STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY THOMAS FRANKLIN

Defendant-Appellant.

UNPUBLISHED
March 14, 1997

No. 182681

Kalamazoo Circuit Court
LC No. 94-0719 FH

Before: Wahls, P.J., and Young and J.H. Fisher, * JJ.

PER CURIAM.

A jury convicted defendant of eight counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). The trial court sentenced defendant to fifteen to thirty years of imprisonment. Defendant appeals as of right. We affirm.

I

Defendant argues that the trial court's refusal to allow him to call witness James Williams to the stand for cross-examination denied defendant his constitutional right to confront a witness against him. We disagree.

Williams, who had testified at defendant's preliminary examination, refused to testify at trial despite a court order to do so. The trial court declared Williams unavailable and allowed his preliminary examination to be read to the jury. A trial court's decision that a witness is unavailable and its decision to admit preliminary examination testimony will not be disturbed on appeal absent an abuse of discretion. *People v Hunter*, 48 Mich App 497, 504; 210 NW2d 884 (1973).

Pursuant to MRE 804, a witness is unavailable where he refuses to testify despite a court order to do so. Where a witness refuses to testify despite court order, his former testimony is not excludable as hearsay, provided that the party against whom the testimony is offered had an opportunity and similar motive to develop or challenge his testimony. MRE 804.

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

However, the Sixth Amendment's Confrontation Clause, applicable to the states through the Fourteenth Amendment, provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI. *Ohio v Roberts,* 448 US 56; 100 S Ct 2531; 65 L Ed 2d 597, 605 (1980). If read literally, the clause would exclude all statements made out of court and "would abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." *Roberts, supra,* 65 L Ed 2d 605-606. Thus, the competing interests served by the Confrontation Clause and the exceptions to hearsay "may warrant dispensing with confrontation at trial." *Id.*, 606. The Confrontation Clause, however, restricts the hearsay which is admitted, in lieu of live testimony, by imposing two requirements, namely, first, that the party offering the hearsay demonstrate that the declarant is unavailable and, second, that the statement bear adequate "indicia of reliability." *Id.,* 608.

In *Ohio v Roberts, supra,* the United States Supreme Court reaffirmed the soundness of its decision in *California v Green,* 399 US 149; 90 S Ct 1930; 26 L Ed 2d 489 (1970). In *Green*, at a preliminary hearing a youth named Porter identified Green as a drug supplier. *Roberts, supra,* 65 L Ed 2d 609. When called to the stand at trial, however, Porter alleged a lack of memory. *Id.* Frustrated in its attempt to adduce live testimony, the prosecution offered Porter's preliminary hearing testimony. *Id.* The trial court ruled that the preliminary examination testimony was admissible and substantial portions were read to the jury. *Id.* The Supreme Court affirmed the trial court.

> . . . Porter's preliminary hearing testimony was admissible as far as the Constitution is concerned . . . . Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel -- the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal, equipped to provide a judicial record of the hearings. Under these circumstances, Porter's statement would, we think, have been admissible at trial even in Porter's absence if Porter had actually been unavailable, despite good-faith efforts of the State to produce him. That being the case, we do not think a different result should follow where the witness is actually produced.
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> . . . [W]e do not find the instant preliminary hearing significantly different from an actual trial to warrant distinguishing the two cases for purposes of the Confrontation Clause. . . . [T]he right of cross-examination then afforded [i.e., at the preliminary hearing] provides substantial compliance with the purposes behind the confrontation requirement . . . . [*Green, supra,* 26 L Ed 2d 501.]

It is apparent, then, that the trial court here correctly admitted Williams' preliminary hearing testimony given his unavailability at trial, i.e., his refusal to testify, and the indicia of reliability of that earlier testimony, specifically that it was taken under oath, recorded, with defendant being represented by counsel, which counsel served as his trial counsel, and with defendant having had the opportunity,

which he exercised, to cross-examine Williams. As the Supreme Court noted in *Green*, *supra*, 26 L Ed 2d 501, a preliminary hearing under these circumstances is not to be regarded differently from the actual trial for purposes of the Confrontation Clause.

On appeal, defendant raises no objection with the court's finding that Williams was unavailable or with the use of the preliminary examination transcript. According to defendant, the question presented is simply whether defendant had the right to call Williams for cross-examination. However, defendant provides no authority for the suggestion that a witness can be both unavailable and subject to examination. MRE 804 contains no language supportive of defendant's argument or the notion that a witness can be simultaneously unavailable and yet subject to examination. Instead, defendant's argument is based on quotations taken out of context from cases which stress the importance of confrontation and cross-examination at trial in lieu of the admission of testimony from an earlier hearing where the prosecution failed to satisfy its burden of demonstrating that it made a good-faith effort to produce the witness at trial.

We further reject defendant's claim that the trial court should have instructed the jury that Williams had refused to testify. However, the transcript reveals that defendant did not make plain what kind of an instruction he was requesting. More importantly, the court never ruled on the request, defendant failed to renew it, and defendant acceded to the final instructions given to the jury. Hence, defendant waived this instruction issue. A party waives issues concerning jury instructions as to which he acceded at trial. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987).

Defendant was not denied his constitutional right of confrontation.

II

Defendant argues that the trial court denied him his right to confrontation and to present a defense by refusing to permit him to introduce evidence that the only other suspect had admitted to having molested children in the past. We disagree.

The scope of cross-examination is a matter within the trial court's discretion, and its rulings will not be reversed absent an abuse of that discretion. *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

"Neither the Sixth Amendment's Confrontation Clause nor due process confers on a defendant an unlimited right to cross-examine on any subject." *Canter*, *supra*, 197 Mich App 564. Cross-examination may be denied on collateral matters bearing only on a witness' general credibility as well as with respect to collateral matters. *Id.* The court may also exclude relevant examination if its probative value is substantially outweighed by its potential of unfair prejudice, issue confusion, or its likelihood to mislead the jury or simply waste time. MRE 403.

Defendant contends that the cross-examination of Weese and Keller regarding Weese's confession that he had previously done improper things with children was permissible under MRE 404(b). Defendant's argument is quickly dispelled because "a prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad

act." *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989). Accordingly, the trial court properly limited defendant's cross-examination of Weese and Keller.

Moreover, Weese exercised his Fifth Amendment right against self-incrimination. Accordingly, Weese immunized himself from the line of questioning that defense counsel was proposing, and defendant was not entitled to force Weese to reassert this privilege before the jury. *People v Dyer*, 425 Mich 572, 579-580; 390 NW2d 645 (1986). Thus, when Weese invoked his Fifth Amendment privilege, defendant could not properly obtain the cross-examination he desired of this witness regardless of which rule of evidence he asserted.

In sum, the trial court did not abuse its discretion in limiting defendant's cross-examination of Weese and Keller.

III

Defendant argues that one of his criminal sexual conduct convictions must be vacated because the only evidence supporting the second count for the date of November 4, 1990, is the complainant's testimony that she thought defendant penetrated her twice. We disagree.

Regarding a sufficiency of the evidence question, review is de novo, with the reviewing court evaluating the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could determine that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, modified 441 Mich 1201 (1992).

In reviewing a sufficiency-of-evidence issue, the reviewing court should not interfere with the jury's role of determining the weight of the evidence or witness credibility. *Wolfe, supra*, 440 Mich 514.

The victim testified that she recalled that defendant rectally assaulted her on November 4, 1993, because it was three days after her state check came and three days after her daughter was molested. When the prosecutor asked her, "How many times did he do this [ejaculate] this time?" the victim responded, "Two. I think twice." Later, on cross-examination, she testified that she was pretty certain about the number of penetrations or ejaculations per episode.

Hence, the issue for the jury to resolve was whether the victim was credible and what weight to accord her testimony. Witness credibility is an issue which is exclusively left for jury determination. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). The reviewing court should not interfere with the jury's role of determining the weight of the evidence or witness credibility. *Wolfe, supra*, 440 Mich 514.

In sum, the record contains sufficient evidence to support defendant's convictions.

Affirmed.

/s/ Myron P. Wahls
/s/ Robert P. Yong, Jr.
/s/ James H. Fisher