

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 26, 2011

v

KENNETH MICHAEL STRAIGHT,

Defendant-Appellant.

No. 294730
Chippewa Circuit Court
LC No. 08-008817-FH

Before: RONAYNE KRAUSE, P.J., and SERVITTO and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant of four counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b) (sexual contact achieved by force or coercion). The trial court imposed, concurrently for all four counts, a two-year term of probation, including one year in jail. Defendant appeals as of right. We reverse and remand for further proceedings.

The incidents giving rise to the charged counts all occurred at an automobile dealership, where defendant and one of the victims worked. The second victim's fiancé also worked at the dealership. The first victim recounted at trial that defendant subjected her to three instances of sexual contact: two in which defendant placed his hands on her hips, simulated sexual intercourse with the victim, and made lewd comments; and one in which defendant squeezed the victim's breast. The second victim described an incident in which defendant grabbed her hips from behind and engaged in simulated sex with her. Defendant denied touching either of the victims.

I

Defendant first complains on appeal that the trial court violated his constitutional rights of confrontation, and his constitutional right to present a defense, when it excluded evidence that one of the victims had filed a wrongful termination civil lawsuit against the dealership, and the other victim's husband had considered doing so. The parties preserved their respective positions concerning the potential admissibility of evidence of a victim's lawsuit or contemplated lawsuit, both in the course of an initial trial that ended in a mistrial and defendant's retrial. At the first trial, the court allowed defense counsel to inquire about the first victim's filing of a civil lawsuit against the dealership, but a different judge who presided over the second trial refused to permit this cross-examination, or cross-examination regarding potential legal action by the second victim's husband.

“It is axiomatic that the credibility of a witness is an issue of the utmost importance in every case. It is also axiomatic that evidence of a witness’ bias or interest in a case is highly relevant to his credibility.” *People v Mumford*, 183 Mich App 149, 152; 455 NW2d 51 (1990) (internal quotation and citation omitted). “While the scope of cross-examination is a matter left to the sound discretion of the trial judge, that discretion must be exercised with due regard for a defendant’s constitutional rights.” *People v Grisham*, 125 Mich App 280, 284; 335 NW2d 680 (1983). “A limitation on cross-examination preventing a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation.” *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996).

However, violations of the rights to adequate cross-examination are subject to a harmless-error analysis. Whether such an error is harmless in a particular case depends on a host of factors, including the importance of the witness’ testimony, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution’s case. [*People v Kelly*, 231 Mich App 627, 644-645; 588 NW2d 480 (1998).]

The prosecutor bears the burden of proving the harmlessness of a constitutional error beyond a reasonable doubt. *People v Minor*, 213 Mich App 682, 685-686 (opinion by Markman, J.), 690 (concurring opinion by Sapala, J.); 541 NW2d 576 (1995); *People v Morton*, 213 Mich App 331, 335-336; 539 NW2d 771 (1995).

It is a well-settled rule of law in Michigan that where civil actions have been commenced on the same matter as the action being tried, it is . . . error for the trial court to refuse to allow inquiry and argument regarding such connected action since the bias or interest of a witness is a proper subject of inquiry. [*People v Johnston*, 76 Mich App 332, 336; 256 NW2d 782 (1977).]

“[W]hether a witness has filed or is contemplating filing a civil lawsuit, the prospects for which may be affected by the outcome of a criminal action, is always relevant to a witness’ credibility.” *Morton*, 213 Mich App at 334-335; see also *Grisham*, 125 Mich App at 285 (characterizing as “reversible error” a trial court’s refusal “to allow inquiry and argument regarding a civil action which has been commenced with respect to the same matter as the criminal action being tried . . .”).

