STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of JENNIFER MARIE MARLIN,
a Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JENNIFER MARIE MARLIN, a Minor,

Respondent-Appellant.

UNPUBLISHED
March 21, 1997

No. 186528
Oakland Probate Court
LC No. 94-058393-DL

Before: White, P.J., and Griffin, and D. C. Kolenda,* JJ.

PER CURIAM.

Following a jury trial, defendant, a juvenile, was convicted of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.78(3)(1)(a), for molesting her young stepsister. The probate court entered a dispositional order placing respondent under the supervision of the court for intensive probation. Defendant appeals as of right. We affirm and hold that the trial court's refusal to admit into evidence respondent's unpreserved and unsupported claim that the victim lied about an earlier incident of sexual misconduct does not constitute error requiring reversal.

I

The victim testified that during some of her biweekly visits to her father's house, respondent, the victim's stepsister, began kissing and touching the victim's breasts, buttocks, and vagina. The victim testified that she was forced to commit similar acts on respondent. The victim testified that these "dirty games" kept occurring until she finally told her mother.

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* Circuit judge, sitting on the Court of Appeals by assignment.

On cross-examination, the victim denied having ever accused respondent's brother of "wrongly touching" her. After confirming that the victim told her about respondent's sexual misconduct, the victim's mother denied that the victim had ever claimed that respondent's brother wrongfully touched her. Nonetheless, the victim's mother admitted that the victim once accused respondent's brother of inducing her to undress and then attempting to persuade her to climb into his bed. The victim's mother testified that she never told police about the incident with respondent's brother because she thought it was better to simply discuss the matter with respondent's stepfather. Although respondent never established that the victim's allegation against respondent's brother was false or recanted, respondent's attorney revisited this issue and began questioning respondent's stepfather about the victim's prior allegation against respondent's brother.[1] The trial court sustained the prosecutor's objection to this line of questioning and then held an untranscribed sidebar conference. Defense counsel made no offer of proof regarding the substance of the disallowed testimony.

Following her conviction, respondent moved for a new trial, claiming that respondent's stepfather would testify that the victim recanted her prior allegation against respondent's brother. Respondent also claimed to possess a letter wherein the victim's mother allegedly noted the victim's allegation against respondent's brother.[2] However, respondent produced no evidence that the victim lied about or recanted her allegation against respondent's brother. The trial court denied respondent's motion for a new trial because respondent failed to make an offer of proof or otherwise establish that the victim's prior allegations were false.

II

On appeal, defendant claims that the trial court reversibly abused its discretion in refusing to admit evidence that the victim had made false allegations of sexual misconduct in the past. However, because respondent failed to establish the factual validity or record the substance of the proposed evidence, we hold that respondent waived her claim of evidentiary error.

MRE 103 provides:

> (a) *Effect of erroneous ruling.* Error *may not* be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, *and*
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> * * *
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> (2) *Offer of proof.* In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked. [Emphasis added.]

Generally, failure to make an offer of proof with regard to excluded testimony precludes appellate review. *People v Stacy*, 193 Mich App 19, 31; 484 NW2d 675 (1992); *People v Emanuel*, 98 Mich App 163, 187-188; 295 NW2d 875 (1980). Indeed, unless the proponent of excluded evidence makes an offer of proof regarding the substance of the excluded testimony, this Court lacks the facts necessary to conclude that the trial court's evidentiary ruling lacked adequate justification or excuse.

Grondziak v Grondziak, 383 Mich 543, 547-548; 177 NW2d 157 (1970); *Emanuel, supra* at 187-188; see, generally, *People v Bahoda*, 448 Mich 261, 289-290; 531 NW2d 659 (1995) (the decision to admit or exclude evidence is within the sole discretion of the trial court); *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995) ("This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made").

Respondent's failure to make an offer of proof is fatal in the present case because the proposed testimony is admissible only if, before the issue is raised at trial, respondent establishes that the victim's prior accusation of sexual abuse was, in fact, false. Notwithstanding the rape shield law, MCL 750.520(j)(1); MSA 28.788(10)(1), an accused sex offender is "permitted to show that the complainant has made *false* accusations of rape in the past." *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984) (emphasis added). Such evidence cannot be admitted, however, unless the proponent affirmatively proves that the victim's past allegations were *actually false*. *People v Adamski*, 198 Mich App 133, 142; 497 NW2d 546 (1993); *People v Yarger*, 193 Mich App 532, 538; 485 NW2d 119 (1992); *People v Williams*, 191 Mich App 269, 272-274; 477 NW2d 877 (1991). "Typically, such impeachment has occurred where, before trial, the complainant has acknowledged that a prior accusation was false." *People v Garvie*, 148 Mich App 444, 448; 384 NW2d 796 (1986); see *People v Wilson*, 170 Mich 669, 670-674: 137 NW 92 (1912); *People v Evens*, 72 Mich 367, 379-380; 40 NW 473 (1888); *Yarger, supra* at 534. Although there may be other means by which falsity can be established, the accused may not conduct a "fishing expedition" at trial or "have the court conduct a trial within the trial to determine whether there was a prior accusation and whether that prior accusation was true or false." *Williams, supra* at 273, 274; see also *Garvie, supra* at 449.

