STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNIE ROBERT BAETZ,

Defendant-Appellant.

UNPUBLISHED
August 26, 1997

No. 191031
Oakland Circuit Court
LC No. 94-134296-FC

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (penetration with victim less than thirteen years of age). The trial court sentenced defendant to four terms of fifteen to forty years' imprisonment, which are to be served concurrently. Defendant now appeals as of right. We affirm.

Defendant's convictions arose out of the sexual abuse of his daughter. The abuse occurred in 1993, when the child was ten years old. However, she did not disclose the abuse until May, 1994. At the time of trial, the child was twelve years old.

Defendant first argues that the trial court erred by denying his motion to compel the child to undergo a psychiatric examination. We find no abuse of discretion. *People v Wilson*, 196 Mich App 604, 615; 493 NW2d 471 (1992). None of the reasons cited by defendant in his brief constitute substantial and compelling reasons. *People v Graham*, 173 Mich App 473, 478; 434 NW2d 165 (1988). Further, we find that the examination was not necessary because defendant was able to explore all of the factors that he claims justified ordering an examination; therefore, his rights were fully protected at trial. *Id.* at 477. Finally, on defendant's request and pursuant to the dictates of *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), we have reviewed the victim's "confidential" and "privileged" counseling records.[1] Although the records reveal that the young victim was depressed and disturbed because of the multiple episodes of sexual abuse inflicted upon her, we find no evidence of mental illness. After a thorough review, we conclude that the lower court did not abuse its discretion in

failing to find a "compelling reason" to order an independent psychiatric examination of the child victim. *People v Freeman (After Remand)*, 406 Mich 514; 280 NW2d 446 (1979); *Graham ,supra* at 478.

We also reject defendant's argument that the trial court considered the delay in the filing of the motion to compel the complainant to submit to a psychiatric examination. It is clear from the record that the trial court considered the appropriate factors in reaching its decision. Accordingly, we find defendant's argument that his counsel was ineffective in not filing the motion earlier to be without merit because defendant has failed to establish prejudice. *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996).[2]

Next, defendant argues that the prosecution's expert witnesses improperly vouched for the credibility of the complainant. In *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), the Michigan Supreme Court addressed the issue of the proper use of expert testimony in child sexual abuse cases. There, the Court reaffirmed its holding in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), that an expert witness "may not vouch for the veracity of a victim." *Id.* at 352.

Defendant argues that prosecution witness Debra Scott improperly vouched for the complainant's credibility when she described the format of the group therapy sessions that the complainant attended. Scott testified, without objection from defendant, that the second week of group therapy focused on the importance of telling the truth while in the group sessions, and that this concept was reinforced throughout the sessions. We find that this isolated remark did not amount to improper vouching. Therefore, no miscarriage of justice would occur absent our review of this unpreserved issue. *People v Mayfield*, 221 Mich App 616,661; 562 NW2d 272 (1997). Further, we find that defendant has already received the appropriate relief because the prosecutor's next question regarding why the concept of truth telling was reinforced was withdrawn, and the court sustained defendant's objection to the next question, which asked whether one of the topics in therapy was the concept of truth telling. *People v Miller (After Remand)*, 211 Mich App 30, 42-43; 535 NW2d 518 (1995).

Defendant's remaining challenges to the testimony of the prosecution's experts are unpreserved. We find that no miscarriage of justice would result absent our review; therefore, we decline to review these issues. Two of the comments cited by defendant did not relate to the child's allegations of sexual abuse by defendant. Moreover, several of the remarks now challenged by defendant were actually elicited by defense counsel. We find that to reverse defendant's convictions under such circumstances would provide him with an "appellate parachute." *Beckley, supra* at 731.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin

I concur in the result only.

/s/ E. Thomas Fitzgerald

[1] Judge Griffin adheres to his position that *Stanaway* was wrongly decided. Privileges such as attorney/client, physician/patient, priest/penitent, and counselor/rape victim have no practical force and effect if they may be defeated by a subjectively-based and ill-defined "balancing" of interests. Further, our task of review is always made more difficult without effective advocacy. Here, pursuant to *Stanaway*, we have reviewed and decided this issue without the benefit of *any* advocacy. As noted by Justice Levin in his separate opinion in *Stanaway*, our courts are ill-suited to act in the dual roles of both judge and advocate.

[2] Further, we note that the prosecution correctly states that defendant has failed to preserve his claim of ineffective assistance by not raising it in his statement of the issues presented. MCR 7.212(C)(5); *City of Lansing v Hartsuff*, 213 Mich App 338, 251; 539 NW2d 781 (1995).