

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TALIB BAQIR ALIBEG,

Defendant-Appellant.

UNPUBLISHED

June 18, 2009

No. 284250

Wayne Circuit Court

LC No. 07-013772-FC

Before: Murphy, P.J., and Sawyer and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). He was sentenced to concurrent prison terms of 13 to 20 years for each CSC I conviction and 5 to 15 years for each CSC II conviction. He appeals as of right. We affirm.

Defendant was convicted of sexually abusing sisters AN and AY between January 1, 2005, and August 5, 2007. AN and AY were nine and seven years old, respectively, at the time of trial.

I. Hearsay Evidence

Defendant first argues that the trial court erred in admitting a statement made by one of the victims, AY, to a friend that defendant had pulled down her pants. The trial court admitted the statement under MRE 803A.

We review for an abuse of discretion a trial court's decision whether to admit evidence under a hearsay exception. *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007). An abuse of discretion occurs when a trial court's decision is outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Issues involving the construction of an evidentiary rule are reviewed de novo. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007).

MRE 803A provides, in pertinent part:

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:

- (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.

Defendant asserts that AY's statement was not admissible under this rule because it did not describe an incident that included a sexual act and it was not "without indication of manufacture."

To be admissible under MRE 803A, it is not necessary that the statement describe a sexual act. Rather, the statement must describe "an incident" that included a sexual act. In this case, the statement described an incident (i.e., defendant pulling down AY's pants), which AY's testimony indicated included a sexual act, namely, defendant touching AY's vaginal area with his fingers. Further, the sole basis for defendant's argument that the statement was not shown to have been "without indication of manufacture" is that there was a delay in disclosure. However, the effect of a delay in making a statement is addressed in MRE 803A(3), which provides that a delay does not preclude admissibility if the delay is excusable as having been caused by fear or other equally effective circumstance. In this case, the trial court found that the delay was excusable because AY testified that she feared being punished by her father. We therefore conclude that the trial court did not abuse its discretion in admitting AY's statement under MRE 803A.

Moreover, even if the statement was improperly admitted, the error was harmless because it is not more probable than not that the statement was outcome determinative. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008). The statement was cumulative to other properly admitted testimony. An examining physician also testified that AY had stated that defendant had pulled down her pants and touched her. In addition, although there were some inconsistencies in AY's testimony, she did not waver on whether defendant touched her. Further, contrary to what defendant asserts, this case was not a mere credibility contest between defendant and the victims. Two police officers testified that defendant confessed to touching AY's vaginal region. Under the circumstances, any error in admitting AY's statement to her friend was harmless. See *People v Meerboer*, 181 Mich App 365, 373-374; 449 NW2d 124 (1989).

II. Prior Inconsistent Statements

Defendant next argues that the trial court erred in refusing to admit certain statements made by the victims at the preliminary examination pursuant to MRE 801(d)(1)(A) and MRE 613(b). MRE 801(d)(1)(A) provides that a prior inconsistent statement is not hearsay, and thus admissible as substantive evidence, if the declarant testifies at the trial or hearing, is subject to cross-examination concerning the statement, and the prior statement is inconsistent with the declarant's testimony, which was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. MRE 801(d)(1)(A); *People v Malone*, 445 Mich 369, 376-378, 381-382; 518 NW2d 418 (1994).

Defense counsel sought to admit a prior statement by AY regarding whether her mother examined her private parts before she went to the police station. He sought to admit four prior statements regarding the other victim, AN, pertaining to (1) the length of time defendant lived above her, (2) when defendant called her, (3) the number of fingers defendant used to touch her, and (4) whether she was afraid of her father. The trial court found that the victims' statements were not inconsistent because they testified at trial that they did not remember their preliminary examination testimony.

