

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 21, 2012

V

CAVAHERI NEMORE DAVIS,

Defendant-Appellant.

No. 302182
Berrien Circuit Court
LC No. 2010-001060-FH

Before: DONOFRIO, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13). Because the trial court did not err by denying defense counsel’s request to play a videotaped interview of the complainant during her cross-examination testimony, the prosecutor’s use of the word “victim” was not erroneous, and defendant waived appellate review of his challenge to the jury instructions, we affirm.

Defendant’s conviction stems from the sexual assault of 11-year-old “JM,” defendant’s wife’s goddaughter, who was staying with defendant and his wife for a few days in August 2009. Defendant assaulted JM by touching her breasts underneath her clothes with his hands and mouth. Defendant testified on his own behalf and denied inappropriately touching JM, claiming that she fabricated the allegations.

Defendant first argues that the trial court abused its discretion by denying defense counsel’s request to play a videotaped forensic interview of JM during counsel’s cross-examination of her. Defendant arguably waived appellate review of this issue by agreeing that the video could be played after JM testified. The parties and trial court engaged in the following discussion:

THE COURT: Ms. Ceresa [the prosecutor], do you have any objection to the tape being played?

MS. CERESA: No.

THE COURT: Okay.

MS. CERESA: But—

THE COURT: But I'm not going to have it played in the middle of cross-examination.

MS. CERESA: That's what I was—

THE COURT: And I'll tell you why, Mr. Parish [defense counsel], because I plan to stop here shortly, you been [sic] at this witness for about an hour, well maybe not quite. So I'm going to ask you to finish your cross-examination. Do you have any other questions?

MS. CERESA: Yes.

THE COURT: Okay. How many?

MS. CERESA: I don't know, probably six.

THE COURT: All right. I'm really, really, really, I'm going to say it one more time, really don't want to bring [sic] this witness back tomorrow. So finish up with what you have to do, tomorrow I don't care if the Prosecutor wants to play it, you want to play it, or you just want to stipulate to play you can play the recording at that time. But not in the middle of the cross-examination.

MR. PARISH: That's agreeable, Your Honor, providing somebody is going to have to get this thing hooked to play it with [sic].

THE COURT: Oh Ms. Ceresa got a whole [sic] office full of laptops and recorders and all sorts of things up there in her office that they can use to play that. I assume it's a CD or something. Okay. Is it a video tape—recording?

MS. CERESA: Yes.

THE COURT: Okay. That's fine. So with that being said are we ready to bring the Jury back in and wrap up this cross-examination?

MR. PARISH: I'm done with cross-examination other than that, Your Honor.

Waiver is “the intentional relinquishment or abandonment of a known right.” *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citations omitted). “One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error.” *Id.* (quotation marks and citations omitted). By specifically agreeing that the video could be played after JM's testimony, defendant arguably waived appellate review of this issue.

In any event, even if defendant did not waive his challenge regarding the video, his argument lacks merit. Defendant contends that he sought to play the video during JM's cross-examination to inquire into her credibility, motives, and bias. The record shows, however, that counsel questioned JM regarding those issues during his cross-examination of her, including her

failure to report the incident until five months after it occurred. Moreover, pursuant to MRE 611(a):

The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Here, the trial court properly exercised its discretion regarding the mode of defense counsel's cross-examination. The court's concern regarding the amount of time that counsel was taking and its desire to avoid bringing JM back for questioning the following day were proper considerations under MRE 611(a). Further, the video of JM's interview was played after her testimony, and defense counsel was able to address any inconsistencies between the video and her testimony during closing argument. Accordingly, defendant has failed to establish error with respect to the denial of his request to play the video during JM's cross-examination.

Defendant next contends that the prosecutor committed misconduct and undermined his presumption of innocence by referring to JM as a "victim." Because defendant failed to preserve this issue for our review by objecting during trial, our review is limited to plain error affecting his substantial rights. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Id.*, quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

The prosecutor's use of the word "victim" was not erroneous. A review of the record shows that the prosecutor was not referring to JM herself as a victim, but rather, the prosecutor was referencing a jury instruction. The following exchange occurred during defense counsel's closing argument:

MR. PARISH: And yes, the government is very fond of saying the first part of that—of an instruction, that you can convict beyond—you can convict on the testimony of one person without collaboration, but they always leave out the second part.

MS. CERESA: Your Honor, I have to object. That instruction says that the testimony of the victim be—not be corroborated and stops. He's suggesting that I'm deliberately leaving out a portion of the instruction. I would ask the court to give that instruction now.

THE COURT: I'll just go ahead and read it because it's only going to take about 30 seconds. And then the lawyers can argue it until the cows come home. But I'll tell you exactly what I'm going to tell you right now.

To prove this charge it is not necessary that there be evidence other than the testimony of [JM] if that testimony proves guilt beyond a reasonable doubt. That is the instruction and I'll give it to you again when we finish up.

Thus, the record shows that the prosecutor was referring to a standard jury instruction and did reference JM, specifically, as a victim. In any event, a prosecutor has wide latitude in making her arguments at trial and may argue all reasonable inferences arising from the evidence as they relate to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Thus, even if the prosecutor referred to JM as a victim, the reference would have been a proper argument based on the evidence as it related to her theory of the case. Defendant has failed to establish plain error affecting his substantial rights. *Unger*, 278 Mich App at 235.

Finally, defendant argues that the trial court improperly referred to JM as a “victim” during one of its jury instructions. Because defendant expressed satisfaction with the instructions, however, he waived any claim of error regarding the instructions. See *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). Moreover, because the trial court properly instructed the jury regarding defendant’s presumption of innocence, the instructions adequately protected defendant’s rights. See *People v Daniels*, 192 Mich App 658, 673; 482 NW2d 176 (1991).

Affirmed.

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Donald S. Owens