STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 24, 2009
v	No. 285636 Livingston Circuit Court
KEITH RUSSELL MOGG, Defendant-Appellant.	LC No. 07-016851-FH

Before: Borrello, P.J., and Whitbeck and K. F. Kelly, JJ.

PER CURIAM.

Defendant Keith Mogg appeals as of right his jury trial convictions of two counts of third-degree criminal sexual conduct.[1] The trial court sentenced Mogg on each count to 5 to 15 years' imprisonment with credit for 179 days, with the sentences to run concurrently. We affirm.

I. Basic Facts And Procedural History

Mogg allegedly inappropriately touched the complainant on at least four occasions. The complainant lived across the street from Mogg, his wife, and their six children, Russell, Shalea, Christina, Kyle, Gabrielle (Gabby), and William.

On Labor Day weekend in 2006, the complainant joined Mogg, Shalea, and Gabby on a camping trip. The complainant testified that, on the first night, she slept on an air mattress with Shalea, and Gabby slept on an air mattress with Mogg. On the second night, Gabby slept on the air mattress with the complainant, and Shalea slept on the air mattress with Mogg. But the complainant also testified at one point that Gabby slept with her both nights.

The complainant testified that while she was sleeping on the air mattress, Mogg reached under her pajamas, beneath her bra and underpants, and touched her skin. The complainant indicated that Mogg put his hand inside her underwear in the area where she went to the bathroom. She further specified that Mogg put his hand underneath her underwear on her skin "in between" where she wiped when she went to the bathroom. She stated that Mogg moved his

[1] MCL 750.520d(1)(a) (contact with a person at least 13 and under 16).

hand up and down. She explained that the touching woke her up. The complainant testified that Mogg told her to not tell anyone what happened. However, the complainant later testified that Mogg did not say anything to her in the tent. The complainant also testified at one point that the inappropriate touching occurred on both nights, not just one.

A second incident occurred when the complainant spent the night at Mogg's home. The complainant was sleeping in Gabby and Shalea's bedroom with Gabby, Shalea, and Christina. While the complainant was sleeping, Mogg put his hand underneath the complainant's clothes and touched her breasts and genitals, moving his hand back and forth. Specifically, the complainant confirmed that Mogg touched her "in between" the folds of skin where she wiped when she went to the bathroom. The complainant stressed that even though she wanted to call her mother to come get her, she did not do so because she was afraid that she would hurt the other girls' feelings.

A third incident occurred in the living room of Mogg's home. The complainant was sitting on the couch next to Mogg watching television. Shalea, Russell, Christina, and Kyle were in the living room watching television as well. The complainant testified at trial that it was dark in the room at the time and there was a blanket on Mogg. Officer Megan Paul with the Hamburg Township police department, however, stated that the complainant indicated to her that the lights were on and that there was no blanket. Defense counsel asked the complainant whether she remembered telling Officer Paul that nobody had blankets on, and the complainant responded that the children did not have blankets on, but Mogg did. The complainant indicated that Mogg's family did not see Mogg touch her because they were "busy watching TV." But the complainant also testified that the children kept looking at her while Mogg was touching her, but said nothing to her about it. When questioned whether there were some times when Mogg said not to tell, the complainant clarified that he only said not to tell once when they were sitting on the couch together.

The complainant also testified to another incident where Mogg touched her while the two of them were sitting on a picnic table in his yard as they watched the other children play soccer. The complainant recalled that her "mind" finally told her to tell someone, so she disclosed the events to her aunt and grandparents. The complainant told her mother later the same day. The following day, the complainant's mother took the complainant to the police station.

Officer Paul testified that when questioned, Mogg repeatedly denied that he inappropriately touched the complainant. Mogg also refused to allow Officer Paul to speak to his children. Officer Paul asserted that, in her opinion, Mogg was nervous during both of the interviews that she conducted with him. She also stated that Mogg cancelled a third interview with her. In addition, Mogg initially indicated when he was interviewed that the mattresses were side by side in the tent, but he later indicated that he slept on the other side of the tent and that Gabby and Shalea both slept with the complainant. When interviewed, Mogg additionally stated that the complainant would tend to sit next to him on the couch and that she would end up getting "smooshed toward him" because all the kids were sitting on the couch together. Mogg testified at trial that he was innocent.

II. Sufficiency Of The Evidence

A. Standard Of Review

Mogg argues that the complainant's testimony was not credible because she contradicted herself on many occasions and her account of the events was not believable. Therefore, Mogg argues, there was insufficient evidence to support the verdict. In reviewing the sufficiency of the evidence, we view the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt.[2]

B. Analysis

"Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime."[3] We do not make credibility determinations when reviewing the sufficiency of the evidence.[4] In reviewing the sufficiency of the evidence, we are mindful that the fact-finder had the special opportunity to assess the credibility of witnesses.[5]

Based on the evidence, as well as all reasonable inferences drawn therefrom, viewed in the light most favorable to the prosecution, we conclude that there was sufficient evidence for a rational trier of fact to find that the essential elements of the crimes were proven beyond a reasonable doubt.

MCL 750.520d provides that "[a] person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and . . . [t]hat other person is at least 13 years of age and under 16 years of age." Mogg does not challenge on appeal the jury's finding that the complainant was 13, 14, or 15 at the time of the alleged acts.

As outlined above, the complainant went on a camping trip with Mogg and his two daughters. The complainant testified that while she was sleeping on the air mattress, Mogg reached under her pajamas, beneath her bra and underwear, and touched her skin. Mogg put his hand inside her underwear on her skin "in between" where she wiped when she went to the bathroom. Mogg moved his hand up and down. The complainant also testified that on one occasion when she spent the night at Mogg's home in his daughters' bedroom, Mogg again put his hand underneath her clothes and touched her breasts and genitals moving his hand back and forth. The complainant, again, stated that Mogg touched her in between the folds of her skin where she wiped when she went to the bathroom.

---

[2] *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

[3] *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998).

[4] *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

[5] *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992).

"Sexual penetration" is defined as "any . . . intrusion, however slight, of any part of a person's body . . . into the genital . . . opening[] of another person's body . . . ."[6] And the complainant's testimony alone can be sufficient evidence to support a conviction.[7] Therefore, based on the foregoing testimony of the complainant and viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence for a reasonable jury to clearly find beyond a reasonable doubt that Mogg penetrated the complainant's genital opening with his hand during the camping trip and in Mogg's daughters' bedroom.

III. Verdict Against The Great Weight Of The Evidence

A. Standard Of Review

Mogg argues that the verdict was against the great weight of the evidence because the complainant's testimony was not credible, as she contradicted herself on many occasions and her account of the events was not believable. Mogg did not move for a new trial; therefore, his claim that the verdict is against the great weight of the evidence is not preserved for appellate review.[8] And because Mogg failed to preserve the issue, we review his claim for plain error affecting his substantial rights.[9]

B. Analysis

The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.[10] Determining whether a verdict is against the great weight of the evidence requires review of the whole body of proofs.[11] In general, conflicting testimony or a question of credibility of a witness is an insufficient ground for granting a new trial.[12] Credibility determinations are to be resolved by the trier of fact, not this Court, and should be removed from the jury only if testimony contradicts indisputable physical facts or laws, if testimony is patently incredible or defies physical reality, if a material witness's testimony is inherently implausible such that it cannot be believed, or if a witness is seriously impeached.[13] None of these considerations is at issue in this case. While there was conflicting

---

[6] MCL 750.250a(r).

[7] MCL 750.520h.

[8] *People v Musser*, 259 Mich App 215, 218; 673 NW2d 800 (2003).

[9] *Id.*

[10] *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

[11] *People v Herbert*, 444 Mich 466, 475-477; 511 NW2d 654 (1993), overruled in part on other gds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998).

[12] *Lemmon*, *supra* at 643.

