STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL MARVIN GORE,

Defendant-Appellant.

UNPUBLISHED
June 20, 2024

No. 364332
Midland Circuit Court
LC No. 21-008675-FH

Before: CAMERON, P.J., and N. P. HOOD and YOUNG, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(2)(b) (victim under 13 years old). He was sentenced as a second-offense habitual offender, MCL 769.10, to a prison term of 4 years to 22 years, 6 months. We affirm.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

This case arose when AR, who was four years old at the time, disclosed to her grandmother that defendant touched her on the "private part" she used to go "potty." AR's mother had been in a romantic relationship with defendant and AR spent the night at defendant's residence several days before the disclosure. AR complained that her "butt" hurt, and, while gesturing to her vaginal area, said it hurt when she urinated. She further reported that "Daddy [defendant] rubs [her]"[1] on her vaginal area when her mother was sleeping and when he took her to the school bus. Two days after the disclosure, AR's mother took her to the emergency room, where she was diagnosed with a urinary tract infection. AR again incriminated defendant as having sexually abused her at a follow-up interview.

AR, now seven years old, testified at trial. She identified defendant as the perpetrator, but, when asked to point him out in the courtroom, could not do so. On direct examination, she

[1] Defendant is not AR's father.

explained that defendant touched her "private part." On cross-examination, however, she stated she could not "remember . . . it happening." Defendant was convicted and sentenced as noted. This appeal followed.

II. VOIR DIRE

The trial court conducted voir dire by questioning some of the prospective jurors in person, and others by interactive videoconferencing technology. Defendant argues that MCR 6.006 did not authorize the latter procedure, and that impaneling a jury selected in such a manner violated his right to an impartial jury. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

To preserve an issue for appeal, a party must provide the trial court an opportunity to correct any error by raising the issue before the court. *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). Defendant did not object to the trial court's use of videoconferencing technology during the jury-selection process. Therefore, this issue is unpreserved for our review. *Id*.

Usually, we review issues involving "the conduct and scope" of jury selection for an abuse of discretion. *People v Orlewicz*, 293 Mich App 96, 100; 809 NW2d 194 (2011). "An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes." *People v Rogers*, 338 Mich App 312, 320; 979 NW2d 747 (2021). But, because this issue is unpreserved, our review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). An error affects substantial rights when it "affect[s] the outcome of the lower court proceedings." *Id*.

B. LAW AND ANALYSIS

The trial court judge discussed with the parties its decision to hold jury voir dire remotely. It asked whether they objected to this procedure; neither party did. "[A] party may not harbor error at trial and then use that error as an appellate parachute[.]" *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010). Because defendant accepted remote voir dire during trial, his present objection to the procedure is an appellate parachute that we reject on appeal. Therefore, this issue is waived for our review. *Id*.

Even so, at the time of defendant's trial, which began on September 19, 2022, the court rule pertaining to "Video and Audio Proceedings," stated:

> (A) Generally.
>
> (1) Except as otherwise provided by this rule, the use of videoconferencing technology under this rule is subject to MCR 2.407.
>
> (2) A court may, at the request of any participant, or sua sponte, allow the use of videoconferencing technology by any participant in any criminal proceeding.

(3) When determining whether to utilize videoconferencing technology, the court shall consider constitutional requirements, in addition to the factors contained in MCR 2.407.

(4) This rule does not supersede a participant's ability to participate by telephonic means under MCR 2.402.

(B) Mode of Proceedings in Cases Cognizable in the Circuit Court.

(1) Generally. Circuit courts may use videoconferencing technology to conduct any non-evidentiary or trial proceeding.

(2) Preferred Mode. The use of videoconferencing technology shall be preferred for the following proceedings:

(a) initial arraignments on the information;

(b) pretrial conferences;

(c) motions pursuant to MCR 2.119; and

(d) Pleas. [MCR 6.006, amended effective September 9, 2022.]

This rule plainly permitted the use of "videoconferencing technology by *any* participant in *any* criminal proceeding." Former MCR 6.006(A)(2) (emphasis added). Because the rule permitted videoconferencing technology for "any proceeding," it was not a plain error for the trial court to conduct jury selection remotely.[2]

III. IRRELEVANT EVIDENCE

Defendant argues that the trial court erred by excluding evidence that AR's great-uncle was previously convicted of a sex crime, and that AR had been in his proximity. We disagree.

A. STANDARD OF REVIEW

This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Martzke*, 251 Mich App 282, 286; 651 NW2d 490 (2002). A trial court abuses its discretion when it chooses an outcome outside the range of principled outcomes. *Rogers*, 338 Mich App at 320.

B. LAW AND ANALYSIS

"Generally, all relevant evidence is admissible at trial." *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001). See also MRE 402. Evidence is relevant "if it has any tendency

[2] Defendant's brief on appeal incorrectly relies on an earlier version of MCR 6.006, which was rescinded before defendant's trial began.

to make a fact more or less probable than it would be without the evidence[,]" and "the fact is of consequence in determining the action." MRE 401. To be material, evidence need not necessarily relate to an element of the charged crime or an applicable defense. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). Rather, "[t]he relationship of the elements of the charge, the theories of admissibility, and the defenses asserted governs what is relevant and material." *People v Yost*, 278 Mich App 341, 403; 749 NW2d 753 (2008) (quotation marks and citation omitted).

Defendant attempted to introduce evidence that AR spent time with her great-uncle, who had sexually abused AR's mother in the past. After hearing testimony about this evidence, the trial court found that no "allegations [had] been presented that the great-uncle [was] accused of the allegations here." It excluded this evidence, concluding it was "speculative," and "more prejudicial than probative." The trial court's conclusion that there was no evidence linking the great-uncle to the instant offense is supported by the record. The trial court therefore did not abuse its discretion by denying defendant's request to admit this evidence.

