STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 30, 2004
v	No. 250288 St. Clair Circuit Court
THOMAS FRANK BRENNAN, Defendant-Appellant.	LC No. 02-000283-FC

Before: Zahra, P.J., and White and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), involving his three-year old daughter. He was sentenced to 135 months to 30 years' imprisonment. He appeals as of right and we affirm, but remand for resentencing.

Defendant claims his conviction was against the great weight of the evidence. We disagree.

"[A] new trial based upon the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result." *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998), quoting *State v LaDabouche*, 146 Vt 279, 283; 502 A2d 852 (1985).

The incident at issue allegedly occurred on August 6, 2001. On that day, the complainant and her two brothers were swimming at a neighbor's pool, two houses away. Amanda, a fifteen-year-old girl who lived in the home the complainant had been visiting, and who babysat for the complainant testified that at some point, defendant called the complainant home to eat, but did not want her brothers to come as well. About an hour and a half later, Amanda heard the complainant crying as she was coming down the street. The complainant jumped into Amanda's arms and said that defendant had hurt her with his "pee pee" and his finger. The complainant testified at trial that defendant had touched her vagina with his penis and his finger. The pediatric nurse who examined the complainant on August 7 testified that the child had suffered an injury to her hymen that was the result of penetration by a penis or some other object of similar size. While defendant correctly asserts that there was some contradictory evidence, including the nurse's testimony that the damage to the complainant's hymen could not have occurred as recently as a day before, and that there were credibility issues revolving around

Amanda and her mother, viewing the evidence as a whole, we cannot conclude that the evidence preponderated heavily against the verdict. *Lemmon, supra* at 625.

Next, defendant raises several alleged errors that he claims cumulatively denied him a fair trial. We review claims of cumulative error to determine whether the effect of the errors was to deny the defendant a fair trial. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003).

Defendant argues that the circuit court erred in denying his motion to quash the information on the grounds that there was insufficient evidence at the preliminary examination to justify the magistrate's finding of probable cause. We disagree. "Probable cause exists when there is a reasonable ground of suspicion supported by circumstances sufficiently strong to warrant a cautious person to believe that the accused is guilty of the offense charged." *People v Maynor*, 256 Mich App 238, 243; 662 NW2d 468, lv gtd in part on other grounds 468 Mich 946 (2003). Here, the pediatric nurse testified at the preliminary examination that the complainant's hymen was damaged and that her injuries were caused by penetration. The fifteen-year-old neighbor testified consistent with her testimony at trial. The testimony of these two witnesses was sufficient to support the magistrate's finding of probable cause. *Id*. Defendant's attacks on the credibility of these witnesses and the competence of the complainant do not undermine the evidence to the extent of rendering it insufficient to support the bindover. Further, because defendant was convicted on sufficient evidence following a jury trial, he cannot establish that he was prejudiced by the bindover. *People v McGee*, 258 Mich App 683, 697-699; 672 NW2d 191 (2003). Therefore, the circuit court did not err in refusing to quash the information.

Next, defendant claims that the testimony of an agent of Children's Protective Services was unfairly prejudicial. Over objection, the agent testified that she had caused defendant's children to be placed in foster care. While defendant frames this as an issue of prosecutorial misconduct, it is essentially an evidentiary matter under the circumstance that the proffered reason for the testimony, to explain why the complainant would be appearing with a different adult, was not shown to be a subterfuge. Further, defendant's objections were sustained, the testimony was brief, and the import was that the complainant was removed based on the nurse's physical examination, rather than any conclusions reached by Children's Protective Services. We find no prejudice sufficient to warrant reversal.

Next, defendant argues that he was improperly prevented by the trial court from eliciting the opinion of Susan Boudreau regarding Pamela Carroll's character for truthfulness. Carroll is the fifteen-year old neighbor's mother. We agree that under MRE 608(a) and 405(a), the trial court erred in excluding the proposed opinion evidence. We conclude, however, that the error was nonetheless harmless. The proposed testimony would have had little effect on the jury because Boudreau's testimony actually corroborated Carroll's. Defendant's argument that he was denied a fair trial by the exclusion of Boudreau's opinion testimony is without merit.

Next, defendant argues that the trial court improperly applied the rape-shield statute, MCL 750.520j, to prevent defendant from offering evidence that the complainant and her brother had engaged in activity that could have provided an alternative explanation for the irritated condition of the complainant's vagina. While we agree that the rape-shield statute does not exclude this evidence, we conclude that no error requiring reversal occurred because the proffered evidence did not provide an alternative explanation for the injury to the complainant's hymen.

