STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WALTER N. HOLMES,

Defendant-Appellant.

UNPUBLISHED
June 15, 2001

No. 220275
Mackinac Circuit Court
LC No. 98-002451-FC

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a), two counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e, and one count of furnishing alcohol to a minor, MCL 436.33a. He was sentenced to six to fifteen years' imprisonment for each CSC III conviction, sixteen to twenty-four months' imprisonment for each CSC IV conviction, and thirty days' jail time for the furnishing alcohol to a minor conviction, all to be served concurrently. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it admitted photographs and documents concerning the complainant's sister's graduation, as well as photographs of defendant's living room. Defendant contends that pictures and documents relating to the complainant's sister's graduation were evidence of educational history that constituted improper vouching for the complainant's credibility, and that the court improperly admitted the pictures of the defendant's living room because it was under the mistaken impression that defense counsel had asserted during opening statement that defendant did not have a videocassette recorder in his home.

We review decisions on the admission of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling of the trial court. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

First, we do not believe that admission of photographs and documents concerning the complainant's sister's graduation constituted improper vouching for the complainant's

credibility. Further, our review of the record shows that, irrespective of the court's stated reasons for admitting the photographs and documents, the evidence was at least marginally relevant to disputed issues at trial and had little, if any, potential for unfair prejudice. MRE 401; MRE 403; see also *People v Sabin*, 463 Mich 43, 56-58; 614 NW2d 888 (2000). Thus, the court did not abuse its discretion in admitting the evidence. In any event, because defendant has not shown that any error in the admission of this evidence undermined the reliability of the verdict, reversal on this basis is not warranted. *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Next, defendant argues that the trial court abused its discretion in allowing a state police trooper to testify about child sexual abuse accommodation syndrome, although he was not qualified as an expert. Defendant relies on *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), where the Supreme Court held that "[a]n expert may testify regarding typical 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 abuse victim *or* to rebut an attack on the victim's credibility." *Id.* at 373.

Our review of the record in this case shows, however, that the officer did not testify regarding typical symptoms of child sexual abuse. Rather, he testified in response to questions by the prosecutor that out of the approximately fifty to one hundred criminal sexual conduct complaints he had investigated, over half of the complainants had delayed reporting the alleged sexual incidents. He also testified that not all of his criminal sexual conduct cases included medical evidence, and he testified that he did not recommend that the complainant seek a medical examination because, on the basis of his training and experience, "there would be no evidence to be gained two months after the incident had occurred."

The challenged testimony was based on the officer's personal knowledge and was relevant to rebut the inference raised by defense counsel during opening statement that because the complainant delayed reporting the alleged assault by defendant for two months, and there was no physical or medical evidence, the complainant could not be believed. Contrary to defendant's assertions, the prosecutor did not ask the trooper *why* a complainant would delay reporting an incident of criminal sexual conduct, nor did the trooper provide an opinion in this regard. When the prosecutor asked whether criminal sexual conduct complainants generally disclose all the details of an alleged incident the first time they make a report, the court sustained defense counsel's objection. Further, the probative value of the officer's testimony was not substantially outweighed by the danger of unfair prejudice. The officer did not vouch for the veracity of the complainant, he did not testify that her behavior was consistent with that of actual victims of sexual abuse, and he offered no opinion with regard to whether the complainant had been sexually assaulted. Compare *Peterson, supra* at 375-376. Accordingly, the court did not abuse its discretion in admitting the testimony.

Defendant next argues that the trial court erred when it refused to admit, pursuant to the business records exception to the hearsay rule, MRE 803(6),[1] a summary of employee work

[1] Under MRE 803(6), the following is not excluded by the hearsay rule, even though the declarant is available as a witness:

(continued…)

hours created by defendant's wife at the business they owned, to show that he was working at the time the alleged sexual assault took place.

