

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BILL EUGENE OSTRANDER,

Defendant-Appellant.

UNPUBLISHED

July 17, 2012

No. 302687

Saginaw Circuit Court

LC No. 10-034994-FC

Before: BECKERING, P.J., and FITZGERALD and STEPHENS, JJ.

PER CURIAM.

A jury convicted defendant Bill Eugene Ostrander of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). The trial court sentenced defendant, as a fourth habitual offender, MCL 769.12, to life in prison. Defendant appeals as of right. We affirm.

I. PERTINENT FACTS

A jury convicted defendant of molesting his former girlfriend's daughter. The victim was four years old when the molestation occurred, and she has a speech impediment. During trial, the victim, who was five years old at the time, repeatedly denied that defendant molested her, contrary to her preliminary-examination testimony. The prosecutor twice asked her if she was scared of defendant; she answered affirmatively the first time and negatively the second time. The prosecutor did not question the victim regarding her preliminary-examination testimony. Following her favorable testimony on direct examination, defense counsel elected not to cross-examine the victim.¹

Bonnie Skornia, a registered nurse and the director of the Saginaw Children's Advocacy Center, testified that she conducted a forensic interview of the victim, which included a nursing diagnostic assessment. The victim told her that defendant's "pee-pee" had touched her "pee-pee." Skornia testified that in order to evaluate whether the victim might have an infection or

¹ After completing his direct examination of the victim, the prosecutor indicated that he may recall her and that she "can be recalled." Defense counsel indicated that he had no questions but that, "if she's recalled, I may ask some questions then."

injury to the hymen, she used her hands to demonstrate a man's and a woman's genitalia, and the victim indicated through her hand gestures that defendant's penis had penetrated her labia majora. A week later, Skornia participated in a medical examination of the victim with Dr. Harry Frederick, M.D. Before the doctor's involvement, Skornia prepared the victim for the anticipated exam by addressing what body parts the doctor would check. When Skornia mentioned "your parts that go pee," the victim stated, "[Y]eah, remember, I told you that [defendant] had touched me down there." Skornia testified that when she asked the victim how the experience felt, the victim told her that it felt "wrong" and that it "hurt." Skornia also testified, based on her training and experience, that children who have reported sexual abuse in the home have difficulty reporting it.

After Skornia's testimony and a brief recess in the trial, the prosecutor informed the court that the victim told him that she lied during her trial testimony because she was scared and that she wanted to go home. The prosecutor expressed his concern that testifying again would be too traumatic for the victim. The prosecutor also expressed his intention to admit the victim's preliminary-examination testimony under MRE 801(d)(1)(A) because it was a prior inconsistent statement by way of testimony that had been subjected to cross-examination. Defendant objected to both the victim being recalled and the use of her preliminary-examination testimony. The trial court ruled that the victim would not be allowed to come in and testify again and that the prosecutor could admit into evidence the victim's preliminary-examination testimony, wherein the victim testified that defendant had touched her "pee-pee" with his "pee-pee," that it "felt like I peed my pants," and that it "hurt."

Harry Frederick, M.D., an emergency medicine physician and medical director of the Saginaw Children's Advocacy Center, testified that, during his medical examination of the victim, she told him that defendant had touched her "pee-pee" with his "pee-pee," it hurt afterwards, she thought she wet herself, and it did not hurt anymore. Dr. Frederick found no physical manifestations of sexual abuse. He testified that such finding is typical, particularly in instances of delayed disclosure, and that it does not rule out the possibility that sexual abuse occurred.

The prosecutor also called two witnesses who testified that defendant had sexually molested them when they were children. J.K. testified that she was four or five years old when defendant, a neighbor at the time, inserted his finger and his penis in her vagina. The certified judgment of sentence for defendant's offense against J.K. was admitted into evidence. C.H. testified that, when she was twelve years old and defendant was in his twenties, defendant fondled her and tried to kiss her on one occasion and, on another occasion, fondled her beneath her underwear and penetrated her vagina with his finger. The certified judgment of sentence for defendant's offense against C.H. was admitted into evidence.

The victim's preliminary-examination testimony was read into evidence during the testimony of Detective David Kerns of the Saginaw County Sheriff's Department, who was assigned to investigate the victim's allegations against defendant in this matter. Defense counsel again objected to admission of the testimony, which the trial court overruled, holding that the testimony was admissible under MRE 801.

