STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NAWARRION TAYLOR,

Defendant-Appellant.

UNPUBLISHED
December 12, 1997

No. 196786
Kalamazoo Circuit Court
LC No. 95-001446-FC

Before: Neff, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) [victim under 13 years of age]. He was subsequently convicted of being a third habitual offender, MCL 769.11; MSA 28.1083. Defendant was sentenced to twenty to fifty years' imprisonment for each conviction. He appeals as of right and we affirm.

At the time of the incident, defendant was engaged to and living with the victim's mother, Beatrice Daniell. According to the victim, one night when her mother and grandmother were at the hospital, defendant displayed his penis to her. He attempted to penetrate her vagina, but was unsuccessful. Defendant forced the victim to perform fellatio on him, and then ejaculated in her mouth. Four days after the incident, the victim informed her grandmother, Norma Warden, that something happened to her while Warden and Daniell were at the hospital. Warden then relayed the information to Daniell, who spoke with the victim and learned the details about the incident.

I

Defendant first argues that the trial court erroneously admitted into evidence the victim's statements regarding the incident to Daniell, Dr. Mary Staten-McCormick, Dr. Colette Gushurst, and Mary Bombich, a Kalamazoo Family Resource Center therapist. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). The standard for reviewing an abuse of discretion is narrow; the result must have

been so violative of fact and logic that it evidences a perversity of will, defiance of judgment, or an exercise of passion or bias. *Id.*

A

Defendant does not challenge the admission of the victim's statement to Warden, and posits that it was admissible under MRE 803A. We disagree. The victim's statement to Warden was not offered to prove the truth of the matter asserted; rather, the purpose of the statement was to explain Warden's subsequent action of encouraging Daniell to speak with the victim.[1] MRE 801(c). Consequently, the testimony was not hearsay and its admission was proper. *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). MRE 803A.

B

With respect to the victim's statement to her mother, the trial court ruled that the statement was admissible as an excited utterance, MRE 803(2), and as a prior consistent statement, MRE 801(d)(1)(B). We disagree with the trial court's ruling,[2] but nevertheless find the statement admissible under MRE 803A.

MRE 803A, which codified the Michigan common-law tender years hearsay exception, permits the admission of corroborative hearsay testimony of children of tender years in criminal proceedings:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.
>
> A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.

In the present case, we find no error in permitting Daniell to testify regarding the victim's statement concerning the incident with defendant. MRE 803A; see *People v Ortiz*, 224 Mich App 468,477; ___ NW2d ___ (1997) (where the trial court reaches the right result, but the wrong reason, this Court will not reverse). However, because MRE 803A does not prohibit the admission of subsequent corroborative statements under another rule, each of the victim's subsequent statements must be analyzed separately to determine whether it is admissible under another exception to the hearsay rule.

C

The trial court also admitted statements that the victim made to two physicians. Dr. Mary Staten-McCormick, an emergency room physician, asked the victim who did this to her; she named defendant. Further, Dr. Colette Gushurst, a physician at the Michigan Center for Medical Studies, while examining the victim's vagina, asked her if anyone had touched her there; the victim again named defendant. The victim also stated to Gushurst that defendant touched her with his "ding-dong," that her brother and sister were sleeping during the incident, and that her panties were off during the incident. The trial court found the statements admissible under MRE 803(4).

MRE 803(4) states that in order to be admissible, a hearsay statement must be 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 [injury]. . . ." In *People v Meeboer (After Remand)*, 439 Mich 310, 330; 484 NW2d 621 (1992), our Supreme Court recognized that child victims of sexual assault may not understand the need to tell the truth to medical health care providers as adults do. The Court thus adopted a ten-factor test for determining the trustworthiness of the child's statement. *Id* at 324-325.

The first factor is the age and maturity of the declarant. *Id*. at 324. The victim was eight years old at the time she visited Staten-McCormick and Gushurst. Lacking any evidence of immaturity, this Court will weigh age and maturity in favor of the child. *People v Hyland*, 212 Mich App 701, 705; 538 NW2d 465 (1995).