> As explained in *Solomon v Shuell*, 435 Mich 104, 120; 457 NW2d 669 (1990), "the traditional business records hearsay exception is justified on grounds of trustworthiness: unintentional mistakes made in the preparation of a record would very likely be detected and corrected." While this exception has evolved and been expanded from its "traditional" roots, "trustworthiness, under the current Rules of Evidence, no longer serves as a mere philosophical justification for the admission of evidence otherwise excluded as hearsay. Rather, under MRE 803(6) and FRE 803(6), trustworthiness is itself an express threshold condition of admissibility." *Solomon, supra*, pp 122-123. Thus, "the trial court, in its discretion, may exclude evidence meeting the literal requirements of the business records exception where the underlying circumstances indicate a lack of trustworthiness business records are presumed to have." *Id.*, p 122. [*People v Huyser*, 221 Mich App 293, 296-297; 561 NW2d 481 (1997).]

Here, the document in question was prepared by defendant's wife, who did not testify at trial regarding when or how she compiled the data. Further, the time cards containing the actual hours worked from which the summary was allegedly compiled were no longer available. Defendant acknowledged that he was not an hourly employee and that he never drew a paycheck from his business. Accordingly, defendant's business would not be relying on the accuracy of the record with regard to defendant's work hours, and "'unintentional mistakes made in the preparation of the record'" would *not* "'likely be detected and corrected.'" *Huyser, supra* at 296, quoting *Solomon, supra* at 120. We conclude, therefore, that the trial court did not abuse its discretion in refusing to admit the evidence under MRE 803(6).

Moreover, contrary to defendant's assertion, the court's exclusion of the evidence did not preclude him from presenting a defense. Immediately after the court ruled that the work hour data compilation was not admissible, defendant was allowed to rely on the excluded document in testifying to the hours he worked on the day in question. Because defendant has not shown that any error in the exclusion of this evidence undermined the reliability of the verdict, reversal on this basis is not warranted. *Rodriguez, supra; Lukity, supra.*

(…continued)

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from infomration transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [MRE 803(6).]

Defendant next argues that the trial court abused its discretion when it admitted statements that defendant allegedly made to the complainant and the investigating officer that he was a "swinger." Defendant argues that this was improper character evidence, which is inadmissible under MRE 404(b). Under MRE 404(b), other acts evidence is admissible if it is offered for a proper purpose, it is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993). However, it is not admissible if offered solely to show the criminal propensity of an individual and that he acted in conformity with that propensity. *Id.* at 65.

Here, the officer's testimony regarding defendant's statement to him, which was admissible as an admission by a party opponent under MRE 801(d)(2)(A), see *People v Goddard*, 429 Mich 505, 518, 523; 418 NW2d 881 (1988); *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), provided direct corroboration of the complainant's version of events and thus was relevant to the issue of her credibility. The complainant testified that at the time defendant made sexual advances to her, he told her that he belonged to a "swingers" club, and the officer who spoke to defendant about the complainant's allegations testified that while defendant denied having intercourse with the complainant, he did admit to kissing and lying on top of the complainant while they were fully clothed, and to discussing with the complainant his attendance at a "swingers" club. At trial, defendant contended that he was not with the complainant, but was at work, at the time that the complainant alleged the assault took place. Thus, his admission that a conversation that was recounted by the complainant actually took place was relevant to the issue of complainant's credibility, which is a proper, noncharacter theory of relevance. See *Starr, supra* at 501. We further conclude that given the relatively strong probative value of the evidence, and its relatively low prejudicial value, its probative value was not substantially outweighed by its potential for unfair prejudice. MRE 403.

Defendant next argues that he was denied a fair trial because of misconduct by the prosecutor. Defendant contends that the prosecutor improperly attempted to elicit testimony from the state trooper regarding child sexual abuse accommodation syndrome and that he engaged in misconduct during closing argument by shifting the burden of proof to defendant and improperly vouching for the credibility of the complainant and state trooper by telling the jury that neither of them had lied.

The only instance of alleged prosecutorial misconduct that defendant preserved with an appropriate objection at trial was the prosecutor's question to the state trooper regarding whether criminal sexual conduct complainants generally report everything that happened the first time they make a report concerning an alleged assault. As discussed above, the court sustained defense counsel's objection; thus, defendant suffered no prejudice. We have reviewed defendant's remaining claims of prosecutorial misconduct, none of which were objected to at trial, and conclude that defendant has failed to show any plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Any prejudicial effect from the challenged remarks could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Finally, because we find no prejudicial error, defendant's cumulative error argument is without merit. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

Affirmed.

/s/ Jeffrey G. Collins
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage