

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH LEE STRONG, JR.,

Defendant-Appellant.

UNPUBLISHED

December 14, 2001

No. 224294

Missaukee Circuit Court

LC No. 99-101464-FC

Before: Wilder, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted as charged of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and sentenced as a second habitual offender to a term of fourteen to thirty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erroneously admitted hearsay testimony regarding statements the victim made to a friend. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). An unsworn, out-of-court statement offered to establish the truth of its contents cannot be admitted except as provided in the Michigan Rules of Evidence. MRE 801; MRE 802; *People v Poole*, 444 Mich 151, 159; 506 NW2d 505 (1993). MRE 803A provides an exception for statements made by children under the age of ten who initially disclose to third parties that they were victims of sexual abuse. Therefore, the victim's hearsay testimony in the present case was admissible, as long as it satisfied the following criteria:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant. [MRE 803A.]

Defendant does not dispute that the victim's statement met the first and fourth factors because the victim was six years old when she made the statement and because her statement was introduced through another's testimony. MRE 803A. However, defendant argues that the statement does not satisfy the spontaneity or immediacy requirements.

Defendant contends the statement was not spontaneous because it was not made under the stress of excitement from a startling event. Defendant erroneously relies on the spontaneity standard of the excited utterance hearsay exception. MRE 803(2). By contrast, the spontaneity factor of MRE 803A requires only that the declarant was not prompted or coached to give the statement. MRE 803A; see also *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996). The trial court determined that the victim's statement met this standard of spontaneity, and we find no error in that determination.

Defendant also asserts that the statement failed to satisfy the immediacy factor because the victim made the statement some eight or nine months after the assault occurred, and defendant argues that the delay was not justified. Again, defendant erroneously relies on the excited utterance standard for immediacy, under which delays of even a few hours may render a statement inadmissible. *People v Hackney*, 183 Mich App 516, 522; 455 NW2d 358 (1990). By contrast, MRE 803A requires that the victim's statement be made immediately *or* after an excusable delay. In *Dunham*, *supra* at 272, this Court approved the admission of similar evidence under MRE 803A, despite an eight or nine month delay, because the victim feared the defendant. The trial court in the present case likewise found that the victim was justified in fearing defendant and that this fear excused her delay in making the statement. We find no error in the court's ruling. Consequently, the trial court did not abuse its discretion in admitting the evidence.

Defendant next argues that the trial court erroneously denied his motion for a mistrial after a prosecution witness revealed that defendant had been in jail, contrary to the court's instructions. We review a trial court's decision to deny a motion for mistrial for an abuse of discretion. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001).

Before trial, and at the prosecutor's request, the trial court ordered the attorneys to instruct their witnesses not to reveal that defendant had been in jail. Nonetheless, in response to direct examination regarding when defendant had been at the house where the assault occurred, defendant's girlfriend mentioned that defendant had been in jail. Defendant contends that this testimony was prejudicial because the charge was not mentioned, allowing the jury to speculate about why he was in jail and to conclude that he was a "bad man" who had likely committed the charged offense.

As a general rule, unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony. *Hackney*, *supra* at 531. See also *People v Griffin*, 235 Mich App 27, 36-37; 597 NW2d 176 (1999). The witness' testimony here was unresponsive because the prosecutor was clearly attempting to elicit the date when defendant returned to the house, not his whereabouts during his absence. Moreover, because the prosecutor had instructed the witness not to reveal that defendant had been jailed, the prosecutor could not have known ahead of time that the witness would give that testimony. Finally, the evidence established that the witness mentioned the

defendant's incarceration only because she was nervous, not because the prosecutor conspired with or encouraged the witness to reveal this information.

We also note that defendant failed to request a curative instruction. An unresponsive, volunteered answer to a proper question is not cause for granting a mistrial. This is especially true where the defendant has rejected the opportunity to have the jury charged with a cautionary instruction. *People v Lumsden*, 168 Mich App 286, 298-299; 423 NW2d 645 (1988). The trial court specifically stated that it would provide an instruction if defendant requested one, and defendant declined this invitation. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant next contends that the trial court erroneously denied defendant's motion to compel the prosecutor to provide a more specific date for when the assault occurred. A trial court has discretion when deciding whether to require the prosecution to provide more specificity of the time at or occasion on which an offense occurred, and we will reverse that decision only if we find an abuse of that discretion. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986).

The Legislature has required that an information state the time of the offense "as near as may be." MCL 767.45(1)(b). Further, the statute states that a variance as to time is not fatal unless time is of the essence to the offense. MCL 767.45(1)(b). Time is not of the essence in a CSC case, at least when a child victim is involved. *People v Taylor*, 185 Mich App 1, 7-8; 460 NW2d 582 (1990). However, MCL 767.51 also provides that a court "may on motion require the prosecution to state the time or identify the occasion as nearly as the circumstances will permit, to enable the accused to meet the charge." This Court has delineated four factors that a trial court should consider when making that determination: (1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense. *Naugle, supra* at 233-234. Defendant contends that the two-month time frame given in the information inhibited his efforts to establish an alibi defense. However, time is not of the essence in a CSC case involving a child victim. *Taylor, supra* at 7-8. Even accepting that defendant was prejudiced, this is but one factor to be weighed. *Naugle, supra* at 233-234. On the facts of this case, the other three factors weighed against requiring more specificity. Therefore, the trial court did not abuse its discretion in denying defendant's motion.

Finally, defendant asserts that the trial court erroneously excluded evidence crucial to his alibi defense. Defendant's argument arises from a ruling barring hearsay testimony about defendant's statements to a state police trooper during the investigation of this case. However, defendant waived this argument for appeal by approving of and acquiescing in the trial court's ruling. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). Defendant's waiver extinguishes any trial court error and bars our review. *Id.*

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski