STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRIS ANTHONY LUKITY,

Defendant-Appellant.

UNPUBLISHED
October 3, 1997

No. 179955
Macomb Circuit Court
LC No. 94-000414-FC

Before: Wahls, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Following a jury trial in the Macomb Circuit Court, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). He was thereafter sentenced to twenty-five to fifty years' imprisonment. He appeals as of right and we reverse and remand for a new trial.

This case arises out of defendant's alleged criminal sexual conduct involving his daughter. On appeal, defendant argues that the trial court abused its discretion in permitting witnesses to testify regarding the character of the complainant before she testified, that the trial court abused its discretion in permitting the prosecutor to introduce other "bad acts" evidence, that the prosecutor's conduct denied defendant a fair trial, that the trial court abused its discretion in permitting improper expert witness testimony, that defendant was denied the effective assistance of counsel, that the cumulative effect of the errors denied defendant a fair trial, and that defendant's sentence violates the principle of proportionality. We find several errors in this case and conclude that defendant was denied his right to a fair trial.

I

Defendant first contends that the trial court abused its discretion when it permitted prosecution witnesses to testify regarding the character reputation of the complainant for her truthfulness and honesty and to bolster her credibility before she testified. Defendant objected to allowing the first prosecution witness, William Adams (the complainant's high school teacher and counselor), to testify regarding the complainant's character reputation. The trial court overruled the objection and permitted the prosecutor

to question Adams regarding the complainant's reputation for truthfulness. Other prosecution witnesses later testified in the same regard without objection, presumably because of the trial court's initial ruling.

We find that the trial court abused its discretion in allowing the prosecutor to present evidence of the complainant's reputation for truthfulness and honesty before the complainant testified and before her reputation had been attacked by defendant. MRE 608(a) controls this issue:

> (a) *Opinion and reputation evidence of character*. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Specifically, under subsection two, evidence of the truthfulness of the character of the witness may be admitted only *after* such has been attacked by opinion or reputation evidence or otherwise. Although we agree with the prosecutor that the "or otherwise" clause would include a situation where the witness' credibility was attacked by defense counsel during opening statement, *United States v Cruz*, 805 F2d 1464, 1480 (CA 11, 1986); *United States v Jones*, 763 F2d 518, 522 (CA 2, 1985); *United States v Maniego*, 710 F2d 24, 27 (CA 2, 1983), a review of the opening statement given by defense counsel in this case reveals that defense counsel did not attack the complainant's credibility. Accordingly, we must conclude that the trial court abused its discretion in permitting prosecution witnesses to testify regarding the complainant's credibility before her credibility was attacked by defendant.

II

Next, defendant argues that the trial court abused its discretion when it permitted the prosecutor to introduce bad acts evidence concerning other instances of molestation and defendant's use of marijuana. Specifically, defendant argues that the trial court improperly permitted the complainant to testify that defendant had engaged in sexual misconduct with her on forty different occasions and that the trial court improperly permitted the prosecutor to cross-examine him regarding his use of marijuana with his son.

Evidence of other crimes or wrongs is controlled by MRE 404(b). First, we note that defendant is correct that the prosecutor failed to give notice of the general nature of the other acts evidence that it intended to produce at trial, in violation of MRE 404(b)(2). Under MRE 404(b)(1), relevant other acts evidence does not violate the rule unless it is offered solely to show the criminal propensity of an individual to establish that the individual acted in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993).

We fail to see any relevance with respect to the evidence of defendant's use of marijuana with his son. This case concerned whether defendant engaged in criminal sexual conduct with the

complainant. Further, contrary to the prosecutor's argument, the issue is preserved. The following colloquy occurred at trial:

> Q. [THE PROSECUTOR] How about providing marijuana to your son? Do you consider that instilling morals and values?
>
> [DEFENSE COUNSEL]: Objection. There is no evidence in place that that ever happened and –
>
> THE COURT: He is asking, he is asking his opinion. He is not saying it happened. Overruled. He may ask the question.

The trial court abused its discretion in permitting this line of questioning. It was not in any way relevant to the case, MRE 401, and was clearly prejudicial.

With respect to the allegations of prior sexual misconduct with the complainant, we find no abuse of discretion in permitting this testimony. The complainant's testimony regarding other acts of sexual misconduct was admissible under *People v DerMartex*, 390 Mich 410; 213 NW2d 97 (1973). See also, *People v Sabin*, 223 Mich App 530, 533; 566 NW2d 677 (1997).

