

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOSEPH RYAN CARLSON,

Defendant-Appellant.

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UNPUBLISHED

August 10, 2010

No. 287420

Kent Circuit Court

LC No. 07-006211-FC

ON REMAND

Before: STEPHENS, P.J., AND CAVANAGH AND OWENS, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court. In our previous opinion, we concluded that the prosecution failed to present sufficient evidence in support of defendant's convictions for first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(a) (complainant under 13 years of age) and that defendant was entitled to a directed verdict because the only evidence of penetration was inadmissible hearsay. We also affirmed defendant's conviction for second-degree CSC, MCL 750.520c(1)(a) (complainant under 13 years of age). See *People v Carlson*, unpublished opinion of the Court of Appeals, issued November 5, 2009 (Docket No. 287420). Our Supreme Court reversed the portion of our opinion that vacated defendant's convictions after concluding that there was additional evidence of penetration that was not considered by this Court. The Supreme Court directed this Court to consider whether that additional evidence of penetration was admissible. *People v Carlson*, 485 Mich 1133, 779 NW2d 821 (2010). On remand, we conclude that the evidence in question was admissible. Therefore, we affirm defendant's convictions for first-degree CSC.

Defendant originally asserted on appeal that he was entitled to a directed verdict where the prosecution failed to present sufficient evidence of sexual penetration. This Court reviews a ruling on a motion for a directed verdict de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). This Court must "review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt." *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008). The essential elements of first-degree CSC are that the defendant "engage[d] in sexual penetration with another person" and "[t]hat other person is under 13 years of age." MCL 750.520b(1)(a); *People v Elston*, 462 Mich 751, 774; 614 NW2d 595 (2000). "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal

intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.” MCL 750.520a(r).

Defendant was convicted of sexually abusing his daughter, who was three years old when the alleged abuse occurred and four years old at the time of trial. Defendant argues that he was entitled to a directed verdict on the two counts of first-degree CSC because the only substantive evidence of penetration was the child’s hearsay statements made to social service and medical personnel, which defendant maintains were inadmissible. Previously, we agreed with defendant that the child’s statements to Melissa Peterson regarding penetration were inadmissible hearsay. We further stated that it was unnecessary to address whether the statements to nurse Debra Hogue were inadmissible hearsay because those statements did not establish the element of penetration. However, the Supreme Court then ruled that the statement to Hogue, in which the victim stated that defendant kissed her “on” her crotch, satisfied the element of penetration. Therefore, the only question before this Court on remand is whether Hogue’s testimony was admissible. Because defendant failed to object to the admissibility of Hogue’s testimony, any argument regarding inadmissibility is unpreserved. As a result, defendant is only entitled to relief if he can demonstrate that the admission of Hogue’s testimony constituted plain error affecting his substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The child’s statements to Hogue constitute hearsay. Hearsay is a “statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c); *People v Yost*, 278 Mich App 341, 363-364; 749 NW2d 753 (2008). Hearsay is generally not admissible as substantive evidence, unless it is offered pursuant to one of the exceptions to the hearsay rule. MRE 802; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). Exceptions to the hearsay rule are “justified by the belief that the hearsay statements are both necessary and inherently trustworthy.” *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621.

An exception to the hearsay rule exists for statements made for purposes of medical treatment or diagnosis. MRE 803(4). Such statements are admissible if they are “made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.” MRE 803(4); *Meeboer*, 439 Mich at 322. The circumstances must suggest “the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.” *Meeboer*, 439 Mich at 322. “While the inquiry into the trustworthiness of the declarant’s statement is just one prong of the analysis under MRE 803(4), it is very important that the understanding to tell the truth to the physician be established.” *Meeboer*, 439 Mich at 324. In cases involving statements made by a child, “further analysis of the circumstances surrounding the examination of a child is necessary to determine whether the child understood the need to be truthful to the physician.” *Meeboer*, 439 Mich at 323.

The *Meeboer* Court articulated the following factors for courts to consider in evaluating the trustworthiness of a child’s hearsay statements to medical personnel:

(1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment, (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment of psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. [*Meeboer*, 439 Mich at 324-325.]

The Court also stated that admission of a child's hearsay statement may be appropriate even if it is not clear that the child understood the need to be truthful in order to receive proper care:

While these factors are neither inclusive nor exclusive, an analysis of the available evidence can support an application of MRE 803(4) even where it is not apparent that the child understood that statements must be truthful in order to receive proper care. . . . The gravamen of our analysis is that hearsay statements must simply be analyzed with more precision because of the young age of the declarants. [*Id.* at 326.]

In the instant case, the child's statement that "defendant kissed her crotch" was reasonably necessary for diagnosis and treatment inasmuch as it identified her assailant. *Meeboer*, 439 Mich at 335. The child's young age weighs against admission, as does her use of the word "crotch," which Hogue thought was odd for a child of that age. Also, there was no physical injury that would corroborate the statement. Other factors weigh in favor of admission, such as the manner in which the statement was elicited. Hogue did not ask leading questions. She asked the child if anyone kissed her, and she volunteered that defendant kissed her crotch. The child's mother was not present for the examination. There is no indication that the statements were influenced by adults. Also, the mother initiated the examination, not the authorities, and it occurred within hours after the child told her mother about defendant's actions. The examination was a physical examination in a hospital emergency room. Compare with *Meeboer*, 439 Mich at 324, citing *People v LaLone*, 432 Mich 103, 109-110; 437 NW2d 611 (1989) (noting that statements made in the course of treatment for psychological disorders may not be as reliable as those made in the course of treatment for physical disorders). Finally, the child's identification of defendant as the perpetrator was reliable because she knew her father, and there is no evidence that she had a motive to fabricate her story.

Defendant must show that the admission of Hogue's testimony constitutes plain error. A plain error is an error that is clear or obvious. *People v Pipes*, 475 Mich 267, 279, 715 NW2d 290 (2006). As demonstrated in the preceding paragraph, the *Meeboer* factors for trustworthiness do not weigh heavily for or against admission of the statement. Because several factors demonstrate the trustworthiness of the child's statements, we cannot conclude that it was obviously an error for the trial court to permit the testimony. Because the testimony sufficiently established the element of penetration, the trial court did not err in denying defendant's motion

for directed verdict. Consequently, defendant cannot satisfy his burden and is not entitled to relief.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Donald S. Owens