STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 19, 2008
v	No. 275867 Lapeer Circuit Court
WILLIAM DUNCAN MORELL, Defendant-Appellant.	LC No. 06-008807-FC

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant William Morell appeals as of right from his convictions of first-degree criminal sexual conduct (CSC I)[1] and second-degree criminal sexual conduct (CSC II).[2] The trial court sentenced Morell to 4 to 12 years' imprisonment for the CSC I conviction and to 4 to 15 years' imprisonment for the CSC II conviction. We affirm.

I. Basic Facts And Procedural History

The complainant in this case is a 12-year-old girl who has memory problems and a developmental delay, which her adoptive mother testified placed her in a first- or second-grade level of development. This case arose after the complainant, along with her sister and her cousin, went on a trip to northern Michigan with Morell (her great uncle) and his wife for several days. While with them, the complainant reported to her sister and cousin that Morell touched her inappropriately. This was eventually reported to the complainant's parents, leading to a police investigation, a forensic interview, and the charges in this case.

II. Complainant's Testimony

A. Standard Of Review

Morell argues that the trial court erred when it declared the complainant to be an unavailable witness due to lack of memory and allowed her preliminary examination testimony

[1] MCL 750.520b(1)(a) (sexual penetration with victim under 13 years of age).

[2] MCL 750.520c(1)(a) (sexual contact with victim under 13 years of age).

to be read into the record. We review for an abuse of discretion a trial court's decision whether to admit evidence.[3] We review de novo a preliminary question of law regarding the admissibility of evidence.[4]

B. Hearsay

Hearsay is "a statement, other than the one made by declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[5] Generally, "[h]earsay is not admissible except as provided by" the rules of evidence.[6] One of the exceptions to this rule is when, due to a "lack of memory of the subject matter," a witness is unavailable to testify.[7] Where a witness is unavailable, former testimony from that witness is admissible "if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination."[8] Preliminary examination testimony of a witness, where that witness was subject to cross-examination by defense counsel, is admissible in such a case.[9] Allowing such prior testimony from a preliminary examination into the record does not violate the constitutional right of confrontation.[10]

Here, the complainant was called to testify at trial, but upon questioning by the prosecutor, she was unable to recall any of her previous allegations. There was no cross-examination by Morell's counsel regarding her memory and no attempt was made to refresh her memory. Morell did, however, have the opportunity to cross-examine the complainant at length during the preliminary examination. Despite this, Morell claims that this was inadequate because the standard of proof at a preliminary examination is probable cause rather than beyond a reasonable doubt. But, as was noted above, preliminary examination testimony is considered reliable and is admissible.[11] Further, *California v Green*[12] provides the following relevant discussion:

> [A]lthough . . . the preliminary hearing is ordinarily a less searching exploration into the merits of a case than a trial, . . . "there may be some justification for holding that the opportunity for cross-examination of a witness at a preliminary

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[3] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[4] *Id.*

[5] MRE 801(c).

[6] MRE 802.

[7] MRE 804(a)(3).

[8] MRE 804(b)(1).

[9] See *People v Meredith*, 459 Mich 62, 66-67; 586 NW2d 538 (1998).

[10] *People v Adams*, 233 Mich App 652, 659-660; 592 NW2d 794 (1999).

[11] *Id.*

[12] *California v Green*, 399 US 149, 166; 90 S Ct 1930; 26 L Ed 2d 489 (1970), quoting *Barber v Page*, 390 US 719, 725-726; 88 S Ct 1318; 20 L Ed 2d 255 (1968).

> hearing satisfies the demand of the confrontation clause where the witness is shown to be actually unavailable . . . ." In the present case[,] respondent's counsel does not appear to have been significantly limited in any way in the scope or nature of his cross-examination of the witness . . . at the preliminary hearing. If [the witness] had died or was otherwise unavailable, the Confrontation Clause would not have been violated by admitting his testimony given at the preliminary hearing—the right of cross-examination then afforded provides substantial compliance with the purposes behind the confrontation requirement, as long as the declarant's inability to give live testimony is in no way the fault of the State.