Relying on *People v Chavies*, 234 Mich App 274; 593 NW2d 655 (1999), overruled on other grounds, *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006), defendant argues that the victims' "I don't remember" or "I don't know" answers constituted inconsistent statements. The trial court and defendant's focus on the victims' memory regarding their preliminary examination testimony is misplaced. The relevant inquiry is whether the victims' testimony at trial regarding the matters on which they were examined was inconsistent with their preliminary examination testimony. Here, the victims gave specific answers at trial regarding the matters on which they were examined. Thus, this case is distinguishable from *Chavies* in which the witnesses asserted lack of memory at trial regarding the matter about which they gave detailed information to a grand jury. Looking at the substance of the victims' testimony that defendant sought to admit, in all but one instance the victims' trial testimony was directly contrary to their preliminary examination testimony.¹ Therefore, the trial court erred in ruling that the inconsistent prior statements were not admissible as substantive evidence.

However, the error was harmless. On appeal, defendant asserts that he sought to have the statements admitted as substantive evidence in order to prove that the victims could not consistently testify about exactly what happened and thus, could not reliably testify that defendant committed the alleged acts. As substantive evidence, the preliminary examination testimony could be used to prove the truth of the matters asserted in the statements. MRE 801(c); MRE 801(d)(1)(A). At trial, defendant impeached the victims with their preliminary examination testimony, raising the question of their credibility for the jury. We fail to see how

¹ AN's trial testimony that she did not disclose the abuse because she was afraid that her father would punish her was not inconsistent with her preliminary examination testimony that she was not afraid of him while he questioned her about the abuse, because these statements involved different timeframes.

admitting the victims' preliminary examination statements as substantive evidence would have furthered defendant's goal of showcasing the victims' alleged shaky credibility. Despite defense counsel's questions, the jury chose to believe the victims. Defendant has not shown that it is more probable than not that the error was outcome determinative. *Miller, supra* at 559.

Defendant also argues that the trial court erred in refusing to admit as impeachment evidence AN's prior inconsistent statement regarding how many fingers defendant used to touch her.² MRE 613(b) provides:

Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Because AN testified at trial that defendant used two fingers and testified at the preliminary examination that he used only one finger, the statements are inconsistent.

“When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement.” *People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995). “The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement—not to prove the contents of the statement.” *Id.* Here, AN contended that she did not remember her preliminary examination testimony and the prosecutor had an opportunity to question her. Therefore, the trial court erred in excluding AN's prior inconsistent statement under MRE 613(b). Again, however, the error was harmless because it was not outcome determinative. *Miller, supra* at 559. Defendant impeached AN with her preliminary examination testimony. In addition, even though the transcript excerpt was not admitted, the trial court instructed the jury that it could consider any inconsistent statements made by witnesses in assessing their credibility. Therefore, the error does not require reversal.

III. Sentencing

Defendant challenges the trial court's scoring of the sentencing guidelines. He argues that the trial court improperly scored OV 4 at ten points because there was no evidence that either victim suffered a serious psychological injury. We review a trial court's scoring decision to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

MCL 777.34(1)(a) requires that ten points be scored when “[s]erious psychological injury requiring professional treatment occurred to a victim.” Ten points is proper “if the serious psychological injury may require professional treatment. In making this determination, the fact

² Defendant does not identify any other statement in his argument. Thus, our analysis is limited to the single statement identified by defendant. See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006).

that treatment has not been sought is not conclusive.” MCL 777.34(2). In this case, the victims’ father testified that because of their culture, the children’s reputations were tainted as a result of the abuse. He also stated that AN cried at night and her school performance had declined, and that AY that did not react to other children the way she did before. There was sufficient evidence of serious psychological injury that may require professional treatment to warrant the ten-point score for OV 4. See *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005).

Defendant also argues that his CSC I sentences are disproportionate, despite being within the sentencing guidelines range of 126 to 210 months. Because defendant’s sentences are within the appropriate guidelines range, and there was no error in the scoring of the guidelines or reliance on inaccurate information in determining the sentences, we are required by MCL 769.34(10) to affirm them. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Although defendant contends that MCL 769.34(10) is unconstitutional, our Supreme Court rejected this argument in *People v Garza*, 469 Mich 431, 435; 670 NW2d 662 (2003). Thus, the proportionality of defendant’s sentences is not subject to appellate review.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Christopher M. Murray