II. RIGHT TO CONFRONTATION

Defendant argues that the trial court's decision to admit the victim's preliminary-examination testimony violated his right of confrontation under US Const, Am VI and Const 1963, art 1, § 20. We conclude that the trial court erred in determining that the victim was unavailable and allowing her preliminary-examination testimony to be read into evidence. Based on the evidence of record, however, the error does not warrant reversal.

We review unpreserved constitutional issues for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Although defendant objected to the use of the victim's preliminary-examination testimony, the objection was too ambiguous to conclude that he was asserting that it violated his constitutional rights.

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence. [*Carines*, 460 Mich at 763-764 (citations, quotation marks, and footnote omitted).]

The Confrontation Clause guarantees defendant the right to confront witnesses against him. See US Const, Am VI; Const 1963, art 1, § 20; *People v Dendel (On Second Remand)*, 289 Mich App 445, 453; 797 NW2d 645 (2010). "[T]he Sixth Amendment bars the admission of testimonial statements by a witness who does not appear at trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *Dendel*, 289 Mich App at 453. The right to confront witnesses is generally satisfied by the ability to cross-examine. See *People v Hill*, 282 Mich App 538, 540; 766 NW2d 17 (2009), vacated in part on other grounds 485 Mich 912 (2009). However, "[a] limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation." *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998). Although a defendant has a right to confront witnesses against him, it is not an unlimited right. *People v Ho*, 231 Mich App 178, 189; 585 NW2d 357 (1998). "Rather, the Confrontation Clause protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness' testimony." *Id.* at 190, citing *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

Defendant argues that the victim was available and that he was denied the opportunity to cross-examine her due to the manner in which the trial court handled her post-testimony conduct.

There are substantial and compelling public interests in protecting young witnesses in cases of sexual abuse allegations. *People v Kline*, 197 Mich App 165, 171; 494 NW2d 756 (1992). However, the trial court did not articulate an appropriate reason for declaring the victim unavailable. Unavailability in the context of the Confrontation Clause has been determined by using MRE 804(a). See *People v Garland*, 286 Mich App 1, 7; 777 NW2d 732 (2009). MRE 804(a) defines unavailability as:

[S]ituations in which the declarant—

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
- (3) has a lack of memory of the subject matter of the declarant's statement; or
- (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
- (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means, and in a criminal case, due diligence is shown.

Here, the victim was not unavailable under MRE 804(a). The victim did not have a privilege that protected her testimony, and she did not refuse to testify after being ordered by the trial court to do so. See MRE 804(a)(1), (2). She did not lack sufficient memory. See MRE 804(a)(3). She was not dead, there was no finding that she had any conditions that made her unable to testify, and she was not absent from the proceeding. See MRE 804(a)(4), (5). The victim was therefore available to testify.

Under the circumstances presented, we conclude that the trial court erred in deeming the victim unavailable but allowing her preliminary-examination testimony to be read. The error was plain because the victim was present at trial and did not qualify as unavailable under MRE 804(a). And the error deprived defendant of his constitutional right of confrontation when he could not question the victim at trial after the trial court decided to admit her preliminary-examination testimony. However, defendant has failed to establish prejudice. And, as stated above, reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence. *Carines*, 460 Mich at 763-764.

First, the error did not affect the outcome of the trial or result in the conviction of an actually innocent defendant. Witnesses Skornia and Frederick both testified that the victim told them that defendant touched her genitals with his genitals, and the victim indicated to Skornia that it involved some level of penetration. In addition, the prosecutor presented two witnesses who testified that defendant had sexually molested them when they were children. Furthermore, although the five-year-old victim denied being molested by defendant when she testified at trial, she also testified that she was afraid of defendant, and the record evidences that the victim was

looking at defendant when she provided these answers. While this Court is not in a position to determine the victim's credibility, see *People v Railer*, 288 Mich App 213, 219; 792 NW2d 776 (2010), the record evidences that the jury could have reasonably determined that the victim was not credible when she denied being molested by defendant in light of both the victim's testimony that she was afraid of defendant and her demeanor while testifying. See *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). Given this compelling evidence, we cannot find prejudice or conclude that defendant is actually innocent.

Second, the error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Although defendant had the opportunity to cross-examine the victim at trial following her testimony on direct examination, defense counsel declined, which under the circumstances was a wise trial strategy. After the victim told the prosecutor that she had lied because she was scared and that she wanted to leave, the trial court's decision to declare the witness unavailable and admit her preliminary-examination testimony deprived defendant of an opportunity to cross-examine her live following the damaging testimony. However, during the preliminary examination, defendant was able to cross-examine the victim and explore her accusations that he sexually molested her. Defendant fails to indicate what new or additional questions would have been asked at trial to further explore this issue. In light of the witness's extremely young age, cross-examination might not have been of much utility, and defendant had the benefit of both having cross-examined her during the preliminary examination and her recantation testimony at trial. Moreover, had defendant properly objected on confrontation grounds, there is a good possibility that the victim would have been made available for recall. Reversal is therefore not warranted.

