

STATE OF MICHIGAN  
COURT OF APPEALS

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LAWRENCE JOHNSON,

Defendant-Appellant.

---

UNPUBLISHED

November 20, 2008

No. 279294

Kent Circuit Court

LC No. 06-004547-FC

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced to 8 to 15 years' imprisonment for this conviction. We affirm.

The victim, who was 20 years of age at the time of trial, alleged that defendant, her father, had sexually assaulted her, beginning at age five and ending when she was nine years old. The sexual abuse involved the victim participating in masturbation and fellatio with defendant. The victim further alleged that defendant would shower with her, touching her between the legs, and would perform oral sex on her. Defendant reportedly attempted, albeit unsuccessfully, to penetrate the victim vaginally and anally while she was positioned on her hands and knees.

On appeal, defendant asserts the trial court erred in admitting hearsay evidence under the catchall exception of MRE 803(24). This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Moorer*, 262 Mich App 64, 67; 683 NW2d 736 (2004). "An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made." *People v Geno*, 261 Mich App 624, 632; 683 NW2d 687 (2004), quoting *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). In accordance with this Court's ruling in *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003), "An error in the admission or exclusion of evidence is not a ground for reversal unless refusal to take this action appears inconsistent with substantial justice."

Specifically, defendant contends the testimony of Jacqueline Cameron, a family friend and babysitter for defendant's children, comprised inadmissible hearsay. The prosecutor acknowledged that the testimony was hearsay but asserted it was admissible under several provisions of MRE 803, including MRE 803(24), or as a present sense expression, MRE 803(1), or excited utterance, MRE 803(2). The trial court rejected the prosecutor's argument for

admission pursuant to either MRE 803(1) or (2), based on the inability to affix a time frame to the victim's statement or demonstrate a temporal proximity to an interaction with defendant. Instead, the trial court admitted the testimony, pursuant to MRE 803(24), but noted initially, "First of all, I'm not sure that it's offered to prove the truth of the matter asserted. The truth of the matter asserted in that statement would be that it hurts. I don't believe that it's being offered for that matter."

At trial, Cameron recounted an incident that occurred while babysitting the victim when she was approximately five years of age. Cameron reported observing the victim alone, "writhing" on a bed, with her buttocks positioned up in the air and heard the victim say, "Ow, Daddy, that hurts." Defendant contends the prosecutor, given the absence of any corroborating testimony or evidence of the victim's allegations, used this testimony to bolster the credibility of the victim. Defendant notes that during closing argument the prosecutor asked the jury to compare Cameron's description to the victim's testimony regarding an incident when she alleged defendant unsuccessfully attempted to anally and vaginally penetrate her. The prosecutor stated, "And just as Ms. Cameron testified to you she was acting out, I submit to you she was recreating and reacting [sic] that incident where Defendant tried to penetrate her and was unsuccessful."

The trial court determined Cameron's testimony was admissible pursuant to MRE 803(24), which provides in relevant part:

**Other Exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Although we concur that this testimony was not admissible under this subrule, we find that it was properly admitted pursuant to either MRE 803(3) or MRE 803A.

MRE 803(3) provides an exception to the hearsay rule for statements made pertaining to a "then existing mental, emotional, or physical condition." Specifically, the rule provides:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

As discussed by this Court in *Moorer*:

Statements of mental, emotional, and physical condition, offered to prove the truth of the statements, have generally been recognized as an exception to the hearsay rule because special reliability is provided by the spontaneous quality of the declarations when the declaration describes a condition presently existing at the time of the statement. "[T]he special assurance of reliability for statements of

present state of mind rests upon their spontaneity and resulting probable sincerity.” [*Moorer, supra* at 68-69.]

In this instance, the victim was a young child, who, while alone spontaneously engaged in behavior and a verbal statement, which indicated her existing mental state. The child was not responding to any inquiry or interaction and her actions and statement were completely unprompted. “It is well accepted that evidence that demonstrates an individual’s state of mind will not be precluded by the hearsay rule.” *People v Fisher*, 449 Mich 441, 449; 537 NW2d 577 (1995).

In addition, this testimony was used, in part, to demonstrate the impact on the victim’s caregivers as Cameron reported the incident to the victim’s mother, who, in turn, took the victim to a counselor. As discussed in *Fisher*:

Wherever an utterance is offered [into] evidence [for] the *state of mind* which ensued *in another person* in consequence of the utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the hearsay rule is concerned. [*Id.* (citation omitted, emphasis in original).]

Further, we would make a distinction between the spontaneous comment by the victim and the physical behavior observed by Cameron. As discussed in *People v Davis*, 139 Mich App 811, 812-813; 363 NW2d 35 (1984), testimony regarding the victim’s physical behavior did not comprise hearsay because there was no “indication that the victim intended to make an assertion by her spontaneous act[s].” Consequently, the proffered evidence of the victim’s physical actions did not comprise a “statement” and, thus, could not be inadmissible hearsay.

We also find that the challenged testimony was admissible pursuant to MRE 803A, Michigan’s tender-years hearsay exception, which states in relevant part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (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.

The prosecutor established through Cameron's testimony that the incident occurred when the victim was approximately five years of age and was completely spontaneous in nature, satisfying three of the four requirements for the evidentiary rule. Although, as argued by defense counsel, the temporal proximity to any actions by defendant could not be established, a review of the record indicates that the victim asserted that, at the time the events were occurring, she was both "scared" and unaware, given her young age, that they were "wrong." These explanations are sufficient to satisfy the requirement of "excusable" delay based on "fear or other equally effective circumstance."

This Court will not reverse a lower court decision that reached the right result, albeit for the wrong reason. *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005). Here, the evidence was clearly admissible under either MRE 803(3) or MRE 803A. In addition, even if the challenged testimony were inadmissible hearsay, the error does not comprise a ground for reversal unless it was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Defendant has not met this standard because the evidence was cumulative of the victim's trial testimony. *People v Meerboer*, 181 Mich App 365, 373-374; 449 NW2d 124 (1989).

Defendant also challenges the sentence imposed for his conviction as disproportionate and constituting an abuse of discretion by the trial court. Although defendant did not object at the time of sentencing, a defendant is not required "to take any special steps to preserve the question of the proportionality of [] [his] sentence . . ." *People v Cain*, 238 Mich App 95, 129; 605 NW2d 28 (1999). Because the incidents comprising the charges occurred between 1991 and 1995, before enactment of the legislative sentencing guidelines, defendant was correctly sentenced pursuant to the judicial sentencing guidelines. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000); MCL 769.34(2). Consequently, the appropriate standard of review is for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 634-635; 461 NW2d 1 (1990).

The principal of proportionality requires that a sentence imposed by the trial court be proportional to the seriousness of the circumstances surrounding the offense and offender. *Milbourn, supra* at 635-636. A trial court is required to articulate its reasons on the record to support "the court's decision regarding the nature and length of punishment." *People v Fleming*, 428 Mich 408, 415, 428; 410 NW2d 266 (1987). Moreover, departures from the judicial sentencing guidelines are not forbidden, rather departures "are expected and encouraged [as long as] the justifications for the departure [are] specific." *Id.*; *People v Hegwood*, 465 Mich 432, 440; 636 NW2d 127 (2001).

At the sentencing hearing, defendant was sentenced to 8 to 15 years' imprisonment. Under the judicial sentencing guidelines, the sentencing recommendation was for 0 to 36 months' (3 years) imprisonment. The trial court justified the sentence by stating:

You're 50 years old, but this is a particularly heinous crime, sir. You violated your daughter literally hundreds of times over the course of four to five years. And I'm not taking into effect anything that – with regards to a CSC, first. I'm looking at CSC, second's [sic], that she [Kelsey] testified to. As a father, that is the absolute worst thing that you can do for your daughter. You have inflicted pain on her that's going to last for years and for what reason? There are guidelines, as Mr. Zambon, had pointed out of zero to 36 months, but using those

old guidelines are also more suggestive. Quite frankly, I think that there are – under the facts of this particular case, there is substantial and compelling reasons to deviate from the sentencing guidelines. The reason I’m imposing this sentence is for punishment, rehabilitation, and protect society. I believe that the repeated CSC attacks that you perpetrated on this young lady over a period of – of four to five years is substantial and compelling.

As was required by law, the trial court made findings to justify the upward departure from the judicial sentencing guidelines. *Fleming, supra* at 415, 428. The record supports that the trial court’s sentence was proportional to the offense and offender. As articulated by the trial court, defendant was the victim’s father and abused that relationship when he committed the sexual assaults. The fact that defendant stopped abusing his daughter at age nine and has not been accused of abusing any other children does not mitigate the fact that he repeatedly sexually assaulted the victim over a period of four to five years. As discussed by the Court in *People v Brzezinski*, 196 Mich App 253, 255; 492 N.W.2d 781 (1992), a sentencing court did not abuse its discretion where the defendant had repeatedly sexually assaulted his young children and the abuse occurred over a period of years.

In addition, the Michigan Supreme Court has determined that a sentence approximately three times longer than the sentencing guidelines recommendations was not excessive for a defendant who had sexually abused his children and stepchildren. *People v Lemons*, 454 Mich 234, 255-256; 562 NW2d 447 (1997). The Court noted the trial court found the defendant “killed their [the victims] trust . . . their faith . . . their family, you have destroyed a big part of their future and that was your choice; you didn’t have to do it.” *Id.* During this trial, the victim testified, “[I]t was just a burden on my life. I just couldn’t get on with my life without dealing with it.” Similar to *Lemons, id.* at 255-256, the trial court at the sentencing hearing observed that the sexual abuse would result in a long-term psychological impact. Hence, we find that the imposed sentence does not constitute an abuse of discretion because the crime was severe and ongoing, defendant was only convicted of one count, and defendant committed the crime by taking advantage of his parental relationship with the victim.

Affirmed.

/s/ Joel P. Hoekstra  
/s/ William C. Whitbeck  
/s/ Michael J. Talbot