In this case, the trial court prevented defendant from cross-examining the primary prosecution witness with respect to her initiation of a civil lawsuit against the dealership where she and defendant had worked together. The primary victim’s civil action, although against the dealership and not defendant personally, asserted counts premised at least in part on defendant’s

inappropriate touchings.¹ The second, contemplated claim or action involved the second victim or her husband. Not many details of this contemplated claim appear in the record, but the parties do not dispute on appeal the fact that the second victim or her husband considered some form of action against defendant, relating to his touching of the second victim. Defense counsel presented an offer of proof, which the trial court rejected, in the form of a witness who had spoken with the second victim's husband after the witness had taken a test drive with defendant; defense counsel summarized that the second victim's husband "was going to bring a suit against him, [defendant]. He was trying to find out if she was inappropriately touched and if so he was going to be bringing a suit on behalf of his wife," the second victim.

The prosecutor disputes that reversal must occur, given that "the jury was informed of the possible [second victim's] suit through an offer of proof and there was evidence introduced at trial that . . . [the dealership's] owner . . . received a letter from [the first victim's] attorney." The prosecutor supposes that the jury, having heard the prosecutor's cross-examination of the dealership owner "insinuating that he wrongly fired [the first victim] in retaliation for her police report," "could easily have suspected that [the first victim] would remedy her mistreatment through a civil suit"; however, this suggestion amounts to pure speculation. The dealership owner's testimony also revealed the following:

Q. Did you study any records before you came to court?

A. I just looked at the administrative investigation.

* * *

¹ At the outset of defendant's first trial, the court ruled, in pertinent part as follows, to permit reference to the first victim's civil action:

As to the pending civil suit, it is the Court's understanding that this civil lawsuit which is on file is ongoing, it is executory in nature. . . . [A] primary witness of the People in this case, is the complainant in that case. Understanding the facts of the case, is that that claim was filed on or about late autumn, early winter of 2008. It names Fernelius Hyundai or Fernelius auto distributor as the defendant. [The first victim's] claim in that lawsuit becomes twofold. As characterized, it is one of a Whistleblower nature, but also under the Elliott-Larsen Civil Rights Act, claiming evidently disparity in treatment by her employer, and therefore, a wrongful discharge type of action that she has filed.

* * *

I conclude that it is in fact permissible, [defense counsel], for you to use the existing lawsuit filed by [the first victim] against [the dealership]

The exhibit *and then I have a letter from her* [the first victim's] attorney. I have the last chance written warning for [defendant]. I have the last chance written warning for Tim [the first victim's fiancé]. [Emphasis added.]

This isolated, passing reference to the first victim's retention of an attorney does not necessarily convey the notion that the first victim had filed a civil action or intended to do so. The lone reference to a contemplated action by the second victim and her husband took place just before the trial court excused the jury to consider defense counsel's offer of proof:

[The second victim's husband] indicated he was prepared to proceed to make, I guess, bring a claim against [defendant], if questioned about whether or not that had happened while she [the potential witness, a dealership customer] was with him. [Defendant] gave her a test drive of a car and [the second victim's husband] called her afterward: Did [defendant] ever touch you? If he did, I am going to sue.

Even assuming that the jury could track the gist of defense counsel's offer of proof, it leaves unanswered what the potential witness might have advised the second victim's husband, and the jury never heard more from the potential witness because the trial court refused the defense offer of proof. We do not detect in the record clear and intelligible elicitations before the jury that either victim initiated or contemplated a suit premised on defendant's conduct.

Relative to our assessment whether the constitutionally improper limitation on cross-examination in this case may be deemed harmless beyond a reasonable doubt, obviously the limitations in this case related to the testimony of defendant's two victims, very important witnesses. *Kelly*, 231 Mich App at 645. The first victim and her fiancé both testified about at least three acts of sexual contact defendant inflicted on her. However, even were we to accept the proposition that the first victim's fiancé's testimony corroborated or rendered cumulative the first victim's account at trial, *id.*, the second victim remained the only source of testimony concerning the fourth sexual contact count against defendant relating to her. *Morton*, 213 Mich App at 336 (declining to find the trial court's limitation on cross-examination harmless beyond a reasonable doubt because "the victim-witness was a virtually indispensable witness in communicating the circumstances of her disability," an element necessary for the defendant's felonious driving conviction).