II. SUFFICIENCY OF THE EVIDENCE

Defendant contends that there was insufficient evidence to prove that there was sexual penetration and, therefore, insufficient evidence to support his CSC I conviction. We disagree.

This Court reviews sufficiency-of-the-evidence issues de novo, examining the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 195-196; 793 NW2d 120 (2010). What inferences can be drawn from the evidence and the weight given to those inferences is a question left to the jury. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The jury is also responsible for determining questions of credibility. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). This Court should not interfere with the jury's role in determining the credibility and weight of the evidence. *Wolfe*, 440 Mich at 514.

To prove CSC I under MCL 750.520b(1)(a), the prosecutor must prove that the defendant engaged in (1) sexual penetration (2) with another person (3) who was under 13 years of age. Here, Skornia testified that the victim told her that defendant's "pee-pee" touched her "pee-pee," that it felt wrong, and that it hurt. Skornia also testified that the victim demonstrated with her hands how defendant penetrated her between the labia majora. See *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981) (holding that penetration of the labia majora constitutes penetration of the genital opening). Frederick testified that the victim said that defendant touched her "pee-pee" with his "pee-pee" and that she thought she had wet herself. She stated

that her “pee-pee” hurt afterwards but does not hurt anymore. Frederick also testified that penetration of the outer structures of the vagina is possible even if there were no physical marks. “Sexual penetration” is “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) (emphasis added). The testimony from both Skornia and Frederick was sufficient for the jury to determine that defendant sexually penetrated the victim.

III. ADMISSION OF EVIDENCE UNDER MCL 768.27a

Defendant argues that the trial court erred in allowing J.K. and C.H. to testify that defendant sexually molested them when they were children. Defendant maintains that his over 20-year-old convictions for criminal sexual conduct upon these two individuals were of little relevance and only distracted the jury; thus, the testimony was unfairly prejudicial under MRE 403. We disagree.

A trial court’s decision to admit evidence is reviewed for an abuse of discretion. *People v Benton*, 294 Mich App, 191, 195; ___ NW2d ___ (2011). MCL 768.27a provides in pertinent part that “in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.” A “[l]isted offense’ includes violations of MCL 750.520b (CSC I) and MCL 750.520c (CSC II).” *People v Mann*, 288 Mich App 114, 117 n 6; 792 NW2d 53 (2010). Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. MRE 401. For example, evidence is relevant if it tends to show more probably than not that the defendant committed the crime or that the victim is telling the truth. See *Mann*, 288 Mich App at 118. As defendant concedes, in cases involving the sexual abuse of minors, MCL 768.27a allows the admission of other-acts evidence to demonstrate a defendant’s propensity or likelihood of criminal sexual behavior toward other minors. *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007).

In this case, the testimony of J.K. and C.H., prior victims of defendant’s criminal sexual conduct upon minors, supports both the credibility of the victim’s allegations here and tends to show that defendant more probably than not committed the crime. As such, the testimony was relevant under MRE 401. See *id.*; *Mann*, 288 Mich App at 118.

However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or confusion of the issues. MRE 403; see also *People v Ortiz*, 249 Mich App 297, 305-306; 642 NW2d 417 (2001). In order to admit evidence of a defendant’s previous sexual offenses under MCL 768.27a, the trial court must still conduct an MRE 403 balancing test. *People v Watkins*, ___ Mich ___; ___ NW2d ___ (Docket No. 142031, issued June 8, 2012), slip op at 28-30. When “applying MRE 403 to evidence admissible under MCL 768.27a, courts must weigh the propensity inference in favor of the evidence’s probative value rather than its prejudicial effect.” *Id.*, at slip op 34. Several considerations may lead a court to exclude such evidence, including “(1) the dissimilarity between the other acts and the charged crime, (2) the temporal proximity of the other acts to the charged crime, (3) the infrequency of the other acts, (4) the presence of intervening acts, (5) the

lack of reliability of the evidence supporting the occurrence of the other acts, and (6) the lack of need for evidence beyond the complainant's and the defendant's testimony." *Id.* at slip op 35.