[13] *Id.* at 643-644.

testimony, this is not a ground for a new trial, and the jury was properly left to resolve the credibility determinations.[14]

IV. Burden Of Proof

A. Standard Of Review

Mogg argues that the prosecutor suggested during closing arguments that Mogg's daughters did not testify because their testimony would support the complainant's testimony. In doing so, Mogg argues, the prosecutor improperly shifted the burden of proof to the defense, which denied Mogg a fair trial. We review Mogg's unpreserved claim for plain error that affected his substantial rights.[15] Issues of prosecutorial misconduct are reviewed "on a case-by-case basis by examining the record and evaluating the remarks in context[.]"[16]

B. Analysis

A prosecutor's argument commenting on a defendant's failure to call a witness does not shift the burden of proof as long as the comment does not impinge on the defendant's right not to testify.[17] It is not improper for a prosecutor to comment on defense counsel's failure to produce evidence on a part of the defense upon which a defendant seeks to rely.[18]

> [W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof.[19]

The prosecutor's comment was responsive to Mogg's theory of the case that the inappropriate touching did not occur and that the other children who were present in the room when the alleged inappropriate touching occurred did not see anything. The prosecutor's comment on lack of evidence supporting Mogg's theory of the case was not improper.[20] And the comment also did not impinge upon Mogg's right to testify. Therefore, the prosecutor's comment regarding the lack of witnesses called to corroborate Mogg's theory did not shift the

---

[14] *Id.*

[15] *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

[16] *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

[17] *People v Fields*, 450 Mich 94, 112; 538 NW2d 356 (1995).

[18] *Id*. at 111 n 21.

[19] *Id*. at 115.

[20] *Id*.

burden of proof.[21] In addition, prosecutors are accorded great latitude regarding their arguments and conduct during trial.[22] A prosecutor is "'free to argue the evidence and all reasonable inferences from the evidence[.]'"[23] Because the prosecutor's comment during closing arguments was not improper, there was no plain error. Further, any prejudice flowing from the prosecutor's remark was mitigated by the jury instructions.[24]

V. Vouching For Witness Credibility

A. Standard Of Review

Mogg argues that it is legal error for a witness to comment or provide an opinion on the credibility of another witnesses since matters of credibility are to be determined by the trier of fact. Therefore, Mogg argues, Elizabeth Stahl, a forensic interviewer, improperly offered her opinion that she was not concerned that the complainant had been coached. We review a trial court's decision to admit or exclude evidence for an abuse of discretion.[25]

B. Analysis

A witness may not comment or provide an opinion regarding the credibility of another witness because matters of credibility are to be determined by the jury.[26] Further, in *People v Peterson*,[27] the Michigan Supreme Court indicated: "(1) an expert may not testify that sexual abuse occurred, (2) an expert may not vouch for the veracity of the complainant, and (3) an expert may not testify regarding whether the defendant is guilty."

Elizabeth Stahl was a forensic interviewer who received her master's degree in social work and received forensic interview training through Livingston County and the state of Michigan. Stahl subsequently conducted a forensic interview with the complainant regarding the allegations. During direct examination by the prosecutor, Stahl offered no description of the substance of the statements made by the complainant. On cross-examination, defense counsel asked Stahl about the substance of the complainant's statements. On redirect, the prosecutor focused on Stahl's experience and observations in general. During recross-examination, however, defense counsel asked whether Stahl considered a hypothesis that the complainant was coached. The testimony included:

---

[21] *Id*. at 112.

[22] *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995).

[23] *Id*., quoting *People* v *Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

[24] *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

[25] *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

[26] *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

[27] *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857, amended 450 Mich 1212 (1995).

Q. . . . And isn't it true that some kids don't tell the truth?

A. Yeah, everybody lies.

Q. And isn't it true that sometimes someone else may give a child an idea and they may actually believe it?

A. And—and often times we—we need to look at the—you know, the hypothesis of coaching and children lying. However, in looking at children who report sexual abuse the statistics show that that is very rare for children to make something up like this. Often child—and then to go into the coaching, when a child is coached typically it's very difficult for that child to relay detailed information about assault when there's been coaching.

Q. Okay. So that might also be an explanation or a hypothesis why someone's time frames may be off, or descriptions or details may be off? That could be a hypothesis for that couldn't it?

A. It could be a hypothesis.

On redirect examination, the prosecutor asked:

Q. Let me ask you this. In this case did you during the course of your forensic interview make an evaluation as to whether there was any coaching that took place? I'm not asking what the answer is.

A. I mean, like I said, there's always the hypothesis and things that we look at, but I don't think that concern was—

Defense counsel objected, arguing that a foundation for the question was not laid and the answer called for details about the specific case. The trial court overruled the objection. And the prosecutor then asked:

Q. Did you make evaluation in this case as to whether you had concerns about coaching?

A. Like I said, I think it's always part of the hypothesis base, but I didn't—no concerns were risen at further—you know, in the interview process.

Q. All right.

A. That was not a concern.

Defense counsel subsequently inquired:

Q. Did you talk to the mother in this matter—

A. Yes.

Q. —about the incidences in this case?

A. We do—as I said, prior to the interview we do talk with the—a parent or guardian in order to kind of gather a little history, as well as to, you know, make sure that the parent is fully aware of the information. And through that process we do get information regarding the allegations.

Q. Did you ask the mother how many times she had questioned her daughter about this case?

A. We typically go through kind of when they made the disclosure and kind of information of that nature.

Q. What was the mother's answer then?

A. I don't remember her exact answers.

Q. Would you utilize that information in determining whether someone was coached?

A. Certainly. That's always a part of—you know, as I said if concerns arise definitely look into that more.

The prosecutor's question—"did you during the course of your forensic interview make an evaluation as to whether there was any coaching that took place?"—did not request that Stahl specifically comment on whether her evaluation showed the complainant was coached; it only asked whether such an evaluation took place. After Stahl answered the prosecutor's question as rephrased following the objection, defense counsel could have objected, again, and asked that the portion of Stahl's answer, which mentioned that no concerns regarding coaching arose, be stricken from the jury's consideration. Defense counsel, however, did not object, even though an instruction to the jury could have cured any error.[28] Defense counsel instead chose to continue to question Stahl on the subject on recross-examination and imply that the complainant could have been coached if her mother repeatedly questioned the complainant about the incident.

Stahl did not comment on the credibility of the complainant or vouch for the veracity of the complainant simply by stating that she had no concerns regarding coaching. A complainant does not need to be coached in order to make untruthful assertions. Thus, by stating that no concerns regarding coaching arose, Stahl was not testifying that the complainant was credible or that the complainant was testifying truthfully; Stahl was merely commenting that no concerns regarding coaching arose in her evaluation. Based on the foregoing, the trial court did not abuse its discretion, because the question did not request an opinion from the witness regarding whether coaching took place, and Stahl did not testify that the complainant was credible or that the complainant was testifying truthfully.

[28] See *Abraham*, *supra* at 279.

VI. Sentencing

Mogg argues that due process requires resentencing because the trial court enhanced Mogg's sentence based on facts neither admitted by Mogg nor proven to a jury beyond a reasonable doubt in violation of the rule of law set forth in *Blakely v Washington*.[29] The Michigan Supreme Court has determined that *Blakely* does not affect Michigan's sentencing scheme and has upheld Michigan's sentencing guideline scheme in *People v Drohan*.[30] Thus, due process does not require resentencing.[31]

VII. Reimbursement Of Court-Appointed Attorney Fees

Mogg argues that the trial court should vacate its order that he pay for the cost of his court-appointed attorney because the trial court made no inquiry into his present or future ability to pay such fee. In support of his argument, Mogg relies in *People v Dunbar*,[32] which held that, before imposing a fee for a court-appointed attorney, a trial court must make a presentence articulation of its conclusion that the defendant has a foreseeable ability to pay the fee. However, the Michigan Supreme Court recently overruled *Dunbar* in part and held that the question of ability to pay arises not at sentencing, but only when enforcement of the reimbursement order begins.[33] In this case, Mogg provides no indication that enforcement of the provision in his judgment of sentence requiring reimbursement of attorney fees has begun. Therefore, we conclude that the reimbursement order is valid on its face and that no remand to assess Mogg's ability to pay is required.

We affirm.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly

---

[29] *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004).

[30] *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

[31] *Id*.

[32] *People v Dunbar*, 264 Mich App 240, 254-255; 690 NW2d 476 (2004).

[33] *People v Jackson*, 483 Mich 271, 275; 769 NW2d 630 (2009).