STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 29, 2010
v	No. 289998 Kalamazoo Circuit Court
WILLIAM ERWIN BECKWITH, Defendant-Appellant.	LC No. 2007-001093-FC

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b). He was sentenced to concurrent prison terms of 11 to 30 years for each CSC I conviction and 7 to 15 years for the CSC II conviction. He appeals as of right. We affirm.

I. INFORMATION AMENDMENT

We first address defendant's claim that the prosecutor's mid-trial amendment of the information to expand the ending date of the charging period by one year violated his right to due process and prejudiced his ability to prepare a defense. Due process requires that a defendant have reasonable notice of the charges against him and an opportunity to present a defense. *People v McGee*, 258 Mich App 683, 699; 672 NW2d 191 (2003). "[T]o establish a due process violation, a defendant must prove prejudice to his defense." *Id*. at 700. We review claims of constitutional error de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010).

"An information is required to contain the 'time of the offense as near as may be'; however, '[n]o variance as to time shall be fatal unless time is of the essence of the offense.'" *People v Dobek*, 274 Mich App 58, 82-83; 732 NW2d 546 (2007), quoting MCL 767.45(1)(b). "A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant." *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008), citing MCL 767.76 and MCR 6.112(H). Prejudice will not generally be found where time is not of the essence of the charged offenses, as was the case here. "Time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim." *Dobek*, 274 Mich

App at 83. Moreover, an alibi defense does not make time of the essence.[1] *Id.*; see also *People v Naugle*, 152 Mich App 227, 234-235; 393 NW2d 592 (1986).

In this case, the defense theory before and after the amendment was victim fabrication, a theory that did not depend principally on the timing of the offense. The amendment did not add any new charges, but merely expanded the timeframe during which the alleged assault was committed. Defendant was aware before trial that the victim had not been able to identify a specific date or time period for the charged assault, and had given inconsistent statements concerning whether it may have been committed when she was 14 or 15 years old, so her continued confusion at trial was not unexpected. Although part of the defense strategy was to show the unavailability of defendant, the victim, or the motor home in which the assault allegedly occurred during relevant times within the charging period, after granting the prosecutor's motion to amend the information to expand the charging period, the trial court adjourned trial for approximately two months to give defendant an opportunity to prepare a defense in response to the expanded charging period. Defendant does not explain why this time period was inadequate to enable him to defend against the expanded charging period, or how his strategy may have been different had he had more advance notice of the expanded period. For these reasons, defendant has failed to show a due process violation.

II. MOTION FOR MISTRIAL

Defendant next argues that the trial court erred in denying his motion for a mistrial after the victim disclosed that defendant also "did stuff to my sisters." We review a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). An abuse of discretion occurs when the trial court's "decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Bauder*, 269 Mich App at 195 (quotation omitted).

Defendant does not challenge the trial court's determination that the victim's response was unsolicited. "When a motion for a mistrial is premised on the unsolicited outburst of a witness, it should be granted only where the comment is so egregious that the prejudicial effect cannot be cured." *Bauder*, 269 Mich App at 195. The victim's comment was brief, isolated, and referred only to "stuff" defendant had allegedly done to the victim's sisters. The nature or details of any prior acts was not disclosed. Under the circumstances, the trial court appropriately determined that any prejudicial effect could be cured by a cautionary instruction. "Jurors are presumed to follow instructions, and instructions are presumed to cure most errors." *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). Thus, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

[1] Although defendant withdrew his formal notice of alibi before trial, a principal theory of defense was that defendant was not present during relevant time periods during which the charged sexual activity may have been committed.

We disagree with defendant's argument that the trial court improperly shifted the burden to him to prove his innocence regarding the alleged acts involving the victim's sisters. First, the trial court's response did not require defendant to do anything. The court merely indicated that defendant would be permitted to present evidence to respond to the victim's comment if he desired. Second, defendant was not charged with any offenses involving the victim's sisters, as the trial court's cautionary instruction made clear, so defendant was not required to defend against any additional charges.

Defendant's argument that the victim's statement violated his constitutional right of confrontation is also without merit. "The Confrontation Clause provides that '[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'" *People v Taylor*, 482 Mich 368, 375; 759 NW2d 361 (2008), quoting US Const, Am VI. Here, defendant had an opportunity to confront the victim, his accuser. Further, he was not charged with any offense involving the victim's sisters, nor was evidence presented that the victim's sisters had accused defendant of inappropriate sexual contact with them. In addition, there was no evidence of an out-of-court testimonial statement that might implicate the Confrontation Clause. *Crawford v Washington*, 541 US 36, 50-52, 61, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *Taylor*, 482 Mich at 374, 377.

