

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BARTON DALE EBY, JR.,

Defendant-Appellant.

UNPUBLISHED

May 10, 2012

No. 303784

St. Clair Circuit Court

LC No. 10-002826-FC

Before: MURPHY, C.J., and STEPHENS and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a) [involving a child under 13 years of age]. Defendant was sentenced to 25 to 37.5 years' imprisonment. We affirm.

Defendant initially contends that his due process right to a fair trial was violated when the trial court provided the deadlocked jury instruction, CJI2d 3.12.¹ The jury sent a note to the court, which stated in its entirety: "Dead lock hung jury." Defendant asserts that a mistrial should have been granted instead.

We note that although defendant objected to the provision of the deadlocked jury instruction, it was not on due process grounds. As such, the constitutional issue is unpreserved and is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 744; 597 NW2d 130 (1999). Defendant's assertion that a mistrial was warranted was properly preserved and is reviewed for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). Further, we review "[c]laims of coerced verdicts . . . on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered." *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989).

¹ This instruction has subsequently been amended. Consequently, paragraph 5 of the current version of the instruction was not provided to this jury.

It is within the discretion of a trial court to order continued deliberations, to accept a verdict, or to declare a mistrial. MCR 6.420(C). There exists an “accepted rule that a trial court must consider reasonable alternatives before sua sponte declaring a mistrial and the court should make explicit findings, after a hearing on the record, that no reasonable alternative exists.” *People v Lett*, 466 Mich 206, 211; 644 NW2d 743 (2002). It is also recognized that “if [the trial judge] fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the jurors.” *Arizona v Washington*, 434 US 497, 509; 98 S Ct 824; 54 L Ed 2d 717 (1978). As a consequence, a trial court is required to balance the propriety of granting a mistrial with “the ends of public justice.” *People v Hicks*, 447 Mich 819, 829; 528 NW2d 136 (1994) (citation omitted).

A jury may properly render a verdict after several days of deliberation and despite previous indications that the jury was unable to reach a verdict. *People v Sullivan*, 392 Mich 324, 327; 220 NW2d 441 (1974). In the circumstances of this case, the jury deliberations were neither protracted nor exhaustive as the note was received after only four and one-half hours on the first day of deliberations. Further, there is no indication that the trial court improperly inquired or received information regarding the numerical division of the jury regarding its deliberations. *Burton v United States*, 196 US 283, 307; 25 S Ct 243; 49 L Ed 482 (1905).

Contrary to defendant’s contention, the note remitted by the jury to the trial judge did not indicate that it was hopelessly deadlocked. A trial court may instruct a jury to continue its deliberations even after the jury indicates that it is unable to reach a verdict. *Sullivan*, 392 Mich at 330-331. The purpose underlying the deadlocked jury instruction is to “generate discussion directed towards the resolution of the case [without] forcing a decision.” *Id.* at 334 (footnote omitted). Such an instruction has been found to be prejudicial to a defendant if the instruction provided substantially departs from the ABA Standard Jury Instruction 5.4(b), which has been incorporated in CJI2d 3.12. The trial court explicitly used CJI2d 3.12 in its instruction to the jury. In providing CJI2d 3.12, the trial court advised the jurors to resume their deliberations, to consult with each other, to try to reach a verdict “if you can do so without violating your own judgment,” consider other views, to talk things over in the spirit of fairness and frankness, to freely express individual opinions and their basis, and to not hesitate to “rethink your own views and change your opinion if you decide it was wrong.” Further, CJI2d 3.12 specifically contains the following warning: “none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.” The decision to provide the deadlocked jury instruction was within the discretion of the trial court and there is nothing to support defendant’s assertion that provision of the instruction by the trial court was in any manner coercive.

Defendant also contends that his due process right was compromised by the admission of testimony by Sarah Willey, the Child Protective Services worker assigned to the case. At the request of the trial court, Willey provided an explanation of what is meant by the term “forensic interview.” Defendant argues that the information improperly bolstered Willey’s credibility. Although defendant failed to challenge the evidence on due process grounds in the trial court, “[w]hether an error is constitutional in nature is an issue of law” and “[e]videntiary errors are nonconstitutional.” *People v Blackmon*, 280 Mich App 253, 259; 761 NW2d 172 (2008). In objecting to the testimony, defendant did challenge the information on the basis of relevancy.

In *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003), our Supreme Court stated:

The decision whether to admit evidence is within the trial court's discretion and will not be disturbed absent an abuse of that discretion. However, where . . . the decision involves a preliminary question of law, which is whether a rule of evidence precludes admissibility, the question is reviewed de novo.

An evidentiary ruling is subject to harmless error analysis, *People v Reed*, 172 Mich App 182, 188; 431 NW2d 431 (1988), while a preserved nonconstitutional evidentiary error “is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error.” *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

During Willey's testimony she indicated that she performed forensic interviews with the victim's half-siblings. The trial judge interjected and requested Willey to provide a general explanation of the term “forensic interview.” In response, Willey stated:

To forensically interview a child there's certain rules we have to go over with the children. Um, them [sic] being—our first rule is they need to promise to tell the truth. We do ask questions to make sure that they know the difference between a truth and a lie or right and wrong, depending on, [sic] on their age. Um, [sic] we then need to verify that they know to correct us if we say something incorrect. And also, if we ask them something that they don't know the answer to, that they say that they just don't know. That they don't make anything up. Um, [sic] from there the questions—we can't really ask direct questions. We, [sic] we have to let them guide the interview. Um, [sic] and that's basically how the interview goes is basically how the child. . . .

* * *

The reason that we use that process is due to the fact that we don't want to lead the child, um [sic], into answering something. Um [sic], we want them to be able to guide the interview.

Other than indicating that she interviewed the victim's half-siblings, Willey did not testify regarding the content of the interviews. Willey did describe her observation of the victim's behavior while another individual conducted a forensic interview of the victim, but she did not express an opinion regarding the manner of handling the victim's interview, whether a forensic approach was used or the effectiveness of the technique. Willey merely described her personal observation of the victim, which coincided with the testimony of another witness. As such, there is no basis to assume, as suggested by defendant, that the jury was more inclined to give greater credence to Willey's observations regarding the changes in the victim's behavior during the interview due to her background or training in forensic interviewing. Willey made no attempt to characterize or interpret the behavior of the victim premised on the use of a forensic interview. The information provided by Willey regarding what comprised, in general, a forensic

interview or technique served merely as background information and did not result in the improper bolstering of the witness's credibility.

Finally, defendant asserts that the evidence was insufficient to support the verdict. Although defendant acknowledges that the victim established that the alleged criminal sexual conduct occurred when she was under the age of 13, he contends that the victim's testimony was incredulous and not corroborated by other evidence; particularly the absence of any medical evidence. Contrary to defendant's argument, MCL 750.520h expressly provides, "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g[, MCL 750.520b to MCL 750.520g]."

In attacking the victim's credibility, defendant cites to certain inconsistencies in her testimony. Specifically, he references instances of confusion regarding whether the victim alleged the occurrence of incidents of criminal sexual conduct in a bedroom or a dining room. The testimony may, however, be understood as the victim indicating that she informed her siblings about the misconduct while in these locations and not as an allegation that the misconduct occurred in these specific rooms. Defendant further focuses on the victim's inability to recall having previously reported that the penetration "stinged" and her subsequent denial of reporting the occurrence of two instances of misconduct. A review of Willey's testimony indicates that the victim did mention a second instance of misconduct, but was unable to provide any details of the alleged incident. Defendant further suggests that the victim's allegations were the result of her resentment of him.

Our Supreme Court "articulated the governing standard for reviewing sufficiency claims" in *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000) (citations omitted), stating:

The test for determining the sufficiency of evidence in a criminal case is whether the evidence, viewed in a light most favorable to the people, would warrant a reasonable juror in finding guilt beyond a reasonable doubt. . . .

[W]hen determining whether sufficient evidence has been presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt.

The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict. The scope of review is the same whether the evidence is direct or circumstantial. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime."

It was within the purview of the jury to determine the victim's credibility and to weigh the evidence, including the noted discrepancies in the victim's testimony and the alleged animosity she retained against defendant. This Court will not interfere with the jury's role in such matters. *People v Bulmer*, 256 Mich App 33, 36; 662 NW2d 117 (2003). We sustain defendant's conviction because a reasonable juror, despite the inconsistencies and contrary evidence, could

have determined the victim's testimony was credible and that defendant's guilt as established beyond a reasonable doubt.

Affirmed.

/s/ William B. Murphy
/s/ Cynthia Diane Stephens
/s/ Michael J. Riordan