STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 19, 2009
v	No. 288005 Wayne Circuit Court
RICHARD DAVIS, Defendant-Appellant.	LC No. 08-000326-FH

Before: Borrello, P.J., and Whitbeck and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of assault with intent to commit second-degree criminal sexual conduct (CSC II), MCL 750.520g(2) (victim under 13). We affirm.

I. Basic Facts

Defendant's conviction stems from his sexual contact with the victim, who was nine years old when the incident occurred. The assault occurred in the victim's aunt's house, which is also defendant's home, when the victim was spending the night. The victim was asleep on the couch and awoke to find defendant "rubbing" her genital area over her pajamas. Subsequently, defendant was arrested and charged with CSC II, MCL 750.520c(1)(a). The matter went to trial and at the close of testimony, defendant, over the prosecutor's objection, requested an instruction for assault with intent to commit CSC II, MCL 750.520g(2). The trial court granted defendant's request and defendant was found guilty of assault with intent to commit CSC II. This appeal followed.

II. Sufficiency of the Evidence

Defendant first argues that the prosecution failed to present sufficient evidence to establish the requisite elements of assault with intent to commit CSC II. We disagree. When considering a sufficiency challenge, we review the evidence de novo and in a light most favorable to the prosecution to determine whether the evidence would justify a rational jury's finding that all elements of the crime were proven beyond a reasonable doubt. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

The elements of assault with intent to commit CSC II are: (1) an assault; (2) done for a sexual purpose; (3) with the specific intent "to touch the complainant's genital area, groin, inner thigh, buttock, breast, or clothing covering those areas;" and (4) the presence of an aggravating circumstance. *People v Evans*, 173 Mich App 631, 634; 434 NW2d 452 (1988); *People v Snell*, 118 Mich App 750, 754-755; 325 NW2d 563 (1982). An assault may be established by showing "that one has attempted an intentional, unconsented, and harmful or offensive touching of a person." *People v Starks*, 473 Mich 227, 229; 701 NW2d 136 (2005). And, intent may be inferred from all the facts and circumstances. *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Further, we note that "[c]ircumstantial evidence, and reasonable inferences arising from the evidence, may constitute satisfactory proof of the [offense's elements]." *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995).

After our review of the record, we conclude that the evidence sufficiently supported defendant's conviction. The victim testified that she woke up and observed defendant touching her "private part" with his hand. The victim's aunt testified that the victim told her, on the night the assault occurred, that defendant had touched her "private part." These testimonies sufficiently established that an assault occurred. Further, based on this evidence a jury could also reasonably infer that the touching was done for a sexual purpose, because defendant was touching the victim's genitalia in a certain way, and that it was intentional, and not accidental, because the touching was a "rubbing." Lastly, the victim was only nine years old when the incident occurred and not legally capable of consent, see *People v Wilkens*, 475 Mich 899, 900; 716 NW2d 268 (2006), which establishes the last element: the existence of an aggravating circumstance. Given the foregoing, there is no merit to defendant's contention that there was insufficient evidence that an assault occurred or that he lacked the intent to touch the victim for a sexual purpose. Thus, viewing the evidence in a light most favorable to the prosecution, we conclude that the evidence was sufficient for a rational jury to find defendant guilty of assault with intent to commit CSC II.

III. Prosecutorial Misconduct

Defendant next argues that the prosecutor committed misconduct. Specifically, defendant contends that the prosecutor elicited improper prior consistent statements in contravention of MRE 803A and improperly vouched for the victim's credibility during closing argument. We disagree. Because defendant failed to raise an objection to any of the alleged instances of prosecutorial misconduct, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The test for prosecutorial misconduct is whether the defendant is denied a fair and impartial trial. *People v Mesik (On Reconsideration)*, ___ Mich App ___ ; ___ NW2d ___ (2009). We consider this question on a case-by-case basis, keeping in mind the context in which the prosecutor's actions occurred. *People v Kelly*, 231 Mich App 627, 637; 588 NW2d 480 (1998). In doing so, we must read the complained of remarks as whole and evaluate them in light of defense arguments and their relationship to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

A. Hearsay

Defendant claims that the following statements were inadmissible: (1) the victim's testimony that she told a person at "Kids Talk" the same version of events that she told the jury; and, (2) officer Inman's testimony regarding what the victim told her on the night of the assault. Typically, such prior consistent statements used to bolster a witness's credibility are inadmissible hearsay. MRE 801(c). However, in certain instances, such statements will not be considered hearsay if

> (1) the declarant [is available to testify] at trial and be subject to cross-examination; (2) there [is] an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent [is offering] a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement [was] made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (citation and quotation marks omitted).]

