STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE JAMES DUENAZ,

Defendant-Appellant.

UNPUBLISHED
July 7, 1998

No. 198670
St. Clair Circuit Court
LC No. 95-003365-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.778(2)(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.778(3)(1)(a). He was subsequently sentenced as an habitual fourth offender under MCL 769.12; MSA 28.1084 to two concurrent prison terms of fifteen to thirty years. He appeals as of right and we affirm.

Defendant first argues that the trial court erred in refusing to allow him to call two witnesses to testify that they had seen the complainant and defendant on numerous occasions during the time the sexual assaults were allegedly occurring and that the complainant never seemed to be afraid of defendant while she was around him. We review this issue for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

We conclude that the witnesses' proposed testimony was relevant because the complainant's actions relating to defendant while in public could tend to compromise her testimony that defendant had touched her improperly. MRE 401; *People v Mills*, 450 Mich 61, 69-70; 537 NW2d 909 (1995). However, the trial court could have properly excluded this testimony under MRE 403 since its probative value would be slight, it would tend to confuse the jury, and defendant had ample opportunity to attack the complainant's testimony through cross-examination. See *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976); *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995). While the witnesses may have been able to testify about what they observed regarding the complainant's conduct toward defendant when the witnesses saw the two of them

together, the witnesses would not have been able to testify regarding the reasons why the complainant acted friendly toward defendant in public. It would be just as reasonable to assume that this behavior indicated that defendant was not molesting the complainant as to assume that the complainant simply did not want anyone to discover what defendant was doing to her. While this was not the ground upon which the trial court decided to exclude the testimony, this Court will affirm a trial court's exclusionary ruling based on an incorrect rationale, if there was an unstated tenable ground for that ruling. *Moncrief v Detroit*, 398 Mich 181, 191, n 4; 247 NW2d 783 (1976).

Defendant next argues that the trial court committed error requiring reversal in refusing to allow defendant to present expert testimony (1) to help explain to the jury the behavior of the complainant after the alleged sexual abuse, (2) to help the jury understand the area of false allegations in child abuse cases, (3) to rebut the police officers' testimony, and (4) to show that children do not normally report more instances of abuse after their initial revelations. Parties may not use an expert to testify regarding the veracity or credibility of the complainant and act as a type of "human lie-detector." *People v Stricklin*, 162 Mich App 623,636; 413 NW2d 457 (1987); *People v Izzo*, 90 Mich App 727,730; 282 NW2d 10 (1979). A trial court may properly exclude an expert's testimony regarding whether a child victim of abuse is credible. *People v McGillen #2*, 392 Mich 278; 220 NW2d 689 (1974); *People v Miller*, 165 Mich App 32, 48; 418 NW2d 668 (1987); *People v Matlock*, 153 Mich App 171, 179; 395 NW2d 274 (1986). Any testimony by an expert regarding the credibility of child victims would have necessarily involved an improper opinion with regard the credibility of the complainant herself. Cf. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995) (an expert may not vouch for the veracity of the victim). The trial court therefore did not abuse its discretion in refusing to appoint defendant's requested expert.

Next, defendant argues that the trial court committed error requiring reversal by refusing to instruct the jury on impeachment by a prior inconsistent statement (CJI2d 4.5). Defendant maintains that some of the statements made previously by the complainant were inconsistent with her trial testimony. When the jury instructions are reviewed in their entirety, *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997), rather than extracted piecemeal, *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995), they fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Davis*, 216 Mich App 47, 54; 549 NW2d 1 (1996). While the trial court did not give defendant's requested jury instruction, CJI2d 4.5, the trial court gave the general jury instruction on evaluating the credibility of witnesses, CJI2d 3.6. This instruction, combined with defendant's chance to raise the complainant's apparent inconsistent statements in his closing argument, adequately protected defendant's rights. In *People v Dixon*, 161 Mich App 388, 396-97; 410 NW2d 812 (1987), this Court held that similar unsupported claims of inconsistencies did not warrant a special instruction for impeachment by prior inconsistent statements. Taking the jury instructions as a whole, we conclude that the instructions were adequate and covered the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997).

Lastly, defendant contends that the trial court erred in allowing the prosecution to improperly use police officers to testify that the complainant's actions in giving each officer differing statements were consistent with the behavior of child abuse victims in general. Although defendant contends that he

raised this issue below, we can find no such objection in the record. Error may not be predicated on a ruling that admits evidence unless a substantial right of the party is affected *and* a timely objection is made. MRE 103(a)(1). Defendant has not met either requirement in this case because the testimony was properly admitted.

In reviewing the trial transcript, we conclude that the two officers were offering permissible lay opinion testimony to explain a possible reason for why the complainant had given one officer more information than she had given to the other. Under MRE 701, lay opinion testimony is proper if it is rationally based on the perception of the witness and is helpful to a clear understanding of a fact at issue. Any witness is qualified to testify regarding the witness' physical observations and opinions formed as a result of those observations. *Lamson v Martin (After Remand)*, 216 Mich App 452, 458; 459 NW2d 878 (1996). The officer's opinion testimony was based on their personal observations of similar events. Moreover, it was general in nature as required by *Co-Jo, Inc v Strand*, 226 Mich App 108, 116; 572 NW2d 251 (1997). Therefore, no substantial right of defendant's was affected because the testimony was properly admitted.

Affirmed.

/s/ Kathleen Jansen
/s/ Michael J. Kelly
/s/ Jane E. Markey