

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JASON ALBER, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

JASON ALBER,

Respondent-Appellant.

UNPUBLISHED
November 4, 2004

No. 248339
Kent Circuit Court
Family Division
LC No. 99-114201-DL

Before: Griffin, P.J., and Saad and O'Connell, JJ.

PER CURIAM.

Respondent appeals as of right from an order of disposition entered by the circuit court following delinquency proceedings in which a jury determined that respondent committed second-degree criminal sexual conduct, MCL 750.520c(1)(a). We affirm.

Respondent first contends that the trial court erred in admitting the child victim's hearsay statement under MRE 803A. The trial court's ruling regarding the admission of evidence is reviewed for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Hearsay testimony is admissible to corroborate a child's testimony if the child was under ten years of age when the statement was made, the statement was made spontaneously, the child made the statement immediately after the incident or "any delay is excusable as having been caused by fear or other equally effective circumstance," and that statement is introduced through someone other than the child. MRE 803A.

The first, second and fourth elements are not at issue here. Defendant challenges only the trial court's finding that the child's delay in reporting the incident was excused because there was no evidence that the child was in fact afraid of respondent. While fear of the perpetrator is a valid basis for excusing a delay, *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996), it is not the sole basis for excusing a delay. The rule itself refers only to "fear" without regard to its cause; it also excuses a delay for any other "equally effective circumstance." Here, the evidence indicated that the child was "scared" to reveal information when first approached and thus did not tell her mother until sometime later. Therefore, the trial court did not abuse its discretion in ruling that the evidence was admissible.

Even if the hearsay evidence had not been admissible, the error is not a ground for reversal unless it was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). This standard has not been met because the evidence was cumulative of the victim's trial testimony, *People v Meerboer*, 181 Mich App 365, 373-374; 449 NW2d 124 (1989), aff'd 439 Mich 310 (1992), and because respondent's statement, the admission of which has not been challenged, was itself sufficient to prove that he committed the charged offense. *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995); *People v Spinks*, 206 Mich App 488, 494; 522 NW2d 875 (1994).

Respondent next contends that he is entitled to a new trial due to ineffective assistance of counsel. Because respondent failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Respondent first argues that counsel was ineffective for failing to produce evidence to establish that the victim was not afraid of him so as to preclude a finding that hearsay testimony of her statement was admissible under MRE 803A. As noted above, a delay in reporting abuse may be excused for reasons other than fear of the perpetrator. That aside, because respondent's confession, which corroborated the victim's testimony, was sufficient to prove that he committed the charged offense, it is unlikely that any error caused by counsel's failure to try harder to exclude the hearsay evidence affected the outcome of the proceedings. *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), aff'd 468 Mich 233 (2003).

Respondent also argues that counsel was ineffective for failing to object to witness Joseph Davis' testimony because it constituted other acts evidence under MRE 404(b) and the prosecutor failed to give notice as required by MRE 404(b)(2).

It appears from the prosecutor's closing argument that Davis' testimony was offered, at least in part, to prove intent. The record shows that the prosecutor did not give notice, either before or during trial, that Davis' testimony was being offered under MRE 404(b)(1), and that defense counsel never objected. However, respondent has not shown that counsel's failure to object constituted error. Respondent has not shown that Davis' testimony was inadmissible for a proper purpose under MRE 404(b)(1); he argues only that it was "highly prejudicial" to his case. However, relevant other acts evidence is not subject to exclusion simply because it is prejudicial. It is only inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v VanderVliet*, 444 Mich 52, 75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994). Respondent has failed to show that he was prejudiced by counsel's alleged error. *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001).

Affirmed.

/s/ Richard Allen Griffin
/s/ Henry William Saad
/s/ Peter D. O'Connell