STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 2, 1999
v	No. 192425 Kent Circuit Court
RICHARD NARLOCK, Defendant-Appellant.	LC No. 95-002162 FH ON REMAND

Before: Hoekstra, P.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2), and sentenced to a term of five to fifteen years' imprisonment. After appealing as of right to this Court, defendant moved to remand to the trial court for a *Ginther*[1] hearing on his claim of ineffective assistance of counsel. This Court denied the motion and subsequently affirmed defendant's conviction and sentence. *People v Narlock*, unpublished opinion per curiam of the Court of Appeals, issued July 18, 1997 (Docket No. 192425). Defendant thereafter submitted a delayed application for leave to appeal to our Supreme Court. In lieu of granting leave to appeal, our Supreme Court vacated this Court's opinion, reversed this Court's denial of defendant's motion to remand and remanded this matter to this Court with the following instructions:

> The case is remanded to the Court of Appeals, which, while retaining jurisdiction, is to remand this case to the Kent Circuit Court for a *Ginther* evidentiary hearing. On remand, if the defendant files a motion for a new trial, the circuit judge must rule on that motion. If the Kent Circuit Court orders a new trial, the Court of Appeals is to dismiss the appeal. If the Kent Circuit Court does not order a new trial, the Court of Appeals is, after remand, to reconsider the defendant's arguments on the basis of the supplemented record. In all other respects leave to appeal is denied, because the Supreme Court is not persuaded that the questions presented should be reviewed by this Court before the proceedings required by this order. Jurisdiction is not retained. . . . [*People v Narlock*, 458 Mich 861; ___ NW2d ___ (1998).]

Following this Court's remand to the Kent Circuit Court, defendant moved for a new trial on the ground of ineffective assistance of counsel. Following the mandated *Ginther* hearing, the court found no merit to defendant's claim of ineffective assistance of counsel and denied defendant's motion for a new trial. This case is now once again before this Court. After reconsidering defendant's arguments based on the supplemented record, we again affirm defendant's conviction and sentence.

This case arises out of an incident in which the eight-year-old complainant and his siblings spent a Thursday through Monday at defendant's home in defendant's care. After the complainant's father and live-in girlfriend (hereinafter stepmother) picked up the complainant and his siblings from defendant's home on Monday afternoon, the stepmother subsequently discovered that the complainant was physically injured. The complainant's father was informed of the injuries, the police were called and the complainant was taken to the hospital. A medical examination revealed that the complainant's body was covered with bruises, his scrotum was bruised, his testicles were extremely swollen and tender to the touch, and the end of his penis had an abrasion.

The complainant's version of how he sustained these injuries, as introduced by the complainant's own testimony as well as the hearsay testimony of several other witnesses, was that defendant had kicked or thrown him down some stairs, twisted his testicles and burned his penis with a lighter. The doctor who examined the complainant at the hospital testified that the injuries to the complainant's testicles were consistent with being twisted and that the abrasion on the end of penis was consistent with a burn. The doctor also testified that the complainant was injured on two separate occasions, with the injuries to his genitals appearing more recent (approximately twenty-four hours old) than his other bodily bruises (approximately two days old).

Defendant's theory at trial was that the complainant's bruises were caused by an accidental fall down defendant's basement stairs but that someone else, possibly the complainant's father or stepmother, had inflicted the complainant's genital injuries.

After remand, defendant again argues that he was denied the effective assistance of counsel. Specifically, defendant claims that counsel was ineffective (1) in failing to object to the admission of certain statements made by defendant to the police, and; (2) in failing to object to the admission of hearsay testimony of various witnesses that the complainant identified defendant as the person who caused the complainant's injuries. In a separate evidentiary issue, defendant also challenges the admissibility of this evidence. Because these issues are intertwined, they will be considered together.

Our review of defendant's claim that he was denied the effective assistance of counsel reveals that defendant calls into question defense counsel's actual performance at trial. *People v Mitchell*, 454 Mich 145, 155; 560 NW2d 600 (1997). The burden is thus on defendant to establish that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland v Washington*, 466 US 668, 686-687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); see also *Mitchell, supra* at 155. In order to so establish, the defendant must make two showings. *Strickland, supra* at 687; see also *Mitchell, supra* at 156. "First, the defendant must show that counsel's performance was deficient," i.e., objectively unreasonable. *Strickland, supra*; *Mitchell, supra* at 164. "This requires showing that counsel made errors so serious

that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland, supra*; see also *Mitchell, supra* at 156, 164.

