Standard Of Review

As a general matter, a party must object to instances of allegedly improper procedure in order to preserve the issue for appeal. See, e.g., *People v Fleming*, 185 Mich App 270, 279; 460 NW2d 602 (1990); *People v Strunk*, 184 Mich App 310, 322-323; 257 NW2d 149 (1990). During the dispositional hearing, defendant did not object until after the victim's two sisters spoke to the court. Nor did defendant object when the victim made several statements which were "interpreted" by one sister and the administrator of the victim's foster care facility. Only when the administrator began asking the victim a series of leading questions did defense counsel state that "now we're getting into sort of a mini-trial." Therefore, the only issue preserved for this Court's review is whether the trial court erred in allowing the administrator to question the victim.

The trial courts have discretion regarding procedures used in the courtroom. See *People v Cole*, 349 Mich 175, 199; 84 NW2d 711 (1957). Therefore, we review the lower court's approach to the dispositional hearing for a abuse of discretion. *Id.*, at 199-200. An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). Furthermore, this Court may only consider unpreserved issues where failure to do so would result in manifest injustice. *Metzler, supra* at 548.

B. The Crime Victim's Rights Act And MCR 5.943(C)(1)

The trial court stated that it was allowing the victim's sisters and the administrator to make statements at the dispositional hearing pursuant to the Crime Victim's Rights Act ("CVRA"), MCL 780.751 *et seq.*; MSA 28.1287(751) *et seq*. MCL 780.765; MSA 28.1287(765) provides that "[t]he victim shall have the right to appear and make an oral impact statement at the sentencing of the defendant." On appeal, defendant argues that these three people went beyond making "statements"

pursuant to the CVRA; he contends that they actually testified against him and, therefore, they should have been placed under oath.[2] We disagree.

MCR 5.943(C)(1) provides that "[a]t the dispositional hearing all relevant and material evidence, including oral and written reports, may be received by the court and may be relied upon to the extent of its probative value, even though such evidence may not be admissible at trial." The trial court, therefore, did not abuse its discretion by receiving the victim's sisters' statements. Nor did the court err by allowing them to provide "interpretations" of the statements made by the victim, who was quite obviously having a very difficult time communicating with the trial court, presumably due to her physical disabilities and her emotional pain. The same reasoning applies to the statements made by the administrator and to her questioning of the victim. The trial court did not abuse its discretion by receiving the administrator's statements, allowing her to question the victim, or by relying upon any evidence thereby elicited to the "extent of its probative value." Furthermore, we do not see any prejudice to defendant from these statements because this was the dispositional phase of the proceedings.

C. Sworn Statements

Defendant contends that, as his "accusers," the victim's two sisters and the administrator should have been sworn before they were permitted to speak at the dispositional hearing. However, defendant had already been adjudicated guilty based on his knowing and voluntary plea. The dispositional hearing was conducted "to determine what measures the court will take concerning the juvenile" following adjudication. MCR 5.943(A). Therefore, any speakers at the dispositional hearing were not testifying against defendant in the sense that their testimony was evidence on the issue of guilt. In any event, defendant has failed to cite any authority to support the proposition that those making statements at the dispositional hearing were required to be sworn, and this Court will not search for authority to support his position. *Jensen*, *supra*, at 457.

VI. Conclusion

We hold (1) that the trial court did not err by accepting by accepting defendant's admission of guilt and that there was a sufficient factual basis to support defendant's plea; (2) that the trial court did not err by proceeding to the dispositional stage of the hearing without the presence of defendant's counsel and by appointing stand-in counsel to represent him; and (3) that the trial court did not err at the dispositional hearing by permitting several persons to make unsworn statements concerning the incident and by permitting these persons to assist the victim in making her statement. Accordingly, we affirm.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Joel P. Hoekstra

[1] Defendant was twelve years old at the time of the incident.

[2] Defendant does not raise on appeal the issue of whether the victim's two sisters and the administrator were "victims" pursuant to the CVRA and were therefore properly allowed to make oral impact statements. It is our view that the victim's two sisters qualified as victims in their own right pursuant to MCL 780.752(1)(I); MSA 28.1287(752)(1)(i), which defines "victim" as "[a]n individual who suffers direct or threatened physical, financial, or emotional harm as a result of the commission of a crime." It is less clear whether the administrator qualified as the "custodian of a victim who is mentally or emotionally unable to participate in the legal process" pursuant to MCL 780.752(1)(i)(iv); MSA 28.1287(752)(1)(i)(iv). However, defendant has not raised this issue, and it is not necessary for this Court to address it in order to resolve defendant's argument on appeal.