

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
December 23, 2014

v

ROBERT KENDALL NICHOLLS,
Defendant-Appellant.

No. 318090
Wayne Circuit Court
LC No. 13-003691-FH

Before: JANSEN, P.J., and TALBOT and SERVITTO, JJ.

PER CURIAM.

Robert Kendall Nicholls appeals as of right his jury trial convictions of three counts of second-degree criminal sexual conduct,¹ and one count of fourth-degree criminal sexual conduct.² Nicholls was sentenced to concurrent terms of 4 to 15 years' imprisonment for each second-degree criminal sexual conduct conviction, and one to two years' imprisonment for the fourth-degree criminal sexual conduct conviction. We affirm.

This appeal arises out of Nicholls's sexual conduct with his biological daughter. Nicholls first contends that inadmissible hearsay evidence was admitted at trial and that it affected his substantial rights. We disagree. This unpreserved issue is reviewed for plain error affecting Nicholls's substantial rights.³

Under the plain error rule, defendants must show that (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected a substantial right of the defendant. Generally, the third factor requires a showing of prejudice—that the error affected the outcome of the trial proceedings. Defendants bear the burden of persuasion.⁴

¹ MCL 750.520c.

² MCL 750.520e.

³ *People v Chelmicki*, 305 Mich App 58, 62; 850 NW2d 612 (2014).

⁴ *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006) (citations omitted).

“ ‘Hearsay’ is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.”⁵ Hearsay is not admissible at trial unless it fits into an established exception.⁶

Nicholls first contends that statements made by Shannon Long, the shift manager of the restaurant where the victim worked, are inadmissible hearsay. The challenged statements of Long are as follows:

Q. Do you recall the first conversation you had with there [sic]; what that was about?

A. It was about him touching her. Him asking to sleep in bed with him [sic]. She told me she felt really uncomfortable. When she would take a shower, he would want to knock on the door and ask if he could come in there and rub her back for her.

Q. Okay.

A. She told me she felt uncomfortable, he would walk around in this [sic] underwear.

Q. Okay.

A. And rub on her legs while they sat by each other.

* * *

Q. Do you remember, as you sit here right now, do you remember everything, off the top of your head that [the victim] said to you?

A. Yes, I do.

Q. Okay. Is there anything else that struck you as unusual that you found out about?

A. Just how he would treat her as though she was his wife or a girlfriend. When they were out in public he would hold her hand. And she felt uncomfortable about that.

In the instant case, the statements were used to prove the truth of the matter asserted, that Nicholls engaged in certain behavior with the victim. The hearsay statements do not fall within

⁵ MRE 801(c).

⁶ MRE 802.

one of the recognized hearsay exceptions. Therefore, plain error occurred. As explained below, however, Nicholls was not prejudiced by the admission of the hearsay statements.

In *People v Gursky*,⁷ the hearsay statements, which contained details of the alleged sexual assaults and corroborated the victim's testimony, were admitted at trial. The Court affirmed the defendant's convictions because the statements were "cumulative to the victim's testimony at trial, and there was other evidence of the defendant's guilt."⁸ In *Gursky*, the Court found that when the declarant "testifies [at trial] and is subject to cross-examination, the hearsay testimony is of less importance and less prejudicial."⁹ The Court further stated that the victim's testimony was sufficient, standing alone, to support the defendant's convictions.¹⁰ Thus, the Court found that the defendant failed to demonstrate that it was more probable than not that the hearsay testimony affected the outcome of the proceedings.¹¹

In this case, Long's hearsay testimony corroborated the victim's testimony. Additionally, because the victim also testified and was subject to cross-examination, the statements made by Long were of less importance and were less prejudicial.¹² Moreover, review of the record reveals that the admission of Long's testimony did not affect the outcome of the proceedings because the victim's testimony was sufficient, standing alone, to support Nicholls's convictions.¹³ As such, relief is not warranted.

Nicholls next argues that the prosecution elicited inadmissible hearsay from William Parsons, the general manager of the restaurant where the victim worked. Parsons testified as follows:

Q. Now without giving the specifics, did she tell you something about her father?

A. Yes.

Q. And what was the nature of it; don't give me specifics, but what was the nature of what she was saying?

A. Um.

⁷ 486 Mich 596, 598-599; 786 NW2d 579 (2010).

⁸ *Id.* at 599.

⁹ *Id.* at 621.

¹⁰ *Id.* at 623.

¹¹ *Id.* at 621.

¹² See *id.*

¹³ See *id.* at 623.

