STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 12, 2006
v	No. 263786 St. Clair Circuit Court
MARIO FRANK LUTCHMAN, Defendant-Appellant.	LC No. 05-000048-FC

Before: Jansen, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1), and second-degree criminal sexual conduct (CSC II), MCL 750.520c. Defendant was sentenced to concurrent terms of 4½ to 20 years' imprisonment for the CSC I conviction, and 4 ½ to 15 years' imprisonment for the CSC II conviction. We affirm.

On appeal, defendant argues that his right to confront the witnesses against him, guaranteed by the Confrontation Clauses of the federal and state constitutions, was violated during the hearsay testimony of Officer Manns at his trial. We disagree. Although defendant objected at trial to the testimony of Officer Manns on grounds that it was hearsay, the Confrontation Clause issue was not raised before the trial court. Thus, this issue is not properly preserved for appeal. *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005). We review unpreserved issues for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that a plain error occurred and that the plain error affected the outcome of the lower court proceedings. *Id*. at 763. If these requirements are met, reversal is warranted only if the error resulted in the conviction of an actually innocent defendant, or the error affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's guilt or innocence. *Id*. at 763-764.

The Confrontation Clauses of the federal and state constitutions ensure that criminal defendants receive the opportunity to confront and cross-examine witnesses against them. US Const, Am VI;[1] Const 1963, art 1, § 20. The right to confrontation insures that witnesses testify under oath at trial, that witnesses are available for cross-examination, and that the jury has the

[1] The Federal Confrontation Clause applies to state prosecutions through the Fourteenth Amendment. *Pointer v Texas*, 380 US 400, 403; 85 S Ct 1065; 13 L Ed 2d 923 (1965).

opportunity to observe the demeanor of the witnesses. *People v Frazier (After Remand)*, 446 Mich 539, 543; 521 NW2d 291 (1994).

Officer Manns testified at trial regarding certain statements given to him by the mother of the minor complainant. According to Manns, the minor had told her mother that she was sexually abused by defendant. Defense counsel objected to Manns's remarks on the ground that they were impermissible hearsay. The trial court agreed with defendant's objection, ruling that Manns's testimony, regarding the complainant's mother's comments, was inadmissible hearsay. Defendant did not request a curative instruction at the time. Nonetheless, the trial court properly instructed the jury at the close of trial that it could only base its decision on properly admitted evidence.

In general, out-of-court testimonial statements made by a person who does not appear at trial are inadmissible, unless the person is unavailable and the defendant had a prior opportunity to cross-examine the declarant. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). However, "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [the declarant's] prior testimonial statements." *Id*. at 59 n 9. Thus, even assuming *arguendo* that the minor complainant's statements to her mother and the mother's statements to Officer Manns were testimonial in nature, there was no Confrontation Clause violation presented by Manns's testimony because both the minor complainant and her mother were available for cross-examination at trial. *Id*. Indeed, both the complainant and her mother testified at trial regarding defendant's alleged offenses and regarding the minor's statements to her mother. Defendant's right to confront and cross-examine the witnesses was not violated in this case.

To the extent that defendant argues that Officer Manns's testimony was nonresponsive, we again find no error. We recognize that a nonresponsive answer from a police officer is more strictly scrutinized than one given by any other witness. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). However, Manns's statement was brief, merely cumulative, and did not convey any new information to the jury. Thus, we cannot conclude that the statement was outcome determinative or that it prejudiced defendant. Moreover, even assuming that a potential for prejudice existed, the situation could have been remedied by a cautionary instruction, which defendant did not request. See *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). We find no plain error in this regard.

Finally, we note that Manns's unsolicited testimony suggested at most that the complainant informed her mother that defendant had sexually abused her. This testimony was cumulative to that of complainant and her mother, both of whom testified that the complainant informed her mother, by some method of communication, that defendant sexually abused her. Accordingly, even if there were some error presented on the facts of this case, any such error was harmless because it did not undermine the reliability of the verdict and was not decisive to the outcome. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ Kathleen Jansen
/s/ David H. Sawyer
/s/ Richard A. Bandstra