STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 22, 2013
v	No. 311745 Emmet Circuit Court
MARVIN DALE VANLIEW, Defendant-Appellant.	LC No. 11-003513-FH

Before: SAAD, P.J., and K. F. KELLY and GLEICHER, JJ.

PER CURIAM.

Defendant appeals his jury trial convictions of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years). For the reasons set forth below, we affirm.

The victim testified that, when defendant was babysitting her on June 23, 2011, defendant touched her "front" between her legs. She testified that she crossed her legs to try and stop him, but that he touched her anyway. She explained that he touched her both over and under her clothes and that the touches occurred many other times when he babysat her. The victim's testimony was corroborated by statements she made to her mother when she first revealed the abuse.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the prosecutor presented insufficient evidence that he touched the victim for sexual purposes.

"This Court reviews de novo defendant's challenge to the sufficiency of the evidence." *People v Meissner*, 294 Mich App 438, 452; 812 NW2d 37 (2011). When evaluating the claim, "we construe the evidence in a light most favorable to the prosecution and consider whether there was sufficient evidence to justify a rational trier of fact in finding that all the elements of the crime were proved beyond a reasonable doubt." *People v Phelps*, 288 Mich App 123, 131-132; 791 NW2d 732 (2010).

MCL 750.520c(1)(a) states that a "person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person" and "[t]hat other person is under 13 years of age." "Sexual conduct" includes the "intentional touching of the

victim's . . . intimate parts or the intentional touching of the clothing covering the immediate area of the victim's . . . intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification[.]" MCL 750.520a(q). It is undisputed that the victim was younger than 13 years old. Further, defendant does not argue that there was insufficient evidence that he touched the victim's intimate parts and the clothing over her intimate parts. Therefore, the issue before this Court is whether there was sufficient evidence that defendant's touching can "reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(q).

In the context of sufficiency of the evidence, intent may be inferred from all the facts and circumstances, *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987), and because of the difficulty of proving an actor's state of mind, minimal circumstantial evidence is sufficient, *People v Fennel*, 260 Mich App 261, 270-271; 677 NW2d 66 (2004). The evidence at trial, viewed in the light most favorable to the prosecution, established that defendant touched a seven-year-old girl between her legs both over and under her clothes in a rubbing motion that passed over her vagina to the bottom on her buttocks. Further, the victim testified that, in between touching her, defendant once "nuzzled" her ear with a kiss and kissed her belly. Because those actions can "reasonably be construed as being for the purpose of sexual arousal or gratification" we find that there was sufficient evidence to support the convictions.

II. ASSISTANCE OF COUNSEL

Defendant argues that defense counsel provided ineffective assistance. "In order to obtain a new trial, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). "In examining whether defense counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's performance was born from a sound trial strategy." *Id*. at 52.

Defendant claims his attorney should have objected to the testimony of the victim's mother about what the victim told her about defendant's actions. 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). "Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule." *People v Gursky*, 486 Mich 596; 786 NW2d 579 (2010). MRE 803A provides the following exception to the hearsay rule:

> 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:
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> (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.

Defendant concedes that the first, third, and fourth requirements are satisfied. However, he argues that the statement was not spontaneous because it was in response to questioning by the victim's mother. Our Supreme Court has held that "MRE 803A generally requires the declarant-victim to initiate the *subject of sexual abuse*." *Gursky*, 486 Mich at 613 (emphasis in original). Further "the mere fact that questioning occurred is not incompatible with a ruling that the child produced a spontaneous statement." *Id*. Here, the victim's mother asked her if she had seen a scary movie and the victim responded that "[defendant] had touched her private parts and it made her uncomfortable." Thus, it is clear that the victim initiated the subject of sexual abuse. Moreover, the victim's mother later asked the victim whether "this had ever happened before" and the victim told her that it happened in the past, both over and under her clothes. The second question was clearly a nonleading, open-ended question, and the response was also spontaneous. *Gursky*, 486 Mich 614.

Defendant also claims his attorney should have presented medical records showing that the victim did not have any physical injuries. The only testimony about a possible physical injury came from the victim's grandmother who testified that the victim once complained that her "crotch" was sore. However, the grandmother also clearly testified that she did not find any blood in the victim's underwear. Moreover, during closing argument the prosecutor did not argue that the victim was physically injured. Thus, there was no issue at trial regarding whether the victim was injured, and defense counsel was not ineffective for declining to introduce extraneous issues.

III. MOTION FOR NEW TRIAL

Defendant contends that the trial court abused its discretion when it denied his motion for a new trial on the ground of juror misconduct. As our Supreme Court explained in *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008):

> A trial court's factual findings are reviewed for clear error. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "Clear error exists if the reviewing court is left with a definite and firm conviction that a mistake has been made." *People v Johnson*, 466 Mich 491, 497-498; 647 NW2d 480 (2002). A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion. *Cress*, 468 Mich at 691, 664 NW2d 174. An abuse of discretion occurs only "when the trial court chooses an outcome falling outside [the] principled range of outcomes." *People v Babcock*, 469 Mich 247, 269, 666 NW2d 231 (2003).

A criminal defendant has a constitutional right to be tried by an impartial jury. US Const, Am VI; Const 1963, art I, § 20. Jurors are presumed to be impartial and the "burden is on the defendant to establish that the juror was not impartial or at least that the juror's impartiality is in reasonable doubt." *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008). Pursuant to MCR 2.611(A)(1)(b), a trial court may grant a criminal defendant a new trial if there is juror misconduct. However, in order to justify a new trial on the basis of juror misconduct, a defendant must show that he or she was actually prejudiced because of the juror's presence. *Miller*, 482 Mich at 548-549, 551.

Here, at an evidentiary hearing, the trial court questioned the juror under oath. The juror testified that she did not deliberately mislead the court when she answered questions during voir dire concerning her relationships to the parties, their attorneys, or other law enforcement personnel. The juror testified that she did not think of her first cousin (a prosecutor) or her nephew (a corrections officer) as law enforcement and she was not close to either of them. Based on her testimony, the trial court found that the juror had not falsely answered questions or concealed anything deliberately during voir dire. The court also found that defendant failed to show actual prejudice. The trial court is in a superior position to assess the credibility of the juror, and we are not left with a definite and firm conviction that the trial court's findings were erroneous. *Cress*, 250 Mich App at 138.

Further, we are not persuaded that defendant was prejudiced. Defendant claims he would have exercised a challenge for cause or used one of his peremptory challenges to remove the juror if he had known about her familial relationships. However, we note that defendant did not use a preemptory challenge to excuse another juror who was related to a law enforcement official, so it is not clear he would have done so in this instance.

Further, it does not appear defendant would have been successful had he challenged the juror for cause. MCR 2.511(D)(8) provides:

> The parties may challenge jurors for cause, and the court shall rule on each challenge. A juror challenged for cause may be directed to answer questions pertinent to the inquiry. It is grounds for a challenge for cause that the person:
>
> (8) is related within the ninth degree (civil law) of consanguinity or affinity to one of the parties or attorneys.

It is undisputed that the juror was not related to either of the attorneys who actually tried the case. Instead, the juror was related to a prosecuting attorney that worked in the same office as the prosecutor who tried the case. Thus, if "attorneys" only applies to the attorneys actually trying the case, there would be no challenge for cause. However, if "attorneys" applies to the attorneys trying the case and all of the attorneys who work in the same office, then the challenge for cause would have been successful.

At issue is the interpretation of "attorneys." The rules of statutory construction apply to court rules. *People v Williams*, 483 Mich 226, 232; 769 NW2d 605 (2009). "When construing a court rule, we begin with its plain language; when that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation." *Id.* A

provision is ambiguous if it is equally susceptible to more than a single meaning. *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008). When interpreting an ambiguous phrase or word, a court should always use common sense. *Adams Outdoor Advertising, Inc v Canton Twp*, 269 Mich App 365, 370-371; 711 NW2d 391 (2006). Moreover, statutes must be construed to avoid absurd consequences. *People v Tennyson*, 487 Mich 730, 741; 790 NW2d 354 (2010).

If we adopted defendant's interpretation "attorneys," a trial court would need to ask each juror if he or she is related to any attorney working in the same office as the attorneys trying the case. For small offices, this would not present a burden, but some prosecutor's offices and law offices have hundreds of attorneys, and the consequences of defendant's interpretation then become unreasonably burdensome. We hold that "attorneys" in MCR 2.511(D)(8) refers only to the attorneys that actually try the case. Accordingly, the juror was *not* related to an attorney within the meaning of the rule and she would not have been dismissed for cause if defendant had known about her relationship with a different prosecutor in the same office. Thus, defendant is not entitled to relief on this ground.

Affirmed.

/s/ Henry William Saad
/s/ Kirsten Frank Kelly