STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK WALTER STOCKMAN,

Defendant-Appellant.

UNPUBLISHED
April 19, 2002

No. 228525
Hillsdale Circuit Court
LC No. 00-248725-FC

Before: Owens, P.J., and Markey and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a). Defendant was sentenced to twelve to twenty years' imprisonment. He appeals as of right. We affirm.

In this case, defendant was convicted of anally penetrating a seven-year-old boy after a Halloween party held at a home. The next day, the victim told his mother and she took the victim to the hospital and called the police. The police interviewed defendant on two occasions. On the first occasion, defendant was confronted with the fact that the victim told the police that defendant left "white glue type balls" on him. However, defendant denied that he sexually assaulted the victim. Instead, defendant explained that the substance could have gotten on the victim while defendant was sleepwalking or if the victim had taken a bath after defendant because defendant had masturbated in the bathtub earlier that evening. The police interviewed defendant on a second occasion, during which defendant admitted that he sexually assaulted the victim.

First, defendant contends that the trial court clearly erred when it denied his motion to suppress the first statement that he gave to the police because it was "not voluntary and knowing in that the police employed trickery, deceit, and a lie in order to obtain the first confession." Specifically, defendant contends that the interrogating police officer told him, untruthfully, that his semen had been found on the victim.

Generally, when reviewing the voluntariness of a confession, we review the record de novo. *People v Adams*, 245 Mich App 226, 230; 627 NW2d 623 (2001). However, we review the trial court's factual findings for clear error. *Id.* A finding is clearly erroneous where, after reviewing the entire record, we are "left with a definite and firm conviction that a mistake has been made." *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

In the instant matter, the trial court found that the police officer merely read defendant the victim's statement, which alleged that defendant had left "white glue type balls" on the victim. Thus, the trial court found no merit in defendant's contention that he was told that his semen had been found on the victim. The trial court further opined:

> Now, in this case, gentlemen, I have overwhelming testimony that Mr. Stockman was never under arrest, he was free to go at all times. He knew that. He was made aware of that. He never asked to be released. He never asked that the questioning be stopped. He never asked for an attorney after being advised of Miranda rights not just on one occasion but on two occasions. . . . He never asked for counsel. He never asked the questioning to stop. He said he understood the rights.
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> Then, in reference to the allegations regarding the white glue type balls, he gave two possible reasons. Masturbation in a bathtub. The boy took a bath and it got on him, or he simply was sleepwalking. Now, there is no reason to suppress those statements. Those are statements made by the defendant. He offered those as plausible reasons as to why the so-called sperm or semen – semen being on the boy. There is no reason to suppress that. They were voluntarily made. They were not against the will of this defendant. He made so – made them voluntarily, intelligently, willingly at that point indicating some plausible response.

The trial court further found that defendant was "street smart," was not easily intimidated, appeared to have "above average intelligence," and had previous contact with the police. Thus, the trial court denied defendant's motion to suppress the first statement.

As a preliminary matter, we note that where a "defendant's statements were admissions of fact, rather than a confession of guilt, no finding of voluntariness is necessary." *People v Gist*, 190 Mich App 670, 671; 476 NW2d 485 (1991). Here, the statement at issue is not the second statement in which defendant confessed to anally penetrating the victim. Instead, the issue concerns the first statement, in which defendant denied the assault and instead offered alternative, albeit implausible, explanations for how the "white glue type balls" might have gotten on the victim. Thus, the statement at issue does not show guilt, and is not a confession. We could, therefore, simply decline to consider this issue.

It should also be noted that even where a police officer makes a false statement to induce a confession, the resulting confession is not automatically rendered involuntary and inadmissible. *People v Givans*, 227 Mich App 113, 123; 575 NW2d 84 (1997). Instead, the false statement by the police officer is just one of several factors to be considered when weighing the voluntariness of a confession. *Id.* In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), our Supreme Court opined as follows:

> In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an

> unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

"The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *Id.*

Here, there was testimony that defendant, an eighteen-year-old man, was intelligent and "street smart." Defendant had prior experience with the police and was found to have been involved in an armed robbery a few years ago. Defendant voluntarily went to the police station with the police officer. Before the interview began, defendant was read his *Miranda*[1] rights. Defendant was also told that he was not under arrest and could leave at any time. There was no indication that this interview was prolonged. Defendant did not complain that he was deprived of food or medical attention, nor did defendant argue that he was physically abused or threatened. Further, there is no indication that defendant was intoxicated at the time he made the statement. Finally, we do not believe that the trial court clearly erred by finding that that defendant's primary complaint regarding the "trickery" purportedly used by the police officer was not even supported by the evidence. Thus, we conclude that, under the totality of the circumstances, the trial court did not err by denying defendant's motion to suppress the first statement.

