STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDALL PRUSAKIEWICZ,

Defendant-Appellant.

UNPUBLISHED
October 3, 1997

No. 192587
Otsego Circuit Court
LC No. 95-002006 FH

Before: Doctoroff, P.J., and Cavanagh and Saad, J.J.

MEMORANDUM.

Defendant appeals by right his jury conviction of one count of criminal sexual conduct in the second degree; he does not challenge the jury's secondary finding of guilt of two counts of providing alcohol to a minor. After trial, defendant was adjudicated a second offender and received an enhanced sentence accordingly.

Defendant first contends that the trial court erred in excluding from evidence testimony that laboratory testing of a semen stain on the bed linens taken from the bed where the crime allegedly occurred failed to establish whether the semen was from defendant or his brother Paul. The laboratory testing did not purport to exclude defendant, or even to make it more likely that his brother was the source of the stain. The charge here was sexual contact, not penetration, although there was some evidence that may have suggested that emission of semen occurred. The bed was the one normally used by defendant's brother, in which the victim was allowed to spend a single night, and there was no testimony indicating that the bed linens had been freshly laundered. Thus, even if the stain had been attributed to defendant's brother, its exculpatory value was minimal. The evidence did not make defendant's innocence more probable or less probable than was otherwise the case, and thus it was irrelevant and properly excluded. *People v Brooks*, 453 Mich 511, 519; 557 NW2d 106 (1996). Alternatively, the trial court did not abuse its discretion in excluding such evidence of minimal probative value, where the probative value was substantially outweighed by the danger of unfair prejudice, confusion of the issues, and waste of time. *People v Sabin*, 223 Mich App 530, 537; 566 NW2d 677 (1997).

Defendant's remaining argument is that the trial court erred in admitting a statement made by the victim to her sister, some thirty minutes or so after the incident, as an excited utterance under MRE 803(2). A trial court has wide discretion in deciding whether to admit evidence as an excited utterance. *People v Hackney*, 183 Mich App 516; 455 NW2d 358 (1990). Admissibility depends on whether declarant had time to contrive or misrepresent and whether the declarant's emotional state at the time permitted fabrication. *People v Edwards*, 206 Mich App 694; 522 NW2d 727 (1994). Here, the trial court's finding that the victim did not have time to contrive or misrepresent and that her emotional state did not permit fabrication was based on its familiarity with the then developed record concerning the incident, the victim's testimony, and observation of the victim's demeanor, and was not an abuse of discretion. Furthermore, even if the trial court's ruling admitting such evidence was an abuse of discretion, as the evidence was cumulative, any error was harmless. *People v Christensen*, 64 Mich App 23, 32-33; 235 NW2d 50 (1975).

Affirmed.

/s/ Martin M. Doctoroff
/s/ Mark J. Cavanagh
/s/ Henry W. Saad