In summary, the trial court violated defendant's constitutional rights when it precluded him from placing on the record some details concerning the first victim's initiation of a civil lawsuit against the dealership and the second victim's consideration of a suit. Because the desired cross-examination related to the two primary, essential witnesses in the case, one of whose testimony constituted the only evidence of defendant's criminal conduct against her, we cannot conclude that the trial court's constitutional error qualified as harmless beyond a reasonable doubt. Consequently, we reverse defendant's convictions on this basis.

II

Defendant additionally contends that the trial court violated his right to due process by making "prejudicial comments that shifted the burden of proof." In light of defendant's failure

to raise a timely constitutional objection at trial, we review this unpreserved constitutional challenge only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Contrary to defendant's assertion, the trial court's comments did not improperly shift the burden of proof.² The trial court did not suggest that defendant had any obligation to call witnesses. Rather, the court seemed to be asking for clarification regarding the direction of defense counsel's line of inquiry. Moreover, the trial court instructed the jury multiple times that the prosecutor had the burden to prove its case, and that defendant need not prove anything. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (noting the well-established notion that "jurors are presumed to follow their instructions"). In summary, nothing in the record substantiates a burden shifting by the trial court.

III

Defendant lastly avers that the trial court erroneously admitted evidence of a witness's larceny conviction under MRE 609. "This Court reviews for an abuse of discretion a trial court's determination whether a prior conviction involving a theft component may be used to impeach a defendant." *People v Meshell*, 265 Mich App 616, 634; 696 NW2d 754 (2005). To the extent that our analysis obligates us to decide whether a rule of evidence allows for admission of the evidence, we consider de novo this legal question. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010).

MRE 609 generally permits the introduction of prior convictions to impeach a witness's credibility only if "the crime contained an element of dishonesty or false statement," MRE 609(a)(1), or "the crime contained an element of theft." MRE 609(a)(2). When the crime involves "an element of theft," the proponent of the evidence must additionally show that "the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted," and the court must determine "that the evidence has significant probative value on the issue of credibility . . ." MRE 609(a)(2)(B). With regard to probative value, "the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity," and the "court must articulate, on the record, the analysis of each factor." MRE 609(b).

² In the course of defense counsel's cross-examination of the first victim about other people who had been working at the dealership when the charged sexual contacts took place, the court observed:

But counsel, you are talking about a large amount of people who were apparently there or who may or may not have seen what occurred. Are you going to offer those people as witnesses? Why do we need to go through this now? Why don't you bring the people in who can tell you what they saw or didn't see and then we can deal with the issue that way? It seems to me this is a waste of time.

The prosecutor urged the trial court to permit her to impeach defense witness Gerald Williams with a prior conviction of larceny of property valued between \$1,000 and \$20,000, a crime potentially penalized by up to five years in prison. MCL 750.356(3)(a). The court opted to make a separate record of Williams's testimony outside the jury's presence. Williams, aged 26 at the time of trial, testified that the larceny took place when he was 17-years-old. Williams related that the incident "involved some friends stealing a snowmobile and I rode on it." After Williams's brief testimony, the trial court declared, "I am going to allow the impeachment." The vintage of Williams's larceny conviction was brought to the trial court's attention, but our review of the transcript reveals no point at which the trial court articulated an analysis concerning, or even mentioned, "the degree to which . . . [Williams's] conviction of the crime is indicative of veracity." MRE 609(b). Because the available record does not allow us to ascertain that "the trial court was aware of the pertinent factors and of its discretion," *People v Meshell*, 265 Mich App at 638, we conclude that the trial court failed to comply with the mandates of MRE 609, and consequently, abused its discretion in admitting evidence of Williams's prior conviction.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher