

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GREGORY JOHN WALKER,

Defendant-Appellant.

UNPUBLISHED

March 25, 2008

No. 275656

Wayne Circuit Court

LC No. 06-010957-01

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a). He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 12½ to 22½ years for each count. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case arose while the thirteen-year-old victim was babysitting at the house of a family friend named Mona while Mona went shopping. Mona had two adult guests staying at the house, defendant and a man named Mike. The record reflects that after Mona's children went to bed, the victim went down to the basement to watch the men play cards. While in the basement, she drank two alcoholic coolers. After the game, Mike suggested that the victim sleep in his basement bedroom while he slept on a couch in another area of the basement, but defendant insisted that the victim sleep upstairs. The victim testified that she went upstairs and lay down on the couch to watch television. Defendant followed her upstairs, sat on the floor, and watched with her. After about thirty minutes, defendant moved to the couch and removed the victim's pants. He first penetrated her vagina with his penis, but eventually stopped to prevent ejaculation. He then performed cunnilingus on her and digitally penetrated her vagina. The victim did not initially tell Mona about the incident, but the next day defendant made a vulgar statement to Mona about sexually penetrating the victim. Mona told him that he had better not be serious, and defendant did not say anything more. A few months later, the victim took a trip up north with Mona and some of her friends. One of them asked the victim whether she had ever had sex, and the victim said that she had never had consensual sex. Crying, she then asked Mona whether someone could get pregnant from an individual who had undergone a vasectomy. When one of the women asked the victim if defendant, who openly discussed his vasectomy, was the individual who had sex with her, she confided in Mona that defendant had touched her inappropriately. When they returned from the trip, Mona took the victim to report the matter to police.

Defendant first argues that the trial court committed reversible error by creating a conclusive presumption regarding the complainant's age. The argument stems from an instruction to the jury about reasonable doubt. After the jury asked to be reinstructed on the issue of reasonable doubt, the court reiterated the elements of the charged crimes, and for the sake of example, stated:

The elements, the easy one in terms of what the parties have already stipulated to is the age of the complainant. That's one of the elements. Okay? Is the complainant thirteen, fourteen or fifteen? The prosecutor has to prove that beyond a reasonable doubt.

Defendant argues that the trial court erred because the parties had not stipulated to the victim's age. In context, however, the trial court did not conclusively state that the parties had stipulated that the victim was a particular age, but instead, it specifically instructed the jury that it must determine whether the prosecutor established the age element beyond a reasonable doubt. Furthermore, the victim testified about her date of birth without contradiction, and, according to the date she provided, she was still thirteen years of age when she testified at trial. Therefore, the jury had ample evidence of the victim's age and no evidence to contradict it. This explains why defense counsel, in his closing argument, conceded that the prosecutor had proven, beyond a reasonable doubt, that the victim was somewhere between the ages of 13 and 16 years old and added that it was "true" and that there "was no question about that." This statement was tantamount to a stipulation regarding the victim's age, and defendant cannot now complain that the trial court took counsel at his word. See *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

Defendant next argues that the trial court should not have allowed Mona to testify about the victim's recitation of events that occurred on their trip up north. We disagree. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An error that results in the admission of evidence does not merit reversal unless it appears that it is more probable than not that the error was outcome determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

In this case, the trial court did not abuse its discretion when it admitted Mona's testimony regarding statements that the victim made a few months after the offense. Defendant argues that the testimony was hearsay. At the outset, we note that defendant did not object when the victim testified that she had informed Mona about the relevant events on a trip up north. On appeal, defendant does not raise any claim of error regarding this testimony. Instead, defendant argues that the trial court abused its discretion by allowing Mona to testify about the victim's statements to her while on the trip.

According to MRE 801(d)(1)(B), a witness's prior consistent¹ statement is not hearsay if it is offered to rebut an implication that the victim acted on an ulterior motive for bringing the

¹ Although defendant argues that not all the statements elicited were consistent with the victim's testimony, we are not persuaded. Those statements that were offered for the proof of the matter
(continued...)

allegations, conformed them to some improper influence, or outright fabricated them. Defendant is quick to point out, however, that a victim's "consistent statement made after the motive to fabricate arose does not fall within the parameters of the hearsay exclusion for prior consistent statements." *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Although defendant argues that the victim's motive to fabricate predated all of the statements presented, this argument takes an overly narrow view of the case.

During the victim's cross-examination, defense counsel elicited that Mona and defendant had a falling out that predated the trip up north, and that they had other arguments that eventually led to Mona asking defendant to leave her home. Defense counsel asked the victim whether Mona really took a shopping trip on the night at issue, or whether she secretly went out for an evening with someone other than her boyfriend. Defendant also asked the victim about her own behavior on the night in question, such as her smoking and drinking alcohol. In defense counsel's opening statement, he had told the jurors that they would hear two versions of events, implying that the victim fabricated her version. So before the prosecutor examined Mona about the victim's statements to her, defendant had implied several motives for fabricating the allegations, including Mona's improper influence.

Although the victim testified that defendant and Mona had engaged in arguments before the trip up north, the record reflects that the two adults traded rancorous words and emotional barbs many other times between the trip up north and the time defendant was charged. According to defendant's own testimony, his relationship with Mona was scarred by a series of breaches of confidentiality about Mona's private life, some occurring before he was charged with these crimes and some occurring afterward. The insidious implication at trial was that the witnesses were reacting to defendant's threatened and actual disclosure of their misdeeds. Defendant admitted that he made at least some of these disclosures after the victim and Mona went up north. The general implication of improper influence was not dampened by defendant's efforts to assert earlier grounds for the witnesses' "real" motives. In any event, the trial court did not act outside the scope of its discretion by allowing the prosecutor to rebut the somewhat vague allusions to Mona's wrongful influence before they were fully presented by defense counsel. MRE 801(d)(1)(B).

Finally, defendant argues that the trial court improperly addressed his refusal to admit guilt and used it against him at sentencing. We disagree. Defendant did not object to the sentencing court's repeated reference to his claims of innocence, so we review the issue for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A sentencing court "cannot base its sentence even in part on a defendant's refusal to admit guilt." *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). However, there is some legal support for the proposition that if "the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to error requiring reversal." *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987) (Archer, J., joined by Griffin, J.). Here, the trial court's statements addressed defendant's potential for rehabilitation and the court's

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asserted were all consistent with the victim's testimony of events. MRE 801(c).

corresponding duty to protect society. The court also addressed the issue of defendant's cross-accusations against the victim and his abrasive demeanor at trial and sentencing, which went well beyond mere denial.² Under the circumstances, we are not persuaded that the trial court committed plain error by referring to defendant's remorselessness, so we do not vacate his sentence on these unpreserved grounds. *Carines, supra*.

Affirmed.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher

² It is worth noting that the stated constitutional basis for the general rule is that a defendant should not be compelled to incriminate himself. *People v Conley*, 270 Mich App 301, 314; 715 NW2d 377 (2006); US Const Am V; Const 1963, art 1, § 17. In this case, however, defendant openly waived his Fifth Amendment rights, so the ordinarily clear application of the bright-line rule in *Yennior, supra*, is blurred by a defendant's demonstrably remorseless and patently fabricated rendition of events. Certainly, we should not stretch the rule's application so far that it provides immunity to a defendant for his decision to assign blame to the victim or otherwise demonstrate his absolute lack of remorse, civility, or conscience.