"Second, the defendant must show that the deficient performance prejudiced the defense." *Strickland, supra*; see also *Mitchell, supra* at 156. This requires showing "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland, supra* at 694; see also *Mitchell, supra* at 158, 167. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Strickland, supra* at 695.

As further explained in *Strickland, supra* at 689-690 (citations omitted):

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to secondguess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense, after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. . . . A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls with the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstance, the challenged action "might be considered sound trial strategy." . . . .
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> Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

We first consider defendant's claim that counsel was ineffective in failing to object to the admission of certain statements made by defendant to the police. At trial, Police Officer James Zaidel testified as follows concerning the circumstances of defendant's arrest in this case:

The Prosecutor: And who all was present when you made the arrest?

Officer Zaidel: Detective [Donna] Alexander and Officer Nancy Davis, Officer Johnson. I believe that was it, just the four of us.

The Prosecutor: Did Mr. Narlock make any statement regarding how the boy suffered the injuries?

Defense Counsel: Your Honor, I guess I'd have to interject a moment.

(Brief discussion off the record)

The Prosecutor: Do you remember my question?

Officer Zaidel: Yes sir, he did make a statement.

The Prosecutor: Regarding how the child suffered the injuries?

Officer Zaidel: Right, he claimed that he hadn't done anything wrong, and when we asked him how the child got injured, he said that he had fallen down a flight of stairs, and then I believe it was Detective Alexander said, "Well, how did he injure" – "How did the injuries occur to his penis and scrotum?"

The Prosecutor: Did he have any comment on that or did he not?

Officer Zaidel: He refused to comment on that and said he wanted an attorney.

The Prosecutor: No other questions.

Defense counsel raised no objection to this testimony, but rather immediately proceeded to his cross-examination of Officer Zaidel.

Subsequently, Detective Alexander testified as follows on cross-examination:

Defense Counsel: Okay. Now, I note in here, consistent with what you've testified, you indicated that after being advised of his arrest, and presumably the purpose for his arrest, as you've testified to, Mr. Narlock stated the victim fell down the stairs.

Detective Alexander: That's correct.

Defense Counsel: Had he been advised of his rights at that point?

Detective Alexander: No.

Defense Counsel: You had a second contact with Mr. Narlock after his arrest, correct?

Detective Alexander: That's correct.

Defense Counsel: And where did that occur?

Detective Alexander: At the Kent County Jail.

Defense Counsel: And at that point, was he given his rights?

Detective Alexander: He was advised of his rights, yes.

Defense Counsel: And among the rights that he's advised of is the right to have an attorney present for any questioning, correct?

Detective Alexander: That's correct.

Defense Counsel: And did he indicate a willingness to talk to you at that time?

Detective Alexander: No, he requested an attorney.

Defense Counsel: Okay. He decided to exercise those rights, correct?

Detective Alexander: That's correct.

This testimony indicates that at the time of his arrest, defendant was subjected to custodial[2] interrogation[3] before being given *Miranda*[4] warnings. The failure to give *Miranda* warnings before the person makes a statement during a custodial interrogation renders the statement inadmissible for purposes other than impeachment. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997). The officers' testimony also indicates that defendant's silence at the jail was in reliance on *Miranda* warnings. Again, where the record indicates that a defendant's silence is attributable to an invocation of his Fifth Amendment right or a reliance on *Miranda* warnings, use of his silence is error except for limited impeachment purposes. *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990); *People v Schollaert*, 194 Mich App 158, 160-167; 486 NW2d 312 (1992).

At the *Ginther* hearing conducted in this case, defense counsel explained that when the prosecutor initially questioned Officer Zaidel about defendant's statements he (defense counsel) interjected because there was no indication in Officer Zaidel's two-page police report that defendant had made any statements and he (defense counsel) wanted to know what Officer Zaidel "was gonna bring out." Defense counsel testified that "all I was told at that point was the officer was gonna say that Mr. Narlock said the boy fell down a flight of stairs." Defense counsel testified that he recognized that this testimony was objectionable because no *Miranda* warnings had been given to defendant, but that he agreed to let this specific statement in because it was consistent with defendant's theory, i.e., that the complainant had fallen down steps while in defendant's care.