Defendant has failed to demonstrate that the trial court abused its discretion in permitting the witnesses to testify. The trial court inquired into the purpose of the testimony, how old the convictions were, and its probative value. The trial court expressed concern with the age of the prior criminal sexual conduct, that it might be confusing to the jury, and that introducing previous convictions carries the possibility of making the jury prejudiced against defendant. The trial court asked questions to determine the relevance of the testimony, and after careful exploration, concluded that the testimony was admissible, but specifically prohibited the witnesses from testifying as to how the incidents "impacted them today."² A trial court's decision regarding a close evidentiary question ordinarily cannot be an abuse of discretion specifically because it is a close question. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Here, the jury was entitled to consider the weight of the evidence given the age of the prior incidents as testified to by the two witnesses. Because the trial court properly determined that the evidence was admissible and was not unfairly prejudicial, it did not err in allowing the evidence under MCL 768.27a.

IV. WITNESS OUTBURST

Defendant argues that an unsolicited outburst by the victim's mother prejudiced the jury and denied him a fair trial. He maintains that the trial court erred in denying his motion for a mistrial. We disagree.

We review a trial court's determination of whether to grant a mistrial for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). A mistrial should only be granted when there is "an irregularity that is prejudicial to the right of the defendant and impairs his ability to get a fair trial." *Id.* (quotation marks and citation omitted). When a defendant moves for a mistrial based on the outburst of a witness, "it should be granted only where the comment is so egregious that the prejudicial effect cannot be cured." *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). However, jury instructions are presumptively curative. *Id.* And a mistrial is inappropriate if the error can be cured because jurors are presumed to follow their instructions. *Id.*

As the victim's mother was stepping down from the witness stand she said, "For two and a half years, this man lied to me." The trial court instructed her not to say anything, and she said that it was wrong and then said, "The man ruined my life and my kids' life." The trial court then told the victim's mother that she could not just talk out of turn and advised her to leave the courtroom. As the victim's mother walked between the counsel tables she leaned toward

² Following closing arguments, the trial court instructed the jury that if it found defendant had committed the prior acts, then it could consider the evidence to decide whether defendant committed the present offense. But the court instructed the jury that it could not convict defendant merely because it found defendant guilty of the prior acts.

defendant and said, “You’re going to pay for what you did.” The trial court ordered the victim’s mother removed from the courtroom.

As soon as he was permitted to do so, defense counsel moved for a mistrial. The judge asked the court reporter to read back what the victim’s mother said and admonished her for her actions. The judge, the prosecutor, and the officer in charge stated that they were unable to hear what the victim’s mother said after she had been excused and was walking out. In arguing that a mistrial was required, defense counsel contended that even if the jury did not hear the specific comments, they were able to observe the witness’s attitude toward defendant. The trial court asked the jurors if they heard anything when the victim’s mother walked between the two counsel tables and whether “[t]he fact that you heard something, is that going to somehow influence your verdict one way or another as to what you decide in this case?” Juror number 2 answered “no,” and the other jury members shook their heads. The trial court acknowledged the jury’s response and cautioned them as follows:

All right. The indication is no. You understand you’re to decide this case based only on the evidence, not on emotions. And evidence, as I’ve told you before, is sworn testimony as well as documents or any exhibit that might be admitted. . . . I’m going to ask you to disregard her remarks once she was excused, so anything she said after that, you’re not to consider.

We find that the trial court took proper corrective action to ensure that the jury would not consider the outburst when making its determination. Instructions are presumed to be curative and followed by the jury. *Bauder*, 269 Mich App at 195. In this instance, the unsolicited statements were not so egregious so as to require a mistrial; accordingly, the trial court did not abuse its discretion in denying defendant’s motion.

V. CUMULATIVE ERROR

Defendant contends that the alleged errors, when aggregated, deprived him of a fair trial. We disagree. Even if the effect of one error does not warrant reversal, the cumulative effect of several errors can. *People v Dobek*, 274 Mich App 58, 106; 732 NW2d 546 (2007). To warrant reversal, “the errors must undermine the confidence in the reliability of the verdict” *Id.* Furthermore, “[a]bsent the establishment of *errors*, there can be no cumulative effect of *errors* meriting reversal.” *Id.* (emphasis added). Here, there was only one error (the witness availability determination), so there is no “cumulative effect of *errors* meriting reversal.” See *id.* (emphasis added).

Affirmed.

/s/ Jane M. Beckering
/s/ E. Thomas Fitzgerald
/s/ Cynthia Diane Stephens