Next, defendant claims the trial court erred in determining that the victim was competent to testify. Under MRE 601, "[u]nless 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." Here, the trial court established that the complainant understood that telling the truth was good and telling a lie was bad. She also responded affirmatively when the court asked her if she would promise to tell the truth in answering the attorneys' questions. She affirmed that her promise to tell the truth was not a lie. Under these circumstances, we conclude that the trial court did not abuse its discretion in finding that the victim was competent to testify under MRE 601. Once the trial court made this determination, any inconsistency in her testimony was a matter of weight, not admissibility. *People v Edgar*, 113 Mich App 528, 535; 317 NW2d 675 (1982).

Next, defendant claims the trial court erred reversibly in engaging in improper ex parte contact with a juror. We disagree. The court's communication with the juror did not pertain to the substance of the case, but rather to personal matters concerning the juror's husband's health and the question whether she could continue to participate as a juror. While the sounder practice is to permit counsel's presence during such discussions, we will not find reversible error where defendant was given the opportunity to object to the procedure and failed to do so. *People v France*, 436 Mich 138, 144; 461 NW2d 621 (1990).

Thus, defendant's claim of cumulative error must fail. *Hill, supra* at 152.

Next defendant objects to the scoring of offense variables (OV) 8 and 13. At sentencing, defendant objected to the scoring of OV 13, but not to the scoring of OV 8. Nor did defendant raise the scoring of OV 8 in either a motion to remand or a motion for resentencing. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Therefore, defendant's claim with regard to OV 8 is not preserved. *Id*.

A trial court has discretion in determining the number of points to score for an offense variable, provided that evidence of record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). A scoring decision will not be overturned if there is any evidence to support it. *Id*. Where a claim of error is unpreserved, this Court will reverse only where plain error occurred affecting defendant's substantial rights. *People v Sexton*, 250 Mich App 211, 228; 646 NW2d 875 (2002).

Defendant argues that because the victim lived with defendant in the same house and the abuse occurred at home, she was never "asported to a place of greater danger," which is required to score fifteen points under OV 8. Offense variable 8 provides that fifteen points should be scored if the "victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Because this Court has held that "'asportation' . . . can be accomplished without the employment of force against the victim," *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003), and the victim was moved at defendant's direction from the neighbor's home to defendant's home in order to commit the offense, we conclude that defendant has failed to establish the requisite plain error.

As for OV 13, the sentencing guidelines provide that fifty points should be scored where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more sexual penetrations against a person . . . less than 13 years of age." MCL 777.43. The guidelines were originally scored with OV 11 being scored at twenty-five points based on one criminal sexual penetration in addition to the conviction offense. The prosecutor argued that rather than scoring OV11 at twenty-five points, the court should score OV 13 at fifty points, based on three or more penetrations. (Offense variable 11 would then be reduced to zero points based on the instructions.) There was some discussion regarding the scoring and the court's superior ability to score the variables based on its knowledge of the case. The court ultimately found that there "was certainly more than one penetration" so that OV 11 would "probably" be scored on the basis that "two or more criminal sexual penetrations occurred."[1] When asked whether the court was deciding to score OV 13 at fifty and OV 11 at zero, the court responded, "Well how, whatever the affect would be I, I'm just going to make that statement. . . . I heard the same evidence. There was certainly more than one penetration. The evidence would be, would disclose to me that there was more than one, and Mr. Brown (the person who initially scored the guidelines) wouldn't have known that necessarily." Defense counsel expressed his disagreement with either scoring, and the Court then inquired of Mr. Brown "In light of what the court has since said . . . how would that change the scoring?" Mr. Brown responded that "[i]t would give offense total of 90. It would change the sentencing guidelines" from fifty-one to eighty-five months, to eighty-one to 135 months. The prosecutor agreed.

As is evident from the exchange, the court never found that there had been three penetrations, as required to score OV 13 at fifty. We therefore remand for the court to again address this scoring issue, and determine, based on a specific finding, how OV 11 and 13 should be scored.

Affirmed, but remanded for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Helene N. White
/s/ Michael J. Talbot

[1] As noted above, however, the instructions to OV 11 exclude the conviction offense, which explains why the prosecutor was focusing on OV 13.