STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 23, 2016
v	No. 325288 Bay Circuit Court
LEON CLARENCE MORIN, II, Defendant-Appellant.	LC No. 13-010776 - FH

Before: O'CONNELL, P.J., and OWENS and BECKERING, JJ.

PER CURIAM.

Defendant, Leon Clarence Morin, II, was convicted by a jury of indecent exposure, MCL 750.335a, and was subsequently convicted by a separate jury of being a sexually delinquent person, as defined by MCL 750.10a, at the time of the indecent exposure offense, MCL 750.335a(2)(c). The trial court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to 300 months to 50 years' imprisonment. Defendant appeals as of right. We affirm.

This case arises out of an incident in which defendant exposed himself to an 11-year old girl at a resale shop. Defendant first challenges the trial court's admission of the victim's hearsay statements through her mother's testimony. Defendant objected on hearsay grounds to the mother's testimony that the victim observed someone in the dressing room and the curtain was not shut, and the trial court ruled the statement was admissible as a present sense impression. By objecting in the trial court, defendant preserved the issue for appellate review. *People v Heft*, 299 Mich App 69, 78; 829 NW2d 266 (2012). Preserved evidentiary issues are reviewed for an abuse of discretion. *People v Orr*, 275 Mich App 587, 588; 739 NW2d 385 (2007). "A trial court abuses its discretion when it chooses an outcome that is outside the range of reasonable and principled outcomes." *Id*. at 588-589, citing *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Hearsay is inadmissible unless the Michigan Rules of Evidence provide otherwise. MRE 802. The present sense impression exception to hearsay is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1). Three conditions must be met for the admission of hearsay evidence as a present sense impression: "(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the

event." *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998), citing *United States v Mitchell*, 145 F3d 572, 576 (CA 3, 1998).

The first two conditions are clearly met because the victim's first statement described a personally perceived event; namely, her observation of defendant's face protruding from behind the dressing room curtain. For the third condition to be satisfied, we look to whether the victim's statement was "substantially contemporaneous" with the event she perceived. *Id.* "[A] slight lapse is allowable" if "precise contemporaneity is not possible." *Id*. Lapses of 4 to 16 minutes have been held to be "substantially contemporaneous." *Id*., citing *Johnson v White*, 430 Mich 47, 56; 420 NW2d 87 (1988) and *United States v Mejia-Velez*, 855 F Supp 607 (EDNY, 1994); See also *People v Chelmicki*, 305 Mich App 58, 63; 850 NW2d 612 (2014) (finding 15 minutes between the event and the statement was substantially contemporaneous). In this case, the record supports that the victim's statements to her mother were "substantially contemporaneous" with the perceived event. The evidence showed that the victim observed defendant in the dressing room and walked across the store to tell her mother what she saw. The statement was, therefore, made shortly after the perceived event, and well within the timeframe this Court has applied to this standard. Therefore, because all three conditions are met, the statement was properly admitted as a present sense impression, and the trial court did not abuse its discretion.

Next, defendant challenges as inadmissible hearsay the victim's statements, as conveyed by her mother, that when she returned to an area by the dressing room to look for boots for a Halloween costume, she observed defendant "naked," and smiling in the partially opened dressing room while "[holding] himself." Defendant failed to object to these statements, and as a result this Court will review these statements for plain error affecting defendant's substantial rights. *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

In this case, the trial court did not plainly err by admitting the victim's statements because the statements were admissible under the present sense impression exception to hearsay. The first two conditions of a present sense impression were met because the victim's hearsay statements described a personally perceived event, her observation of defendant naked with the curtain half-open. *Hendrickson*, 459 Mich at 236. Even though the victim had time to walk away from the dressing room to find her mother, the record supports that the victim's statements were "substantially contemporaneous" with her observation. Testimony established the distance between the victim and her mother in the store was only a few feet, and the time it took to walk that distance was short. Additionally, the victim testified that she made the statements "as soon as" the perceived event happened, which demonstrates that the lapse in time was slight. *Id*. Therefore, because the challenged statements were "substantially contemporaneous" with the perceived event, the third condition for a present sense impression was satisfied. Because the statements were admissible under MRE 803(1), the trial court did not plainly err in admitting the statements.

After testifying to the statements discussed *supra*, the victim's mother testified on cross-examination to the victim's statement that she saw defendant's penis. This issue is waived because defendant intentionally elicited a hearsay response by questioning the victim's mother on the victim's hearsay statements. See *People v Carter*, 462 Mich 206, 214; 612 NW2d 144

(2000) ("Waiver has been defined as the intentional relinquishment or abandonment of a known right."). Counsel may not " 'sit back and harbor error to be used as an appellate parachute in the event of jury failure.' " *People v Pollick*, 448 Mich 376, 387; 531 NW2d 159 (1995), quoting *People v Brocato*, 17 Mich App 277, 305; 169 NW2d 483 (1969). Therefore, defendant has waived his right to appeal any issue regarding hearsay statements elicited by defense counsel on cross-examination. In any event, the statement was admissible under the present sense impression hearsay exception. In fact, all of the above described statements would also have been admissible under the excited utterance exception, MRE 803(2)[1], given the abundant evidence demonstrating the victim's being under the stress of excitement caused by the event at the time she made the statements.

Defendant next argues that there was insufficient evidence to prove the indecent exposure charge.[2] This Court reviews sufficiency of the evidence claims de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001) "[A] reviewing court 'must consider not whether there was any evidence to support the conviction but whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt.' " *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992), quoting *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979). The Court "must view the evidence in the light most favorable to the prosecution," *People v Kloosterman*, 296 Mich App 636, 639; 823 NW2d 134 (2012), and "should not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses," *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000), citing *Wolfe*, 440 Mich at 514. "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime." *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993), citing *People v Reddick*, 187 Mich App 547, 551; 468 NW2d 278 (1991). Additionally, any factual conflicts are to be resolved in favor of the prosecution. *Wolfe*, 440 Mich at 515.

The prosecution presented sufficient evidence to sustain defendant's conviction. MCL 750.335a(1) provides that "[a] person shall not knowingly make any open or indecent exposure of his or her person or of the person of another." "[T]he use of the word 'or' reveals that the plain language of the statute provides that one may be guilty of open exposure or indecent exposure, as it prohibits two different types of conduct." *People v Neal*, 266 Mich App 654, 656; 702 NW2d 696 (2005). To prove an open exposure, the prosecution must prove beyond a reasonable doubt there was a "display of any part of the human anatomy under circumstances that create a substantial risk that someone might be offended." *Neal*, 266 Mich App at 659, citing *In re Certified Question*, 420 Mich 51, 63; 359 NW2d 513 (1984) (BOYLE, J., concurring). On the other hand, indecent exposure is "an intentional exposure of part of one's body (as the

[1] Pursuant to MRE 803(2), a hearsay statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if it is a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

[2] Defendant does not challenge the sufficiency of the evidence with respect to his conviction as a sexually delinquent person.

genitals) in a place where such exposure is likely to be an offense against generally accepted standards of decency in a community." *People v Williams*, 256 Mich App 576, 585; 664 NW2d 811 (2003), quoting *People v Vronko*, 228 Mich App 649, 654; 579 NW2d 138 (1998) (quotations omitted).

In this case, the jury was instructed on both types of prohibited conduct. At trial, evidence was presented that defendant knew other people, specifically the victim, were in the store. Defendant, who was standing in a dressing room, stuck his face out of the dressing room curtain and made eye contact with the victim, causing the victim to leave the area. Later, when the victim returned to the area in order to select boots, which was the purpose of her visit to the store, defendant stood naked in the dressing room with the curtain half open. The victim saw defendant standing naked, holding his penis in his hands; while doing so, he was looking straight out of the dressing room and smiling at the victim. The victim was offended by defendant's display of his penis. Accordingly, a jury could reasonably infer that defendant intentionally exposed his penis by stripping naked, leaving the dressing room curtain half open, and holding his penis in his hands, and that such exposure was likely to be an offense against generally accepted standards of decency in a community, and further, that defendant's conduct in standing naked holding his penis with his dressing room curtain was half-open created a substantial risk that someone might be offended. Therefore, with regard to both indecent and open exposure, the prosecution presented sufficient evidence " 'to justify a rational trier of fact in finding guilt beyond a reasonable doubt.' " *Wolfe*, 440 Mich at 513-514, quoting *Hampton*, 407 Mich at 366. Although defendant alleges that the evidence was insufficient because there were no other witnesses to the event besides the victim and no security camera footage captures the incident, the victim's testimony alone was sufficient to establish the requisite proofs in this matter. Furthermore, other witnesses corroborated the relevant circumstances before and after the incident. Viewed in a light most favorable to the prosecution, a rational trier of fact could easily have found the essential elements were proven beyond a reasonable doubt. *Wolfe*, 440 Mich at 515.

Affirmed.

/s/ Peter D. O'Connell
/s/ Donald S. Owens
/s/ Jane M. Beckering