We, therefore, conclude that the trial court was entitled to consider admitting the preliminary examination testimony under the circumstances.

C. Inadequate Investigation

Morell also claims that an inadequate investigation was done into whether the complainant truly lacked memory of the events or if her memory could have somehow been refreshed. It is true that Morell was not able to explore this issue with the complainant on the stand and that no attempt was made to refresh the complainant's memory. But it was also undisputed on the record that the complainant was developmentally delayed and had memory difficulties. Additionally, five months had passed since the preliminary examination. Given all of those factors, it was reasonable for the trial court, upon seeing the complainant have an apparent lack of memory about any of the incidents or discussions relevant to this case, to conclude that she did not remember and probably would not remember. Thus, it was not outside the range of principled outcomes[13] for the trial court to conclude that, due to lack of memory, the complainant was an unavailable witness. Once that determination was made, the only appropriate course remaining was to admit the complainant's prior preliminary examination testimony.

III. Admission Of DVD Of Complainant's Forensic Interview

A. Standard Of Review

Morell claims that the trial court erred when it did not allow the DVD of the complainant's original forensic interview to be admitted into evidence. We review for an abuse of discretion a trial court's decision whether to admit evidence.[14] We review de novo a preliminary question regarding the admissibility of evidence.[15] We also review de novo statutory interpretation as a question of law.[16]

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[13] See *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[14] *Lukity*, *supra* at 488.

[15] *Id*.

[16] *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

B. MCL 712A.17b

The trial court ruled that the DVD of the complainant's forensic interview was inadmissible under MCL 712A.17b. However, this was clearly error, because MCL 712A.17b only applies to juvenile or child protection proceedings,[17] which this case obviously is not. However, this does not necessarily mean that the DVD of the complainant's interview was admissible. Morell apparently sought to have the DVD introduced into evidence originally so his expert witness could testify regarding whether the forensic interview of the complainant was properly done. But there is nothing in the record to indicate exactly what was on the tape, or even what Morell *thought* was on the tape, that specifically would help his case. With no offer of proof of what is on the DVD in the record, appellate review of the admissibility of that DVD is precluded.[18]

IV. Admissibility Of Complainant's School Records

A. Standard Of Review

Morell argues that the trial court erred when it excluded the complainant's school records from evidence. Generally, we review for an abuse of discretion a trial court's decision whether to admit evidence.[19] However, we review this unpreserved claim of error for plain error affecting substantial rights.[20]

B. The Basis For Exclusion

Morell states that he presumes that the basis for keeping the complainant's school records out of evidence was the Federal Education Rights and Privacy Act (FERPA).[21] But the record clearly demonstrates that the prosecutor specifically moved to exclude the school records under MCL 600.2165,[22] not the FERPA. Thus, we conclude that Morell, having devoted his entire

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[17] MCL 712A.17b(2)(a), (b); MCL 712A.2(a)(1), (b).

[18] *Hashem v Les Standford Oldsmobile, Inc*, 266 Mich App 61, 94; 697 NW2d 558 (2005).

[19] *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[20] *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

[21] 20 USC 1232g.

[22] MCL 600.2165, which is referred to as the "teacher-student" or "teacher-pupil" privilege, *People v Pitts*, 216 Mich App 229, 234-235; 548 NW2d 688 (1996); *Samson v Saginaw Professional Bldg, Inc*, 44 Mich App 658, 670; 205 NW2d 833 (1973), is designed to protect the privacy of students and creates a testimonial privilege, which, like all testimonial privileges, may only be asserted by the owner of the privilege or persons "vested with the outside interest or relationship fostered by the particular privilege." McCormick, Evidence (Hornbook Series, 4th ed), § 73.1, p 102. Specifically, MCL 600.2165 provides as follows:

> No teacher, guidance officer, school executive or other professional person engaged in character building in the public schools or in any other educational institution, including any clerical worker of such schools and

(continued…)

argument on appeal to application of the FERPA, rather than MCL 600.2165, has abandoned review of this issue of appeal.[23]

Regardless, defense counsel indicated at trial that "the only issue [he had] on the school records [was he] wanted to be able to have . . . [his] expert . . . be able to comment on [the complainant's] IQ testing, which according to the school records was 50." What is not explained is how this would have been at all helpful for Morell's case, given that the precise number only confirms what was already testified to regarding the complainant's cognitive impairment. Thus, we conclude that any error that occurred, if any, in excluding the school records was harmless.

V. Profile Evidence

Morell's claim that the trial court erred by excluding testimony from his expert regarding the profile of a sexual predator is without merit in light of the clear holding of *People v Dobek*.[24] There is no need to consider whether the trial court's discovery sanction was appropriate because this evidence would not have been allowed in any case. The same is true of Morell's assertion that counsel was ineffective. Regardless of counsel's actions, the evidence sought was inadmissible under *Dobek*.

VI. Prosecutorial Misconduct

A. Standard Of Review

Morell claims that the prosecutor committed reversible misconduct by telling the jury that he had a duty to ensure Morell received a fair trial and by improperly vouching for the credibility of prosecution witnesses. We review prosecutorial misconduct claims on a case-by-case basis, looking at the prosecutor's comments in context, and in light of the defense arguments and their

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> institutions, who maintains records of students' behavior or who has records in his custody, or who receives in confidence communications from students or other juveniles, shall be allowed in any proceedings, civil or criminal, in any court of this state, to disclose any information obtained by him from the records or such communications; nor to produce records or transcript thereof, except that testimony may be given, with the consent of the person so confiding or to whom the records relate, if the person is 18 years of age or over, or, if the person is a minor, with the consent of his or her parent or legal guardian.

[23] See *Derderian v Genesys Health Care Sys*, 263 Mich App 364, 689 NW2d 145 (2004), quoting *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 175; 568 NW2d 365 (1997) ("When an appellant fails to dispute the basis of the trial court's ruling, 'this Court . . . need not even consider granting plaintiffs the relief they seek.'").

[24] *People v Dobek*, 274 Mich App 58, 102-104; 732 NW2d 546 (2007).

relationship to evidence admitted at trial.[25] A prosecutor may not argue facts not entered into evidence,[26] but may otherwise argue the evidence and all reasonable inferences it creates.[27]

B. The Prosecutor's Statements

(1) Duty To Ensure A Fair Trial

During jury voir dire, the prosecutor stated "that the Supreme Court mandates [him] to prosecute but [he has] a duty to ensure Defendant gets a fair trial. And [he was] required to do that ethically. If [he] didn't do that [he] could be disbarred." He later repeated that he has "a duty to ensure that the Defendant has a right to a fair trial." Morell does not dispute this legal description of the prosecutor's duty, but still objects to it, characterizing it as describing the prosecutor's office as being more believable by virtue of this status. But, as Morell concedes, prosecutors are public officials who have an obligation to ensure justice is done rather than to simply obtain a conviction.[28] We conclude that a correct statement of the law cannot be considered misconduct.

(2) Improper Vouching

Morell also claims that the prosecutor committed misconduct in his closing argument by improperly vouching for witnesses by stating that he "believe[d the complainant] is credible" and that he "believe[d] she's telling the truth based on her testimony," and by later stating that two other witnesses were "telling the truth" and had "no reason to lie." It is true that a prosecutor may not vouch for the credibility of a witness on the basis of special knowledge, otherwise unavailable to the jury,[29] but a prosecutor may argue that a witness is worthy or unworthy of belief on the basis of the evidence.[30] That is all that was done here. Because neither of the instances complained of qualify as misconduct, there is no basis for relief for Morell on this issue.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

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[25] *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

[26] *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

[27] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

[28] *Id*. at 266 n 6. See also *People v Carr*, 64 Mich 702, 708; 31 NW 590 (1887) ("[P]rosecutors are sworn ministers of justice, and not advocates employed to procure convictions without regard to legal guilt or innocence.").

[29] *Bahoda*, *supra* at 276.

[30] *Thomas*, *supra* at 455.