

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT WILLIAM MUNSELL,

Defendant-Appellant.

UNPUBLISHED
October 22, 1999

No. 210989
Hillsdale Circuit Court
LC No. 21-007768

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced to three years' probation, including twelve months in jail.

On appeal, defendant first argues that he was denied his right to a fair trial because the trial court's comments to and about a particular juror pierced the veil of judicial impartiality. Defendant claims that that juror's opinion could have been given more weight based on the dialogue. Although defendant did not object below to these comments, this Court may review the matter if manifest injustice results from the failure to review, especially where an objection to the trial court's conduct would have had to be made to the trial judge himself. *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988). We review the trial court's conduct for an abuse of discretion. *Id.* at 698. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments "were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *Id.*, quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975).

Defendant relies on *Collier* in support of his argument. In *Collier*, *supra* at 698-700, during the jury voir dire, the trial court conversed with a potential juror, who ultimately served as foreman, and commented that the juror is a notorious criminal defense lawyer, referred to the juror's past business venture, and recessed the proceedings so that the juror could check his upcoming work schedule for conflicts. This Court determined that the trial court's conduct "pierced the veil of judicial impartiality so as to unduly influence the jury" because "[t]he remarks established an ambiance of collegiality or

camaraderie between the judge and the jury foreman such that it was apparent the foreman shared a special relationship with the judge.” *Id.* at 698.

The case at hand is distinguishable from *Collier*. Here, the trial court’s comments to the juror were not related to any role in the legal profession; rather, they were related to the juror’s landscaping and snow removal abilities in the form of “free advertising,” they were quite brief, and they displayed knowledge of the juror’s employment and his job performance in a non-legal occupation, but in no way placed the judge in a position to accommodate the juror. *Id.* at 700. Under these circumstances, the trial court’s comments were not “of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.” *Id.* at 698. We conclude that the trial court neither abused its discretion nor pierced the veil of judicial impartiality, and therefore, no manifest injustice occurred.

Next, defendant argues that the trial court abused its discretion in finding the four-year-old victim competent to testify because there was no clear showing that she could understand the truth in this matter. We disagree. A trial court’s determination of the competency of a witness will be reversed only for an abuse of discretion. *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998). Generally, witnesses are presumed to be competent to testify. *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). MRE 601 provides:

Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.

“In applying MRE 601, ‘the test of competency of a witness does not focus on whether a witness is able to tell right from wrong but, rather, on whether a witness has the capacity and sense of obligation to testify truthfully and understandably.’” *Breck, supra*, quoting *People v Burch*, 170 Mich App 772, 774; 428 NW2d 772 (1988). The determination of the trial judge, who is able to view the demeanor of the witness, is given great weight. *Storms v Storms*, 183 Mich App 132, 135; 454 NW2d 175 (1990). “Once the trial court is satisfied that the child is competent to testify, a later showing of the child’s inability to testify truthfully reflects on credibility, not competency.” *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991).

Here, the trial court questioned the four-year-old victim regarding her ability to tell the truth and ascertained that she was competent to testify. Although she was not responsive to some of the court’s questions, she affirmed that she knew the difference between telling the truth and telling a lie, stated that it is better to tell the truth, and promised to tell the prosecutor and defense counsel the truth. Where the trial court conducted a proper inquiry and was satisfied that the victim had the capacity and sense of obligation to tell the truth and where the trial court instructed the jury that the witness’ age and maturity may be factors in determining credibility, the trial court did not abuse its discretion in finding the four-year-old victim competent to testify. See *People v Jehnsen*, 183 Mich App 305, 308; 454 NW2d 250 (1990).

Defendant next argues that the trial court abused its discretion when it allowed the victims' foster mother to testify regarding the older victim's statements to her concerning the allegations against defendant because there was no showing of excusable delay. The older victim's statement took place eleven months after the incident. On appeal, admission of evidence is reviewed for an abuse of discretion. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998). MRE 803A, which is also known as the "tender years exception" to the hearsay rule, codified Michigan's common-law tender years hearsay exception and provides in relevant part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

* * *

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance

....

In general, the ordinary rules of statutory construction must be used when interpreting the court rules, and thus a court rule "should be construed in accordance with the ordinary and approved usage of the language; it should also be construed in light of its purpose and the object to be accomplished by its operation." *Taylor v Anesthesia Associates of Muskegon, PC*, 179 Mich App 384, 386; 445 NW2d 525 (1989).

Defendant's argument is inapposite because MRE 803A is not implicated where the foster mother did not testify about the substance of the victim's statement. The foster mother did not "describ[e] an incident that included a sexual act performed with or on the declarant by the defendant . . ."; instead, she testified that she had a conversation with the older victim that caused her to take action. Further, defendant's argument is without merit that it was an abuse of discretion to allow the foster mother's testimony regarding multiple occurrences because this information was elicited by defense counsel during cross-examination. A defendant should not be permitted to claim as error on appeal something defense counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "Invited errors occasioned by defense tactics may not, on appeal, be assigned as grounds for reversal." *People v Bates*, 91 Mich App 506, 516; 283 NW2d 785 (1979). We conclude that the foster mother's testimony neither implicated nor violated MRE 803A.

Finally, defendant argues that there was insufficient evidence to support his convictions. Specifically, defendant argues that the prosecutor failed to establish that defendant had sexual contact with the victims. We disagree. The relevant statutory provision, MCL 750.520c; MSA 28.788(3), 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 exists:

(a) That other person is under 13 years of age.

“In reviewing a sufficiency of the evidence question, this Court reviews the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the crime were proved beyond a reasonable doubt.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). “When deciding this issue, this Court should not interfere with the jury’s role of determining the weight of the evidence or the credibility of the witnesses.” *Id.* at 514. Further, “[c]ircumstantial evidence and reasonable inferences drawn therefrom may be sufficient to prove the elements of a crime.” *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993).

Here, both victims testified that defendant touched a “private” or “touched where I go potty” and pointed to the vaginal or groin area in explanation. The victims’ foster mother testified that the older victim disclosed something to her in church that caused her to take action. Further, detective Edwards testified that defendant told him that he had touched both victims in the vaginal area and that defendant had made a written statement to that effect at that time, which was read to the jury. Viewing this evidence in a light most favorable to plaintiff, a rational trier of fact could have found evidence sufficient to prove beyond a reasonable doubt that defendant engaged in sexual contact with the victims, and therefore, we conclude that sufficient evidence exists to support defendant’s conviction. We also note that defendant’s argument about the inconsistencies in the testimony and the difficulty in comprehending the younger victim’s testimony is not a matter of sufficiency of the evidence, but a matter of credibility and the weight of the evidence, which is rightly decided by the jury. *People v Gray*, 457 Mich 107, 124; 577 NW2d 92 (1998); *Wolfe, supra*.

We affirm.

/s/ Richard A. Bandstra

/s/ Stephen J. Markman

/s/ Patrick M. Meter