The second factor is the manner in which the statements were elicited. *Meeboer*, *supra* at 324-325. During Staten-McCormick's exam, the victim indicated that she was too shy to describe the incident, so her mother provided the information. When asked by Staten-McCormick who did this to her, the victim provided defendant's name. Although Staten-McCormick's question implies that something happened to the victim, it does not imply that defendant was the perpetrator. Further, while examining the victim's vagina, Gushurst asked her if anyone had touched her there, to which the victim provided defendant's name. Because Staten-McCormick's and Gushurst's questions were non-leading in nature, we find that the manner in which the statements were elicited does not undermine their credibility.

The third and fourth factors are the manner in which the statements are phrased and the use of terminology unexpected in a child of similar years. *Id.* at 325. Because the victim did not describe the alleged incident to Staten-McCormick, these factors cannot be assessed. However, during her examination with Gushurst, the victim referred to defendant's penis as his "ding-dong." This child-like reference fails to indicate that her statement was influenced by an adult.

The fifth factor addresses who initiated the examination. *Id.* "[P]rosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment." *Id.* Here, Daniell took the victim to Staten-McCormick the night she revealed the incident. Additionally, Kalamazoo Protective Services requested that Gushurst examine the victim. Accordingly, we find that the victim was examined only for medical reasons.

The sixth and seventh factors address the timing of the examination in relation to the abuse and the trial. *Id.* "If the examination is close in time to the abuse, the child may still be suffering from pain and distress. An examination close to trial might indicate a non-medical motive for the examination." *Hyland, supra.* The examination with Staten-McCormick occurred on September 27, 1995, four days after the incident. The examination with Gushurst occurred in October 1995, approximately one month after the incident. The timing of the exams supports the trustworthiness of the statements.

The eighth factor is the type of examination. *Meeboer, supra* at 325. Staten-McCormick performed a physical examination in a hospital emergency room. At the request of Kalamazoo Protective Services, Gushurst examined the victim to determine whether she had been sexually assaulted. Neither examination provides an indicia of untrustworthiness. *People v McElhaney,* 215 Mich App 269, 282; 545 NW2d 18 (1996).

The ninth factor is the relation of the declarant to the person identified. *Meeboer, supra* at 325. Because the victim lived with defendant, this Court assumes that no misidentification occurred.

The tenth factor involves the existence of a motive to fabricate. *Id.* Although defendant maintained that the victim was jealous because he was more attentive to the other children, this assertion was wholly unsupported. Accordingly, based on the *Meeboer* factors, the victim's statements to Staten-McCormick and Gushurst identifying defendant were inherently trustworthy and properly admitted under MRE 803(4).

D

Finally, defendant claims that the victim's statement to Mary Bombich was erroneously admitted. The statement was admitted through the testimony of Detective Thomas Baarda, who observed Bombich's interview with the victim. During the victim's cross-examination, she denied telling Bombich that her mother told her about "privacies" and how they feel. Then, during Baarda's cross-examination, defense counsel elicited testimony that the victim informed Bombich that her mother had told her about "privacies" and how they feel. The prosecutor then argued that because part of the statement was admitted, she should be permitted to introduce the remainder of the victim's statement to Bombich so that the victim's statement would not be taken out of context. The trial court agreed, and

Baarda further testified that the victim stated that defendant tried to put his penis in her vagina, that he forced her to put his penis in her mouth and that defendant ejaculated in her mouth.

The rule of completeness is codified in MRE 106, which states:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other party or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

By its very terms, the rule is limited to writings and recorded statements and does not apply to the conversation at issue here.[3] Nor did the statement fall under any other exception to the hearsay rule. Further, the statement was not admissible as a prior consistent statement under MRE 801(d)(1)(B) because, as noted above, the victim's motive to fabricate occurred before her conversations with Bombich. Baarda's testimony on redirect simply corroborated the victim's own trial testimony. Consequently, we find that the trial court abused its discretion by allowing Baarda to testify regarding the remainder of the victim's statement to Bombich.

