

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 14, 2012

v

DAVID BARRY BURNS,

Defendant-Appellant.

No. 304403
Bay Circuit Court
LC No. 10-010787-FC

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

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (victim under 13 years of age). We reverse and remand for a new trial.

In January of 2010, the victim, a four-year old girl, began talking about sex and an imaginary friend. Subsequently, the victim was accused of inappropriate sexual behavior at her daycare, began wetting the bed, and exhibited anger issues. In August of 2010, the victim made disclosures to an associate pastor at her church that suggested she was the victim of sexual abuse committed by defendant, her father. The police were contacted. Following a forensic interview at the Child Advocacy Center, an interview with a Sexual Assault Nurse Examiner (SANE) nurse, and a physical examination, defendant was charged with first-degree CSC. However, the victim refused to testify at defendant's trial. In her absence at trial, the associate pastor testified regarding statements made by the victim. The trial court held that those hearsay statements were admissible as evidence against defendant pursuant to MRE 804(b)(6) because defendant "engaged in or encouraged wrongdoing that was intended to and did procure the unavailability of" the victim as evidenced by the victim's statements made during the forensic interview. For the same reason, the trial court admitted the testimony of the SANE nurse regarding statements allegedly made by the victim to her, as well as the recording of the victim's forensic interview at the Child Advocacy Center. Subsequently, defendant was convicted and this appeal followed.

Defendant argues that the trial court abused its discretion when it admitted the victim's alleged statements to the associate pastor and the SANE nurse, as well as the recording of the forensic interview, after erroneously concluding that the requirements of MRE 804(b)(6) were established. We agree.

We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). Preliminary questions of law, including whether a rule of evidence precludes the admission of the evidence, are reviewed de novo. *Id.*

Generally, hearsay is not admissible as evidence. MRE 802. However, MRE 804(b)(6) allows out-of-court statements to be admitted for the truth of the matter asserted if the statement is “offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.” This rule codifies the common-law equitable doctrine of forfeiture by wrongdoing. *Jones*, 270 Mich App at 212. “The common-law forfeiture rule was aimed at removing the otherwise powerful incentive for defendants to intimidate, bribe, and kill the witnesses against them” *Giles v California*, 554 US 353, 374; 128 S Ct 2678; 171 L Ed 2d 488 (2008). Stated another way:

Rule 804(b)(6) contemplates application against the use of coercion, undue influence, or pressure to silence testimony and impede the truth-finding function of trials. [A]pplying pressure on a potential witness not to testify, including by threats of harm and suggestions of future retribution, is wrongdoing. [*Jones*, 270 Mich App at 221 (internal quotations and citations omitted)].

Accordingly, to admit evidence under MRE 804(b)(6), the prosecutor must show by a preponderance of the evidence (1) that the defendant engaged in or encouraged wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability. *Id.* at 216-217.

In this case, the trial court relied on the statements the victim made during the forensic interview to conclude that the requirements of MRE 804(b)(6) were established by a preponderance of the evidence. In that regard, the prosecutor had argued that “it was the wrongdoing of the defendant in telling this child not to tell while he was committing these acts that has led to her unavailability.” The trial court agreed, noting that the victim's statements during the forensic interview included that, while “contemporaneously” “doing the acts in question,” defendant told the victim not to tell anybody and that she would get in trouble.

We do not agree with the prosecutor or the trial court that defendant's alleged contemporaneously issued statements to the victim amount to the “wrongdoing” contemplated by MRE 804(b)(6). Although it appears that the purpose of any such statements “not to tell” may have been to prevent the victim from disclosing the criminal acts, it is doubtful that they can be construed as threats intended to prevent the victim from testifying at trial. That is, these statements cannot reasonably be characterized as “coercion, undue influence, or pressure to silence testimony and impede the truth-finding function.” See *Jones*, 270 Mich App 221. And there is evidence that, prior to trial, the victim did allegedly tell the associate pastor, forensic interviewer, and SANE nurse about certain criminal sexual acts allegedly committed by defendant. Further, review of the record reveals several possible reasons for the victim's refusal to testify in court including, for example, that she was intimidated by the formality of the proceedings and presence of people in the courtroom, as well as by the use of a microphone. However, we could not discern from the record any evidence that would lead to the conclusion

that the victim refused to testify in court because of any threats issued by defendant against the victim. See *id.* at 218.

In summary, we conclude that the prosecutor failed to establish by a preponderance of the evidence that defendant engaged in wrongdoing, that the wrongdoing was intended to procure the victim's unavailability, and that the wrongdoing did procure the victim's unavailability. Thus, the trial court abused its discretion when it admitted, pursuant to MRE 804(b)(6), the victim's hearsay statements allegedly made to the associate pastor and the SANE nurse, as well as the recording of the forensic interview.

The prosecution argues on appeal that, even if the disputed evidence was erroneously admitted under MRE 804(b)(6), reversal is not required because the evidence was otherwise admissible. An appellee may raise alternative grounds for affirmance without filing a cross-appeal. See *Middlebrooks v Wayne Cty*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994). However, the arguments asserted here by the prosecutor were not raised or decided in the trial court and, therefore, are not properly before this Court. See *City of Riverview v Sibley Limestone*, 270 Mich App 627, 633 n 4; 716 NW2d 615 (2006). Nevertheless, to the extent that the necessary facts are available and the issues involve questions of law, we will address these arguments. See *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

First, the prosecutor argues that the associate pastor's testimony regarding the victim's statements to her was admissible under MRE 803(3). MRE 803(3) provides that hearsay is admissible if it is a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." However, "[b]efore a statement may be admitted under MRE 803(3), the trial court must first determine that the declarant's state of mind is a relevant issue." *Int'l Union, United Auto, Aerospace & Agricultural Implement Workers of America v Dorsey (On Remand)*, 273 Mich App 26, 36; 730 NW2d 17 (2006). Here, the declarant's state of mind was not a relevant issue and the statements allegedly made by the victim to the associate pastor were statements of memory or belief admitted "to prove the fact remembered or believed;" thus, this hearsay exception does not apply to the associate pastor's contested testimony. See *People v Moorner*, 262 Mich App 64, 72-73; 683 NW2d 736 (2004).

Second, the prosecutor argues that the SANE nurse's testimony related to the victim's statements was admissible under MRE 803(4). To be admitted under MRE 803(4), the statements must have been "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." Other supporting rationale for MRE 803(4) are the existence of (1) the self-interested motivation to speak the truth in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the declarant. *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992).

In *Meeboer* our Supreme Court discussed at length the application of MRE 803(4) in sexual assault cases involving very young children. *Id.* at 323. The Court noted that the first consideration is whether the child's out-of-court statement is reliable. To answer that inquiry, the totality of the circumstances surrounding the declaration of the statement must be considered. *Id.* at 323-324. The *Meeboer* Court stated that "it is very important that the understanding to tell the truth to the physician be established." *Id.* at 324. Ten factors related to trustworthiness guarantees surrounding the actual making of the statement were set forth by the Court, including the age and maturity of the child, the timing of the examination in relation to the assault and several other factors. *Id.* at 324-325. In raising this issue on appeal, the prosecutor failed to address the issue of reliability or any of the factors as indicative of the victim's understanding to tell the truth. Thus, the prosecution has failed to establish that the victim's out-of-court statements to the SANE nurse were reliable and, thus, admissible under MRE 803(4).

Finally, the prosecution argues that the recording of the forensic interview was admitted at defendant's request, not the prosecution's request; thus, under the doctrine of invited error, defendant waived the right to challenge its admission. However, the prosecution's characterization of the actual events leading to the admission of the recording is quite lacking. The recording was initially admitted as a separate record after defense counsel objected to the associate pastor testifying at all on the ground that the victim said the first person she told about the alleged crime was the forensic interviewer, not the associate pastor. See MRE 803A. After the trial court overruled the objection, defense counsel indicated to the trial court as follows:

Your Honor, just for the record, then I would add for the limited purpose of my objection and - - and the Court's ruling, I would ask that the transcript from [the victim's] interview . . . be admitted just for purposes of - - of analyzing my objection. Because the child did specifically state that - - that she had not told anyone about it beforehand.

The trial court clarified that the request was for the admission of the transcript only as a separate record, and defense counsel responded in the affirmative. Thereafter, the trial court granted the request for admission of the transcript on a separate record. It appears that later in the proceedings the trial court admitted the recording after it ruled that it was admissible under MRE 804(b)(6). Accordingly, the prosecution's argument that the doctrine of invited error applies is without merit.

In summary, the alternative grounds for affirming the judgment raised by the prosecution on appeal are without merit. Thus, we consider the remedy to which defendant is entitled as a consequence of the erroneous admission of the victim's alleged statements to the associate pastor and the SANE nurse, as well as the recording of the forensic interview.

A trial court's error in admitting evidence does not warrant reversal unless "after an examination of the entire cause, it shall affirmatively appear" 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), quoting MCL 769.26. In support of his argument that manifest injustice resulted from the improper admission of the hearsay evidence, defendant argues: "The prosecution had no physical evidence, no third-party eyewitness, and no in-court testimony from the complainant; the proper exclusion of the out-of-court statements would have left the prosecution with no

evidence whatsoever.” We tend to agree, at least in part, and conclude that, after examination of the entire cause, it appears more probable than not that the erroneous admission of the victim’s alleged statements to the associate pastor and the SANE nurse, as well as the recording of the forensic interview were outcome determinative. Accordingly, defendant’s conviction must be reversed and this matter is remanded for a new trial. In light of our holding, we need not consider defendant’s claims that he was denied his constitutional rights to confront the witnesses against him and to receive the effective assistance of counsel. See *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001) (a constitutional issue should not be addressed where the case may be decided on nonconstitutional grounds).

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra