STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 4, 2002
v	No. 239118 Eaton Circuit Court
GREG LEWIS HERBAN, Defendant-Appellant.	LC No. 01-020026-FH

Before: Whitbeck, C.J., and Sawyer and Kelly, JJ.

PER CURIAM.

Defendant Greg Lewis Herban appeals by delayed leave granted his plea-based conviction of criminal sexual conduct in the fourth degree (CSC IV).[1] We affirm. We decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Basic Facts

The police began investigating Herban after learning that the complainant, his daughter, reported to a counselor that he touched her in an inappropriate manner. The police interviewed the complainant on two separate occasions on the same day. The interviews, which were tape recorded, took place in an automobile in the driveway of the complainant's home. In the first statement the complainant denied that Herban engaged in any inappropriate contact. In the second interview, which took place after the police interviewed the complainant's mother, the complainant stated that Herban penetrated her vagina with his finger on one occasion when she was sixteen years old. The complainant stated that she initially denied that the conduct occurred because she loved her father and did not want to see him jailed.

The prosecutor charged Herban with criminal sexual conduct in the third degree (CSC III), the victim being related to the actor by blood or affinity in the third degree.[2] The prosecutor also moved to admit the complainant's statements pursuant to MRE 804(b)(7).[3] MRE 804(b)(7) provides that a statement that does not fall under any of the other exceptions to the rule against

[1] MCL 750.520e.

[2] MCL 750.520d(1)(d).

[3] Formerly MRE 804(b)(6).

hearsay is admissible if the statement has "equivalent circumstantial guarantees of trustworthiness," if the statement's proponent gives appropriate advance notice of the intent to use the statement, and if

> the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. . . .

At a pretrial hearing, the complainant unequivocally stated that she would refuse to testify against Herban at trial. She also refused to answer certain questions regarding her truthfulness when making the statements. The trial court subsequently ruled that the complainant's out-of-court statements were admissible. In ruling, the trial court found that complainant was unavailable as a witness because she refused to testify against Herban.[4] The trial court determined the statements met the criteria enumerated in MRE 804(b)(7) and showed particularized guarantees of trustworthiness. In particular, the trial court noted that the complainant was reluctant to speak to the police and refused to testify because she loved her father and did not want him to be prosecuted, which the trial court believed made the statements more trustworthy.

Herban pleaded guilty of a reduced charge of CSC IV, and reserved the right to challenge on appeal the trial court's ruling admitting the complainant's statements. The trial court sentenced Herban to one year of non-reporting probation, and imposed costs and fees.

II. Standard Of Review

We review a trial court's decision to admit evidence for an abuse of discretion.[5] However, to the extent that this case involves the preliminary legal issue whether the statements were sufficiently trustworthy to meet the constitutional and evidentiary standard, we apply de novo review.[6]

III. The Catchall Exception

To be admissible under MRE 804(b)(7), the "catchall" hearsay exception, a statement must qualify under the rules of evidence and admitting the statement must be consistent with the rights embodied in the Sixth Amendment's Confrontation Clause.[7] This constitutional standard requires proof that admitting the statement is necessary because the declarant is unavailable and

[4] MRE 804(a)(2).

[5] See *People v Schutte*, 240 Mich App 713, 715; 613 NW2d 370 (2000).

[6] See *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); see also *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000), remanded 465 Mich 928; 639 NW2d 255 (2001), on remand 249 Mich App 728; 643 NW2d 607 (2002).

[7] See *Smith*, *supra* at 688, citing *Idaho v Wright*, 497 US 805, 814; 110 S Ct 3139; 111 L Ed 2d 638 (1990).

that the statement has "'particularized guarantees of trustworthiness'" if it does not fall "within a firmly rooted hearsay exception."[8] We do not believe that MRE 804(b)(7) states a firmly rooted hearsay exception because, in comparison to substantive exceptions identified in MRE 804(b), subsection (7) attempts to cover unanticipated, and therefore unarticulated, circumstances. Nevertheless, we note that the complainant is unavailable because she refuses to testify and that the court rule incorporates this trustworthiness standard in its plain language. Thus, we consider whether the statements were trustworthy and met the criteria identified in MRE 804(b)(7).

Herban argues that the statements are not trustworthy because the complainant only made the statements at the behest of the police and because the statements were inconsistent. In determining whether a hearsay statement is sufficiently trustworthy to admit in evidence, appropriate factors to consider include:

> (1) the spontaneity of the statements; (2) the consistency of the statements; (3) lack of motive to fabricate or lack of bias; (4) the reason the declarant cannot testify; (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence; (6) personal knowledge of the declarant about the matter on which he spoke; (7) to whom the statements were made, e.g., a police officer who was likely to investigate further; and (8) the time frame within which the statements were made.[9]

Additionally, a statement may be sufficiently trustworthy if cross-examining the declarant would be only marginally useful.[10]

The record indicates that the police did not compel the complainant in any way to make the statements.[11] Nor is there other evidence that she was unduly influenced to make the statements. Plainly, the facts of the assault are matters of which the complainant would have personal rather than second-hand knowledge. Herban is correct that the statements were inconsistent in that complainant first denied and then asserted that Herban had committed the crime. However, the complainant lacked a motive to fabricate her allegations against her father. If she did testify at trial, the complainant could not plausibly deny the second statement given that she said that she loved Herban and did not want to see him prosecuted. With these feelings toward Herban, the complainant had no reason to accuse him falsely. Further, these feelings explain the complainant's initial hesitance at admitting what had happened. In this particular case, as the trial court observed, the inconsistencies in the statements do not diminish their trustworthiness. Additionally, cross-examining the complainant would have provided Herban with no additional benefit because the contradiction in the two statements offered him a full opportunity to impeach her allegation that he committed the crime.

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[8] *Wright*, *supra* at 814-815, quoting *Ohio v Roberts*, 448 US 56, 65-66; 100 S Ct 2531; 65 L Ed 2d 597 (1980).

[9] *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000).

[10] *Id*. at 181.

[11] Compare *Smith*, *supra* at 688-689 (declarant had a reason to implicate the defendant in the crime because she was under threat of prosecution).

As for the criteria identified in the court rule itself, Herban does not contend that the statements were admissible pursuant to any of the other exceptions to the rule against hearsay, which would make the statements inadmissible under the catchall provision.[12] The prosecutor offered the complainant's statements as evidence that Herban committed the crime itself, which is undoubtedly a material fact.[13] The statements were more probative of the point for which the prosecutor offered them than any other evidence the prosecution could procure with reasonable effort.[14] In our view, the statements served the general purposes of the hearsay exception and the interests of justice.[15] Under the circumstances, the trial court did not err in ruling that the statements were admissible.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kirsten Frank Kelly

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[12] See MRE 804(b)(7) (The catchall provision applies to a "statement not specifically covered by any of the foregoing exceptions . . . .").

[13] MRE 804(b)(7)(A).

[14] MRE 804(b)(7)(B).

[15] MRE 804(b)(7)(C).