STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 15, 2007
v	No. 265959 Ingham Circuit Court
HAROLD EDWARD ANDERSON, Defendant-Appellant.	LC No. 04-001579-FC

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right following his convictions by a jury of six counts of first-degree criminal sexual conduct (CSC I) involving sexual penetration of victims less than thirteen years of age. MCL 750.520b(1)(a). We affirm.

Defendant first argues that the trial court erred in allowing a videotape of defendant's police interrogation to be played for the jury because he invoked either his right to remain silent or right to counsel. We disagree.

A criminal defendant invoking either his right to counsel or his right to remain silent after waiving his *Miranda*[1] rights[2] must do so unequivocally, and an equivocal or ambiguous statement allegedly invoking either right does not require law enforcement to cease questioning the accused, nor will it render subsequent statements inadmissible. Cf. *People v Catey*, 135 Mich App 714, 723-725; 356 NW2d 241 (1984) (holding that a defendant invoking his right to remain silent must do so unequivocally); *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995), citing *Davis v United States*, 512 US 452, 458-462; 114 S Ct 2350; 129 L Ed 2d 362 (1994) (holding that only a clear invocation of the right to counsel would require

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] An officer testified that he advised defendant of his *Miranda* rights and that defendant waived them and signed the waiver form. Defendant does not appear to challenge these allegations but argues that he later invoked either the right to remain silent or the right to counsel.

evidence to be suppressed or require the police to cease their interrogation). A suspect is free to invoke either right at any time, and if the suspect invokes either right, law enforcement must immediately cease questioning. *Catey, supra* at 722, 727-728.

Notably, defendant has not provided a copy of the video, which was not transcribed in the record, nor has he quoted in his brief on appeal the statement allegedly invoking either right. MCR 7.212(C)(7) requires defendant to cite where the record would support his allegation, and "[d]efendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Thus, we need not address defendant's argument.

In any event, the trial court did not err in admitting the tape. After defendant objected below that he had invoked his right to remain silent during the taped interrogation, the trial court indicated that it had watched the video and stated that "Defendant . . . says at some point: I can't say anything more now, because that's blowing my mind away. I believe that statement is a direct quote from the tape."[3] Defendant never argued that the trial court incorrectly quoted from the tape or that this quote was not the statement to which defendant was referring. Based on this evidence, it cannot be said that the trial court erred in holding "[defendant's] expression of his inability to respond to the allegation based on shock and disbelief is not an unequivocal assertion of his right to remain silent." Further, the fact that defendant referred to his ability to respond to the allegations using the word "can" and referenced his shock as the reason for being unable to speak further support the trial court's finding that defendant was referring not to his desire to remain silent but to his *inability* to respond to the charges in light of his shock. During the new trial hearing, the trial court applied identical reasoning to defendant's allegation that he invoked his right to counsel. Because defendant does not cite any instance where defendant referred to counsel or an attorney, and defendant stated that the reason he could not speak was shock (rather than his desire to consult an attorney), the trial court did not err in holding that defendant had not unequivocally invoked his right to counsel.

With respect to defendant's allegation that the video evidence was more prejudicial than probative, prejudice alone is not enough to exclude evidence, and all relevant evidence presented by an opponent is necessarily prejudicial. See *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). "What is meant [under MRE 403] is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *Id*. However, some danger of unfair prejudice to defendant is not enough to exclude the evidence; defendant must show that the probative value is substantially outweighed by the danger of unfair prejudice. *Id*. Here, defendant's statement to police that he had masturbated in his daughters' bedroom was highly probative to whether defendant sexually assaulted them as they alleged because the younger girl's testimony indicated that he ejaculated in connection with sex acts performed on her. In this regard defendant's statement that he masturbated in his daughters' bedroom could

[3] Similarly, plaintiff either quoted or paraphrased the statement as "I can't say anything more now. That's a shock to me."

reasonably be viewed as contrived and an attempt to provide an innocent explanation for any evidence of the presence of his semen in that bedroom that might have been found by the police and, thus, as indicative of his guilty knowledge. Notably, defendant attacked the victims' credibility during his opening statement by suggesting their mother had encouraged the children to fabricate the allegations. Thus, the trial court did not err in holding that the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice.

Defendant next argues that the trial court erred in allowing the jury or a member of the jury to see defendant wearing handcuffs. We conclude that any possible error in this regard was harmless.

"The rule is well-established . . . that a defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). However, when the trial court finds that the jury could not have seen the shackles, the decision to shackle the defendant without a justification stated on the record is at most harmless error. *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987). In this case, during defendant's new trial hearing, the trial court found that the jury could not have seen or heard defendant's restraints unless defendant wanted it to, stating that the defendant's alleged belly chain was not a chain but a cloth belt under his clothing to which his left arm was chained.[4] Thus, any possible error in the use of restraints on defendant during the trial was harmless.

Defendant next argues that the trial court erred in admitting testimony from his neighbor about a statement his older daughter made concerning defendant engaging in sexual activity with her because it was inadmissible hearsay. We disagree.

The trial court found that the statement was admissible under MRE 803A,[5] which provides in pertinent part as follows:

> 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:

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[4] Although defendant argues that "[a] review of the transcript indicates that the jury did, at various times, see that defendant was shackled and that he had one hand in a handcuff," the pages cited by defendant to support this allegation do not support it and, therefore, this allegation lacks merit.

[5] The older victim's statement to the neighbor that, "[Defendant] sleeps with us naked and he's playing with himself" meets the definition of hearsay because it contains an out of court assertion "offered in evidence to prove the truth of the matter asserted[.]" Thus, it is inadmissible unless an exception to the hearsay rule applies. See MRE 802 ("Hearsay is not admissible except as provided by these rules").

(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.

With respect to the first requirement, the declarant was less than ten years old when she made the statement. In light of the neighbor's testimony that the declarant made the statement while watching television and without any prompting, it cannot be said that the trial court abused its discretion in finding that the second requirement was met. With respect to the third requirement, even assuming there was a delay between an instance of the incident described and the declarant's statement, the declarant said that defendant told her not to tell anyone about anything or she would get a spanking, and when asked what she was not supposed to talk about, she answered, "Privates." Thus, the trial court did not abuse its discretion in holding that any delay was both excusable and likely attributable to her fear that defendant would spank her if she told anyone. Finally, the statement meets the fourth requirement because it was offered through the testimony of defendant's neighbor.

Defendant next argues that the trial court erred in admitting the DVD jacket of a pornographic DVD.

With respect to defendant's allegation that the DVD jacket was more prejudicial than probative, again prejudice alone is not enough to exclude evidence, and defendant must show that the probative value is substantially outweighed by the danger of unfair prejudice. *Vasher, supra*. The evidence, although prejudicial, was highly probative as corroborating evidence that defendant had watched a pornographic DVD with the younger victim as she alleged. Notably, when the DVD jacket was admitted, defendant had not yet testified that the younger victim had accidentally seen him watching a pornographic DVD. Thus, defendant has not shown that the trial court abused its discretion in admitting this evidence. While defendant states that the search warrant underlying the police obtaining the DVD jacket has an incorrect street address, he does not explain how this is relevant to this issue or argue that this independently entitles him to relief. It is plain that any such error in the search warrant is irrelevant to the probative value of the DVD jacket.

Defendant next argues that the trial court should have declared a mistrial based on a Children's Protective Services investigator's testimony or stricken his testimony because the investigator presented redundant, double hearsay, the testimony was "devastating to defendant[,]" and it only served to bolster the plaintiff's case. However, defendant never cites any portion of the investigator's testimony in his brief on appeal nor specifies what aspect of the

investigator's testimony he is challenging. Thus, this Court need not address this issue. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

The only authority cited by defendant to support his argument that the trial court erred in admitting the investigator's testimony is *People v Eady*, 409 Mich 356, 361; 294 NW2d 202 (1980), which is distinguishable.[6] Defendant's double-hearsay argument is probably in reference to the investigator's statement that he learned prior to the interview that there were allegations that the victims had seen defendant naked and that he had been sleeping with them, possibly naked. However, this statement does not meet the definition of hearsay because it was not offered to prove the truth of the matter asserted, *Eady*, *supra* at 360-361, but was offered to explain the reason for the investigation of the victims and in response to plaintiff's question what the investigator expected when he went to the interview. Moreover, the prosecutor in *Eady*, *supra* at 360-361, relied on the hearsay testimony to rebut defendant's argument that the complainant consented, whereas the investigator's statement was not necessary to plaintiff's case and was cumulative to the admissible hearsay statement that the older girl relayed to the neighbor. Thus, even if the trial court erred in refusing to strike the investigator's testimony,[7] such error was harmless because denying defendant's request for a new trial would not be inconsistent with substantial justice, MCR 2.613(A), nor does it "affirmatively appear that the error complained of has resulted in a miscarriage of justice." MCL 769.26. More specifically, given the testimony of the complainants, including the seven-year-old complainant's knowledge of sex that went beyond what she could have viewed from a DVD, it does not affirmatively appear that the jury found defendant guilty based on this alleged hearsay testimony but rather primarily on the complainant's testimony.

With respect to defendant's allegation that the investigator's testimony was more prejudicial than probative, defendant does not cite or explain what part of the testimony he is referencing. Regardless, any prejudice to defendant was minimal in light of the complainants' testimony that defendant sexually assaulted them.

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[6] In *Eady*, the defendant argued that the alleged sexual assault in the complainant's car was consensual and stated that although she honked the horn and screamed, she did so only after police arrived because she was embarrassed. *Id*. at 359-360. An officer testified that he arrived at the scene in response to a report from the dispatcher that someone had called about honking and screaming from a car in the vicinity. *Id.* at 360. The *Eady* Court held that this statement was inadmissible as hearsay because it was offered to prove the truth of the matter asserted, and no exception applied. *Id*. at 360-361.

[7] Notably, defendant argued before the trial court that the investigator's entire testimony should either be stricken or would warrant a mistrial. Defendant cites no authority to support the implication that a hearsay statement would require a court to strike the entire testimony of the witness who offered it.

Defendant also argues that the investigator's testimony "about a video-taped interrogation of the alleged victims . . . served only to bolster the plaintiff's case." However, contrary to the premise of this argument, when defendant asked the investigator during re-cross examination whether the interview was taped or videotaped, the investigator answered, "No." Further, any alleged prejudice was minimal in light of the complainant's testimony.

Affirmed.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Richard A. Bandstra