STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNON GEORGE HARRINGTON,

Defendant-Appellant.

UNPUBLISHED
September 27, 1996

No. 176020
LC No. 93-125028-FH

Before: Marilyn Kelly, P.J., and Wahls and M.R. Knoblock,* JJ.

PER CURIAM.

Defendant was convicted in a bench trial of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant was sentenced to a term of two to twenty years' imprisonment and appeals as of right. We reverse.

Defendant argues that the prosecutor improperly bolstered the credibility of the complainant. We agree. When questioning the complainant's mother, the prosecutor elicited the following testimony:

> Q [PROSECUTOR]: And when you got to the school did you have an opportunity to speak with [the complainant] and this Ms. Kolson at that time?
>
> A: Yes.
>
> Q: Based on your discussion with them did you come to an understanding of what the problem was or what the concern was that had been raised?
>
> A: Yes.
>
> Q: And what was your understanding of that?
>
> A: Ms. Kolson had told me that [the complainant] had told her that *she had been improperly touched by my ex-husband*.

* Circuit judge, sitting on the Court of Appeals by assignment.

* * *

Q: Did you ask anybody else to become involved or to help you discuss this with [the complainant] about the information she had provided at least to that point?

A: Yes I did. At that point I was real confused and I wanted [the complainant] to talk to a girlfriend who is a very good friend of our family and have [the complainant] talk to her. I didn't feel I could be objective so I asked her to talk to [the complainant].

Q: And do you know whether or not that actually took place?

A: Yes it did.

Q: And that girlfriend who you had [the complainant] talk to was whom?

A: Lisa Ross.

Q: That having been accomplished, was the information still the same from [the complainant] or had she said that it was fabricated?

A: No. *It was still the same.*

* * *

Q: Did there come a point and time after that when you and [defendant] ever sat down and discussed the details of the incident at all?

A: No. He basically – based on what [the complainant] had told me, he never questioned what she had said so *I assumed that it encompassed everything that she had told me about it*.

Q: Everything she had said up to that point?

A: Right.

As in *People v Smith*, 158 Mich App 220, 228; 405 NW2d 156 (1987), the trial court erred when it allowed a prosecution witness to testify that the prior statements of another prosecution witness were consistent with each other and identical to that latter witness' testimony at trial. As in *Smith*, this error bore on the credibility of the prosecution's key witness. *Id.* However, also as in *Smith*, the error would not have mandated reversal had there not been other errors at trial. *Id.*

In addition to the improper bolstering, error occurred because of the continued references to polygraph tests. Here, the following exchange occurred between the prosecution and one of its witnesses:

Q [PROSECUTOR]: Following these interviews, did you ever have a chance to speak to your then husband about what had transpired?

A [JOAN BURR]: Yes I had an opportunity but he never gave any details up until that point. He claimed that he was innocent. When he talked to the detectives *he had agreed to take a polygraph test.* So based upon his willingness to do so, I also assumed that he was innocent.

Q: Did there come a point and time ma'am when he spoke to you regarding whether or not he didn't feel that he was innocent anymore?

A: Yes.

Q: And how much later than this conversation was that?

A: That – the exact date of that was April 19th.

Q: Did you speak with him that day?

A: Yes.

Q: And what information did Mr. Harrington provide you on that date.

A: *He was scheduled to take a polygraph test on that day* which had taken several weeks to set up. I think that was the reason for such a great lapse in time. *He was suppose* [sic] *to take the test early that morning* and he went and he called me and I was at work at the time and he told me that he would like to come and take me out for lunch which was something that was not – something that he normally did. At that point I told him I couldn't do that.

Following this exchange, the judge excused the jury to discuss the matter with counsel. Although defense counsel agreed that a cautionary instruction would be appropriate, the trial court rejected counsel's proposed language. Defense counsel objected to the wording of the instruction that was given.

The next day, another prosecution witness made a third reference to the polygraph examination in response to the prosecutor's questions:

Q [PROSECUTOR]: Did your interview with Mr. Harrington continue much beyond that point or was it concluded shortly thereafter?

A [TOM BARRETT]: It was concluded shortly thereafter. *Mr. Harrington made an arrangement with Detective Mackie to undergo a polygraph examination.*

After a short bench conference, the trial court gave the following cautionary instruction:

> Ladies and gentlemen, as I told you yesterday, a polygraph has nothing to do with this case. The witnesses should have been informed. We thought – sir, there is to be no mention of a polygraph. It's – we don't want this case to become a mistrial. It may already. I don't know. You've got to ignore it ladies and gentlemen. It has no bearing on this case. You decide – you are to decide the case from the facts you hear in the courtroom. As I told you about the polygraph it wasn't done because the officer chose not to perform it, and – so you shouldn't even be considering it at all.

During the final jury instructions, the trial court instructed the jury again to ignore the polygraph references.

The results of a polygraph test are not admissible as evidence in Michigan. *People v Kosters*, 175 Mich App 748, 754; 438 NW2d 651 (1989). However, a brief, inadvertent reference to a polygraph is harmless. *Id.* The following factors are relevant to whether reference to a defendant's polygraph has caused prejudice: (1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness' credibility; and (5) whether the results were admitted rather than merely the fact that a test has been conducted. *People v Turner*, 213 Mich App 558, 575-576; 540 NW2d 728 (1995); *People v Rocha*, 110 Mich App 1, 8-9; 312 NW2d 657 (1981).

Here, defense counsel sought a curative instruction, and there were repeated references to the polygraph. Although the references to the polygraph might not have caused reversible error by themselves because of the trial court's limiting instructions, contrast *People v Smith*, 211 Mich App 233, 235; 535 NW2d 248 (1995); *Rocha*, *supra*, p 9, they contributed to the totality of circumstances which denied defendant a fair and impartial trial.

The above errors were compounded by references to defendant's drinking problem, attendance at Alcoholics Anonymous, and family therapy. These references occurred in the following colloquy between the prosecutor and Barrett:

> Q [PROSECUTOR]: In the course of your being involved with this case from the time that you were from April – from the beginning part to the latter part of April, did you ever make any recommendations to either remove the child or to seek to remove Mr. Harrington from the home?
>
> A [BARRETT]: No.
>
> Q: And can you tell us why that did not occur?
>
> A: For several reasons. One, that it was alleged to only be a one time incident that occurred approximately nine months prior to that. The child was reporting to us that she was not fearful of her father, that it had never happened again or having no instances where she felt that she was being threatened sexually by Mr. Harrington. *The family was in treatment. The treatment therapist who was involved with the family felt*

that they were making some progress. Mr. *Harrington had gone on his own to A.A.* and hopefully he was making some – I guess maybe it was more of a realization that he had, a problem that he had to deal with aside from what having occurred with his daughter.

Q: In light of those factors being disclosed to you or you being informed of those, did that go into your recommendation as to whether or not he should be removed from the home?

A: That would be part of my consideration yes.

Q: The – *was there some part of your investigation*, at least that you conducted or were involved in, *that suggested to you that Mr. Harrington was in need of treatment from Alcoholics Anonymous?*

A: No not per se. *Mr. Harrington did admit that he had drank and was drinking. In a statement that he had made to the therapist that he had, who I had later talked to, admitted to a blackout and she suggested that A.A. may be a possible avenue for him.* And I did then follow up with Mr. Harrington in terms of talking about A.A. with him. He indicated that it had been a real eye opener for him and he was planning on continuing.

Due process requires that a defendant not be convicted for what he has done in the past. *People v Springs*, 101 Mich App 118, 124; 300 NW2d 315 (1980). To be valid under MRE 404(b), bad acts evidence must be relevant to an issue or fact of consequence at trial, must be offered under something other than a character to conduct theory, and must not violate the balancing test of MRE 403. *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993).

Here, the record does not show how defendant's drinking problem, attendance at A.A. meetings, or family therapy were relevant to defendant's guilt of first-degree CSC. At most, the fact that defendant attended A.A. meetings tended to confirm the testimony of Detective Mackie who claimed that defendant told her that he had been drinking heavily on the night in question. However, first-degree CSC is a general intent crime to which voluntary intoxication is not a valid defense. *People v Langworthy*, 416 Mich 630, 645; 331 NW2d 171 (1982); *People v Brown*; 197 Mich App 448, 450; 495 NW2d 812 (1992). Furthermore, defendant never raised that invalid defense. Because this testimony was not relevant to an issue or fact of consequence at trial, it was inadmissible. *VanderVliet*, *supra*, p 74.

Although none of the errors would have caused reversal alone, we believe that cumulatively, defendant has been denied a fair trial. Accordingly, we reverse and remand for a new trial. See *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987); *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).

/s/ Marilyn Kelly

/s/ Myron H. Wahls
/s/ M. Richard Knoblock