STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JASON MICHAEL GURSKY,

Defendant-Appellant.

UNPUBLISHED
July 17, 2008

No. 274945
Macomb Circuit Court
LC No. 2006-002756-FC

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

A jury convicted defendant of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a),[1] and the trial court sentenced defendant to concurrent prison terms of 15 to 30 years for each conviction. Defendant appeals as of right. We affirm.

Defendant first argues that his verdict was against the great weight of the evidence. This Court reviews this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A new trial may be granted if the jury's verdict is against the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). The evidence must preponderate so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id.* In determining whether sufficient evidence has been presented to sustain a conviction, an appellate court is required to view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). A new trial based on the great weight of the evidence cannot generally be predicated on questions of witness credibility or conflicting testimony. *Id.* Questions of witness credibility are within the province of the jury. *Id.* Where testimony in favor of the verdict has been impeached, it remains the responsibility of the jury to make credibility determinations unless the impeached testimony is "deprived of all probative value." *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998).

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[1] The victim was six and seven years old at the time of the alleged offenses.

Defendant asserts that the verdict was against the great weight of the evidence because the victim's testimony, as well as the corroborating testimony presented by three separate witnesses, was overcome by the examining nurse's testimony on cross-examination that she could not conclusively state that the abrasion observed on the victim's labia minora was caused on the day of the alleged sexual touching. We disagree. The failure to pinpoint a specific time for the genesis of the abrasion does not create an "indisputable physical fact." *Lemmon, supra* at 643-644. Such a failure may represent a weakness in the prosecution's argument, but it is within the province of the jury to weigh the credibility of witness testimony and gauge what impact that testimony should have on the consideration of other evidence. *Id.* at 643.

Defendant next argues that the victim's hearsay statements introduced during the testimony of Stacy Morgan are not admissible under the "tender years" hearsay exception in MRE 803A. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Pattison,* 276 Mich App 613, 615; 741 NW2d 558 (2007). A court abuses its discretion when it selects a course outside of the range of principled outcomes, or when it makes an error of law. *People v Shahideh,* 277 Mich App 111, 118; 743 NW2d 233 (2007).

MRE 803A permits the admission of hearsay where a statement corroborating the declarant's own testimony is about a sexual act and:

> (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 argues that the evidence failed to show that the victim's statements to Morgan were "spontaneous and without indication of manufacture."

The trial court ruled that the only question for it to consider, given the victim's age, was whether the delay in the victim's statement was reasonable, MRE 803A(3), leaving aside defendant's objection of whether the statement was spontaneous, MRE 803A(2). The plain language of MRE 803A requires that the declarant's statement be spontaneous *in addition* to the other enumerated requirements. The trial court abused its discretion in ruling based on an erroneous conclusion of law. *Shahideh, supra* at 118.

Nevertheless, an erroneous evidentiary ruling does not require reversal unless it "affirmatively appear[s] that it is more probable than not that the error was outcome determinative." *People v Lukity,* 460 Mich 484, 488, 495-496; 596 NW2d 607 (1999); MCL 769.26; MCR 2.613(A); MRE 103. Accordingly, we must consider the merits of defendant's objection.

This Court has not previously clearly defined what constitutes a spontaneous statement under MRE 803A. In *People v Dunham*, 220 Mich App 268, 271-272; 559 NW2d 360 (1997), this Court declared that answers to open-ended, innocuous questions are spontaneous.[2] Here, Morgan, a family friend of the victim's mother, testified that she asked the victim if "anyone had been touching her" or "touched [her] private parts. After the victim confirmed that someone had touched her, Morgan began supplying the names of various men. When Morgan said defendant's name, the victim started crying, pointed to her vaginal area, and said, "down there."

The victim responded emotionally to the first mention of the subject matter, crying and sucking her thumb. She willingly gave details that exceeded the scope of Morgan's inquiry. She pointed to her vaginal area and reported that the touching had occurred "down there," volunteered that the touching was with a finger and a tongue, denied that defendant touched her with his penis, and volunteered that the conduct had occurred over a greater span of time than suspected by Morgan. Taken as a whole, the victim's statements were primarily spontaneous, despite being prompted by Morgan's questions. Thus, the testimony would have been admissible had the trial court considered this objection and, therefore, the court's erroneous legal conclusion had no effect on the outcome of the trial. *Lukity, supra* at 460 Mich 488.

Defendant also argues that Morgan's testimony was inadmissible under MRE 803A, that Morgan's testimony would be inadmissible under MRE 803(24), the "catch-all" hearsay exception. This admission of Morgan's statement under MRE 803(24) was never discussed in the trial court. Nonetheless, given our finding that Morgan's testimony was admissible under MRE 803A, we need not address this argument.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio

[2] In *Dunham*, the child was asked what she did and did not like about each of her parents, pursuant to a divorce proceeding. *Dunham, supra* at 272 n 1.