Defense counsel testified that Officer Zaidel's subsequent testimony concerning defendant's refusal to comment and request for an attorney had been a surprise because there had been no discussion of such a statement at the bench conference and because the prosecutor's question to Officer Zaidel had not "necessarily suggest[ed]" the answer given by Officer Zaidel, who "could have easily just said no, and there wouldn't have been any problem whatsoever." Defense counsel acknowledged that this testimony, coming as it did immediately after Officer Zaidel's testimony that defendant had given a statement about the complainant falling down stairs "certainly could have conveyed to the jury that, well, maybe he has something to hide about this, although he doesn't have something to hide about that." Defense counsel testified it was not his conscious strategy to allow this testimony into evidence and that had he known of this testimony he would have objected or requested a hearing outside the presence of the jury to determine whether admission of this evidence was appropriate.

With respect to counsel's failure to object to this evidence, either immediately or at some point during trial, defense counsel testified at the *Ginther* hearing that he did not immediately object to or request that the trial court exclude Officer Zaidel's testimony concerning defendant's refusal to comment and request for an attorney because he was surprised and unsure of his options at that point. Counsel explained that he was unsure of his options because he was unsure whether his agreement to let in defendant's statement that the complainant had fallen down some stairs meant that "the rest of it had to come in." When asked by appellate counsel whether he (defense counsel) was concerned that the prosecutor might try to rely on Zaidel's testimony concerning defendant's refusal to comment and request for an attorney during closing argument or bring in such additional testimony from another police witness, defense counsel responded "I guess I wasn't concerned about it until we got there, with other witnesses." The following exchange then occurred:

> *Appellate Counsel*: I just wonder if you considered asking the Court to exclude any further references to this testimony.
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> *Trial Counsel*: I don't believe I did at that time. I don't remember. I don't think there were any – like I say, I haven't read the whole transcript, so I don't remember if anybody else made specific references to him invoking his right to silence or not.
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> *Appellate Counsel*: I was gonna ask you if you recalled Detective Donna Alexander taking the stand later on, testifying basically to the same information about your client's statement.
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> *Trial Counsel*: I did review a portion of that, yes, I remember her, and I guess I asked even more questions of her at that point than I did of Officer Zaidel, in terms of the various steps that were taken and whether he was given his rights and what his response was. I think I worded it in some different fashion to try to lessen the impact of the way Officer Zaidel had testified to previously which I was not expecting.

In its written opinion following the *Ginther* hearing, the trial court found that counsel's decision to allow the admission of the favorable evidence concerning the cause of the complainant's injuries

(defendant's statement that the complainant fell down some stairs) was a legitimate and reasonable trial strategy. We agree. *Strickland, supra* at 689-690. Moreover, because defense counsel deemed the admission of this statement proper, defendant may not separately on appeal claim error arising out of the admission of this statement. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

However, the crux of defendant's complaint is not the admission of this evidence, but rather is the admission of Officer Zaidel's testimony indicating that in response to questioning at the time of his arrest defendant refused to comment and requested an attorney. The trial court found no error in the admission of this portion of Officer Zaidel's testimony, reasoning that "by allowing detectives to relate defendant's statements about causation, the door was then opened to permit full development of the subject." In making this determination, the trial court relied on *People v Allen*, 201 Mich App 98; 505 NW2d 869 (1993).

In *Allen*, the defendant testified that the trial was his first opportunity to tell his version of the events. *Id*. at 103. The prosecutor then questioned the defendant about his postarrest, post-*Miranda* warnings silence. The *Allen* Court noted that the general rule is that a defendant's exclupatory story at trial may not be impeached with evidence of postarrest, post-*Miranda* warnings silence. *Id*. at 102. However, the *Allen* Court held that the impeachment did not constitute error because it came within "the exception permitting impeachment of a defendant's version of his postarrest behavior."[5] *Id*. 103. The *Allen* Court noted that "[h]aving raised the issue of his opportunity to explain his version of the events, he 'opened the door to a full and not just selective development of that subject.'" *Id*.

As previously indicated, *Allen* is a postarrest, post-*Miranda* case. The record in this case indicates that defendant's statements to Officer Zaidel at the time of his arrest occurred in a postarrest, pre-*Miranda* situation. Defense counsel agreed at trial that Officer Zaidel could testify that defendant had stated that the complainant fell down the stairs. Defendant's statement was an exclupatory story concerning the cause of the complainant's injuries. Although a defendant's exclupatory story at trial may not be impeached with postarrest, post-*Miranda* silence, *Allen, supra*, a defendant's exclupatory story at trial may be impeached with evidence of postarrest, pre-*Miranda* silence without violating the Fifth Amendment, *People v Sutton (After Remand)*, 436 Mich 575, 592; 464 NW2d 276 (1990); *Schollaert, supra* at 163. Thus, even if *Allen* is inapplicable to this case, Officer Zaidel's testimony that defendant refused to comment and requested an attorney was arguably admissible under *Sutton* and *Schollaert*. If so, then counsel cannot be said to have erred in failing to raise a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 129 (1997).

Conversely, if defendant's refusal to comment and request for an attorney at the time of his arrest is construed as an invocation of his Fifth Amendment right, then the use of his silence as substantive evidence would be error. *McReavy, supra*; *Schollaert, supra*. The trial court transcript in this case does not reveal that Officer Zaidel's testimony was purposely admitted for impeachment purposes. Rather, the transcript indicates that the officer's testimony was simply inadvertently admitted during the prosecutor's direct examination of the arresting officer in the prosecution's case-in-chief. We will assume for purposes of analysis that Officer's Zaidel's testimony constituted evidence of defendant's silence that was erroneously admitted for substantive purposes. See *McReavy, supra*;

Schollaert, supra. The question then becomes whether defense counsel erred in failing to object, either immediately or sometime thereafter, to this inadmissible testimony.

In considering all the circumstances, we note that Officer Zaidel's inadmissible testimony occurred during the midst of trial. Through no fault of defense counsel, the damage was already done and the witness was immediately turned over to defense counsel for cross-examination. The record at the *Ginther* hearing establishes that counsel did not immediately object because he was surprised by the testimony and unsure of his options. Under these circumstances, we cannot conclude that counsel's failure to immediately object to Zaidel's inadmissible testimony was objectively unreasonable. Requiring a defense attorney to raise an immediate objection at a time when the attorney is surprised and unsure of his options could result in an adverse ruling and the loss of meritorious legal arguments.

Defendant asserts on appeal that defense counsel should have subsequently moved to strike Officer Zaidel's inadmissible testimony and request a curative instruction. This certainly could be considered reasonable trial strategy. Conversely, reasonable trial strategy might advise against any action that would emphasize the error to the jury. When appellate counsel asked defense counsel whether he had considered asking the trial court to exclude any further references to Officer Zaidel's inadmissible testimony, defense counsel testified that "I don't believe I did at that time. I don't remember." However, defense counsel's testimony also indicates that he was prepared to handle any further references to defendant's silence on a witness-by-witness basis and that he cross-examined Detective Alexander to lessen the impact of Officer Zaidel's inadmissible testimony. We thus conclude that defense counsel's strategy choices in his cross-examination of Detective Alexander and in his failure to move to strike Officer Zaidel's inadmissible testimony or request a curative instruction were within the wide range of reasonable professional assistance. *Mitchell, supra* at 156. Moreover, because defense counsel reasonably deemed the admission of Detective Alexander's testimony proper, defendant may not on appeal separately claim error arising out of the admission of this testimony. *Barclay, supra*.

There still remains the separate issue whether any error arising from the inadvertent admission of Officer Zaidel's testimony was harmless. We will denominate this error nonstructural constitutional error. The issue then is whether the error was harmless beyond a reasonable doubt. *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998). As noted by defense counsel, the prosecutor's question to Officer Zaidel did not necessarily call for the answer given by Officer Zaidel. Officer Zaidel's nonresponsive testimony that defendant refused to comment and requested counsel was brief and isolated. We agree with defense counsel that his cross-examination of Detective Alexander did lessen the impact of Officer Zaidel's testimony. Finally, the prosecutor did not use defendant's refusal to comment and request for counsel as direct evidence of defendant's guilt during closing argument.[6] Accordingly, we conclude that on this record any erroneous admission of constitutionally protected silence as substantive evidence was harmless beyond a reasonable doubt. *People v Anderson (After Remand)*, 446 Mich 392, 406-407; 521 NW2d 538 (1994).[7]

We next consider defendant's claim that counsel was ineffective in failing to object to inadmissible hearsay testimony of various witnesses that the complainant identified defendant as the person who caused the complainant's injuries. Specifically, defendant notes that the complainant's stepmother testified without objection that in response to her inquiry about his injuries the complainant

stated that "big Rick did it. Kicked him down the stairs. And he had red, his testicles were red and he said that he twisted his balls, and put a lighter up to his weenie, his peter, or whatever." Defendant notes that the complainant's father testified without objection that the complainant stated that "Rick kicked him down the stairs, pinched his nuts and twisted 'em, and burned his peter, and made him sleep in the basement." Defendant notes that Officer Zaidel testified without objection that the complainant stated at the hospital that "big Rick grabbed his privates and twisted 'em. He stated that he was kicked down the stairs by big Rick into the basement, and he stated that this big Rick held a cigarette lighter to his privates." Defendant notes that Detective Alexander testified that the statement she took from the complainant at the hospital was consistent with the trial and that the complainant had never varied from this statement. And defendant notes that the doctor who examined the complainant at the hospital testified that the complainant stated that "Ricky had hit him, had thrown him down the stairs, had twisted his balls, was the term he used, and that he had tried to burn his balls with a cigarette lighter." Evidence was admitted that in using the names "big Rick," "Ricky" or "Rick," the complainant was referring to defendant.

When questioned about his failure to object to the alleged inadmissible hearsay testimony at the *Ginther* hearing, defense counsel explained that he had objected to the doctor's testimony at the preliminary examination and been overruled. A review of the preliminary examination transcript reveals that when the doctor began to testify at the preliminary examination to statements made by the complainant at the hospital, defense counsel objected "to any statements as to the identity of the perpetrator that would not be relevant to a history for treatment purposes, and it would be hearsay." In response, the prosecutor contended that the doctor's testimony was admissible under *People v Meeboer*, 181 Mich App 365; 449 NW2d 124 (1989), affirmed 439 Mich 310 (1992) (*Meeboer I*), in which this Court held that a medical doctor's testimony concerning a child victim's identification of the defendant as the person who sexually penetrated her was admissible under MRE 803(4), the medical treatment exception to the hearsay rule. Defense counsel's objection was overruled and the doctor was permitted to testify at defendant's preliminary examination concerning the complainant's statements.

Defense counsel further explained at the *Ginther* hearing that when he was preparing for trial he "probably" did not "revisit" the hearsay issue "as to whether or not it was appropriate to let all that in. So I don't believe I did object to it." The following exchange occurred:

> *Appellate Counsel*: Do you recall why you didn't? I understand the response with respect to the doctor's, but with respect to the other witnesses, do you recall why you decided not to?
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> *Defense Counsel*: Boy, I really can't give you a specific recollection as to why I did nor didn't in the trial situation. I may have just thought it was – would be a useless objection, based upon what happened at the prelim.

In its written opinion following the *Ginther* hearing, the trial court found that it was likely that the doctor's testimony concerning the complainant's statements in this case was admissible under MRE 803(4) as construed in *People v Meeboer (After Remand)*, 439 Mich 310; 484 NW2d 621 (1992) (*Meeboer II*), which affirmed *Meeboer I*. We find no abuse of discretion in this regard on this record.

See, generally, *Meeboer II, supra*. Thus, we conclude that admission of the doctor's testimony in this case did not constitute evidentiary error. Because defense counsel was not required to raise a meritless objection to the doctor's testimony, we likewise conclude that defense counsel's failure to object to the doctor's admissible testimony at trial was not objectively unreasonable. *Mitchell, supra*; *Torres, supra*.

With respect to the remaining challenged hearsay testimony, the trial court held as follows in it written opinion following the *Ginther* hearing:

> While similar testimony of the victim's mother[8] and step-father[9] is more problematic, it is not necessarily inadmissible, particularly given the victim's in-court identification of defendant as the perpetrator. As the people suggest, the defendant's attack on such testimony presumably would be based at least in part upon an allegation of recent fabrication, thereby permitting such testimony. MRE 801(d). And even if such testimony is considered to be inadmissible, it should not in this court's opinion be the basis of an ineffective assistance of counsel claim because of the cumulative nature of such testimony, and the apparent harmlessness of same.

We note that the trial court failed to analyze or consider the police officers' alleged hearsay testimony.

MRE 801(d)(1)(B) provides as follows:

> A statement is not hearsay if . . . [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

In order to be admissible under MRE 801(d)(1)(B) the prior consistent statement must have been made before the alleged influence or motive to fabricate occurred. *Tome v United States*, 513 US 150; 115 S Ct 696; 130 L Ed 2d 574 (1995); *People v Brownridge*, 225 Mich App 291, 302; 570 NW2d 672 (1997), lv gtd on other grounds 458 Mich 865 (1998); *People v Rodriquez (On Remand)*, 216 Mich App 329, 331; 549 NW2d 359 (1996).

In this case, our review of the record does not reveal that the prosecutor intended to specifically admit the testimony of the police and the complainant's parents for the purpose of rebutting an allegation of recent fabrication by, or improper influence or motive of, the complainant. Rather, this evidence was simply admitted without objection during the course of these witnesses' testimony. However, defense counsel did point the finger at the complainant's parents during opening statement. Defense counsel also suggested during closing argument that the complainant had been coached to accuse defendant and that the complainant's motive to continue his accusations was the fear of permanent separation from his father. Thus, we agree with the trial court that some of the challenged testimony was potentially admissible under MRE 801(d)(1)(B), particularly the stepmother's, whose testimony indicates that as soon as she observed and asked about the complainant's injuries the complainant told her that he was injured by defendant, with the resulting inference that there was no time or opportunity for improper

influence before the first statement occurred.[10] However, we decline, as did the trial court, to consider this issue further because, contrary to defendant's suggestion on appeal, the record simply is not clear concerning when the improper influence or motive to fabricate is alleged to have arose in this case.

Rather, we will consider the trial court's conclusion that any erroneous admission of hearsay testimony was harmless, i.e., not prejudicial. We initially note that in an evidentiary context, contrary to the trial court's analysis, the fact that the erroneous admission of hearsay evidence was cumulative "standing alone, does not automatically result in a finding of harmless error." *People v Smith*, 456 Mich 543, 555; 581 NW2d 654 (1998). In *Strickland*, *supra* at 695-696, the Supreme Court explained that the determination of prejudice in the context of a claim of ineffective assistance of counsel requires a consideration of the totality of the circumstances:

> Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

In this case, the primary issues facing the jury were the identity of the person who injured the complainant and whether the complainant suffered serious physical harm. The erroneously admitted hearsay testimony did not impact the determination of serious physical harm, of which sufficient evidence was admitted,[11] but did relate to the determination of the complainant's credibility and, therefore, the issue of identity. However, the determination of identity did not depend solely on the credibility of the complainant and defendant. Rather, in this respect, evidence was admitted that defendant not only had the opportunity to inflict the complainant's injuries, but also the motive to do so.[12] Moreover, evidence was admitted that when the complainant's parents came to pick up the complainant and his siblings from defendant's house on Monday defendant wanted just the complainant but not the complainant's siblings to remain with defendant, thus raising an inference of guilty knowledge.

However, the credibility of the complainant and defendant was a crucial component of the determination of identity. The complainant apparently has some sort of developmental delay or delays and, as noted by defense counsel, the prosecutor and the trial court throughout this case, apparently was not a particularly good witness on the stand, unable at times to answer even the simplest of questions. Nevertheless, the complainant was able to tell his story. When asked by the prosecutor "Who did it to you?" the complainant did respond "Richard Narlock." At varying points, the complainant was able to detail that "Rick Narlock" kicked him down the stairs, burned his penis with a lighter, and twisted his testicles. And, when shown a photograph of the injuries to his legs, the complainant testified that he fell in the basement when "Rick Narlock" kicked him. The doctor's admissible testimony concerning the complainant's statements of the cause of his injuries as well as the

actual results of the doctor's physical examination of the complainant corroborated the complainant's testimony.

The prosecutor did refer during closing and rebuttal argument to the consistency of the complainant's statements to his parents, the police and the doctor, which probably tended to bolster the complainant's credibility somewhat. However, the prosecutor's remarks in this regard were brief. Moreover, the prosecutor placed his greatest emphasis on the doctor's admissible testimony, noting that the doctor had examined the complainant alone in a nonthreatening situation removed from any outside influences. Finally, during rebuttal argument, the prosecutor persuasively argued the complainant's credibility from evidence properly elicited during defense counsel's cross-examination of complainant. Thus, we conclude that any erroneous admission of hearsay testimony did not unfairly bolster the determination of the complainant's credibility.

Most importantly, we cannot say that any erroneous admission of hearsay testimony eroded defendant's theory of the case. As indicated previously, defendant's theory was that either the complainant's father or stepmother injured the complainant's genitals. This theory was bolstered at trial by discrepancies between the testimony of the father and the stepmother concerning the discovery of the complainant's injuries and by the stepmother's apparent demeanor during cross-examination. This theory was also bolstered by evidence that the complainant's father had eleven previous contacts with protective services for child neglect, that the stepmother had previously been accused of leaving "a little bruise" on the complainant, and that on the evening before the second day of trial the father's and stepmother's children, including, apparently, the complainant, were removed by protective services apparently because of allegations of child abuse by the stepmother and neglect.

Significantly, defendant's theory was also that someone, most likely the father or stepmother, had coached the complainant to accuse defendant. That the complainant was deficient to the point where he was unable to answer many simple questions but nevertheless was able to maintain a consistency in his story to his parents, the police and the doctor fit defendant's "coaching" theory aptly and was emphasized by defense counsel during closing argument:

> Let's take another look at [the complainant], and his – certainly initially, we have all kinds of concerns about his ability to understand and communicate. It's very limited, you could observe that both when [the prosecutor] and I were talking to him. But he seemed to have a degree of understanding and a degree of communication that suggests that you can at least reach him. If he can be reached under these circumstances, he can be reached when he's at home, by a parent, somebody in parent authority.
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> Could he be coached, could he accept what somebody is telling him and repeat it and repeat it and repeat it? Is it his or is it somebody else's? You're going to have to decide that. And part of deciding that, consider this. When I was talking with [the complainant], I asked him things like, well, how often did you go over to [defendant's]? Have you ever been there before? No.

> He made it sound like this was the first time he was ever there. And we know he's been going over there regularly for a year. Why would he say something like that? Well, because that's not part of the story. See, he's gonna stick to the story. Now, I'm not suggesting that [the complainant] is some kind of bad kid, that he is being devious. I'm not sure he's capable of it. But I think he can take direction from somebody who has authority over him.
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> Why wouldn't he be able to give that? Because it's not part of the story. Were any other adults over there at any time during that weekend? Seemed like a pretty simple question, doesn't ask for anything dramatic in terms of response. No. Why couldn't he give me that? That's not part of the story.
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> The only thing that [the complainant] could testify to, and testify consistently to, was the story, the original story, the story that never changed, that, yes, I was hurt and [defendant] did it. But he could not add any other detail whatsoever. You have to take a good look at that and decide whether that means anything to you.
>
> That's for your decision, not mine, but I suggest to you that it ought to, it ought to have some real significance and give you pause as to whether or not this is [the complainant] talking or this is somebody else whispering in his ear. Could he accept such a suggestion? I believe he could. Would he have any motive to continue such a perception? Motive demonstrated itself in this trial. He has fear of permanent separation from his dad.

Finally, we note that the trial court had the opportunity to observe the trial dynamics, including the witnesses and the extent to which any inadmissible hearsay improperly effected the determination of the complainant's credibility, and found that any erroneous admission of hearsay evidence was harmless.

We thus conclude that defendant has failed to meet his burden of establishing prejudice, i.e., that, absent the admission of the inadmissible hearsay testimony, the jury would have had a reasonable doubt respecting guilt. *Strickland, supra* at 695. Thus, defendant has not shown that defense counsel's failure to object to the admission of the challenged hearsay testimony denied defendant the effective assistance of counsel. *Mitchell, supra* at 156. For the same reasons, we conclude that any separate unpreserved evidentiary error did not result in manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

In summary, we conclude that defendant has failed to establish that he was denied the effective assistance of counsel. Accordingly, the trial court did not abuse its discretion in denying defendant's motion for a new trial on this ground. *Torres, supra* at 415. We likewise conclude that defendant has failed to establish that any evidentiary error that did occur, standing alone, warrants reversal.

Next, defendant argues after remand that the prosecutor and police failed to disclose his statement that he refused comment and requested an attorney at the time of his arrest. Defendant does not argue that such failure violated a discovery rule or statute. Rather, defendant contends that the alleged failure to disclose violated his due process right to a fair trial.