III

Next, defendant argues that he was denied a fair trial due to prosecutorial misconduct. Defendant did not object to the alleged instances of prosecutorial misconduct, therefore, this issue has not been preserved for appellate review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Upon review of the record, we find no exception to this rule because an objection by defense counsel and a curative instruction by the trial court could have cured any possible prejudice to defendant. *Id.* Further, failure to consider this issue would not result in manifest injustice. *Id.* Moreover, we note that the trial court instructed the jury that the statements and arguments of the lawyers are not evidence.

However, we note that the prosecutor did engage in one instance of impropriety when he stated the following at closing argument:

> May 1, 1992. We chose that date because we have to choose a date. We have to indicate on or about, Judge Schwartz said, on or about a certain date that the crime occurred. In that case, we have forty or so sexual molestations. You pick one. We picked May 1, 1992 because you heard [the complainant] say that that was the time of Regina High School Parade or some event. That is how she knew the date of May 1, 1992.

The prosecutor should not have told the jury to "pick one" because the burden of proof is on the prosecutor to prove, beyond a reasonable doubt, each and every element of the crime. If the prosecutor decided to prosecute defendant using the date of May 1, 1992, then the prosecutor had to

prove that the crime occurred. The prosecutor improperly told the jury to pick a date, and should refrain from doing so on retrial.

IV

Defendant next argues that the trial court abused its discretion in allowing testimony of unqualified expert witnesses who impermissibly vouched for the complainant's credibility.

First, there was no error in permitting Richard Gnesda, Judith Schiap, and Susan Coats to testify as expert witnesses at trial. Defendant did not object that these witnesses were not qualified to testify as experts. Therefore, the issue has been forfeited for appellate review. Moreover, in considering the backgrounds of these witnesses, we would find that the experts were properly qualified to testify in this case. See *People v Beckley*, 434 Mich 691, 711-713; 456 NW2d 391 (1990).

Defendant also contends, however, that the expert witnesses' testimony violates the principles set forth in *Beckley*. Our Supreme Court has recently clarified the proper scope of expert testimony in childhood criminal sexual abuse cases. The expert may not testify that the sexual abuse occurred, the expert may not vouch for the veracity of the victim, and the expert may not testify whether the defendant is guilty. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). However, an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim. *Id.* Also, an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. *Id.*, p 353.

A review of Gnesda's testimony reveals nothing improper under *Beckley* or *Peterson*. Gnesda merely testified that child sexual abuse cases are crimes of control rather than crimes of passion. Schiap testified, however, that the complainant's psychiatric behaviors were consistent with a sexual assault victim.[1] Schiap also testified that she considered the complainant's conduct to be consistent with that of a rape victim. Coats testified that it is uncommon for teenage sexual abuse victims to report such crimes, especially if the perpetrator is a family member; it is not uncommon for a victim to attempt to commit suicide after revealing the sexual abuse; a range of behavior exists for sexual abuse victims; and rape is a crime of control rather than a crime of passion.

We find that Gnesda's and Coats' testimony were properly admissible, but find that Schiap's testimony was improper in light of *Peterson*. In *Peterson*, our Supreme Court held that unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child. *Id.*, pp 373-374. The Court explained that the credibility of the victim is attacked when the defendant highlights behaviors exhibited by the victim that are also behaviors within child sexual abuse accommodation syndrome and alludes that the victim is incredible because of these behaviors. *Id.*, p 374, n 13.

In this case, Schiap's testimony that the complainant's psychiatric behaviors were consistent with those of a sexual assault victim and that the complainant's conduct was consistent with that of a rape victim was in error and should not have been admitted. Defendant did not attack the complainant's credibility in this regard. Specifically, defendant did not highlight behaviors within child

sexual abuse accommodation syndrome and allude that the complainant was incredible because of those behaviors. Moreover, the trial court compounded the error when it instructed the jury in the following manner:

> You have heard Judy Schiap and Susan Coats' opinions about the behavior of sexually abused children. *You must consider that evidence only from the limited purpose of deciding whether [the complainant's] acts and words were after the alleged crime were consistent with those of sexually abused children*. The evidence cannot be used to show that the crime charged here was committed or that the defendant committed it. Nor can it be considered opinions by Judy Schiap or Sue Coats that [the complainant] is telling the truth.

Accordingly, we must conclude that Schiap's testimony was improper in light of *Peterson*. The trial court abused its discretion in permitting Schiap to testify that the complainant's psychiatric behaviors were consistent with those of a sexual assault victim and that the complainant's conduct was consistent with that of a rape victim.

V

Defendant next argues that he was denied the effective assistance of counsel. Because there was no evidentiary hearing on this claim, our review of the allegations of ineffective assistance of conduct are limited to the record before us. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prove that counsel's conduct constituted ineffective assistance, defendant must first show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. 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. *Stanaway, supra*, p 687.

Defendant first argues that trial counsel was ineffective for failing to adequately prepare and investigate this case. Because this allegation of ineffective assistance is not apparent from the record, defendant has failed to meet his burden that counsel's performance fell below an objective standard of reasonableness and that he was prejudiced by the performance in this regard.

Defendant also claims that counsel was ineffective for failing to object to the admission of prosecution witnesses' testimony as to the complainant's character for truthfulness; failing to request a cautionary instruction with regard to the testimony bolstering the complainant's credibility; failing to object to Coats and Schiap testifying as expert witnesses; failing to properly object to Coats' and Schiap's opinion testimony; failing to properly object to the admission of other bad acts evidence; failing to object to the prosecutor's misconduct; failing to object to the admission of evidence regarding the complainant's suicide attempts; and failing to object to the sentencing guidelines.

To the extent that defense counsel did not object to the witnesses who testified after Adams concerning the complainant's reputation for truthfulness, we find no error because counsel did initially object to Adams' testimony in this regard and the objection was overruled. Further, we see no need for

counsel to have requested a cautionary instruction regarding the testimony as to the complainant's reputation for truthfulness because that testimony was improperly admitted. Further, we have explained that Gnesda, Schiap, and Coats were all qualified to testify as experts, thus, counsel was not ineffective for failing to object to them testifying as expert witnesses. Also, counsel did object to Schiap's improper testimony (see issue IV, *supra*), and the remaining testimony of Gnesda and Coats was proper. With respect to the other bad acts evidence, the evidence of other acts of molestation was properly admitted, and we have already concluded that counsel objected to the evidence of marijuana use and that such evidence was improperly admitted. Further, although counsel did not object to the alleged instances of prosecutorial misconduct, we do not find any instance to require reversal. The failure to object to the admission of evidence regarding the complainant's suicide attempts was not ineffective because the evidence was not improperly admitted. Regarding the failure to object to scoring of the sentencing guidelines, we need not review this allegation because we are reversing for a new trial.

Accordingly, we cannot conclude, based on the record before us, that defendant was denied the effective assistance of counsel.

VI

Having found three separate instances of error (prosecution witnesses improperly testified regarding the complainant's reputation for truthfulness, the evidence of defendant's use of marijuana was improperly admitted, and Schiap's testimony was improper pursuant to *Peterson*), we must now decide whether those errors can be deemed harmless. We conclude that the cumulative effect of the errors cannot be deemed harmless in this case.

The errors in this case constitute preserved, nonconstitutional error. While such error is not to be reviewed under the harmless beyond a reasonable doubt standard, a conviction should not be reversed unless the error was prejudicial. *People v Mateo*, 453 Mich 203, 206, 215; 551 NW2d 891 (1996). In other words, reversal is required only if the error was prejudicial. This inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. *Id.*, p 215.

At trial, there was really no physical evidence corroborating the complainant's testimony. Defendant denied all sexual conduct. Thus, this case turned on the character and credibility of the witnesses, especially the complainant and defendant. The instances of error concern these pivotal issues. Whether defendant ever smoked marijuana, with or without his son, was completely irrelevant to the issues in this case. It was clearly prejudicial because it could have influenced the jury to find the defendant to be a "bad person." Further, allowing certain witnesses to testify as to the complainant's truthfulness before such had even been attacked, and before she testified, was improper under MRE 608(a). Additionally, in allowing the complainant's credibility to be bolstered before she testified, it could have allowed the jury to give her testimony more weight than otherwise. As we have noted, credibility was a key issue for the jury to decide in this case. Finally, the testimony of Schiap was clearly improper in light of *Peterson*. Once again, because Schiap's testimony bolstered the complainant's credibility, we cannot dismiss it as being merely harmless error.

In light of these errors as assessed against the weight and strength of the untainted evidence, we cannot conclude that the errors were harmless. The errors all involved witness credibility and character of the two critical witnesses as trial. Therefore, we conclude that there is a reasonable probability that the erroneously admitted evidence affected the outcome of the trial. *Sabin, supra,* p 540. The errors were not harmless and defendant is entitled to a new trial.

VII

Because of our resolution of the previous issues, we need not address the sentencing issues raised by defendant.

Reversed and remanded for a new trial. Jurisdiction is not retained.

/s/ Myron H. Wahls
/s/ Harold Hood
/s/ Kathleen Jansen

[1] Defense counsel objected to this testimony, but the trial court overruled it.