IV. PROSECUTORIAL ERROR[3]

Defendant argues that the prosecutor erred by referring to AR as "the victim" during the proceedings. We disagree.

A. PRESERVATION AND STANDARD OF REVIEW

"[A] defendant must contemporaneously object and request a curative instruction to preserve an issue of [prosecutorial error] for appellate review." *People v Solloway*, 316 Mich App 174, 201; 891 NW2d 255 (2016) (quotation marks and citation omitted, first alteration in original). In this case, defendant did not object to the prosecutor referring to AR as "the victim." Thus, this issue was not preserved for appeal. *Id*. We review unpreserved claims of prosecutorial error for plain error affecting substantial rights. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003). "Reversal . . . is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id*. at 274-275 (footnote and citation omitted).

B. LAW AND ANALYSIS

The question for claims of prosecutorial error is whether the alleged error deprived a defendant of a fair trial. *People v Dunigan*, 299 Mich App 579, 588; 831 NW2d 243 (2013). In this respect, a defendant must show that the error resulted in a miscarriage of justice. *People v*

[3] Defendant calls the prosecutor's conduct in this instance "prosecutorial misconduct." "Although 'prosecutorial misconduct' is a commonly accepted term of art in criminal appeals, it is a misnomer when referring to allegations that do not involve violations of the rules of professional conduct or illegal activity." *People v Thurmond*, ___ Mich App ___, ___ n 6; ___ NW3d ___ (2023) (Docket No. 361302); slip op at 9. "Less egregious conduct involving inadvertent or technical error . . . should be deemed 'prosecutorial error.' " *Id*. (citation omitted). Defendant does not allege illegality or violations of the rules of professional conduct. Therefore, we refer to defendant's allegations using the term "prosecutorial error."

Brown, 279 Mich App 116, 134; 755 NW2d 664 (2008). Unpreserved claims of prosecutorial error only warrant relief if the prejudicial effect of the error was so great a curative instruction could not have eliminated it at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant believes the prosecutor committed error by using the term "the victim" when referring to AR. The term "victim" in CSC cases is defined as "the person alleging to have been subjected to criminal sexual conduct." MCL 750.520a. AR was the person who alleged "to have been subjected to criminal sexual conduct." *Id.* Therefore, the prosecutor's use of the term "the victim" in reference to AR was not plainly erroneous.

V. SUFFICIENCY OF THE EVIDENCE

Finally, defendant argues that the evidence was insufficient to support his conviction. We disagree.

A. STANDARD OF REVIEW

This Court reviews de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010).

B. LAW AND ANALYSIS

Due process[4] requires that a prosecutor must prove every element of a crime beyond a reasonable doubt to warrant a criminal conviction. *People v Hampton*, 407 Mich 354, 366; 285 NW2d 284 (1979), citing *In re Winship*, 397 US 358, 364; 90 S Ct 1068; 25 L Ed 2d 368 (1970). This Court reviews the evidence "in the light most favorable to the prosecutor[]" to ascertain "whether a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *People v Tennyson*, 487 Mich 730, 735; 790 NW2d 354 (2010), quoting *People v Hardiman*, 466 Mich 417, 429; 646 NW2d 158 (2002) (quotation marks omitted). "[A] reasonable doubt is an honest doubt based upon reason. It is a state of mind that would cause the [fact-finder] to hesitate when acting in the graver and more important affairs of life." *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988) (citation omitted). Direct and circumstantial evidence, as well as all reasonable inferences which may be drawn from it, are properly considered to determine whether the evidence was sufficient to sustain a conviction. *Hardiman*, 466 Mich at 429.

To convict a defendant of CSC-II, the prosecutor must show: "(1) the defendant engaged in sexual contact, (2) with a person under 13 years of age." *People v Duenaz*, 306 Mich App 85, 106; 854 NW2d 531 (2014), citing MCL 750.520c(1)(a). "Sexual contact" includes "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts[.]" MCL 750.520a(q).

[4] US Const, Am XIV, § 1; Const 1963, art 1, § 17.

Defendant argues that the evidence did not adequately support the conclusion that he touched AR for a sexual purpose, particularly given AR's inability to remember the assaults or identify defendant in the courtroom. This argument is belied by the record. AR testified three times that defendant touched her "private part." AR's grandmother testified that AR told her "Daddy [defendant] rubs me" on her vaginal area while her mother slept and when defendant took her to her school bus. A physician who examined AR recounted AR's report that "Dad [defendant]" had "touched me with his hand on my butt," while pointing to her vaginal area. According to the physician, AR added that it hurt, that she was not sure how many times it happened, and that defendant took her clothes off "on accident." Viewing this evidence in a light most favorable to the prosecutor demonstrates the jury reached the reasonable conclusion that defendant touched AR for a sexual purpose.

It is also not dispositive that AR was unable to identify defendant in the courtroom. The jury observed AR's testimony, which it obviously found credible. Appellate courts should not interfere with the fact-finder's "assessment of the weight and credibility of witnesses or the evidence[.]" *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013). We are also "required to draw all reasonable inferences and make credibility choices in support of the [fact-finder's] verdict." *People v Gonzalez*, 468 Mich 636, 640-641; 664 NW2d 159 (2003) (quotation marks and citation omitted). Construing the evidence in this light shows that sexual contact occurred and defendant was the perpetrator.

Affirmed.

/s/ Thomas C. Cameron
/s/ Noah P. Hood
/s/ Adrienne N. Young