III. DEPUTY LEMMEN'S TESTIMONY

Defendant next argues that Deputy Lemmen's testimony concerning the victim's statements explaining her feelings about the abuse and why she did not report the abuse earlier was improper because the victim's statements were inadmissible hearsay. A trial court's decision regarding the admissibility of evidence is reviewed for an abuse of discretion. *People v Jambor (On Remand)*, 273 Mich App 477, 481; 729 NW2d 569 (2007).

The trial court admitted the statements under the MRE 803(3), the hearsay exception for statements of the declarant's then existing state of mind or physical condition. Some of the victim's statements indicated how she was feeling when she spoke to Deputy Lemmen. We believe those statements were clearly admissible under MRE 803(3), because they indicated the victim's state of mind at the time she made the statements. Some other statements, however, do not appear to have been admissible. For example, the victim's statements *explaining* her state of mind are not admissible under MRE 803(3). See *People v Moorer*, 262 Mich App 64, 69, 72-74; 683 NW2d 736 (2004); see also *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Dorsey (On Remand)*, 273 Mich App 26, 38; 730 NW2d 17 (2006). In addition, the victim's statements explaining why she did not disclose the sexual abuse earlier do not appear to fit within the hearsay exception in MRE 803(3).

To the extent some of the victim's hearsay statements were inadmissible, they do not require reversal. A preserved nonconstitutional error does not require reversal unless it is more probable than not that the error was outcome determinative. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). In this case, the victim testified at trial and explained why she did not report the sexual abuse earlier. Deputy Lemmen's testimony was cumulative of the victim's testimony. Accordingly, it is not more probable than not that any error in admitting some of the victim's hearsay statements affected the outcome. Thus, any error was harmless. *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003); *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

IV. DETECTIVE REGAS'S TESTIMONY

Lastly, defendant argues that the prosecutor committed misconduct when he elicited Detective Regas's opinion regarding defendant's answers to his interview questions. Although defendant objected to some of the questioning at trial, he did not raise below any claim of prosecutorial misconduct. Therefore, his prosecutorial misconduct claim is unpreserved, *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004), and our review is limited to plain error affecting his substantial rights, *Carines*, 460 Mich at 763; *Unger*, 278 Mich App at 235.

Allegations of prosecutorial misconduct are reviewed on a case-by-case basis, analyzing the prosecutor's conduct in view of defense arguments and the evidence admitted at trial, to determine whether the defendant was denied a fair and impartial trial. *Dobek*, 274 Mich App at 63-64. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Id.* at 70.

At trial, Detective Regas testified that he confronted defendant with the victim's allegations during a police interview and defendant responded by commenting on inappropriate behavior by the victim. The trial court permitted Detective Regas to testify that, based on his training and experience, he considered defendant's answer "very suspicious" and not "a proper way of answering." Detective Regas also testified that defendant's answer led him to believe "there was more to the story" and defendant "was trying to deface the victim—show her in a bad light."

Although defendant observes that Detective Regas was not qualified as an expert, we conclude that his testimony was admissible as lay opinion testimony under MRE 701, which provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Testimony is properly considered lay opinion testimony when it is based on personal knowledge and common sense, not overly technical, scientific, or highly specialized knowledge. MRE 701; *Petri*, 279 Mich App at 416; *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), mod 433 Mich 862 (1989). Detective Regas's opinions were based on his own personal knowledge of defendant's responses to questioning, and the detective's background and experience indicated that his opinions were rationally based on his perceptions.

It is improper for a prosecutor to ask a witness to comment on the credibility of another witness, or on the defendant's guilt or innocence. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). Here, the prosecutor did not ask Detective Regas to comment on the credibility of defendant or another witness at trial or to express an opinion concerning defendant's guilt or innocence. Instead, the questioning was limited to eliciting the detective's opinion of defendant's response during a pretrial interview. Detective Regas's opinion that he felt there was more to defendant's story and that defendant was trying to portray the victim in a bad light was not the equivalent of stating that the victim was credible or that defendant was not credible. Rather, the detective expressed

his lay opinion regarding defendant's forthcomingness and attitude when confronted with the victim's allegations.

For these reasons, defendant has failed to show any plain error associated with the prosecutor's questioning of Detective Regas.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen