

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BURT STEPHEN ANDERSON,

Defendant-Appellant.

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UNPUBLISHED  
October 28, 1997

No. 185910  
Marquette Circuit Court  
LC No. 94-029715-FC

Before: Murphy, P.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of twelve counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2), for conduct involving the eleven-year-old daughter of the woman with whom defendant was living. Defendant appeals as of right. We affirm.

Defendant argues that the trial court clearly erred in admitting a tape recording of a telephone conversation between defendant and the complainant's mother in which he admitted to sexually assaulting the complainant on a regular basis, and in admitting the mother's testimony that defendant made admissions to her in other telephone calls that were not recorded. We disagree. Defendant was lodged in an Indiana jail when he made the inculpatory telephone calls to the complainant's mother, but the questioning by her was neither initiated by nor directed by police. Therefore, Miranda warnings were not necessary. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602, 1612; 16 L Ed 2d 694 (1966); *Grand Rapids v Impens*, 414 Mich 667, 673; 327 NW2d 278 (1982). The complainant's mother was not a police officer and the record does not support a finding that she was acting as a police agent where there was no evidence that she acted with or at the request of police when questioning defendant about his activities with complainant. *People v Seymour*, 188 Mich App 480, 483-484; 470 NW2d 428 (1991); *People v Grevious*, 119 Mich App 403, 407; 327 NW2d 72 (1982).

Defendant also claims coercion and involuntariness. Although defendant initiated the telephone calls to complainant's mother, he claims he was coerced into confessing because complainant's mother threatened to put their mutual children up for adoption if he did not confess. The mother denied making

such a threat. Defendant's claim of coercion was not credible where it was far more likely that defendant would not see his children again if he confessed and was found guilty of the offenses, than if he had not made any inculpatory statements. Under the circumstances, we cannot conclude that the mother coerced defendant such that the confessions were involuntary. *Seymour, supra* at 484.

Defendant also argues that his right to counsel had attached at the time he made the inculpatory statements. We disagree. The warrant in this case was not issued until February 23, 1994, which is after the February 2, 1994 tape recorded telephone conversation. Thus, formal adversarial proceedings against defendant had not commenced such that defendant's Sixth Amendment right to counsel had attached. *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). While defendant had been arrested on January 14, 1994 in Indiana on an extradition warrant and counsel was appointed on January 18, 1994 at defendant's request to represent defendant on that matter, an extradition hearing is not a "criminal proceeding" within the meaning of the Sixth Amendment. *Judd v Vose*, 813 F2d 494, 497 (CA 1, 1987); see *United States v Gouveia*, 467 US 180, 189; 104 S Ct 2292; 81 L Ed 2d 146 (1984).

Next, defendant argues that he was denied a fair trial and effective assistance of counsel when his trial attorney introduced into evidence the complainant's diaries which contained prejudicial allegations against him and, through cross examination of the complainant, established a factual basis for additional counts of CSC I. We disagree. Our review is limited to the record because defendant did not move for a new trial or an evidentiary hearing on this issue. *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Based on the record, we do not find that there is a reasonable probability that the result at trial would have been different if defense counsel had not admitted the diaries into evidence or not elicited the additional testimony from the complainant on cross examination. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Defendant was not denied effective assistance of counsel.

Several diary entries supposedly made on the dates of alleged assaults either did not report an assault or dealt with mundane or trivial concerns. Other entries appeared to have been written after the fact, possibly in an attempt to incriminate defendant. The diaries did contain descriptions of defendant engaging in criminal conduct. If, however, the jury accepted defense counsel's contention that the contents of the diaries was fabricated to implicate defendant, then the diaries would actually undermine complainant's credibility. Although trial counsel's strategy involved an element of risk that the jury might not regard the diaries as fabricated, this does not amount to ineffective assistance of counsel. The jury heard a tape recording of defendant's admissions of guilt. These admissions were more incriminating than the diaries, given the credibility issues defendant's counsel raised in conjunction with the diaries. The diaries added nothing new in that the entries, whether written contemporaneously or written after the fact, were consistent with the complainant's testimony as a whole. Even if defendant had met his burden of proof with respect to showing that counsel's performance fell below an objective standard of reasonableness, he cannot show that but for the diaries, he would not have been convicted. *Stanaway, supra* at 687-688.

