STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 26, 2000
v	No. 212481 Oakland Circuit Court
WILLIAM D. TYLER, Defendant-Appellant.	LC No. 97-154450-FC

Before: Markey, P.J., and Gribbs and Griffin, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Following a jury trial, he was convicted of two counts of second-degree CSC, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and sentenced to two concurrent terms of ten to fifteen years' imprisonment. He appeals by right. We affirm.

Defendant argues that the trial court erred in instructing the jury on second-degree CSC. We disagree. Second-degree CSC is a cognate lesser offense of first-degree CSC. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447 (1997). A trial court is obligated to instruct the jury on a cognate lesser offense upon request if the evidence would support an instruction for the offense. *People v Bailey*, 451 Mich 657, 669-670; 549 NW2d 325 (1996), amended 453 Mich 1204 (1996). If there is a factual dispute over the evidence that would support a conviction on a cognate lesser included charge, then an instruction on the cognate lesser included offense will be required. *Lemons*, *supra* at 254.

Second-degree CSC, as opposed to first-degree CSC, requires proof that the defendant engaged in sexual contact with the victim. Sexual contact is defined as "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); *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997). In the present case, in addition to providing testimony supporting an inference of penetration, the victim also testified that defendant rubbed his penis on her body. Further, Dr. Brock testified that the victim told him that defendant had touched her private

parts. This testimony was sufficient to support a finding that defendant engaged in sexual contact, and, therefore, the trial court did not err in instructing the jury on second-degree CSC.

Next, defendant challenges three separate rulings allowing the admission of out-of-court statements by the victim and her friend under exceptions to the hearsay rule. "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). "This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Id*.

The trial court did not abuse its discretion in admitting the victim's initial disclosure of the sexual abuse to her friend under the tender-years exception, MRE 803A. Contrary to defendant's claim, the circumstances surrounding the victim's initial disclosure of the sexual abuse indicate that the challenged statements were spontaneously made and, therefore, admissible under MRE 803A. *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996).

In addition, the trial court did not abuse its discretion in allowing Sherry Kincaid to testify about her conversation with her daughter. Because the testimony also involved the victim's initial disclosure of sexual abuse that was made to Kincaid's daughter, that evidence was admissible under the tender-years exception, as previously explained. Also, the trial court did not err in ruling that the statement was alternatively admissible as a prior consistent statement of the victim, inasmuch as it was the defense theory that the victim's allegations were fabricated. Because the evidence does not indicate that the victim made the initial disclosure only after she learned that either Sherry Kincaid or her daughter also had been sexually abused, the evidence did not suggest that the victim had a motive to fabricate her claims against defendant before she made her statement. *People v Rodriquez (On Remand)*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996).

Finally, the statement made by Kincaid's daughter to Kincaid, revealing the victim's sexual abuse, was admissible as an excited utterance. Under this rule, a hearsay statement is admissible if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." MRE 803(2); *People v Larry Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). If there is a delay between the startling event and the statement, it is necessary to consider if a plausible reason existed for the delay. *Id*. at 551. "[T]here is no express time limit for excited utterances." *Id.* The period of delay may be affected by physical factors, such as pain, shock, or unconsciousness. *Id*. at 551-552. The trial court's decision regarding whether the declarant made the statement while still under the stress of the startling event is afforded wide discretion. *Id*. at 552.

Although there was a delay between the time the victim confided in her friend and when her friend shared the information with Kincaid, there was sufficient evidence to indicate that Kincaid's daughter was still under the stress of the startling revelation when she spoke to Kincaid. Accordingly, we cannot say that the trial court abused its discretion in admitting the testimony as an excited utterance. *Smith, supra* at 550, 552. Moreover, even assuming that the trial court improperly admitted the statements, we do not conclude that it is more probable than not that a different outcome would have

resulted without the error. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The testimony in question was merely cumulative to other evidence presented at trial. *Rodriquez, supra* at 332. At trial, both Police Officer Cosby and Dr. Brock testified that the victim had told them that defendant had repeatedly touched her private parts and had put his private part in her private parts. No reversal is required.

We affirm.

/s/ Jane E. Markey
/s/ Roman S. Gribbs
/s/ Richard Allen Griffin