# STATE OF MICHIGAN

# COURT OF APPEALS

In the Matter of ZACKERY GLYNN HENDRIX, a Minor.

UNPUBLISHED
April 15, 2008

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

No. 281011
Genesee Circuit Court
Family Division
LC No. 07-122248-DL

ZACKERY GLYNN HENDRIX,

Respondent-Appellant.

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Following a jury trial, respondent was adjudicated responsible for second-degree criminal sexual conduct (victim is under 13 years of age), MCL 750.520c(1)(a). Following a dispositional hearing, respondent was placed on probation and placed in a juvenile detention facility. Respondent appeals as of right. We affirm.

The incident occurred when respondent was eleven years old. He and his two sisters – aged ten and sixteen – were at the home of their long-time babysitter, Corina Lee, who had two daughters of her own, aged four and twelve. Lee's four-year-old daughter is the victim in this case. All six people, as well as Lee's boyfriend, were present in the house. Respondent and the victim were playing in Lee's bedroom, while everyone else was in the living room. At one point, the twelve-year-old went to check on respondent and the victim, and she discovered respondent lying on top of the victim, "humping" her; both of them had their pants and underwear down at their ankles. The twelve-year-old ran back to the living room and announced what she saw, whereupon Lee's boyfriend ran into the bedroom, also observed respondent on top of and "humping" the victim, and pulled respondent off. Respondent had an erection when he was pulled off of the victim. Lee followed her boyfriend into the bedroom and also observed respondent on top of the victim and that respondent had an erection when pulled off. The victim did not testify at trial, but all three eyewitnesses did.

Lee called the police and respondent's mother. Lee took the victim to the hospital for an examination that found no evidence of penetration, but the incident caused her to feel "scared

and upset." The same day, Richfield Township Police Officer Michael Bernard took statements from Lee, Lee's boyfriend, the twelve-year-old, and respondent's mother. Bernard testified that he was later told by someone at the hospital that, although the victim tested negative for penetration, "there was redness." Respondent told Bernard that he and the victim "were playing house when we did it," but refused to clarify what "it" was. Later that day, Bernard went to respondent's house and read respondent his *Miranda*[1] rights. His mother refused to sign a form permitting Bernard to interview respondent. Respondent told Bernard that he had seen that kind of "stuff" before with Lee and her boyfriend in their bedroom, with their clothes on, doing "what grownups do." Bernard returned a few days later to invite respondent to provide an additional statement, but respondent declined, and Bernard did not thereafter return.

Approximately a month later, Marie Putnam, a social worker and investigator for Child Protective Services (CPS) was assigned to interview respondent. The interview took place at respondent's middle school in the principal's office, outside the presence of any parents, which Putnam testified was the customary protocol. She further explained that she conducted a "forensic interview" that entailed attempting to build rapport with respondent, ensuring that he understood the difference between the truth and a lie, and obtaining an agreement that he would tell the truth. Respondent told her that he knew why Putnam was interviewing him, and he further indicated that the allegations involving the victim were true. He stated that he had touched the victim's private parts. He further stated that he knew what he did was wrong and he had been seeing a doctor to help him stop touching people.

Respondent first argues on appeal that his statements to Putnam were involuntary and therefore improperly admitted. We disagree.

A juvenile's confession may only be admitted if, under the totality of the circumstances, the statement was voluntarily made. *People v Givans*, 227 Mich App 113, 120; 575 NW2d 84 (1997). The factors to consider include: (1) whether the requirements of *Miranda* have been met and the juvenile clearly understands and waives those rights, (2) the degree of police compliance with MCL 764.27[2] and the juvenile court rules, (3) the presence of an adult parent, custodian, or guardian, (4) the juvenile's personal background, (5) the juvenile's age, education, and intelligence level, (6) the extent of the juvenile's prior experience with the police, (7) the length of detention before the statement was made, (8) the repeated and prolonged nature of the questioning, and (9) whether the juvenile was injured, intoxicated, in ill-health, physically abused or threatened with abuse, or deprived of food, sleep, or medical attention. *In re SLL*, 246 Mich App 204, 211; 631 NW2d 775 (2001). We review an unpreserved evidentiary challenge for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999).

