STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2006
v	No. 260758 Ingham Circuit Court
DARYL TODD NEVINS, Defendant-Appellant.	LC No. 02-001241-FC

Before: Donofrio, P.J., and O'Connell and Servitto, JJ

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration of a person under 13 years of age). Because we conclude the trial court appropriately denied defendant's motion to suppress and further find that the prosecution did not improperly lead a witness or bolster the complaining witness's testimony through inadmissible hearsay, we affirm.

According to the complainant, defendant, a close family friend, digitally penetrated her on several occasions when he was babysitting for her and her sister. The complainant was 12 years old at the time. The last incident occurred when the complainant's mother took a short trip to the store. Defendant, who was extremely intoxicated, went into the complainant's bedroom, and, according to her testimony, put his finger in her "private area." When the complainant's mother returned, she found defendant standing next to the complainant's bed with his hand under her blanket. The mother removed defendant from the bedroom, contacted the police, and took the complainant to the emergency room. According to the examining nurse, the complainant had an abrasion on her hymen that, although minor, indicated some trauma to the area. Defendant was ultimately convicted of three counts of first-degree criminal sexual conduct and sentenced to concurrent sentences of 12 to 25 years in prison for each count.

On appeal, defendant first argues that the trial court erred in denying his motion to suppress statements he made to Lansing Police Department Detective Mark Davis. Defendant claims that he was coerced into making an involuntary statement through the threat of physical force and questionable interrogation tactics. We disagree.

A trial court's ultimate decision on a motion to suppress evidence is reviewed de novo. *People v Akins*, 259 Mich App 545, 563; 675 NW2d 863 (2003). While we review the entire record independently, we give deference to the trial court's assessment of the weight of the

evidence and the credibility of the witnesses, and we will not disturb the trial court's factual findings absent clear error. *People v Shipley*, 256 Mich App 367, 372-373; 662 NW2d 856 (2003). A finding is clearly erroneous only if it leaves this Court with a "definite and firm conviction that a mistake was made." *Id.* at 373.

A confession must be made without coercion, intimidation, or deception, and must be the product of the free and unconstrained will of its maker in order to be admitted. *Akins, supra* at 564. Statements obtained from a defendant during a custodial interrogation are admissible only if the defendant voluntarily, knowingly, and intelligently waived his Fifth Amendment rights. *People v Daoud*, 462 Mich 621, 632-639; 614 NW2d 152 (2000). When a defendant claims that a confession was involuntarily made as the result of noncustodial interrogation, a court must examine the entire record and make an independent determination of the ultimate issue of voluntariness. *Beckwith v United States*, 425 US 341, 347-348; 96 S Ct 1612; 48 L Ed 2d 1 (1976). The prosecution bears the burden of proving by a preponderance of the evidence that a confession was voluntary. *Akins, supra* at 564.

In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the Court set forth a non-exhaustive list of factors to be considered in evaluating whether a confession was voluntary, including:

> the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

Defendant contends that several of these factors are implicated in this case and that the trial court thus erred in denying his motion to suppress.

This Court notes that defendant refers in his brief to the "custodial statements" given by defendant. Defendant does not, however, argue on appeal that his statements were elicited in violation of *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Were such an argument raised, we would conclude defendant was not in custody at the time his statements were made and that *Miranda* warnings were thus not required. See, *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987).

Custody is determined by the totality of the circumstances, with the key question being whether a defendant reasonably could have believed that he was not free to leave. *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995). Here, defendant voluntarily appeared to speak with Davis (who came to the interview in plain clothes). Defendant also arranged for his employer to drive him to the interview, wait while the interview was being conducted, and then

drive him back to work. While defendant testified at the *Walker*[1] hearing to being nervous or scared during the interview, there is nothing in the record to indicate that defendant was in any way prevented from leaving the room or reasonably believed he was not free to leave.

At the *Walker* hearing, defendant also testified that Davis threatened to "kick his butt" before the interview started, which made defendant so nervous and scared that he told Davis "whatever he wanted to hear" so that he could leave. Defendant further testified that Davis had told him the interview would last about 20 minutes and when the interview exceeded 20 minutes, he became anxious and upset.

The trial court, however, found no suggestion in the interview transcript of any force or coercion by Davis. It concluded that there was no convincing evidence to contradict Davis's denial of the use of threats or coercion, particularly in light of the advice of rights form that was signed and initialed by defendant and the transcript of the statement, which contained no references to the use of force or any fear on the part of defendant. The trial court noted that defendant had a tenth grade education and had previous experience with law enforcement and judicial proceedings, including waiving his rights in connection with guilty pleas. The trial court further noted that defendant was driven to the interview by his boss and thus recognized that he was free to leave and was not being taken into custody. It therefore concluded that there were no circumstances present to render the statement involuntary.

It does appear that Davis's questions were repetitive, and defendant's admission was fairly equivocal. After initially denying any wrongdoing, defendant eventually admitted that he could have touched the complainant when he was drunk, but he did not remember doing it. When asked again whether the touching occurred, defendant replied, "Yeah, I guess." Contrary to defendant's assertion otherwise, however, there is no indication Davis employed improper interrogation tactics to place defendant in a state of confusion with respect to the events that had occurred. Moreover, while defendant may have been anxious to complete the interview because his employer was waiting, there is no indication that he made any request to leave. Under the totality of the circumstances, it does not appear that defendant's "will has been overborne and his capacity for self-determination [was] critically impaired" by Davis's conduct. See *Cipriano, supra* at 334, quoting *Culombe v Connecticut*, 367 US 568, 602; 81 S Ct 1860; 6 L Ed 2d 1037 (1961). As noted above, this Court will not disturb a trial court's findings of fact relating to a *Walker* hearing unless they are clearly erroneous. *Akins, supra* at 566. The trial court, which was in the best position to assess the credibility of the witnesses, credited Davis's testimony over defendant's, and we see no clear error in its factual determinations. We therefore conclude that the trial court did not err in ruling that defendant made his statement voluntarily.

Defendant next argues that the prosecutor repeatedly used leading questions during direct examination of the complainant, demonstrating a pattern of intentionally eliciting inadmissible testimony that requires reversal. We disagree.

[1] *People v Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

The use of leading questions on direct examination is permitted by MRE 611(c)(1), which states "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." In particular, this Court has noted that "a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). To warrant reversal based on a prosecutor's use of leading questions, the defendant must show "'some prejudice or pattern of eliciting inadmissible testimony.'" *People v Watson*, *supra*, quoting *People v White*, 53 Mich App 51, 58; 218 NW2d 403 (1974). Reversal is not required if the defendant was not prejudiced by the leading questions. *Id.*

Here, defendant takes issue with the prosecutor's asking the complainant if she felt a specific part of defendant's hand on her private area and if defendant put his finger inside of her. The complainant had already testified at that point, however, that she had been woken up by defendant's hand in her pants. The complainant had also already testified that defendant's hand was underneath her underwear on her private area. The complainant was uncomfortable testifying and expressed that it was difficult to talk about what happened. It is not surprising that a witness, especially a child, would, as a result, use vague terms in describing an event that might require clarification. The prosecutor's questions, then, were leading only to the extent necessary to develop the testimony of the complainant, who was 14 years old at the time of trial. Further, the only alleged instances of improper leading questions involved the complainant, and the defendant has not argued that the testimony elicited by those questions was inadmissible or improper. We thus conclude that defendant has failed to demonstrate a "pattern of eliciting inadmissible testimony." See *White*, *supra* at 58.

Defendant's final argument on appeal is that the trial court erred in admitting testimony from the complainant's mother about certain hearsay statements of the complainant under MRE 803(1), the present sense impression exception. We disagree.

The decision whether to admit evidence is generally reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998); *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). Where the decision involves a preliminary question of law, such as whether a rule of evidence precludes admissibility, the question is reviewed de novo. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). The erroneous admission of evidence does not require reversal unless a substantial right was affected. MCR 2.613(A); *McLaughlin*, *supra* at 650. Reversal is warranted only if "it is more probable than not that the alleged error affected the outcome of the trial in light of the weight of the properly admitted evidence." *McLaughlin*, *supra* at 650.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *McLaughlin*, *supra* at 651. Hearsay is not admissible except as provided by the rules of evidence. MRE 802. The exception at issue here, MRE 803(1), creates a hearsay exception for a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." To admit a hearsay statement under this rule, three conditions must be satisfied: "(1) the statement must provide an explanation or description of the perceived event, (2) the declarant must personally perceive the event, and (3) the explanation or description must be 'substantially contemporaneous' with the event." *People v Hendrickson*, 459 Mich 229, 236; 586 NW2d 906 (1998). The rule does not require precise

contemporaneity, however, and even a statement made several minutes after the event may be admissible as a present sense impression. *Id.* at 236-237; *People v Bowman*, 254 Mich App 142, 145; 656 NW2d 835 (2002).

The complainant made the challenged statements to her mother shortly after her mother saw defendant in the complainant's bedroom. When the complainant's mother asked her what happened, the complainant told her that defendant "had been putting his hands in the wrong place and that this was not the first time that it had happened." According to the mother's testimony, complainant also said that defendant "had his hands in her underpants touching her where he shouldn't be touching her."

Defendant argues that the complainant's statements to her mother were inadmissible because they were not substantially contemporaneous with the events they described. The complainant's mother, however, testified that "no more than five minutes" passed between the time she saw defendant standing next to the complainant's bed and the time she returned to the bedroom to speak with her daughter. Because complainant's statement describing the alleged improper touching was made only minutes after the underlying event, we conclude that the trial court did not abuse its discretion in admitting the statement.

The complainant's statement that "this was not the first time that it had happened," however, was not admissible as a present sense impression, because it related to events that occurred several months before the statement was made. See *People v Jensen*, 222 Mich App 575, 581; 564 NW2d 192 (1997), vacated in part on other grounds 465 Mich 935 (1998) (concluding that a statement made a day after the event in question was not admissible as a present sense impression). The statement was clearly not substantially contemporaneous with the events it described. *Hendrickson, supra* at 236.

Nevertheless, we conclude that defendant is not entitled to relief based on this error because it has not been established that it was more probable than not that the error was outcome determinative. *McLaughlin, supra* at 650. Other witnesses testified that the complainant reported defendant had touched her on previous occasions, and the complainant testified that she made these statements to her mother. Further, the critical portion of the mother's testimony indicating that the complainant told her that defendant had just improperly touched the complainant was admissible.

Defendant further argues that the statements were inadmissible because there was no independent evidence to corroborate that the underlying events occurred. We disagree. In *Hendrickson,* a majority of the Court concluded that, in order for a present sense impression to be admissible, there must also be corroborating evidence extrinsic to the hearsay statement itself. *Hendrickson, supra,* 459 Mich at 237-238, 249.[2] In this case, there was such corroborating

[2] Three justices in *Hendrickson, supra,* 459 Mich at 238-239 (Kelly, J.) concluded that, for a present sense impression to be admissible, there must be independent evidence that the underlying event occurred. Three justices disagreed that corroborative evidence of the underlying event is a prerequisite to the admission of a present sense impression. *Id.* at 240-241 (Boyle, J.). Justice Brickley, on the other hand, would have required corroborating evidence not

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evidence extrinsic to the hearsay statement because the complaint testified at trial that defendant stopped sexually assaulting her when her mother entered the bedroom, the complainant's mother testified to seeing defendant's hand under the complainant's blanket, and an examining nurse testified to finding an abrasion on the complainant's hymen a short time after the incident occurred.

Finally, defendant vaguely refers to the confrontation clause with regard to this issue. However, the issue does not implicate defendant's Sixth Amendment right to confrontation because the complainant testified at trial subject to cross-examination. *Crawford v Washington*, 541 US 36, 50-51; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto

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only that the underlying event occurred, but that the statement was made under conditions satisfying the hearsay exception. *Id.* at 250-251 (Brickley, J.).