Defendant's claim is based on defense counsel's testimony at the *Ginther* hearing that there was no indication in Officer Zaidel's two-page police report that defendant had made any statements. Officer Zaidel did testify at trial that he did not document in his police report the conversation he had with defendant at the time of defendant's arrest. Officer Zaidel testified that he did not believe that this conversation "was important to go in my report," but that the conversation might be in "the detective's report."

Contrary to defendant's contention, we will not conclude that the prosecutor actually knew, as evidenced by the form of his question, that Officer Zaidel would testify that at the time of his arrest defendant refused to comment and requested an attorney. As even noted by defense counsel at the *Ginther* hearing, the prosecutor's question to Officer Zaidel did not necessarily call for the response given by Officer Zaidel. However, we do agree with defendant that the prosecutor will be imputed with knowledge of facts that are known to its chief investigative officer. *People v Lester*, ___ Mich App ___; ___ NW2d ___ (Docket No. 199269, issued October 23, 1998), slip op at 7.

However, a review of defense counsel's cross-examination of Detective Alexander at trial reveals that defendant's statement at the time of his arrest that the complainant had fallen down stairs was in Detective Alexander's report. Defense counsel also cross-examined Detective Alexander about defendant's request for an attorney after being advised of his *Miranda* rights at the police station, thus raising the inference that this fact was also included in Detective Alexander's report. Defense counsel did not cross-examine Detective Alexander concerning defendant's refusal to comment and request for an attorney at the time of his arrest. Thus, we are unable to determine whether this statement was included in Detective Alexander's report. Accordingly, it is unclear on this record whether there was any failure to disclose this statement to defendant.

However, defendant's favorable statement that the complainant fell down stairs was disclosed to defendant through Detective Alexander's report. Defendant's statement at the time of his arrest that he refused to comment and requested an attorney was not favorable to defendant, was known to defendant, and it is not clear on this record that the prosecution suppressed this statement. Moreover, we do not find on this record any suppression that was intentional or any bad faith on the part of the prosecutor or police. Thus, we conclude that defendant has failed to state a cognizable due process claim. See *People v Fink*, 456 Mich 449, 453-454; 574 NW2d 28 (1998); *Lester, supra* at slip op p 8; cf. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992); *People v Leigh*, 182 Mich App 96; 451 NW2d 512 (1989).

Affirmed.

/s/ Joel P. Hoekstra
/s/ William B. Murphy
/s/ Michael R. Smolenski

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[2] A person is in custody when they have been formally arrested or when their freedom of action has been deprived in a significant manner. *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997); *People v McElhaney*, 215 Mich App 269, 278; 545 NW2d 18 (1996).

[3] Interrogation refers to express questioning or any words or actions on the part of the police that the police should know are reasonably likely to elicit an incriminating response. *People v Raper*, 222 Mich App 475, 479; 563 NW2d 709 (1997).

[4] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[5] Such impeachment is proper when a defendant testified at trial that he made a post-*Miranda* statement to the police consistent with his trial testimony or that that the trial was his first opportunity to explain his version of the events. *Allen, supra*; *Schollaert, supra* at 163.

[6] The only argument by the prosecutor concerning defendant's statements to the police was during rebuttal when the prosecutor, in response to an inference raised by defense counsel that defendant had not "clammed up" but rather had been very open and talkative with the police, reminded the jury that defendant's explanation to the police had been limited to stating that the complainant had fallen down the stairs.

[7] For these same reasons we would also hold that any error by counsel in failing to move to strike Officer Zaidel's testimony and request a cautionary instruction did not prejudice defendant.

[8] The record at trial indicates that this person was actually the complainant's step-mother.

[9] The record at trial indicates that this person was actually the complainant's father.

[10] However, we are sure that defendant would argue that the first statement by the complainant was also the result of improper influence.

[11] MCL 750.136b; MSA 28.331; *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

[12] Evidence was admitted that the complainant's stepmother and defendant had previously had a romantic relationship and that defendant wanted to marry the stepmother. The prosecutor theorized that defendant took out his frustration in being unable to have the stepmother on the complainant, who apparently bore a physical resemblance to the stepmother's current boyfriend, the complainant's father.