STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH MICHAEL HARRIS,

Defendant-Appellant.

UNPUBLISHED
April 4, 1997

No. 165220
Macomb Circuit Court
LC Nos. 92-002000;
92-002001;
92-002002

Before: Jansen, P.J., and Reilly and W.C. Buhl*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). He was sentenced to concurrent terms of twenty-five to forty years' imprisonment. Defendant now appeals as of right. We affirm.

I

Defendant first argues that there were numerous instances during trial where he was denied effective assistance of counsel.[1] In order to succeed on a claim of ineffective assistance of counsel, defendant must first show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. Defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy.

Second, defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

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

Defendant avers that he was denied effective assistance of counsel by his attorney's failure to call Dr. Walter Guevara as a witness at trial because defendant did not have the money to pay for the doctor's fee. Defendant claims that his counsel failed to recognize that he had the right to independent psychiatric testimony at the expense of the government if he was indigent. We disagree.

MCL 768.20a(3); MSA 28.1043(1)(3) provides an indigent criminal defendant with the opportunity to prepare a defense of insanity at public expense by the appointment of an expert witness, chosen by defendant, who may testify as to the underlying medical basis for the defense. *People v McPeters*, 181 Mich App 145, 151; 448 NW2d 770 (1989).[2] However, because defendant did not plead insanity, his sanity at the time of the sexual assaults was not a question at trial. Rather, in light of defendant's admission that he had sexual intercourse with the complainant, his attorney attempted to show that the complainant was a willing participant in the intercourse. Therefore, because defense counsel was not required to introduce Dr. Guevara's testimony at trial, his conduct did not fall below an objective standard of reasonableness. Therefore, defendant was not denied effective assistance of counsel.

Defendant did not preserve the remaining eight claims of ineffective assistance of counsel that he raised because he failed to argue the merits or cite any authority in support of his claims.[3] *People v Piotrowski*, 211 Mich App 527, 530; 536 NW2d 293 (1995); *People v Jones, (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). However, after thoroughly reviewing the record, we find that defendant did not establish that trial counsel's conduct fell below an objective standard of reasonableness, or that there is a reasonable likelihood that the outcome of the proceeding would have been different.

II

Defendant next argues that he was denied a fair trial by improper comments made by the prosecutor during closing argument. However, because defendant did not object to the prosecutor's comments at trial, appellate review is precluded, unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *Stanaway, supra* at 687. Although the prosecutor may have appealed to the fears and prejudices of the jury regarding the sexual abuse of children by highlighting their susceptibility and the fact that children are "our most prized assets," we believe that any prejudicial effect of that comment could have been cured with a cautionary instruction to the jury. Moreover, the comment did not produce a miscarriage of justice in light of the overwhelming evidence of defendant's guilt.

Similarly, although defense counsel should have objected to the prosecutor's improper comments, the failure to do so did not deny defendant the effective assistance of counsel because there is no reasonable probability that the result of the proceeding would have been different if he had. *Stanaway, supra* at 687-688.

III

Defendant next argues that he was denied his right against self incrimination by virtue of the testimony of Clinton Township Police Detective Thomas Albin, in which he stated that defendant did not make a statement to the police after he was read his *Miranda* rights.

Although defendant failed to object to the admission of Detective Albin's testimony at trial, review is nevertheless appropriate where a significant constitutional question is involved. *People v Alexander*, 188 Mich App 96, 101; 469 NW2d 10 (1991). Where the defendant has not objected to the admission of evidence, but there was plain error, reversal is not required unless the error affected the substantial rights of the defendant. An error affects the substantial rights of a defendant if it affected the outcome of the proceedings. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994).

The prosecution may not use a defendant's exercise of his Fifth Amendment right to remain silent against him at trial; a defendant's silence during police questioning may be used only to impeach his assertion that he made a statement. *People v Gilbert*, 183 Mich App 741, 747; 455 NW2d 731 (1990).

Defendant contends that the prosecutor deliberately elicited from Detective Albin that defendant invoked his right to remain silent in order to substantiate defendant's guilt, and that Detective Albin should have known that he could not testify as to defendant's silence following the *Miranda* warnings. We disagree. The prosecutor merely asked detective Albin what he did after placing defendant under arrest. There is no indication that he intended or attempted to elicit from him that defendant refused to make a statement. It is not clear whether Detective Albin purposely testified as to evidence that he knew was inadmissible in order to show that defendant was guilty; however, we do not believe that his testimony established or alluded to defendant's guilt. This was not a situation where the prosecutor asked defendant why he did not make any statement to the police if he was not guilty. Rather, Detective Albin, in describing the events that took place after defendant's arrest, mentioned that he did not make a statement to the police. Moreover, even if the testimony was erroneously admitted, the error did not affect the substantial rights of defendant because there was abundant other evidence from which a jury could convict him of first-degree CSC.

Defendant also argues that defense counsel's failure to object to the testimony denied him effective assistance of counsel. However, as noted, there was no indication that Detective Albin's testimony connoted that defendant was guilty because he did not give a statement to the police. Furthermore, because the admission of the testimony did not affect the outcome of the proceedings, defendant was not denied effective assistance of counsel.

IV

Defendant also argues that the testimony of Dr. Joseph Flynn regarding what the complainant told him during the medical examination was not admissible because it did not fall within the medical exception to the hearsay rule. Because defendant did not object to the admission of Dr. Flynn's testimony at trial, the issue is not preserved. MCR 103(a)(1). However, this Court may take notice of plain errors that affect the substantial rights of a party, even if no objection was made at trial. *Grant*,

supra at 546. An error affects the substantial rights of a defendant if it affected the outcome of the proceedings. *Id.* at 552-553.

Dr. Joseph Flynn was an emergency room physician at Mount Clemens General Hospital. He testified that he examined the complainant on April 29, 1992. He took a history from the complainant and was told that the complainant "was forced into rectal intercourse on that day at approximately 4:15, 4:30 in the afternoon. And [he] was also told that there was six to seven other episodes over the past two to three months." Dr. Flynn was "told that there was forced oral intercourse a week before that." Dr. Flynn further testified that the complainant's anus had been traumatized and that the complainant told him that he and his family were threatened. Dr. Flynn testified that the complainant told him that "he was hit with a rope for having a bad report card." The prosecutor asked Dr. Flynn what the complainant's emotional reaction was when he conducted the medical examination and spoke with him. Dr. Flynn replied that "[h]e was an emotionally upset child."

"'Hearsay' is 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). Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment are excluded from the hearsay rule. MRE 803(4). The declarant must have the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to the diagnosis and treatment of the patient. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). Further, when the patient is over ten years old, as here, a rebuttable presumption of truthfulness arises. *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1996).[4]

Dr. Flynn testified that a general physical examination entails "a history of the chief complaint, followed by an examination that would be directed towards any type of evidence that would support a diagnosis of an assault." Dr. Flynn then explained the history that the complainant gave him for purposes of conducting a physical examination. The complainant explained to Dr. Flynn that he was anally and orally penetrated, and he explained how and why he was "threatened" and "enticed" into "these activities." The complainant's statements likely allowed Dr. Flynn to structure the examination and questions to the exact type of trauma that he had recently experienced. See *McElhaney, supra* at 282-283. Sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment. *Id*. at 283. Therefore, because the complainant's statements to Dr. Flynn were reasonably necessary to his diagnosis and treatment, they were properly admitted under MRE 803(4). Furthermore, the statements were cumulative to the complainant's testimony and are, therefore, harmless. *McElhaney, supra* at 283.

Defendant also argues that he was denied effective assistance of counsel because his attorney did not object to the admission of Dr. Flynn's testimony regarding what the complainant told him. However, because Dr. Flynn's testimony was admissible pursuant to MRE 803(4), defense counsel had

no basis to object to the testimony. Therefore, defendant was not denied effective assistance of counsel.

V

Next, defendant argues that the testimony of Dr. Flynn, Officer Terzo and the complainant's brother, vouched for the complainant's credibility and produced manifest injustice. Because defendant did not object to the admission of this testimony at trial, this Court may only take notice of plain errors that affected defendant's substantial rights. *Grant, supra* at 546.

Defendant relies on *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), in which a majority of the Supreme Court held that, in a case involving sexual abuse of a child, an expert witness may testify that the behavior of the victim is consistent with that of child sexual abuse victims generally. However, the expert may not testify with regard to whether the victim's allegations are truthful or whether sexual abuse in fact occurred. *People v Garrison (On Remand)*, 187 Mich App 657, 658; 468 NW2d 321 (1991). *Beckley* and *Garrison* are distinguishable from the present case inasmuch as the witnesses in this case did not testify as experts with respect to child abuse and did not compare the complainants' behavior with that of other victims. Defendant's substantial rights were not affected.

Defendant also claims that he was denied effective assistance of counsel by his attorney eliciting that Officer Terzo and Dr. Flynn believed that the complainant was a victim of sexual assault. We disagree. Although defendant perceives that defense counsel elicited a response that was damaging to him, it is not clear that defense counsel was not pursuing a certain strategy in asking this question. In fact, he may have been attempting to elicit that the witnesses formed the opinion that the complainant was a victim of sexual abuse based only on the complainant's word. Defendant did not overcome the presumption that counsel's assistance constituted sound trial strategy. Moreover, even if defense counsel's conduct fell below an objective standard of reasonableness under prevailing professional norms, defendant has not shown that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. Rather, the complainant's graphic testimony coupled with defendant's admission that he had intercourse with the complainant was enough, without more, for the jury to convict defendant.

VI

Finally, defendant argues that the testimony of the complainant's brother and father was improperly admitted because it was inadmissible hearsay. Once again, defendant did not object to this testimony at trial, therefore, our review is limited to whether there was error affecting defendant's substantial rights. *Grant, supra* at 546.

We do not believe that the testimony of the brother was inadmissible hearsay, to which defense counsel should have objected. First, defendant does not explain why the brother's statement that defendant waited until parents left in the morning to spend time with the neighborhood children was improper. His statement was not hearsay; rather it was an observation made by the brother regarding matters within his personal knowledge pursuant to MRE 602.

The complainant's brother's testimony that the complainant told him defendant had been molesting him was cumulative of the complainant's testimony at trial and did not affect defendant's substantial rights. We are not persuaded that the failure of defendant's counsel to object was prejudicial and therefore, reject defendant's ineffective assistance of counsel claim.

Defendant also argues that the testimony of the complainant's father was inadmissible hearsay and therefore improperly admitted. The complainant told his father that defendant was molesting him on April 29, after defendant had sexually assaulted the complainant in his home. Thus, the complainant's statement arose out of a startling event, was made before he had an opportunity for contrivance and related to the circumstances of the startling event. MRE 803(2). Therefore, its admission was proper as an excited utterance. The fact that the complainant's father testified that the complainant was crying is not hearsay because it was merely the complainant's father's observation of what the complainant was doing at the time he told him about the molestation. He similarly described that the complainant was afraid when he spoke with Officer Terzo. MRE 602. Finally, there is no indication that the complainant's father's statement that the family moved was hearsay. He stated that the complainant and the rest of the family were being harassed by defendant's friends and family. The complainant's father did not testify as to any statement made by an out of court declarant. He simply expressed the reasons his family moved from the neighborhood. Accordingly, defendant was not denied effective assistance of counsel by his attorney's failure to object to its admission.

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ William C. Buhl

[1] Five of the claims of ineffective assistance argued by defendant are discussed in greater detail under the other issues presented in defendant's brief on appeal. Therefore, we address whether he was denied effective assistance of counsel on those bases under the appropriate section of this opinion and we discuss the other nine instances under this first section.

[2] Defendant claims that defense counsel did not recognize *Ake v Oklahoma*, 470 US 68, 74, 105 S Ct 1087, 84 L Ed 2d 53 (1985). In that case:

> [T]he United States Supreme Court held that, when an indigent defendant has made a preliminary showing that his sanity at the time of the crime is likely to be a significant issue at trial, the state must provide the defendant access to a psychiatrist to prepare for this issue. The Court held that in such cases the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. This is not to say, of course, that the indigent defendant has a constitutional right to choose a

> psychiatrist of his personal liking or to receive funds to hire his own. [*McPeters, supra* at 150-151.]

[3] Because the other five preserved claims are addressed under subsequent sections, we only address one claim under this section of the opinion.

[4] Although defendant argues that the ten factors established in *People v Meeboer*, 439 Mich 310; 484 NW2d 621 (1992), must be evaluated to determine whether the statements of a child to a medical professional bear the sufficient induce of trustworthiness to be admitted pursuant to MRE 803(4), this Court specifically held that the factors do not need to be evaluated where the child is over ten years of age. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662; 496 NW2d 388 (1992).