See also MRE 801(d)(1)(B). In addition, even if the testimony does not qualify as non-hearsay under MRE 801(d)(1)(B), it may still be admissible if it meets the requirements of a hearsay exception. MRE 802. Particularly relevant to this proceeding is MRE 803A, which sanctions the admission of hearsay statements made by child victims of sexual abuse that describes the incident. This rule only permits the admission of the first corroborative statement made about the incident, which is introduced by someone other than the declararnt.

Here, the prosecution asked the victim and officer Inman about prior consistent statements the victim had made after defense counsel implied in opening argument that the victim had fabricated her story. Specifically, defense counsel informed the jury that the victim had "told [her aunt] at the church the very next day that she was asleep and did not feel anything." The hearsay statements of the victim and officer Inman, however, were not admissible under MRE 803A. This is because the victim's testimony did not qualify under 803A as she is the declarant and the victim's aunt was the first to provide hearsay testimony regarding the victim's initial corroborative statement about the abuse. Thus, it was only the aunt's testimony that qualified under MRE 803A. It follows that any subsequent corroborative consistent statements regarding the incident were inadmissible hearsay unless they met the requirements of MRE 801(d)(1)(B).[1]

It is clear, however, that the testimony was not admissible as non-hearsay under MRE 801(d)(1)(B). Defense counsel's implied charge of fabrication made in opening argument is not an accusation of *recent* fabrication as required by MRE 801(d)(1)(B). Thus, the general rule against bolstering a witness's testimony with a prior consistent statement was violated. See

[1] The prosecution contends that the statements at issue were non-hearsay under this rule. The prosecution does not argue that the victim's statements may have qualified under some other hearsay exception. Thus, we do not consider whether another exception applies.

People v Lewis, 160 Mich App 20, 29-30; 408 NW2d 94 (1987). Nonetheless, when viewing the prosecutor's questions in context, we are not of the opinion that the prosecutor deliberately elicited improper testimony. Given defense counsel's opening statement, the prosecutor may well have reasonably believed that both the victim's and officer's testimonies were admissible under the rules of evidence. A claim for prosecutorial misconduct may not be premised upon such good-faith efforts to admit evidence during trial. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). We fail to see any misconduct here, despite the error that occurred. Moreover, defendant fails to show prejudice as a result of the testimonies, especially in light of the other evidence introduced below. Thus, we conclude that relief is not warranted on this basis.

B. Vouching for Credibility

Defendant also argues that the prosecutor committed misconduct by personally vouching for the victim's credibility. During closing argument, the prosecutor commented on the victim's testimony, stating:

> In this case the victim has no reason to lie. She testified that she went over to her aunt's house frequently. There were times when the defendant was there, she liked the defendant, the defendant was nice to her and he was never mean to her.
>
> * * *
>
> Yes, I'm sure that it was Richard that touched me. She wasn't mistaken. She knows who Richard is. He's not a stranger to her.

It is certainly true that a prosecutor may not bolster a witness's credibility by asserting that she has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor may argue from the facts in evidence that a witness is worthy or not worthy of belief. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007).

After our review of the record, we conclude that the prosecutor's comments made during closing argument were proper and there was no error. The comments related to the victim's credibility and were based on evidence introduced at trial; they did not suggest that the prosecutor had some special knowledge of truth unknown to the jury. Instead, when read in context, the statements convey that the evidence indicated that the victim was credible. Further, any prejudicial effects of the prosecutor's comments were cured by the court's instructions to the jury that the attorneys' arguments were not to be considered evidence. See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Accordingly, relief is also not required on this basis.[2]

[2] We note that defendant also argues that counsel was ineffective for failing to object to the same alleged instances of prosecutorial misconduct. Defendant cannot prevail on this claim because, (continued…)

IV. Jury Instructions

Finally, defendant asserts that the trial court erred by instructing the jury on the lesser charge of assault with intent to commit CSC II. However, a party whose own conduct directly causes error waives the right to appellate review of the error. *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004). Here, defendant specifically requested the instruction on assault with intent to commit CSC II, which the trial court granted over the prosecutor's objection. Thus, because defendant requested the instruction, he directly caused the error and cannot now seek appellate relief based on that error.

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

(…continued)

as we have already concluded, he cannot establish prejudice.