

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON LEE BORIS,

Defendant-Appellant.

UNPUBLISHED

June 1, 2010

No. 289847

Cheboygan Circuit Court

LC No. 08-003827-FC

Before: WHITBECK, P.J., and SAWYER and BORRELLO, JJ.

PER CURIAM.

Defendant was convicted by a jury of eight counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a) (victim 13 to 15 years of age). He was sentenced as a second offense habitual offender, MCL 769.10, to eight concurrent prison terms of 102 months to 22 years, 6 months. He now appeals as of right, and for the reasons set forth in this opinion, we affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant and the victim in this matter met at a family event in 2007. Several individuals noticed what they deemed inappropriate behavior between defendant and the victim, who was a minor. Eventually, alarmed by the interactions between defendant and the minor, the police were called to investigate a possible CSC involving defendant and the minor. During initial conversations with investigating officers, the minor denied any sexual relationship with defendant. However, during a follow-up investigation, the officer told the minor that she and defendant had engaged in sexual acts, ostensibly, to “make [defendant] go away.” Later the minor told prosecutors that she and defendant had engaged in sexual relations on numerous occasions. Following her statement to police, defendant was arrested, tried and convicted as stated *infra*. Following his convictions, he brought this appeal asserting that he is entitled to a new trial because the trial court had excluded evidence which denied him the opportunity to effectively challenge the credibility of the complaining witness.

The testimony challenged by defendant arises from a question as to whether the victim had been asked by her father whether she had a tattoo, to which she responded, “No.” When the victim’s father was asked the same question, he responded that he could not recall whether he asked the victim that question. Then, during direct examination of defendant’s former fiancé, defense counsel asked if she had overheard a conversation between the victim and her father about a tattoo. Plaintiff objected and the court sustained the objection. The trial court concluded that the question posed of the former fiancé was inadmissible as improper impeachment by

extrinsic evidence on a collateral matter. Defendant argues that the court erred because the victim's credibility was not a collateral issue. Defendant also argues that in sustaining the objection, the court undermined his right to pursue his chosen defense.

The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire case, it appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

MRE 608(b) provides as follows:

Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

* * *

In addition, MRE 613(b) provides as follows:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

"It has long been the law of this state that a cross-examining attorney must accept the answer given by a witness regarding a collateral matter." *People v LeBlanc*, 465 Mich at 590; 640 NW2d 246 (2002). The issue of whether there had been a confrontation between father and daughter on a tattoo was a collateral matter not directly bearing on defendant's guilt or innocence. "[E]xtrinsic evidence may not be used to impeach a witness on a collateral matter . . . even if the extrinsic evidence constitutes a prior inconsistent statement of the witness, otherwise admissible under MRE 613(b)." *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007). Thus, the court did not abuse its discretion in sustaining the objection. See *Babcock*, 469 Mich at 265.

Defendant's argument that the trial court's ruling undermined his right to pursue his defense is also belied by the fact that defendant diligently pursued his defense of challenging the credibility of the victim, and he was not precluded from doing so when his inquiries were admissible. Therefore, because the trial court properly followed the rules regarding

impeachment with extrinsic evidence under MRE 613(b), and defendant was not thwarted in his attempts to undermine the credibility of the victim, the basis of his defense, we find no error.

Affirmed.

/s/ William C. Whitbeck

/s/ David H. Sawyer

/s/ Stephen L. Borrello