Next, defendant argues that there was insufficient evidence presented at trial to support his conviction. A challenge to the sufficiency of the evidence requires us to determine "whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt." *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

Defendant was convicted of first-degree criminal sexual conduct. MCL 750.520b(1)(a) provides that "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [t]hat other person is under 13 years of age." Sexual penetration is defined in pertinent part as "anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(l). Here, the victim testified that defendant took the victim's pants off and defendant put his penis "in my butt." The victim stated that this lasted approximately two minutes and was painful. When defendant was finished, the victim had a "wet" substance on him, which he wiped off with a towel after he ran to the bathroom. The victim was seven years old. As such, viewed in a light most favorable to the prosecution, there was sufficient evidence to support defendant's conviction for first-degree criminal sexual conduct.

Nevertheless, defendant contends that the victim's testimony was inconsistent with statements he had previously given to police. Defendant also points out that plaintiff's case

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

rested entirely on the victim's testimony. It is well established, however, that we "should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses." *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000). Indeed, the jurors in this case were presented with conflicting testimony, which required them to make a determination concerning the credibility of each witness and the weight to afford each witness' testimony. The jury apparently found the victim's testimony credible, despite the inconsistencies between his testimony and the statements he made to police. Thus, we find that defendant's argument fails.[2]

Finally, defendant contends that the trial court incorrectly scored fifty points for offense variable seven ("OV-7"), MCL 777.37. MCL 777.37 provides:

> (1) Offense variable 7 is aggravated physical abuse. Score offense variable 7 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) A victim was treated with terrorism, sadism, torture, or excessive brutality . . . 50 points
>
> (b) No victim was treated with terrorism, sadism, torture, or excessive brutality . . . 0 points
>
> (2) As used in this section:
>
> (a) "Terrorism" means conduct designed to substantially increase the fear and anxiety a victim suffers during the offense.
>
> (b) "Sadism" means conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification.

"The interpretation and application of statutes is a question of law that is reviewed de novo by this Court." *People v Al-Saeigh*, 244 Mich App 391, 394; 625 NW2d 419 (2001).

In this case, the trial court rejected defendant's argument that OV-7 was improperly scored, explaining as follows:

> The Court finds that this variable has been properly scored. What I have is a very young individual here, the victim, who was very obese, who suffered at the hands

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[2] Defendant also contends that his conviction was against the great weight of the evidence. Where, as here, a motion for a new trial is not made below, we will only consider the issue if the failure to do so would result in a miscarriage of justice. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). For the same reasons that we believe that there was sufficient evidence to support defendant's conviction, we conclude that the failure to consider this argument would not result in a miscarriage of justice. Consequently, we decline to further consider this issue.

> of this particular individual. He was beaten prior to this act taking place, struck across – around his face and body parts, as described by the nurse based on the bruises that she observed on him when he was taken to the hospital. He was subjected to humiliation and pain. He indicated, I believe, even when he testified, that he couldn't walk right for about a week afterwards based on that beating.
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> Based on the conduct and the humiliation that this rather obese young boy went through, the added effect that during the process of this rape that he was threatened with physical harm, that he was going to be killed if he ever told anyone, based on that increased anxiety that he has felt and the effect it has had on his ability and self-esteem, I think the variable is properly scored and would leave it at 50 points.

Here, we believe that the trial court's findings support a conclusion that the victim was treated with "sadism," inasmuch as the evidence suggests that the victim was subjected to humiliation and extreme pain. Indeed, the nurse who examined the victim also noticed bruising on his left breast, right breast, and temple. There was also bruising and redness around the victim's rectum. In addition, the presentence investigation report indicates that defendant told the victim that he would kill him if he told anyone. We find that this evidence supports a finding that defendant also terrorized the victim. Thus, we do not believe that the trial court erred as a matter of law by scoring OV-7 at 50 points. MCL 777.37.

Affirmed.

/s/ Donald S. Owens
/s/ Jane E. Markey
/s/ Christopher M. Murray