E

In sum, we find that the trial court did not abuse its discretion by admitting the victim's statements to her grandmother and mother and to Staten-McCormick and Gushurst. However, we find that the trial court abused its discretion by admitting the victim's statement to Bombich introduced through the trial testimony of Baarda. However, we conclude that the erroneous admission of this statement was harmless.

Whether a nonconstitutional error is harmless depends upon the nature of the error and its effect on the reliability of the verdict in light of the weight of the untainted evidence. *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). An error need not be harmless beyond a reasonable doubt. *Id.*, 216. Rather, the defendant must show a reasonable probability that the error affected the outcome of the trial. *People v Sabin*, 223 Mich App 530, 540; 566 NW2d 677 (1997).

Defendant cannot make such a showing here. The victim provided descriptive testimony regarding the incident, and defendant testified and denied that the incident occurred. There was no physical evidence that a recent sexual assault occurred. However, defendant acknowledged writing letters to Daniell, including one in which he offered to admit the crime even though he could not remember the incident. On direct examination, however, defendant testified that he remembered the evening well, and claimed that he lied in his letter. Defendant's own testimony seriously undermined his credibility.

We find no reasonable probability that the admission of the victim's statement to Bombich affected the outcome of the trial by tipping the scales in favor of the prosecution, and that any error in the admission of this evidence was harmless.

II

Defendant also argues that the trial court abused its discretion by erroneously excluding evidence of the victim's prior sexual conduct with another individual. We disagree.

The victim indicated that she had been previously sexually assaulted by an uncle. At trial, defendant sought admission of this evidence to explain an "old" injury to the victim's hymen that was discovered during a physical examination and to determine if she was confused about who penetrated her; however, on appeal, defendant now argues that the evidence was admissible to demonstrate the victim's familiarity with sexual matters. "An objection based on one ground at trial is insufficient to preserve an appellate attack based on a different ground." *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Moreover, evidence of a victim's possible sexual conduct with others is not admissible to explain the victim's ability to describe sexual acts. *People v Arenda*, 416 Mich 1, 12-13; 330 NW2d 814 (1982).

III

Defendant also alleges several instances of prosecutorial misconduct. However, defendant failed to object at trial to the remarks at issue. Appellate review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We have carefully reviewed the record and find that only one of the remarks was improper. During closing argument, the prosecutor stated: "[F]or some kids, like [the victim], monsters are not under the bed. They're in the bed. And this is the monster right here, so I am asking you to find him guilty." This remark is an improper appeal to the jury for sympathy. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). However, this remark alone would not be grounds for a new trial because the prejudicial effect could have been cured with a timely requested cautionary instruction.

Affirmed.

/s/ Janet T. Neff
/s/ Kathleen Jansen
/s/ Jane E. Markey

[1] This purpose was emphasized during the prosecutor's closing argument:

> Grandma testified that [the victim] was - - was upset and went to talk in the bathroom, and tried to spell out the word sex and [defendant's name]. And Grandma knew enough to know that something had happened and told the Mother. Then [the victim] told the mother everything that happened to her."

[2] Defendant asserted at trial that the victim fabricated the alleged abuse because he was more attentive to the other children. Because the victim's alleged motive to fabricate occurred before her conversation with Daniell, her statement should not have been admitted pursuant to MCR 801(d)(1)(B). Nor does the statement qualify as an excited utterance under MRE 803(2). The statement was made approximately four days after the incident, during which time the victim's behavior was not noticeably different, thus suggesting that the victim was not still under the influence of an overwhelming emotional condition. *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988).

[3] In its appellate brief, plaintiff cites two cases in support of its claim that MRE 106 is also applicable to oral statements or conversations. *People v Badour*, 167 Mich App 186; 421 NW2d 624 (1988), rev'd on other grounds, 434 Mich 691 Mich 691 (1990), *People v Warren*, 65 Mich App 197; 237 NW2d 247 (1975). However, these cases both involve recorded conversations and thus are distinguishable from the case at bar.