In the present case, respondent failed to offer any evidence that the victim made a prior false accusation of sexual abuse. Nonetheless, respondent claims on appeal that the trial court committed error requiring reversal in disallowing respondent's stepfather's testimony that the victim recanted her claim against respondent's brother. This claim has several defects. First, respondent did not attempt to establish the falsity of the victim's prior allegation before trying to explore the issue at trial. Thus, respondent failed to lay a proper foundation for the admission of this impeachment testimony. *Adamski, supra* at 142; *Yarger, supra* at 273; *Garvie, supra* at 448-449.

Second, even if respondent had laid a proper foundation, it is unclear whether the accused's stepfather's allegation that the victim had lied would warrant an evidentiary hearing to test the truthfulness of the victim's unrecanted prior allegation; let alone render the testimony admissible. See *Williams, supra* at 274; *Garvie, supra* at 449.

Third, respondent neither made nor requested to make an offer of proof regarding the substance of respondent's stepfather's testimony. See MRE 103(a)(2); *Grondziak, supra* at 548; *Emanuel, supra* at 187. Nor does the evidence on record imply, let alone make apparent that respondent's stepfather would testify that the victim had recanted her prior allegation. Indeed, the victim's denial that she had previously accused anyone of wrongfully *touching* her proves nothing about respondent's

stepfather's testimony and is not contradicted by her mother's testimony that the victim once accused respondent's brother of persuading her to undress and trying to induce her into bed.[3] Thus, the issue is unpreserved; and the trial testimony did not open the door for respondent to explore the victim's prior allegations.

Fourth, as a general rule, evidence known before trial cannot be offered after trial as grounds to impeach a jury verdict. See *People v Miller (After Remand)*, 211 Mich App 30, 46-47; 535 NW2d 518 (1995); *People v Davis*, 199 Mich App 502, 515-516; 503 NW2d 457 (1993). Nevertheless, respondent failed to produce any tangible evidence at the hearing on the motion for a new trial that the victim lied about or recanted her allegation against respondent's brother.

Here, the record is devoid of any evidence that the victim recanted or falsified a prior allegation of sexual abuse. Accordingly, we can only speculate as to the relevance, admissibility, or potential impact of the excluded testimony. MRE 103 was designed to preclude such speculation. See *Emanuel*, *supra* at 187-188. The bar of MRE 103 applies to the present case. To rule otherwise would allow a post hoc and unsupported claim regarding unknown evidence to impeach the integrity of a jury verdict.

Finally, defendant claims, without authority, that the sidebar conference should have been recorded. However, we know of no rule requiring all sidebar conferences to be on the record absent an objection or request to make a record.[4] Nor do we know of any duty of the trial court to make inquiries of counsel whether proposed evidence is offered for a limited purpose. Finally, the circumstances of this case reveal that claimed errors, if any, lack consequence. Indeed, any harm caused by the trial court's failure to articulate its rationale for disallowing the evidence was cured by the trial court's written opinion on respondent's motion for a new trial.

III

Next, respondent claims that the trial court erred in allowing the introduction of hearsay statements by the complainant. Prior consistent statements of a witness are admissible to rebut a charge of recent fabrication if the statement was given at a time before the existence of any fact which would motivate bias, interest, or corruption on the part of the witness. MRE 801(D)(1)(B); *People v Lewis*, 160 Mich App 20, 29; 408 NW2d 94 (1987). Mary Ann Hunter's testimony that complainant told her "[m]y stepsister touched my private parts" was not admissible under this rule, as complainant's statement to Hunter was made after the claimed fabrication, motive, or influence arose. However, we conclude that the error in admitting the statement was harmless. MCR 769.26; MSA 28.1096. See *People v Mateo*, 453 Mich 203, 214-215; 551 NW2d 891 (1996). We distinguish *People v Eady*, 409 Mich 356, 362; 294 NW2d 202 (1980), where we found the admission of such hearsay evidence not harmless. In *Eady*, absent improperly admitted hearsay statements, the only evidence on the determinative issue in the case was the testimony of the complainant and defendant. In the present case, the jury had the benefit of other admissible evidence. Under the circumstances of this case, we find no miscarriage of justice.

IV

Finally, defendant claims that she was denied the effective assistance of counsel. We disagree. Effective assistance of counsel is presumed, and defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 666, 687-688; 521 NW2d 557 (1994). After a thorough review of the record, we conclude that defendant has neither sustained his burden of proving that counsel made a serious error that affected the result of trial nor overcome the presumption that counsel's actions were strategic. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Affirmed.

/s/ Richard Allen Griffin
/s/ Dennis C. Kolenda

[1] Respondent's stepfather's responses were stricken from the record.

[2] The letter was neither introduced into evidence nor placed on record. Thus, our knowledge of the letter's contents is based exclusively on representations of respondent's attorney and implication derived from the victim's mother's trial testimony.

[3] To this extent, the letter described at the motion for new trial does not help respondent's claim that she had evidence that the victim had previously fabricated an allegation of sexual abuse.

[4] Respondent makes no claim that evidence relevant to the admissibility of the proposed testimony was revealed during this sidebar conference.