Q. Do you understand what I'm saying?

A. I don't think I do.

Q. Well, was it about her homework, or keeping the room messy or staying out late. What was the nature of it?

A. Not any of that.

Q. Okay, what was it?

A. Like more of a touching, like type thing [sic].

Q. And—

A. More of a relationship between them two.

Q. Okay, between her and her father?

A. Correct.

Q. And when you say touching, are you speaking of physical touching?

A. Yes.

Q. And how did you respond to that with her, when you heard these things?

In this instance, no out of court statement is being used to prove the truth of the matter asserted. Parsons merely states the nature of the conversation. The nature of the conversation was elicited as foundation for Parsons to explain what he did upon learning certain information from the victim. Thus, the testimony is not hearsay and no plain error occurred.

Nicholls next contends that the prosecution elicited inadmissible hearsay from John Raymond Taylor, the victim's boyfriend. Taylor testified, in pertinent part, as follows:

Q. Now did, [Taylor] did there come a time when [the victim] told you something about her father that caused you some concern and made you do something?

A. About two and a half months into our relationship she mentioned a couple things that caught me off guard. As to, she would have to spend countless hours with him. With no cell phone. With no contact to the outside world. She would have to stop talking to me and go talk to him. I would continuously try and message her or call her. She wouldn't answer.

* * *

Q. All right. Now did there come a time, and I don't want you to tell me what she said. But did there come a time when she finally gave you some details?

A. Yes, she did.

Q. And was that about her father?

A. Yes, it was.

Q. And did she say anything to you about you telling anybody else?

A. She made me promise before she told me; that this would stay between me and her and only me and her. That I would not say a word of it to anyone else.

Q. And did you keep that promise to her?

A. No, I did not.

The victim's statement to Taylor is hearsay because it is offered to prove that the victim would have to spend countless hours with Nicholls, without a cell phone. The statement does not fall within one of the established exceptions, and thus the testimony was inadmissible. Nicholls, however, was not prejudiced. Again, the victim testified similarly and was subject to cross-examination, making such testimony of less importance and less prejudicial.¹⁴ Additionally, we find that the admission of Taylor's testimony regarding what the victim told him did not affect the outcome of the proceedings because there was other evidence of the sexual conduct, specifically, the victim's testimony, which is sufficient standing alone to support Nicholls's convictions.¹⁵ As such, relief is not warranted.

Nicholls further asserts that the admission of the hearsay statements made by Hilda Nicholls, the victim's mother, was plain error that affected his substantial rights. Hilda stated:

Q. Okay. And what do you, did you try to get an understanding of what she meant by spending time with her dad after she left work?

A. I did ask her. I said exactly what do you mean. You know, like ten minutes here [sic] a conversation. She was like no. Sit down and have a lengthy conversation or, you know, ask me to cuddle with him or whatever. And I was just really tired. And it would just upset her a bit.

* * *

¹⁴ See *id.* at 621.

¹⁵ See *id.* at 623.

Q. Okay. Did her age, if you know, did her age have any impact on whether or not she told you this or not? If you know personally.

A. If her age?

Q. Yeah. Did her age, the fact that she was 17 years old—was she going on 18 years old?

A. She was going on 18.

Q. Did that have any impact on whether or not she was going to tell at the time or wanted to tell at the time these allegations surfaced?

A. She, yes. From what she had mentioned. And it hadn't played, you know, she wasn't to [sic] sure whether she be [sic] allowed if she made any kind of decision to either stay with me full-time or be made to go with her father. From what she stated, that she says if I choose to be with you and they send me, regardless of what I want, there could be retribution for what I did. And I'm gonna have to live it out until I'm 18.

Hilda's testimony is hearsay because it is offered to prove that Nicholls asked to cuddle with the victim and that the victim's age had an impact on the victim's decision to inform her mother about the sexual contact. The hearsay statements also do not fall within any of the established exceptions, so their admission constituted error. Nicholls, however, was not prejudiced by the admission of the hearsay statements because they are again cumulative of the testimony the victim previously provided. Additionally, because the victim testified and was subject to cross-examination, the hearsay testimony is of less importance and less prejudicial.¹⁶ Moreover, Hilda's testimony did not affect the outcome of the proceedings because there was other evidence presented of Nicholls's sexual conduct with the victim.¹⁷

Nicholls next asserts that his Sixth Amendment right to confront the witnesses against him was violated when the hearsay statement of Taylor's religion professor was admitted at trial. "Both the United States and Michigan constitutions guarantee a criminal defendant the right to confront the witnesses against him or her."¹⁸ "[I]f an out-of-court statement is testimonial in nature, it may not be introduced against the accused at trial unless the witness who made the statement is unavailable and the accused has had a prior opportunity to confront that witness."¹⁹

¹⁶ See *id.* at 621.

¹⁷ See *id.* at 623.

¹⁸ US Const, Am VI; Const 1963, art 1, § 20; *People v Garland*, 286 Mich App 1, 10; 777 NW2d 732 (2009).

¹⁹ *People v Henry (After Remand)*, 305 Mich App 127, 153; 854 NW2d 114 (2014) (citation and quotation marks omitted).

A pretrial statement is testimonial if the primary purpose is to prove past events potentially relevant to later criminal prosecution.²⁰

In the instant case, the religion teacher's statement that "we need[] to call CPS" and the related statements did not have a primary purpose of proving past events. Rather, the statements were made for the purpose of providing assistance to Taylor regarding what steps needed to be taken to report Nicholls's alleged conduct. Therefore, Nicholls's Sixth Amendment right to confront the witnesses against him was not violated.

Nicholls next contends that the prosecution engaged in prosecutorial misconduct. We disagree. This unpreserved issue of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected Nicholls's substantial rights.²¹ "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."²²

"[T]he test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial."²³ Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context.²⁴ "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial."²⁵ A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but is "free to argue the evidence and all reasonable inferences arising from the evidence as it relates to their theory of the case."²⁶ "A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness."²⁷ A prosecutor may, however, argue from the facts in evidence that a witness is worthy or unworthy of belief.²⁸

Nicholls argues that error occurred when the prosecution stated, "there's absolutely no reason, no motive to lie whatsoever." The prosecutor, however, was merely arguing from the facts in evidence that the victim was worthy of belief. At trial, Nicholls testified and was unable to provide a motive for the victim to lie or make up the allegations regarding his sexual conduct.

²⁰ *Id.* (citation omitted).

²¹ *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008).

²² *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (citation and quotation marks omitted).

²³ *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007).

²⁴ *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010) (citation omitted).

²⁵ *Brown*, 279 Mich App at 135.

²⁶ *Unger*, 278 Mich App at 236.

²⁷ *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

²⁸ *Dobek*, 274 Mich App at 67.

The statement by the prosecutor also countered Nicholls's claim that no sexual conduct occurred. In arguing that there was no motive for the victim to lie and that she was worthy of belief, the prosecution did not imply that it had some special knowledge that the victim was testifying truthfully. As such, the comment did not amount to prosecutorial misconduct and no error occurred.

Nicholls also contends that the prosecutor's comment, that "[the prosecution asks specific questions to] let [the jury] know that [the answers are] coming from [the victim's] memory. And not something that's being made up," was prosecutorial misconduct. Again, the prosecution was merely arguing from the facts in evidence that the victim was worthy of belief. Therefore, no plain error occurred.

The prosecution's statement during rebuttal also did not rise to the level of prosecutorial misconduct. The prosecution stated:

Now the first person you tell is your mother. That's not always true. Sometimes the last person you tell is your mother or your father, 'cause you don't want to hurt 'em. You don't want to put 'em in the middle. You don't want the walls to come tumbling down. That is absolutely a fact.

Nicholls contends that the statement is a statement of fact that is unsupported by the evidence. As stated above, "[p]rosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial."²⁹ The prosecution was responding to the statement made by defense counsel that "the first person you tell is your mother. At least from [defense counsel's] perspective." Additionally, the victim repeatedly stated that she did not initially tell her mother about the sexual abuse because she did not "want to burden her." Evaluating the comments in light of defense arguments and the relationship to the evidence admitted at trial, the comments did not rise to the level of prosecutorial misconduct.

Finally, Nicholls argues that the trial court violated his constitutional right to a jury trial when the trial court engaged in judicial fact-finding for the purposes of assessing offense variables 4, 10, and 13. We disagree. This unpreserved issue is reviewed for plain error affecting Nicholls's substantial rights.³⁰

Nicholls contends that he was improperly sentenced because the trial court engaged in judicial fact-finding that increased the floor of his sentence, in violation of the Sixth and Fourteenth Amendments. This Court has previously held that "the exercise of judicial discretion guided by the sentencing guidelines scored through judicial fact-finding does not violate due process or the Sixth Amendment right to jury trial" because judicial fact-finding when scoring

²⁹ *Brown*, 279 Mich App at 135.

³⁰ *People v Loper*, 299 Mich App 451, 456-457; 830 NW2d 836 (2013).

the sentencing guidelines does not establish a mandatory minimum.³¹ Thus, his argument must fail.

Affirmed.

/s/ Michael J. Talbot
/s/ Deborah A. Servitto

³¹ *People v Herron*, 303 Mich App 392, 404; 845 NW2d 533 (2013), app held in abeyance 846 NW2d 924 (2014).