STATE OF MICHIGAN

COURT OF APPEALS

In re ANGELA GOSSAGE, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

ANGELA GOSSAGE,

Respondent-Appellant.

UNPUBLISHED
November 30, 2004

No. 247958
Macomb Circuit Court
LC No. 02-052303-DL

Before: Cavanagh, P.J., and Kelly and H Hood*, JJ.

PER CURIAM.

In this delinquency case, respondent, a minor, appeals by leave granted from the order of disposition entered after a jury found her guilty of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). We remand.

This case concerns allegations that respondent, a thirteen-year-old girl, engaged in sexual conduct with two brothers, age three and six. During the autumn of 2001, respondent babysat the two boys regularly. Respondent's mother was a friend of the boys' mother. The boys' mother learned of statements that the older boy made to a neighbor, which led her to question both boys about respondent. The older boy alleged that respondent played a doctor game with him while she was naked and "licked his winkie," or penis. The younger boy asserted that he had seen respondent naked in the older boy's bedroom and that she had compelled the younger boy to touch her breast. The jury found respondent guilty of the charge relating to the older boy and not guilty of the charge relating to the younger boy.

Respondent raises several evidentiary issues on appeal. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v Washington*, 468 Mich 667, 670; 664 NW2d 203 (2003). When "the decision regarding the admission of evidence involves a preliminary question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence," we review the issue de novo. *Id*. at 670-671. We review issues of whether the trial court properly limited the cross-examination of a witness for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995).

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

Respondent challenges the trial court's refusal to allow the introduction of evidence regarding an allegation of sexual abuse by the boys' mother against her father approximately thirty years before the incidents at issue. To the extent that respondent argues that she was denied her right to confront the boys' mother, thereby precluding her from impeaching this witness at trial, this Court has stated the following:

> A defendant has a constitutional right to confront the witnesses against him, US Const, Am VI; Const 1963, art 1, § 20. If a defendant has been limited in his ability to cross-examine the witnesses against him, his constitutional right to confront witnesses may have been violated. Yet, there are limits to this right to confront witnesses. The Confrontation Clause "'guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" Rather, the Confrontation Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony. [*People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998) (citations omitted) (emphasis in original).]

Trial judges "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993) (citation omitted). Moreover, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

In the instant case, it appears that the trial court found that evidence of the allegation of sexual abuse by the boys' mother against her father some thirty years previously would confuse or mislead the jury. The trial court stated that it was "not going to try a 30-year old case here in the middle of this case." We conclude that, because the allegation made by the boys' mother against her father was never substantiated, such testimony would have been speculative and would have confused the jury. Because a trial court has wide latitude to impose reasonable limits on cross-examination, the trial court did not abuse its discretion in refusing to allow respondent's counsel to question the boys' mother about this previous allegation. In addition, pursuant to MRE 403, the trial court did not abuse its discretion in not allowing the parents of the boys' mother to testify about this previous allegation because the probative value of such testimony was substantially outweighed by the danger of confusing or misleading the jury.

Respondent next challenges the trial court's decision to allow the boys' mother to testify pursuant to MRE 803A about statements the boys made to her. An unsworn, out-of-court statement offered in evidence to prove the truth of the matter asserted cannot be admitted except as provided by the Michigan Rules of Evidence. MRE 801; MRE 802. MRE 803A provides a hearsay exception for a child's statement about a sexual act if the statement is corroborative of other testimony given by the declarant during the same proceeding. MRE 803A provides in pertinent 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:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (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; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.

Respondent argues that, although MRE 803A limits the testimony to only the first statement made by the declarant, the trial court allowed the boys' mother to testify to numerous and subsequent statements made by the boys. When the plain language of a court rule is unambiguous, "we must enforce the meaning expressed, without further judicial construction or interpretation." *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003). MRE 803A states that "[i]f the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule." Respondent cites *People v Katt*, 248 Mich App 282; 639 NW2d 815 (2001), to support her proposition that MRE 803A applies only to the victim's "first statement." While the prosecutor properly points out that *Katt* addressed the applicability of MRE 803(24), and not MRE 803A, the *Katt* Court noted that MRE 803A did not apply because the prosecutor conceded that the victim's statement was the second statement about the abuse. *Katt*, *supra* at 288.

At the hearing on the prosecutor's motion to admit these statements pursuant to MRE 803A, the boys' mother testified that she learned from a neighbor that something was going on between respondent and her sons because her older son had told his friend that respondent touched his buttocks. At trial, however, the trial court ruled that this statement was hearsay within hearsay. The trial court then allowed the boys' mother to testify to *subsequent* statements made by the older son. In addition to the fact that these were subsequent statements, we also find that the statements made by the boys after the telephone call from the neighbor were not "spontaneous," as is required by MCR 803A.

Generally, open-ended questions are considered spontaneous. *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996). Unlike the statement in *Dunham*, however, the older son's statements to his mother were prompted. The boys' mother testified that after she received the telephone call from her neighbor, she pulled her older son into her bedroom and told him that his friend's mother had called. She then told him what the neighbor had said, asked him if respondent ever went into the bathroom with him, and asked him if he ever saw respondent naked. The boys' mother testified that a couple days later, her younger son told her to pull down her pants so he could see her butt. The boys' mother asked where he learned this, and when he stated respondent, the mother asked him if he ever touched respondent when she was naked. Sometime later, the boys' mother asked her older son what happened when he would get naked with respondent, and he said that she would "lick his winkie." After reviewing the above

testimony, we conclude that statements made to the boys' mother were not admissible pursuant to MRE 803A.

The prosecutor argues that even if the trial court erred in admitting the statements made by the boys to their mother, the error was harmless.

> In order to overcome the presumption that a preserved nonconstitutional error is harmless, a defendant must persuade the reviewing court that it is more probable than not that the error in question was outcome determinative. An error is deemed to have been "outcome determinative" if it undermined the reliability of the verdict. In making this determination, the reviewing court should focus on the nature of the error in light of the weight and strength of the untainted evidence. [*People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001) (citations omitted).]

In *People v Foreman* (*On Remand*), 179 Mich App 678, 680; 446 NW2d 534 (1989), this Court found that, although the children's statements about the abuse were inadmissible pursuant to MRE 803(2), the error was harmless because the hearsay statements were cumulative to the children's in-court testimony, which was credible and convincing beyond a reasonable doubt. This Court looked at the fact that the children's testimony regarding the criminal sexual conduct was detailed and convincing. *Id.* at 681. This Court stated that it was "highly improbable that six-and seven-year-old children, in a courtroom setting subject to cross-examination, could lie convincingly about experiencing oral sex, sodomy and intercourse." *Id.*

In the instant case, even though the trial court improperly admitted the testimony of the boys' mother regarding the statements of the boys, respondent has not carried her burden of establishing that it was more probable than not that the alleged error affected the outcome of the trial. *Whittaker, supra* at 427. The older boy testified that respondent licked his "winkie," which was sufficient to find respondent guilty of CSC II. We also find that the testimony of the boys' mother with regard to the younger boy's statement was harmless error because the jury found respondent not guilty of charges relating to him.

Respondent also argues that the trial court erred in not allowing respondent's expert to testify with regard to whether the boys' testimony was truthful. In *People v Beckley*, 434 Mich 691, 727; 456 NW2d 391 (1990), the Michigan Supreme Court ruled that an expert may not testify with regard to whether the victim's allegations were truthful or whether the sexual abuse did in fact occur. Therefore, this issue is without merit.

Respondent next challenges the trial court's decision to allow the boys' mother to testify with regard to statements made by her neighbor. The boys' mother testified that she received a telephone call from her neighbor on December 27, 2001. The prosecutor asked the boys' mother what her neighbor stated, and respondent's counsel objected on the ground of hearsay. The trial court sustained the objection. The prosecutor then asked that the statement be admitted for a nonhearsay purpose. Because the prosecutor was trying to explore the mother's state of mind, the trial court overruled respondent's objection.

After reviewing the transcript, we conclude that the challenged portion of the testimony of the boys' mother was not offered to prove the truth of the matter asserted. Rather, it was

presented to show the effect of the statement on the mother and the reasons for her course of action following this telephone call. "It is well accepted that evidence that demonstrates an individual's state of mind will not be precluded by the hearsay rule." *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995).

Respondent challenges the trial court's refusal to admit the affidavit of the boys' mother. MRE 801(d)(1)(A) provides that prior inconsistent statements are not hearsay if they were given "at a trial, hearing, or other proceeding, or in a deposition[.]" Because this affidavit was not given at a trial, hearing, other proceeding, or deposition, MRE 801(d)(1) does not apply.

Respondent also argues that, if the affidavit is determined to be hearsay, then the recorded recollection exception applies. "Hearsay" is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Because we find that the statements included in the affidavit fall within the definition of hearsay, an exception must apply for them to be admissible. Respondent cites the exception contained in MRE 803(5), which provides in pertinent part:

> A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly.

Nothing in the record indicates that the witness had "insufficient recollection" or that the affidavit was made when the matter was fresh in the witness' memory. Furthermore, although the trial court did not admit the affidavit into evidence, the trial court still allowed respondent's counsel to cross-examine the boys' mother with regard to the dates involved, which was the point on which respondent sought to admit the affidavit. Therefore, even if the trial court erred with regard to the affidavit, such error was harmless.

Respondent next challenges the prosecutor's questioning of respondent's mother regarding respondent's prior psychiatric treatment and counseling. Respondent argues that such testimony was not "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Rather, respondent argues that the evidence was solicited to improperly suggest that respondent "was some kind of deviant or person with emotional problems."

MRE 401 dictates, "evidence is relevant if two components are present, materiality and probative value." *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Materiality requires that the proffered evidence must be related to a fact that is "of consequence" to the action. *Id.* Materiality examines the relationship between the issues in the case and the propositions for which the evidence is offered. *Id.* at 389. The evidence is not material if it is offered to prove a proposition that is not a matter in issue. *Id.* at 389. Because respondent's prior counseling was not related to any fact that was of consequence to the action or offered to prove a proposition that was a matter in issue, it was not relevant. We conclude, however, that respondent has not shown that it is more probable than not that the error in question was outcome determinative. *Whittaker, supra* at 427.

Respondent also argues that the above testimony was improper pursuant to MRE 404 because respondent's character had not been introduced. However, respondent's counsel did not object on this basis. Rather, respondent's counsel objected on the basis of relevance. To preserve an evidentiary issue for appeal, the "party opposing the admission of evidence must object at trial on the same ground that the party asserts on appeal." MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Because this issue is not preserved, we review it for plain error affecting respondent's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). After reviewing the relevant testimony, we conclude that the testimony was not introduced as character evidence, and therefore, MRE 404(a) is not applicable. Thus, respondent has failed to demonstrate that plain error occurred.

Respondent next argues that the boys should not have been permitted to testify at trial because their competency was not determined by the trial court as required by MRE 601, but rather was determined by the questioning of the prosecutor. Because respondent's counsel failed to object to such questioning,[1] this issue is unpreserved and will be reviewed for plain error affecting respondent's substantial rights. *Carines, supra at* 763.

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." The trial court questioned the older boy about truth and lies, and then the prosecutor questioned him. The trial court resumed questioning, verifying that the boy knew the difference between the truth and a lie and that he knew that he was supposed to tell the truth while testifying. After completing questioning, the trial court stated: "I think you can approach him. I think you can ask him the questions." While the trial court did not explicitly state that it found the boy competent to testify, by allowing the prosecutor to proceed with questioning the boy about the allegations, the trial court implicitly ruled that he was competent. See *People v Kasben*, 158 Mich App 252, 257; 404 NW2d 723 (1987). We therefore conclude that the trial court did not commit plain error in permitting the older boy to testify.

The trial court began the questioning of the younger boy, asking him if he knew what a lie was and whether he would tell the court a lie. The younger boy answered, "[n]o." When asked if he would tell a truth or a lie, he replied, "[t]he truth." The prosecutor then asked the younger boy questions about truth and lies. From the transcript, it appears as if the child became confused, first telling the prosecutor that he was going to tell lies, then saying that it was not good to lie because he would get in trouble with his mother. Finally, when asked if he was going to tell the truth, he replied, "Yeah."

[1] It is apparent that respondent's counsel failed to object to the questioning of the older boy. After the trial court gave the prosecutor permission to proceed with questioning of the younger boy, respondent's counsel asked to approach the bench, at which time there was a conference off the record. While we recognize that respondent's counsel could have been discussing whether the victim should be allowed to testify, there was no objection made on the record. This issue is therefore unpreserved and will be reviewed for plain error affecting respondent's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The younger boy testified that he was present while respondent was naked in the older boy's room but denied that respondent had any sexual contact with himself. Because the jury did not find respondent guilty of the charges with regard to the younger boy, and his testimony was merely cumulative of the older boy's testimony, respondent's substantial rights were not affected by the younger boy's testimony. Accordingly, we conclude that even if the trial court committed plain error in permitting the younger boy to testify, reversal is not warranted.

Respondent challenges the denial of her motion for a new trial, judgment notwithstanding the verdict, or rehearing, arguing that the trial court erred in making statements to the jury outside the presence of counsel. We review a trial court's decision on a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

Respondent attached the affidavit of respondent's father to her motion for new trial. Respondent's father averred that he was present in the courtroom when the trial judge made statements to the jury outside the presence of the prosecutor and respondent's counsel. The statements in question included that this is juvenile court and not adult court, and that they should not worry about finding respondent guilty because she would not be punished like an adult. MCR 6.414(A) mandates that a trial court:

> may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

In the instant case, whether the trial judge made the above comments is necessary to determining whether the court violated MCR 6.414(A). "Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). In order to establish that the extrinsic influence was an error requiring reversal, the respondent must prove that the jury was exposed to an extraneous influence, which created a real and substantial possibility that it could have affected the jury's verdict. *Id.* at 88-89.

If the trial judge did in fact make the alleged statements, it is likely that such an extraneous influence would have affected the verdict. We therefore find that the trial court abused its discretion in summarily denying respondent's motion. We remand for an evidentiary hearing to be conducted before Judge Switalski to determine whether such statements were made and whether the statements affected the jury's verdict. If it is determined on remand that such statements were made and that they affected the verdict, respondent is entitled to a new trial.

Remanded. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood