STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD NARLOCK,

Defendant-Appellant.

UNPUBLISHED
July 18, 1997

No. 192425
Kent Circuit Court
LC No. 95-002162-FH

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2), and sentenced to a term of five to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant's conviction arises out of an incident in which defendant, while baby-sitting the eight-year-old complainant for a weekend, kicked the complainant down some stairs, twisted the complainant's testicles and tried to burn the complainant's penis with a lighter.

We first address defendant's argument concerning the sufficiency of the evidence. The child abuse statute provides, in relevant part, that "[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or mental harm to a child." MCL 750.136b(2); MSA 28.331(2)(2). In this case, the prosecution's theory was that defendant caused the complainant serious physical harm. Defendant argues that the evidence of serious physical harm was insufficient in this case.

We have found no cases construing the phrase "serious physical harm" as used in the child abuse statute. However, the child abuse statute itself defines "serious physical harm" as follows:

> "Serious physical harm" means an injury of a child's physical condition or welfare that is not necessarily permanent but constitutes substantial bodily disfigurement, or seriously impairs the function of a body organ or limb. [MCL 750.136b(1)(e); MSA 28.331(1)(e).]

The child abuse statute is to be construed according to the fair import of its terms, to promote justice and to effect the objects of the law. MCL 750.2; MSA 28.192.

In this case, the complainant's examining doctor testified that the complainant suffered extensive bruising over his entire body. The skin at the tip of the complainant's penis was gone in what could be termed an abrasion that was compatible with a burn. There was also a purplish deep bruise and an abraded area at the base of the complainant's penis. However, the most severe physical injuries were to the complainant's testicles, which were bruised, very large, swollen and bulging in the scrotum. These injuries were consistent with the complainant's story that defendant had twisted his testicles. The examining doctor explained that swelling can cut off the blood supply to the testicles, and that if testicles are denied a blood supply for even a short period of time then the testicles may be so damaged that they become incapable of eventually producing sperm or sex hormones. The doctor testified that she "was afraid we were at the stage of swelling that was preceding tissue death."

Viewing this evidence in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found that the complainant sustained serious physical injury as defined in the child abuse statute. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992). Accordingly, we reject defendant's claim regarding the sufficiency of the evidence.

Next, defendant raises an issue concerning the testimony of Police Officers Zaidel and Alexander that defendant, upon his arrest and without being given his *Miranda*[1] rights, told them that the complainant had fallen down a flight of stairs and then refused to answer further questions and requested an attorney. Defendant argues that the admission of this evidence violated his constitutional rights against self-incrimination and to due process. Defendant also argues that the prosecution improperly commented on this evidence during closing argument.

We agree with defendant that generally the admission of such evidence violates a defendant's constitutional rights. *People v Belanger*, ___ Mich ___; ___ NW2d ___ (Docket No. 104037, issued 6/17/97), slip op pp 708; *People v Raper*, ___ Mich App ___; ___ NW2d ___ (Docket No. 193491, issued 4/1/97), slip op p 2. However, we also agree with the prosecution that a defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

In this case, defendant's general theory was to deny that he had caused the complainant any injury. Specifically, defendant conceded that the complainant had fallen down some stairs by himself while in defendant's care during the weekend. Defendant contended that he had unsuccessfully attempted to contact the complainant's parents about this incident numerous times during the course of the weekend. Defendant insinuated that the complainant's parents, particularly his step-mother, were responsible for the injuries to the complainant's penis and testicles, and that the complainant had been coached to implicate defendant.

Defense counsel allowed Zaidel and Alexander to testify without objection during direct examination and cross-examination concerning defendant's statements upon his arrest and the fact that

defendant had made these statements without the benefit of *Miranda*. During closing argument, defense counsel used this testimony to bolster the defense theory as follows:

> Mr. Narlock could have easily, when this whole situation precipitated itself and found out the authorities were involved, clammed up and not said anything. What happens when the police show up on his doorstep, three, four o'clock in the morning, get him out of bed, say "We're going to take you downtown, you're under arrest for abusing [the complainant]."? He says, "Well, [the complainant] fell down the steps while he was here." That's no surprise. I'm not gonna hide – I've talked to all kinds of people about that, I tried to track his parents down several different ways throughout the weekend.
>
> Is that the conduct of a person who's abusive?

We also note that the prosecutor made no improper references to defendant's refusal to answer further questions or request for an attorney, but rather confined his rebuttal argument, in relevant part, to answering defense counsel's argument concerning the fact that defendant, consistent with his theory of innocence, told the police that the complainant had fallen down some stairs.

Based on this record, we conclude that defense counsel deemed it proper at trial to admit defendant's responses to the police for the purpose of getting before the jury the fact that defendant told the police that the complainant fell down the stairs. We decline to find error on this ground. *Barclay, supra*. We likewise decline to find ineffective assistance of counsel simply because counsel's strategy did not work. *Id*. at 672-673.

Next, defendant argues that the trial court erred in admitting several witnesses' hearsay testimony concerning the complainant's previous descriptions of defendant's offense. However, defendant failed to object to the admission of this testimony at trial. Thus, this issue is not preserved. MRE 103(a); *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1994). We note that MRE 103(d) provides that "[n]othing in this rule precludes taking notice of plain errors affecting substantial rights, although they were not brought to the attention of the trial court." However, we are unable to conclude that defendant's asserted evidentiary error is plain error where the hearsay testimony was arguably admissible under MRE 801(d)(1)(B) and MRE 803(4). Accordingly, we decline to address this issue. *People v Grant*, 445 Mich 535, 545-547; 520 NW2d 123 (1994). Furthermore, because the evidence was arguably admissible, we also decline to find that defense counsel's failure to object to its admission constituted ineffective assistance of counsel. *Barclay, supra*.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Michael R. Smolenski

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