

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH RYAN CARLSON,

Defendant-Appellant.

UNPUBLISHED
November 5, 2009

No. 287420
Kent Circuit Court
LC No. 07-006211-FC

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (“CSC”), MCL 750.520b(1)(a) (complainant under 13 years of age), and one count of second-degree CSC, MCL 750.520c(1)(a) (complainant under 13 years of age). He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 25 to 48 years for each first-degree CSC conviction and 12 to 24 years for the second-degree CSC conviction. We affirm defendant’s conviction and sentence for second-degree CSC, but reverse and vacate his two convictions of first-degree CSC. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of sexually abusing his daughter, who was three years old when the alleged abuse occurred and four years old at the time of trial. Defendant argues that he was entitled to a directed verdict on the two counts of first-degree CSC because the only substantive evidence of penetration was the child’s hearsay statements made to social service and medical personnel, which defendant maintains were inadmissible.

This Court reviews a ruling on a motion for a directed verdict de novo. *People v Hammons*, 210 Mich App 554, 556; 534 NW2d 183 (1995). This Court must “review the evidence in a light most favorable to the prosecutor to determine whether a rational trier of fact could have found that the essential elements of the offense were proven beyond a reasonable doubt.” *People v Couzens*, 480 Mich 240, 244; 747 NW2d 849 (2008). The essential elements of first-degree CSC are that the defendant “engage[d] in sexual penetration with another person” and “[t]hat other person is under 13 years of age.” MCL 750.520b(1)(a); *People v Elston*, 462 Mich 751, 774; 614 NW2d 595 (2000). “‘Sexual penetration’ means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required.” MCL 750.520a(r).

At trial, the child testified that defendant once touched her “butt” and her “crotch” with his fingers, but she denied that he put his finger or tongue in her “crotch” or kissed her anywhere but her face and hands. A physical examination of the child did not establish evidence of sexual abuse. The only evidence of penetration was the child’s statements social worker Melissa Peterson that defendant put both his finger and his tongue inside her “crotch” and “put his crotch in her mouth.” Additionally, the complainant told nurse Debra Hogue that defendant kissed her crotch. Although defendant now argues that these statements were inadmissible hearsay, he did not object to the admissibility of the statements at trial. Therefore, to be entitled to relief on appeal, defendant must establish that the statements were plain error and affected his substantial rights. MRE 103(d); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Hearsay is “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Generally, hearsay is not admissible. MRE 802. Exceptions to this general rule are “justified by the belief that the hearsay statements are both necessary and inherently trustworthy.” *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992). One such exception involves “[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.” MRE 803(4). This exception is rationalized by “the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.” *Meeboer, supra* at 322. Where the declarant is a child, “further analysis of the circumstances surrounding the examination of a child is necessary to determine whether the child understood the need to be truthful to the physician.” *Id.* at 323. Among the factors used to guarantee the trustworthiness of the child declarant’s statements are:

- (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. [*Id.* at 325-325.]

The reliability of the child’s statement is “strengthened when it is supported by other evidence.” *Id.* at 325-326.

Defendant argues that the child’s statements to Hogue and Peterson were not admissible under MRE 803(4). We conclude that the statements to Peterson were not admissible pursuant to MRE 803(4). We further conclude that it is irrelevant whether the statements to Hogue were

admissible pursuant to MRE 803(4) because the statement to Hogue did not establish the element of penetration.

Hogue examined the complainant within hours after the child told her mother about the alleged abuse. Hogue is an emergency room nurse who has been specifically trained to examine both adult and child victims of alleged sexual abuse. Due to the medical nature of the interview, the statements to Hogue were arguably admissible pursuant to MRE 803(4). However, the relevant issue is whether the prosecution presented evidence of sexual penetration to support the conviction of first-degree CSC. The complainant told Hogue that defendant kissed her on the crotch. We find that the complainant's statement is not sufficient to establish that penetration occurred. We recognize that any penetration, regardless of how slight, supports a conviction under the statute at issue. However, a reasonable finder of fact was not permitted to conclude, based on Hogue's testimony, that even slight penetration occurred. Therefore, we must next analyze whether complainant's statement to Peterson was properly admitted and was sufficient to establish elements of the charged offense.

The interview with Peterson occurred a week after the interview with Hogue. Peterson is a social worker who is trained to conduct forensic interviews of alleged victims of sexual assault. Although Peterson apparently communicated the results of her interview with Dr. Buchanan, there is no evidence on the record that establishes that the victim's statements to Peterson were made for the purpose of medical treatment. Consequently, the hearsay statements were not admissible pursuant to MRE 803(4). As a result, it was plain error to admit the statements.

Because it was plain error to admit the statements to Peterson, defendant is entitled to relief if he can establish that the plain error affected his substantial rights. Peterson's testimony was the only evidence presented to the jury that permitted a finding that penetration occurred. Had the trial court excluded the testimony, no evidence of penetration would have been presented and the jury would not have been permitted to find defendant guilty of first-degree CSC. It naturally follows that the plain error affected defendant's substantial rights and defendant's convictions for first-degree CSC were improper.

The prosecution argues that the statements were independently admissible under MRE 803A with regard to child declarants. MRE 803A states, in pertinent part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (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.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

The child's statements to Hogue and Peterson do not qualify for admission under this rule. Most significantly, the statements were not spontaneous, but rather were given during an interview with medical and protective services personnel in response to questioning. Further, the statements were not made immediately after the alleged abuse. Rather, the complainant first told her mother of the alleged events, then spoke to Hogue and then spoke to Peterson one week later. The statement to Peterson, which was the only admitted statement regarding penetration, was particularly far removed in time from the alleged events. There is no evidence that the child delayed making a statement because she was in fear of defendant. Indeed, at trial the child denied that defendant told her not to tell anyone about the alleged touching. Moreover, the statements describing acts of penetration did not corroborate the complainant's trial testimony. Although the complainant testified at trial that defendant touched her crotch and butt with his fingers, she denied that he put his fingers inside her crotch and denied that he kissed her anywhere but her face and hands. Therefore, the statements were not admissible under MRE 803A.

For these reasons, we conclude that the admission of the child's hearsay statement to Peterson was plain error. Further, because these statements provided the only evidence of penetration, they affected defendant's substantial rights. Because the admissible evidence, viewed in a light most favorable to the prosecution, would not have permitted the jury to find beyond a reasonable doubt that penetration occurred, the trial court erred in denying defendant's motion for a directed verdict with respect to the two counts of first-degree CSC. We therefore vacate defendant's convictions and sentences for the two counts of first-degree criminal sexual conduct. However, defendant's conviction and sentence for second-degree CSC is affirmed.

Affirmed in part, reversed in part, and vacated in part.

/s/ Cynthia Diane Stephens

/s/ Mark J. Cavanagh

/s/ Donald S. Owens