Defendant also claims he was denied effective assistance of counsel because his trial counsel elicited testimony from the complainant that established additional counts of CSC I.

There is a strong presumption that counsel's performance constitutes effective assistance. *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995). Defendant has the demanding burden of establishing that counsel's representation "was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Id.* at 390-391. The testimony was elicited as part of an attempt to clarify the complainant's claim that defendant had multiple ejaculations within a span of minutes when assaulting her. One of defendant's theories of defense was that it was physically impossible for the sexual assaults to have occurred as the complainant described. Defense counsel offered expert testimony that most adult men, after ejaculating, cannot have another ejaculation for a significant amount of time. Accordingly, eliciting and questioning the complainant's assertions that defendant ejaculated more than once in the course of a few minutes was in the wide bounds of permissible trial strategy because it presented a reason for the jury to question the complainant's version of events. Because the complainant was the only person who directly testified to defendant performing sexual acts on her, defendant had a strong interest in undermining her credibility with the jury. In addition, defendant would, if convicted of all of the counts of CSC I, receive concurrent sentences for the multiple convictions of CSC I. For this reason, defendant had a much stronger interest in being acquitted of all the CSC I charges than he had in reducing the number of charges that he was facing. This Court may not, in hindsight, substitute its judgment regarding trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Defendant next claims that he was denied a fair trial due to improper bolstering of the complainant's credibility by various witnesses during trial and by the prosecution in closing argument. He also claims that defense counsel's failure to object to this bolstering rendered her performance ineffective. We disagree. Defendant failed to preserve the claim of improper bolstering by trial witnesses because he either failed to object or failed to specify the grounds when objecting. *People v Johnson*, 205 Mich App 144, 148; 517 NW2d 273 (1994). Unpreserved evidentiary issues will not be reviewed unless the admission of the evidence resulted in manifest injustice. *Id.* Here, there was no evidence of manifest injustice given the other evidence of defendant's guilt.

Defendant also failed to object to the alleged improper vouching by the prosecutor during closing and rebuttal. Because there was no objection, our review of the issue is precluded absent a miscarriage of justice. *People v Rivera*, 216 Mich App 648, 651; 550 NW2d 593 (1996). While a prosecutor may properly relate the facts presented at trial to his theory of the case and argue all reasonable inferences arising from the evidence presented, he may not make statements to the effect that he has some special knowledge concerning a witness' truthfulness. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). During closing argument and rebuttal, the prosecutor made several references that defendant claims amounted to improper vouching. Upon examining the prosecutor's remarks in context, *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996), it is apparent that he was attempting to argue that the jury could reasonably infer from the evidence that the complainant was telling the truth. His message was that the complainant's testimony must be honest because it was not practiced or rehearsed but was consistent. On rebuttal, his arguments intimated that he knew with certainty that the complainant was telling the truth. These remarks were improper. However, any prejudicial effect these comments may have had could have been remedied with a limiting

or curative instruction, had one been requested. Thus, we do not find a miscarriage of justice. *Rivera, supra* at 651-652.

We also note that although defendant characterized this issue as presenting a claim of ineffective assistance of counsel in his statement of the question presented, defendant does not argue the merits of this allegation in his brief on appeal. As a result, we find that the issue is not preserved for appeal. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993); *Richmond Twp v Erbes*, 195 Mich App 210, 220; 489 NW2d 504 (1992). We note that were we to consider this claim on its merits, we would conclude that defendant has not met his burden of proving ineffectiveness. *Reed, supra* at 390-391.

Defendant next argues that he did not receive a fair trial because the prosecutor introduced hearsay testimony concerning complainant's prior consistent statements where no prior inconsistent statement had been admitted and that defendant's trial counsel was ineffective in failing to keep this testimony from the jury. Defendant argues that the admission of the prior statements amounted to improper bolstering of the complainant's credibility. The complainant's mother was permitted to testify as to what the complainant said to her on January 10, 1994, the day the mother was first made aware of the sexual assaults. Defendant did not object. The mother was also allowed to testify as to what she overheard the complainant say to a friend on the same afternoon. In response to defense counsel's objection to this testimony on the basis of hearsay, the trial court instructed the jury that it could not use the statements that the mother overheard to establish the truth of the matter asserted, but that it could consider them as evidence of what prompted the mother to take action against defendant. The testimony as to what the complainant said to the mother and as to what the mother overheard was hearsay and did not fit within any of the hearsay exceptions found in MRE 803, 803A, or 804. The jury should not have considered it at all. However, because the trial court informed the jury that the statements the mother overheard could not be used to prove the truth of the matter asserted and because of the overwhelming evidence of defendant's guilt, we find the admission of the evidence was harmless error. *People v Mateo*, 453 Mich 203, 218-219; 551 NW2d 891 (1996). We also note that while defendant objected to some of this testimony at trial on the basis of hearsay, defendant did not object to it as being an improper bolstering of the complainant's credibility with a prior consistent statement. This issue is therefore not preserved on appeal. See *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992), where we stated that "[o]bjections raised on one ground are insufficient to preserve an appellate attack based on different grounds."

In addition to the mother's testimony regarding complainant's prior consistent statements, the complainant's boyfriend testified that the complainant told him she had written in her diary that defendant had raped her. Defense counsel failed to object to this hearsay testimony as improper bolstering with a prior consistent statement. Unpreserved evidentiary issues are not reviewed on appeal absent evidence that the admission of the evidence resulted in manifest injustice. *Johnson, supra* at 148. In light of the other evidence of guilt, the outcome would not have differed had defense counsel succeeded in keeping out hearsay testimony concerning what the diaries contained when the diaries themselves had been admitted into evidence by defendant. We find no manifest injustice.

As to defendant's argument that failing to keep out the testimony concerning prior consistent statements amounted to ineffective assistance of counsel, defendant failed to show that but for counsel's unprofessional errors, there was a reasonable probability that the result of the proceeding would have been different and that the result was fundamentally unfair or unreliable. *Stanaway, supra* at 687-688.

Defendant also argues that he was denied a fair trial and effective assistance of counsel where damaging character evidence was improperly admitted into evidence. We disagree. Initially this Court notes that defendant failed to preserve on appeal all but one of the issues raised in this argument. The only preserved issue is whether the prosecution's use of defendant's prior armed robbery conviction for impeachment purposes was improper. Appellate relief and review of unpreserved evidentiary issues are granted only when necessary to avoid manifest injustice. *Johnson, supra* at 148. No manifest injustice will result if we fail to review the unpreserved issues.

With regard to the armed robbery conviction, the decision to admit evidence is within the sound discretion of the trial court and this Court will not disturb that decision on appeal absent an abuse of discretion. *People v Brooks*, 453 Mich 511, 516-517; 557 NW2d 106 (1996). The record shows that evidence of defendant's prior conviction was properly admitted for impeachment purposes. MRE 609. Although an armed robbery has a lower probative value regarding credibility than other theft crimes, it does have some probative value. *People v Daniels*, 192 Mich App 658, 671; 482 NW2d 176 (1991). The trial court found that its probative value outweighed any prejudicial effect because the conviction was dissimilar to the crimes with which defendant was charged and because the admission of the conviction for impeachment purposes would not affect defendant's decision to testify. MRE 609(a)(2)(B); MRE 609(b). The trial court did not abuse its discretion in admitting the prior conviction. Even if it was error to admit the evidence, the error was harmless since there was overwhelming evidence of defendant's guilt.

Finally, defendant argues that he was denied a fair trial where the prosecution introduced expert testimony that a child victim's recanting allegations of sexual abuse is fairly common. This evidence was admitted to rehabilitate the complainant on a collateral matter concerning a previous recantation of a sexual abuse allegation directed at the complainant's uncle. We disagree that error occurred.

An expert may testify regarding typical 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 abuse victim *or* to rebut an attack on the victim's credibility. [*People v Peterson*, 450 Mich 349, 373; 537 NW2d 857 (1995) (emphasis in original).]

Here, defendant attacked the complainant's credibility by presenting evidence of an earlier recantation of an abuse allegation. While the instant case is somewhat distinguishable from *Peterson* in that there the recantation concerned allegations directed toward the defendant and here the recantation concerned allegations directed toward a third person, the fact remains that

defendant opened the door to this testimony when he chose to use the complainant's previous inconsistent statements to attack her credibility.

Affirmed.

/s/ William B. Murphy

/s/ Harold Hood

/s/ Richard A. Bandstra