

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 14, 2013

V

No. 307373
Wayne Circuit Court
LC No. 11-004260-FH

SHABUL MIAH,

Defendant-Appellant.

Before: MURPHY, C.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a) (victim at least 13 but less than 16 years of age). Because the trial court did not abuse its discretion by admitting the testimony of the complainant's mother and the evidence was sufficient to support defendant's conviction, we affirm.

Defendant's conviction stems from the sexual assault of "KZ," who was 15 years old at the time of the assault. KZ worked for defendant at a donut shop that defendant owned. KZ alleged that defendant approached her from behind and touched her breasts over her clothing as she was cleaning a coffee machine. KZ further alleged that, on the following day, defendant touched her buttocks over her clothing as she was explaining an e-mail to him. The jury convicted defendant of the first incident and acquitted him of the second.

Defendant first argues that the trial court erred by allowing KZ's mother, "SZ," to testify that KZ told her that something improper had occurred between KZ and defendant. We review for an abuse of discretion a trial court's decision whether to admit evidence. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). When the admission of evidence involves a preliminary question of law, such as whether a rule of evidence or a statute precludes the admission of the evidence, we review the question de novo. *Id.*

Defendant argues that KZ's out-of-court statements to SZ constituted inadmissible hearsay to the extent that KZ identified defendant as the perpetrator. MRE 801(c) defines hearsay as "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." "Where a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay." *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). Moreover, testimony provided to show why a particular action was taken, rather than to establish the truth

of the matter asserted, is not hearsay. *City of Westland v Okopski*, 208 Mich App 66, 77; 527 NW2d 780 (1994).

Defendant challenges the following testimony that the prosecution elicited from SZ on direct examination:

Q. Do you know a man by the name of Shabul Miah?

A. Yes.

* * *

Q. How do you know Shabul Miah?

A. My brother's brother-in-law.

* * *

Q. Okay. Did your daughter work for Mr. Miah?

A. Yes.

Q. Do you know where she worked for Mr. Miah?

A. The donut shop.

Q. At some point, did your daughter stop working for Mr. Miah?

A. She doesn't work now. She stop working [sic] long time ago.

Q. Okay. At some point, did your daughter – just yes or no.

At some point, did your daughter tell you that something had happened with Mr. Miah?

A. Yes.

Q. Just yes or no. Did she say where this happened with her and Mr. Miah.

A. The donut shop.

Q. When — do you remember when your daughter told you what happened? Just yes or no.

A. The date?

Q. Do you remember the exact date?

A. No, I don't.

* * *

Q. When your daughter — don't tell us what she said, but when she told you what happened, how was she acting. What was she like?

A. My daughter was crying and was telling me what happened.

Q. Okay. After your daughter told you what happened, what did you do?

A. My daughter was crying and I was comforting her, and I told her that don't cry and I will confront his family.

Q. Okay. Was your daughter supposed to go to work?

A. That day?

Q. Yes.

* * *

A. I told her that — she was supposed to go to work, but I told her not to go to work.

Q. Did you do anything so that she didn't have to go to work?

A. I went to his family's — I went to his family's house and I confronted them.

I told them that there was an incident happened between my daughter and that person, so from that day I told my daughter not to go to work.

The trial court did not abuse its discretion by admitting SZ's testimony. The testimony was not hearsay because, contrary to defendant's argument, it was not offered to prove that defendant sexually assaulted KZ. Rather, SZ's testimony pertaining to defendant was admitted to provide context for SZ's description of the events that followed and to explain why SZ took the actions that she did. Accordingly, the testimony was not hearsay.

In any event, even if SZ's testimony was hearsay to the extent that she identified defendant as the perpetrator, any error was harmless. "An erroneous admission of hearsay evidence can be rendered harmless error where corroborated by other competent testimony." *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003). "Moreover, the admission of a hearsay statement that is cumulative to in-court testimony by the declarant can be harmless error, particularly when corroborated by other evidence." *Gursky*, 486 Mich at 620. When the declarant herself testifies at trial, the likelihood of prejudice is greatly diminished because the primary rationale for the exclusion of hearsay is the inability to test the reliability of such statements. *Id.* at 621. "Where the declarant [her]self testifies and is subject to cross-

examination, the hearsay testimony is of less importance and less prejudicial.” *Id.* In this case, KZ testified at trial and identified defendant as the perpetrator of the sexual contact. SZ’s testimony identifying defendant as the perpetrator was admitted after KZ’s testimony and was merely cumulative of KZ’s testimony in that regard. Further, the identity of the perpetrator was not in question. Thus, even if SZ’s identification of defendant as the perpetrator was inadmissible hearsay, any error was harmless.

Defendant also contends that SZ’s entire testimony was irrelevant and should have been excluded under MRE 403 because it was far more prejudicial than probative. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Generally, all relevant evidence is admissible, and irrelevant evidence is inadmissible. MRE 402. “Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice” MRE 403. All relevant evidence is prejudicial to some extent. *People v Murphy (On Remand)*, 282 Mich App 571, 582; 766 NW2d 303 (2009). The question “is not whether the testimony was more prejudicial than probative, but whether the probative value is *substantially* outweighed by the risk of unfair prejudice.” *People v Starr*, 457 Mich 490, 499; 577 NW2d 673 (1998) (emphasis in original). “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

SZ’s testimony was highly relevant and was not merely marginally probative. SZ explained that KZ did not return to work at the donut shop because an incident had occurred between KZ and defendant. Her testimony was relevant to rebut defense counsel’s contention during his opening statement that KZ did not return to work because defendant had fired her for sneaking her boyfriend into the back of the shop. Counsel further asserted that KZ’s parents were angry that KZ had been fired and threatened defendant that they would go to the police with their story unless defendant paid them money. Thus, SZ’s testimony was relevant to the ultimate issue, i.e., whether defendant sexually assaulted KZ. Accordingly, the evidence was not merely marginally probative and the risk of unfair prejudice did not substantially outweigh the probative value of the testimony.

Defendant next argues that the trial court erred by denying his motion for a directed verdict because the evidence was insufficient to support his conviction. When reviewing a trial court’s decision on a motion for a directed verdict, this Court reviews the record *de novo*. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). We must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the offense were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant contends that an examination of the quality of the evidence presented during trial shows that KZ’s allegations were fabricated and requires reversal of the trial court’s denial of defendant’s motion for a directed verdict. To the contrary, the prosecution presented sufficient evidence to support defendant’s conviction. KZ provided details regarding the sexual contact, including where it occurred, on which date, and who perpetrated the contact. Although her testimony was at times conflicting and inconsistent and the surveillance video did not

explicitly show the alleged touching,¹ matters involving the credibility of witnesses and the weight to accord the evidence are for the jury to determine. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009); see also *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997) (“[I]t is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for a directed verdict of acquittal, no matter how inconsistent or vague that testimony might be.”) Thus, the fact that KZ gave inconsistent and conflicting testimony was not a proper basis for the trial court to grant defendant’s motion for a directed verdict. Moreover, the evidence was sufficient to allow the jury to conclude, beyond a reasonable doubt, that defendant committed the sexual assault.

Affirmed.

/s/ William B. Murphy
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher

¹ The video depicted KZ and defendant standing with their backs to the camera when defendant approached KZ from behind and allegedly touched her breasts.