Respondent concedes that because he was not in custody at the time of the interview, the interviewer was not required to inform him of his *Miranda* rights or comply with the above-

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

[2] MCL 764.27 discusses the arrest procedure for juveniles.

mentioned juvenile statute or juvenile court rule.[3] There is no evidence suggesting that he was threatened or abused, subject to prolonged questioning, or was in any way pressured to give Putnam a statement. At no point did respondent express a desire to remain silent or have a family member or attorney present. Further, there was no evidence to suggest that respondent was below average in intelligence, lacked a capacity to understand the questions being asked of him, failed to understand the difference between the truth and a lie and that he should tell the truth, or was intoxicated or in ill-health during the interview. To the contrary, respondent apparently evinced a knowing and intelligent demeanor, even expressing his awareness of why Putnam was there and that what he did was wrong.

The totality of the circumstances suggests that respondent's statement was knowing and voluntary. We further note that the three eyewitnesses who testified provided extraordinarily strong evidence independent of respondent's confession; thus, even if the confession should have been excluded, we do not believe that its admission affected the outcome of the lower court proceedings. *Carines*, *supra* at 762-763.

Next, respondent claims that the trial court erred when it denied his motion for a mistrial despite the possibility that two or three jurors observed respondent in the courtroom with his hands handcuffed behind his back. We disagree.

A defendant is generally entitled to appear in court without handcuffs or shackles. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Reversal of a conviction on the basis of being shackled requires a showing of prejudice. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988). A mistrial should only be granted for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). We review a decision whether to grant a mistrial for an abuse of discretion. *Id*., 194.

Here, it appears that there was a possibility that two or three of the jurors might have seen respondent in handcuffs. The trial court offered to question the jurors on the matter or to give a curative instruction. Trial counsel declined, concluding that either of the trial court's offers would alert all jurors to the matter. Trial counsel's rationale was certainly reasonable, but we are left with no record on which to find any evidence that respondent suffered any prejudice. See *People v Herndon*, 98 Mich App 668, 673; 296 NW2d 333 (1980) (rejecting the contention that the trial court had a duty to give an unrequested cautionary instruction, and holding that, absent an evidentiary record demonstrating prejudice, the defendant was not entitled to a mistrial despite the possibility that jurors observed him in handcuffs). In any event, again, the evidence against respondent in this case was sufficiently overwhelming that we find it highly unlikely that defendant would have been prejudiced even if the jurors saw him in handcuffs.

[3] Respondent concedes that the juvenile statute, MCL 764.27, and court rule, MCR 3.934, apply only after the juvenile is taken into custody. At the time of the interview, a petition against respondent had been filed, but respondent had not been taken into custody or arrested.

Finally, respondent argues that the prosecutor engaged in misconduct that denied him a fair trial. We disagree.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The test is whether the defendant was prejudiced by actually being denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Although the prosecutor may not assert a fact that is not in evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), the prosecutor may comment on the evidence and on reasonable inferences that can be drawn from that evidence. *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995).

The challenged remark occurred during the prosecutor's rebuttal closing argument, when the prosecutor stated, "[t]he testimony that you heard was that he had an erection, that *there was redness on the vagina. . . .* This boy is humping her, doing motions with his hips, doing 'what adults do.'" Defense counsel objected, claiming that the prosecutor was alleging facts not in evidence because there was no testimony that the victim had redness on her vagina. The prosecutor responded that the victim's mother had indeed provided testimony concerning the victim's vaginal redness. It appears to us that the prosecutor was mistaken about where the testimony came from: Officer Bernard testified that when he spoke with someone at the hospital where the victim was examined, he was told that the test results were negative for penetration, but that "there was redness." Bernard did not identify the person with whom he spoke, nor did he explicitly say that the redness was associated with the victim's vaginal region. However, that association is unambiguously implied from context; indeed, all testimony concerning medical examinations involved the victim's vaginal area. The prosecutor's statement was a reasonable inference from facts in evidence. Furthermore, the prosecutor's mistaken attribution of the evidence of redness to the victim's mother was made outside the presence of the jury. And, again, we find the other evidence sufficiently overwhelming that defendant was unlikely to have been prejudiced even if the prosecutor's remark had been erroneous.

Affirmed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis