

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND LEE WHIPPLE,

Defendant-Appellant.

UNPUBLISHED

February 4, 2010

No. 288591

Muskegon Circuit Court

LC No. 08-056294-FC

Before: Beckering, P.J., and Markey and Borrello, JJ.

PER CURIAM.

At the conclusion of a bench trial, defendant was convicted of one count each of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Defendant was sentenced as a fourth habitual offender, MCL 769.13, to 30 to 75 years' imprisonment for the CSC I conviction, and 18 to 50 years' imprisonment for the CSC II conviction. He appeals as of right. For the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The prosecution's first witness, a director with the Child Abuse Council, testified that she gave a "good touch/bad touch" presentation at the complainant's school on November 29, 2007. The complainant's mother testified that the complainant was eight years' old at the time of the offense. The complainant spent Thanksgiving at her father's home in November 2007. At an earlier time, the mother had a conversation with the complainant in which the mother described good touch/bad touch, told the complainant that she had been molested when she was a child, and to tell her (the mother) if anything similar happened to her. The conversation occurred before the date when the complainant told the mother about the instant offense. The mother stated that, during a family dinner in December 2007, the complainant was picking at her food and looked like something was bothering her. The complainant initially stated that nothing was bothering her, but then said she had something to tell the mother but it could wait until after dinner. Defendant objected to the anticipated testimony, arguing that it was inadmissible hearsay. The prosecutor sought to introduce the testimony under MRE 803A. Following a discussion on the issue, the trial court admitted the testimony.

Without finishing dinner, the complainant told the mother, "What happened to you, happened to me." The complainant said that when she was at her father's house, a man named "Gray" (later identified as defendant) touched her in her pants with his fingers and made her rub

his private areas outside of his pants. The complainant seemed scared and confused when telling the mother, as though she did not know how the mother would react. The complainant did not have much of an appetite and was not sleeping well between the time she returned home from her father's house after Thanksgiving and the time she reported the offense to the mother. According to the complainant, immediately after the incident, defendant told her, "This is our little secret—don't tell anybody." The complainant testified that she was very scared in her mind, but that defendant had not threatened to hurt her or her mother if she told on him.

During an initial interview by a Muskegon County sheriff's detective, defendant consistently denied ever touching the complainant in any manner. At a second interview several months later and again at trial, defendant stated that, when he went into the living room where the complainant was sleeping, he noticed her pants were unbuckled, her underwear was showing, and her hand was under her pants. Defendant stated that he thought it was inappropriate for her to be sleeping in the pullout sofa bed with her brother and father. He took her hand out of her pants and zipped her pants back up. At that point, the complainant woke up. Defendant told her it was inappropriate for her to be in that position and that she needed to go to another room. She began to cry because he was going to move her to another room, so he rubbed her stomach in an attempt to get her to calm down. At the second interview, defendant did not have an explanation for why he failed to disclose this in his original interview with the sheriff detective. At trial, though, defendant explained that he had difficulty remembering everything about the night in question when he was first interviewed.

On appeal, defendant first argues the trial court erred by allowing the complainant's mother to testify, pursuant to the hearsay exception of MRE 803(A), regarding the complainant's statements to her. Specifically, defendant asserts the mother's testimony was inadmissible because the complainant's statement was not spontaneous and because the delay in reporting it was inexcusable.

This Court reviews a trial court's admission of evidence under a hearsay exception for an abuse of discretion. *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007); *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). Hearsay is a statement, other than one made by the declarant while testifying, offered to prove the truth of the matter asserted. MRE 801(C). Hearsay is not admissible unless an exception to the rule applies. MRE 802. The "tender-years" exception to the hearsay rule provides that a statement describing an incident involving a sexual act is admissible to the extent it corroborates testimony given by the declarant during the same proceeding if: the declarant was under the age of ten when the statement was made, the statement is shown to have been spontaneous and without indication of manufacture, either the declarant made the statement immediately after the incident or the delay is excusable as being caused by fear, and the statement is introduced through the testimony of someone other than the declarant. MRE 803(A).

Contrary to defendant's claim, the complainant's statements were spontaneous. *People v Dunham*, 220 Mich App 268; 559 NW2d 360 (1996). The mother never asked the complainant if she had been sexually abused. Rather, she asked the complainant if anything was bothering her when she noticed the complainant was not really eating her food while at the dinner table. As in *Dunham*, 220 Mich App at 272, this was an open-ended question resulting in a spontaneous answer as required by MRE 803(A)(2). There is no evidence to suggest that such an innocent question would result in a manufactured allegation of abuse. Defendant's argument

that the mother's earlier conversation with the complainant about her own prior abuse, coupled with the prevention service's "good touch/bad touch" school presentation, combined to result in unintended pressure to create such an allegation, is without merit. To find otherwise would create a situation where statements made by complainants following such presentations would always be inadmissible hearsay.

The trial court also correctly determined that the one- to two-week delay in reporting the abuse was excusable due to the complainant's fear of defendant. *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995). The complainant testified that defendant told her after the abuse that it was "their little secret." She also testified that she was afraid of him. While she did not see defendant after the night in question, he was an adult who told her to keep the events a secret. This warning, coupled with the uncomfortable nature of discussing such events, excuses the complainant's delay in reporting it to her mother. *Id.* Accordingly, the trial court did not abuse its discretion by admitting, pursuant to MRE 803(A), the mother's testimony about the statements made by the complainant. *Stamper*, 480 Mich at 4; *Adair*, 452 Mich at 550; *Dunham*, 220 Mich App at 272.

Defendant next argues the trial court improperly failed to apply the presumption of innocence and shifted the burden of proof in finding him guilty of the charged offenses. This claim is without merit.

Following a bench trial, a trial court's findings of facts are reviewed for an abuse of discretion while its conclusions of law are reviewed de novo. *Ligon v Detroit*, 276 Mich App 120, 124; 739 NW2d 900 (2007). Because defendant failed to preserve these claims of constitutional error, this Court reviews the issues for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Reversal is required if the error was plain (i.e., clear or obvious) and affected the outcome of the lower court proceedings. *Id.* at 763.

The Due Process Clause of the Fourteenth Amendment of the US Constitution requires that the state must prove all facts necessary to establish the elements of the charged crime beyond a reasonable doubt. *Sandstrom v Montana*, 442 US 510, 520-521; 99 S Ct 2450; 61 L Ed 2d 39 (1979); *In re Winship*, 397 US 358, 364; 30 S Ct 1068; 25 L Ed 2d 368 (1970). The defendant must be presumed innocent until all elements of the charge are proven beyond a reasonable doubt. *Winship*, 397 US at 364; *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987).

At the close of proofs, the trial court stated that the prosecution has the burden of proving guilt beyond a reasonable doubt. It then proceeded to review the evidence presented to determine whether there was a reasonable doubt in the case. The court said it was aware that young children can lie and that it therefore closely reviews such testimony. The court found the complainant's testimony to be credible. The court further found the mother's testimony to be credible and consistent, with no known motivation to bolster a case against defendant. It similarly concluded that the police witnesses were credible and honest, and that nothing on the record showed they were mistaken or had a motivation to fabricate. In reviewing defendant's testimony, the court noted that he was not required to take the stand or prove anything. But because defendant did take the stand, the court stated that it had to evaluate his testimony in the same manner as any witness. In so doing, the court found that defendant's testimony was not

credible. Finally, the court specifically stated on the record that the prosecution had proven the elements of the offenses beyond a reasonable doubt.

Although the trial court spoke in terms of having no reason to doubt the testimonies of several prosecution witnesses, those statements were simply colloquial indications that the court specifically found the witnesses to be credible. The statements did not reflect a *presumption* that the prosecution witnesses were credible or a *shifting* of the burden of proof onto defendant to prove otherwise. The record reflects that the court conducted a thorough review of the evidence and concluded that the prosecution witnesses were credible whereas defendant was not. Defendant's unpreserved claim of constitutional error is without merit, *Sandstrom*, 442 US at 520-521; *Winship*, 397 US at 364, and does not constitute plain error requiring reversal, *Carines*, 460 Mich at 764.

Affirmed.

/s/ Jane M. Beckering

/s/ Jane E. Markey

/s/ Stephen L. Borrello