

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL ANTHONY NELSON,

Defendant-Appellant.

UNPUBLISHED
October 15, 1999

No. 209468
Livingston Circuit Court
LC No. 97-010019 FC

Before: Neff, P.J., and Murphy and J. B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c; MSA 28.788(3) (victim under thirteen years of age). The trial court sentenced defendant to five to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first contends that the verdict was against the great weight of the evidence. We review for an abuse of discretion a trial court's denial of a motion for a new trial on the ground that the verdict was against the great weight of the evidence. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). An abuse of discretion occurs when the decision was manifestly against the clear weight of the evidence. *Id.* We find no abuse of discretion.

The victim testified that defendant touched her breast on May 18, 1997. Defendant contends that her testimony should not be credited because it was tainted by repeated interviews, and her disclosures contained many inconsistencies. We conclude that the victim's credibility was a matter for the jury.

First, with regard to defendant's claim that the victim's testimony was tainted by numerous interviews, defendant relies primarily on suppositions and possibilities for his claim rather than evidence.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

The evidence does not indicate that the interviews in this case were so

unusual that they provide exceptional circumstances justifying reversal of defendant's conviction. In the typical child sexual abuse case, multiple interviews are to be expected because the initial disclosure is made to someone other than the police. Further, it is not unusual for a family member to talk with the victim about an alleged incident. The victim would also typically be interviewed by the prosecutor. Thus, it cannot be said that the trial court's decision to deny a new trial was manifestly against the clear weight of the evidence on the basis of improper interviewing.

Second, with regard to inconsistencies in the victim's testimony, defendant likewise has not established a basis for granting a new trial. At trial, the victim testified that defendant touched her breast and digitally penetrated her vagina on April 25 and May 18, 1997, as she had testified at the preliminary examination. Defendant did not testify; the defense provided no evidence directly contradicting the victim's allegations that defendant touched her breast and digitally penetrated her vagina on two separate occasions. Consequently, this case was a matter of witness credibility, particularly the victim's. "New trial motions based solely on the weight of the evidence regarding witness credibility are not favored." *People v Lemmon*, 456 Mich 625, 639; 576 NW2d 129 (1998).

It is undisputed that there were inconsistencies in the details of the victim's statements. However, some of the testimony alleged as inconsistent by defendant could have been found to be otherwise by the jury because the testimony was subject to differing interpretations. Further, the jury reasonably could have found that some of the alleged inconsistencies resulted from the manner of questioning rather than the victim changing her story. Given these circumstances, the issue of the victim's credibility was properly resolved by the jury.

Moreover, at trial, defendant brought detailed and extensive evidence of the alleged inconsistencies to the attention of the jury, particularly through his expert witness' testimonial analysis of inconsistencies in the victim's pretrial statements. Thus, the alleged inconsistencies were before the jury, and, presumably, were considered by the jury in weighing the victim's credibility. Additionally, the prosecution presented substantial evidence to explain the inconsistencies in the victim's statements. The prosecution's expert witness testified that inconsistencies in child sexual abuse disclosures were not uncommon. The prosecution also introduced evidence that the inconsistencies in this particular case were to be expected because of the victim's learning disabilities.

In general, a question as to the credibility of a witness is not a sufficient ground for granting a new trial. *Id.* at 643. When the testimony supporting the verdict has been impeached, "if 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,'" then the issue of credibility is for the jury. *Id.*, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942). A trial judge may not sit as a thirteenth juror. *Lemmon*, *supra* at 627, 637-638. The victim's testimony was not so inherently implausible to be beyond the belief of a reasonable juror nor was it so seriously impeached and the case marked by uncertainties and discrepancies that a new trial is warranted. See *id.* at 643-644.

II

Next, defendant claims that the prosecutor's unsworn testimony mandates reversal. We find this claim without merit. The defense resolved this issue to its satisfaction in the lower court; thus, there is no basis for defendant to argue on appeal that the prosecutor's unsworn testimony was error requiring reversal. The trial court's failure to issue a curative instruction resulted from defendant's own action in resolving this matter. Error warranting reversal must be that of the trial court and not one to which an aggrieved party contributed by planned or neglectful omission of action on his part. *Smith v Musgrove*, 372 Mich 329, 337; 125 NW2d 869 (1964); *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993).

III

Next, defendant claims that the trial court erred in failing to play back the entire video recording of the victim's testimony. This Court reviews a trial court's decision regarding the review of trial testimony for an abuse of discretion. MCR 6.414(H); *People v Wytcherly*, 172 Mich App 213, 218; 431 NW2d 463 (1988), (*On Rehearing*) 176 Mich App 714; 440 NW2d 107 (1989). The trial court must exercise its discretion in granting a jury's request to review trial testimony to ensure fairness and should not refuse a reasonable request. MCR 6.414(H); *Wytcherly, supra*, 172 Mich App at 218. When a jury makes a request for specific testimony or evidence, the court's response to that request is a matter of discretion. *People v Lyles*, 148 Mich App 583, 595; 385 NW2d 676 (1986); *People v Lobaito*, 133 Mich App 547, 564; 351 NW2d 233 (1984).

The trial court did not abuse its discretion in failing to play back the victim's entire testimony because the court planned to play back the entire testimony, but the jury subsequently interrupted the playback to confer before the end of the day, and ultimately reached its verdict before returning to view the remainder of the testimony. No purpose would have been served by mandating that the jury view additional testimony after it informed the court that it had reached its decision.

IV

Next, defendant claims that the trial court committed error requiring reversal in stating its recollection of a witness' testimony, and in playing only a minute of the testimony. We disagree. "A judge who comments on the evidence must take great pains to assure that his comments accurately represent the subject." *People v Jones*, 130 Mich App 676, 678; 344 NW2d 46 (1983). We find no error in the court's recollection of the date as the "18th." The court was not an unsworn witness with regard to matters not in evidence or credibility. See *id.* at 679. The court's recollection pertained to testimony provided at trial, and the recollection was not inaccurate.

Further, there was no error in the court's decision to play the portion of the video that provided the requested date. When a jury makes a request for review of specific testimony or evidence, the court's response to that request is a matter of discretion. *Lyles, supra* at 595; *Lobaito, supra* at 564. Given the jury's specific request and the court's cautionary instruction, the court's decision to play one minute of testimony was not an abuse of discretion.

Finally, defendant claims that the trial court erred in admitting the testimony of expert witness Laura Moore. An expert in childhood sexual abuse may (1) “testify in the prosecution’s case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim,” and (2) “testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim’s credibility.” *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857, amended 450 Mich 1212 (1995). See also *People v Lukity*, 460 Mich 484, 500; 596 NW2d 607 (1999) (reiterating these principles). An expert may not testify that sexual abuse occurred, may not vouch for the veracity of the victim, and may not testify that the defendant is guilty. *Id.*

The expert witness’ testimony in this case was not improper. The defense theory was that the victim was not credible. In his opening statement defense counsel made repeated references to the victim’s lack of credibility and stated that “[the victim’s] testimony and its incredibility will become very apparent to each of you when she is testifying.” Counsel also raised the issue of the victim’s postincident behaviors in his opening statement, stating that the defense’s expert witness would testify that the victim “doesn’t fit the profile of a victim.” Where a defendant raises the issue of the particular child victim’s postincident behavior or attacks the child’s credibility, an expert may testify that the particular child victim’s behavior is consistent with that of a sexually abused child. *Id.* at 500-501; *Peterson, supra* at 373-374.

Moore’s testimony was properly limited to statements of typical postincident behaviors and whether the victim’s behaviors were consistent with those of other child sexual abuse victims. Her testimony was not lengthy and did not delve into any improper areas such as the veracity of the victim. Her testimony regarding the victim’s specific behavior was limited. Expert testimony regarding the manner of the victim’s disclosure was admissible because the defense attacked the victim’s behaviors by stating that she did not fit the profile of a victim. *Peterson, supra* at 374, n 13. Moore’s testimony was proper.

Because Moore’s testimony was not improper, the prosecutor’s closing argument referring to Moore’s testimony was not improper. The trial court did not err in allowing the testimony of the expert witness.

Affirmed.

/s/ Janet T. Neff
/s/ William B. Murphy
/s/ Joseph B. Sullivan