

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

LESLY JON RICHARD FLOOD,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 231220

Muskegon Circuit Court

LC No. 00-044693-FH

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with a victim under thirteen years of age). The trial court sentenced defendant to 66 to 270 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant contends that he was deprived of his constitutional right to present a defense. The record indicated that other individuals had previously sexually abused the victim. Defendant sought to introduce evidence of the prior sexual contacts to explain her "age-inappropriate familiarity with sexual matters." The trial court excluded the evidence, relying on the rape-shield statute, MCL 750.520j, which provides in pertinent part:

Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

We review a trial court's decision to admit or exclude evidence under an abuse of discretion standard. *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). Our Supreme Court

added: “In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant’s sexual conduct where its exclusion would not unconstitutionally abridge the defendant’s right to confrontation.” *Id.* Generally, an abuse of discretion will be found only “if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made.” *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

In *People v Morse*, 231 Mich App 424, 426-427; 586 NW2d 555 (1998), we reviewed a situation factually similar to the case at bar: the defendant sought to introduce evidence of the victims’ previous sexual history, in part, to show that their age-inappropriate sexual knowledge was not learned from the defendant. Although we noted that such evidence may be admissible in certain circumstances, we explained that the proffered evidence must be “significantly similar” to the facts alleged by the victim. *Id.* at 437. Similarly, in *People v Byrne*, 199 Mich App 674, 679; 502 NW2d 386 (1993), we recognized that, in order to introduce evidence of the victim’s sexual abuse by her father, the defendant would have to establish that the sexual conduct of which he was accused was “highly similar” to that charged against the victim’s father.

Here, the victim did not display any age-inappropriate sexual knowledge. Moreover, defense counsel represented to the trial court that the victim’s father had been convicted of first-degree criminal sexual conduct, which, according to MCL 750.520b, requires penetration of the victim. Defendant, however, was not accused of penetrating the victim, but was instead accused of rubbing the victim. Accordingly, there was a significant difference between the charged acts and the evidence that defendant sought to have admitted. Consequently, the trial court did not abuse its discretion by excluding the evidence.

Defendant also contends that the trial court’s denial of his motion for a mistrial constituted an abuse of discretion. Sandra Rexford, the victim’s biological grandmother and adoptive mother, who testified as a witness for the defense, was admonished by the trial court for shaking her head in disagreement with the prosecutor’s closing argument. When the trial court ordered her to leave the courtroom, she exclaimed “[i]t’s baloney,” presumably referring to the prosecutor’s closing argument. The trial court excused the jury, and threatened to hold her in contempt. Defense counsel moved for a mistrial, contending that the situation made his client “look horrible.” Defendant also requested an instruction that the jury not draw any unfavorable inferences from Rexford’s conduct. The trial court did not rule on defendant’s motion for a mistrial, but did caution the jury not to “hold” Rexford’s behavior against defendant.

Ordinarily, we decline to review issues that were not actually decided by the trial court. *People v Evola*, 202 Mich App 178, 180; 507 NW2d 815 (1993). Accordingly, the trial court’s failure to rule on defendant’s motion for a mistrial precludes appellate review of the merits of defendant’s motion for a mistrial. Nevertheless, the trial court’s decision to grant defendant’s simultaneous motion for a cautionary instruction could arguably be characterized as an implicit rejection of defendant’s motion for a mistrial. Generally, a trial court’s ruling on a motion for a mistrial is reviewed for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). “A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial.” *Id.*, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Here, Rexford's physical gestures and comments indicated that she did not agree with what the prosecutor was arguing in his closing argument. In fact, her apparent willingness to risk reprimand by the trial court suggests that her disagreement was substantial. An argument certainly could be made that Rexford's behavior demonstrated such strong feelings that it actually helped defendant's case. Indeed, Rexford's behavior plainly indicated that she disagreed with the prosecutor's characterization of the facts. At the very least, we are not persuaded that Rexford's behavior, notwithstanding the trial court's reprimand, impaired defendant's ability to get a fair trial. Moreover, although the trial court instructed Rexford that her behavior was inappropriate, the trial court excused the jury before discussing the possibility of Rexford being held in contempt of court. Further, the trial court granted defendant's request for an instruction that Rexford's behavior not be held against defendant. Accordingly, to the extent that the trial court's ruling could be characterized as an implicit denial of defendant's motion for a mistrial, we are not persuaded that this ruling was an abuse of discretion. *Griffin, supra* at 36.

Finally, defendant argues that the trial court should have granted his motion for a mistrial based on the testimony of Kim Parling, a school counselor who interviewed the victim and her brother. At the close of the prosecution's case, the prosecutor indicated that Parling could possibly be called as a rebuttal witness. Apparently, the school had taken the legal position that the communications between Parling and the victim were privileged. Thus, the prosecution stated that its questions would be limited to whether Parling met with the victim or made promises to the victim. In other words, the questioning would not concern the details of the conversations. Defense counsel agreed that the only questions that would be asked of Parling would relate to "how long and how often she had conversations with her [the victim]."

Defendant presented Rexford's testimony, which suggested that Parling made three promises to the victim:

The first is that she could be Kim's special friend, and that she could call her "Kim."

The second was that she would have the authority to tell me what could be done in the home, who could go and who could stay and so on and so forth.

And the third was . . . that she could still come back and be a part of [the] group there, the social worker Kim, that kind of thing.

During cross-examination, Rexford noted that Parling did not promise the victim toys, but that "the toys did come later."

In light of Rexford's testimony, the prosecutor called Parling as a rebuttal witness. Parling testified that she met with the victim after the victim's brother made "statements" to Parling. Parling testified that she called "Protective Services" after the meeting, and that a worker and state police officer came to the school. Defense counsel promptly objected, contending that the prosecutor had exceeded the scope of rebuttal. Defendant also moved for a mistrial. Defense counsel argued that the testimony had not been limited to whether promises were made. The trial court denied defendant's motion, noting that the questioning had not gone "anywhere near the level of a mistrial." The trial court also denied a defense request to limit the

questioning to the anticipated rebuttal testimony, but noted that it would sustain any objection where the prosecutor's questioning was not "related to rebuttal." Ultimately, Parling testified that she met with the victim three times and met with the victim's brother "[m]aybe a couple times." She denied making any promises or coaching the victim to testify. Parling reiterated these assertions during cross-examination.

On appeal, defendant contends that the trial court abused its discretion by denying defendant's motion for a mistrial. However, the record indicates that the prosecutor's questioning merely provided background information. In other words, it does not appear that the prosecutor elicited any privileged information. Moreover, following defendant's motion, the prosecutor introduced testimony that was within the scope of anticipated rebuttal testimony. In fact, defendant did not object to any of the prosecution's questions. Accordingly, there is no indication that defendant was harmed by the trial court's denial of his request to limit the prosecution's questioning. In addition, defendant was given an opportunity to cross-examine Parling—which is plainly contrary to his assertion that he was deprived of an opportunity to do so. Indeed, there is no indication that Parling's testimony in any way prevented defendant from receiving a fair trial. Thus, we are not persuaded that the trial court's denial of defendant's motion for a mistrial constituted an abuse of discretion. *Griffin, supra* at 36.

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens