

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MORRIS ALLEN ROSS,

Defendant-Appellant.

UNPUBLISHED

July 24, 1998

No. 201241

Branch Circuit Court

LC No. 96-036099-FC

Before: Jansen, P.J., and Markey and O'Connell, JJ.

PER CURIAM.

Defendant was charged and convicted of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced defendant to concurrent terms of four to twenty years' imprisonment for his CSC I conviction and three to fifteen years' imprisonment for his CSC II conviction. Defendant appeals by right. We affirm.

In 1996, defendant was accused of sexually molesting the victim, his daughter, on one occasion in 1986 when she was five or six years old. The victim testified at trial that defendant put lotion on her hands, took her hands and made her rub his penis, and then made her put his penis in her mouth.

Defendant claims on appeal that the prosecutor engaged in misconduct warranting reversal in this case when he introduced the victim's prior consistent statements regarding the allegations against defendant in violation of the trial court's pretrial ruling excluding such hearsay evidence. Defendant did not object at trial to most of those alleged instances of misconduct, however. Appellate review of alleged prosecutorial misconduct is precluded if the defendant fails to timely object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We find no miscarriage of justice, and we find that the testimony regarding the victim's prior consistent statements were admissible to rebut defendant's fabrication defense.

Prior consistent statements of witnesses are generally not admissible as substantive evidence. *People v Stricklin*, 162 Mich App 623, 627-629; 413 NW2d 457 (1987). Three recognized exceptions to this rule exist, however, where (1) a statement is used to rebut a charge of influence, (2) there is a question whether a prior inconsistent statement was made, and (3) a witness has been impeached with a charge of recent fabrication. *Id.* Pursuant to MRE 801(d)(1)(B), a prior consistent statement is not considered hearsay if the declarant testifies at trial and is subject to cross-examination and the statement is offered to rebut an express or implied charge against her of recent fabrication or improper influence or motive. *People v Fisher*, 220 Mich App 133, 154-155; 559 NW2d 318 (1996).

Before trial began, defense counsel asked the trial court to exclude as hearsay witnesses the victim's boyfriend and two of her girlfriends who the prosecution planned to call to testify that the victim told them defendant sexually molested her because the testimony would improperly bolster the victim's story. The trial court ruled that the testimony would be inadmissible hearsay if the witnesses would only reiterate what the victim told them. Defendant also moved to exclude the victim's diary in which she wrote about the alleged molestation. The prosecution admitted that there was no hearsay exclusion for admission of the diary; therefore, defendant's second motion was granted. During opening arguments, which took place later that day, however, the prosecutor told the jury that the victim told three of her friends about the alleged sexual abuse by her father and wrote about it in her diary. In addition, the prosecutor told the jury that the victim recently confronted defendant by saying, "Do you remember what you did to me in your bedroom when I was five or six years old?" Defense counsel did not object to this portion of the prosecutor's opening argument. Later, during the direct examination of the victim, the prosecutor elicited the same evidence from the victim without objection from defense counsel.

Defendant argues that the prosecutor had to wait until after the victim was impeached with a charge of recent fabrication before making reference to or offering evidence of her prior consistent statements, which the prosecutor did in his opening statements. Although the prosecutor may have acted prematurely in making reference to and eliciting testimony regarding the victim's prior consistent statements, defense counsel did not object to that portion of the prosecutor's opening statement. Nor did defense counsel object to the victim's direct examination testimony that she told her boyfriend and two other friends about the molestation before defendant found the letter that the victim wrote to her boyfriend and that she wrote about the molestation in her diary. Rather, defense counsel introduced his fabrication theory during his opening argument and pursued it throughout trial. Thus, the prosecutor's allegedly premature introduction of otherwise admissible evidence did not result in manifest injustice to defendant.

We affirm.

/s/ Kathleen Jansen
/s/ Jane E. Markey
/s/ Peter D. O'Connell