STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 27, 1999
v	No. 205167 Oakland Juvenile Court
SEAN DENNIS MEDLEY, Defendant-Appellant.	LC No. 97-062759 DL

Before: Saad, P.J., and Murphy and O'Connell, JJ.

PER CURIAM.

Following delinquency proceedings before a jury, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(d)(ii); MSA 28.788(2)(1)(d)(ii), and second-degree criminal sexual conduct, MCL 750.520c(1)(d)(ii); MSA 28.788(3)(1)(d)(ii). Defendant was sentenced to an indefinite term at Children's Village in Oakland County. We affirm.

Defendant first argues that the trial court erred in admitting statements complainant made to her social worker under the medical diagnosis exception to the hearsay rule because there was no indication that the statement was made with the motivation to speak the truth in order to receive proper care and medical treatment. We disagree. We review a trial court's decision to admit or exclude evidence for abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

MRE 803(4) allows for the admission of statements that are made for the purposes of medical diagnosis in connection with treatment, and describe medical history, past or present symptoms, pain or sensations, or the inception or general character or external source of the injury insofar as reasonably necessary to diagnosis or treatment. MRE 803(4); *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). The rationale supporting the admission of statements under MRE 803(4) is the existence of the (1) self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient. *Meeboer*,

supra. This exception extends to statements made to psychiatric social workers, and psychiatric counseling constitutes treatment within the meaning of the rule. See *In re Freiburger*, 153 Mich App 251, 257; 395 NW2d 300 (1986).

While our Supreme Court has noted that "statements made in the course of treatment of psychological disorders may not always be as reliable as those made in the course of treatment of physical disorders," *LaLone*, *supra* at 110, the record is devoid of any evidence suggesting that complainant's motive for making the statement was other than to seek emotional and psychological therapy. In addition, the statements were reasonably necessary for treatment. *Id.* at 112 n 5, citing Weinstein & Berger, Evidence, ¶ 803(4)[01], p 803-150; *In re Freiburger*, *supra* at 258 (statements by victim of sexual abuse to psychiatric social worker were reasonably necessary for treatment and diagnosis because fact that victim was abused was significant in treating the resulting emotional and behavioral problems). The social worker testified that she elicited the facts of the incident to assist in complainant's therapy. She stated that having complainant recount the occurrence would increase her self-esteem, decrease her depression, and help her to put the past behind her. Because the statements were sufficiently trustworthy and were reasonably necessary for diagnosis or treatment, we conclude that the trial court did not abuse its discretion in admitting the statements under MRE 803(4).

Defendant next argues that the trial court abused its discretion in admitting complainant's statement to her friend, Becky Snover, that defendant had raped her. We disagree. To be admissible under MRE 803(2), two primary requirements must be met: (1) there must be a startling event, and (2) the resulting statement must be made while under the excitement caused by that event. *Smith*, *supra*. The focus of the rule is "the lack of capacity to fabricate, not the lack of time to fabricate. The question is not strictly one of time, but the possibility of conscious reflection." *Smith*, *supra* at 551, citing 5 Weinstein, Evidence (2d ed), § 803.04[4], pp 803-82.

We conclude that the trial court did not abuse its discretion in admitting the statement as an excited utterance. There is little doubt that the alleged sexual assault was a startling event. Complainant testified that she was dragged into a dark shed by both defendant and the codefendant where she was assaulted against her will. See *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988) ("few could quarrel with the conclusion that a sexual assault is a startling event"). The pivotal issue is whether complainant was still under the stress of the event when she made the statement. Stover testified that complainant was scared, upset, uncharacteristically unhappy, and not talkative when complainant spoke to her shortly after the incident. Moreover, complainant began crying after she told Snover what had occurred. These circumstances, combined with the short interval, a couple of hours, between the assault and the statement, support an inference that the statement was made out of a continuing state of emotional shock precipitated by the assault itself. Although defendant argues that the gap between the event and the statement was too great, lapses of time considerably exceeding the period in this case did not preclude admissibility under the exception. See, e.g., *Smith*, *supra* at 552 (ten hours); *People v Soles*, 143 Mich App 433, 438; 372 NW2d 588 (1985) (five days).

Defendant also asserts that the statement should not have been admitted as an excited utterance because the prosecutor failed to present independent evidence that the startling event ever took place, contrary to *People v Burton*, 433 Mich 268, 294-295; 445 NW2d 133 (1989). However, contrary to defendant's claim, complainant's testimony that she had been sexually assaulted direct evidence sufficient to establish the foundation for the excited utterance.

Next, defendant contends that the trial court abused its discretion in permitting the prosecutor to introduce similar acts testimony from another female victim concerning sexual assaults defendant committed against her. Defendant also contends that the trial court abused its discretion in permitting complainant to testify concerning a sexual assault defendant perpetrated against her shortly after the incident for which defendant was charged. We disagree. Other acts evidence is admissible under MRE 404(b) when (1) the evidence is offered for a proper purpose rather than to prove the defendant's character or propensity to commit the crime, (2) the evidence is relevant to an issue of fact or consequence at trial, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994).

We conclude that the trial court did not abuse its discretion in admitting the other acts evidence under MRE 404(b). In each case, the evidence was relevant to counteract defendant's claim that complainant consented to the assault. See *People v Asevedo,* 217 Mich App 393, 398; 551 NW2d 478 (1996). Moreover, instead of being used to establish a propensity to commit sexual assaults, the evidence established that defendant had a consistent pattern or scheme in approaching and overcoming his victims. See *People v Miller (On Remand)*, 186 Mich App 660, 664; 465 NW2d 47 (1991). The contested testimony established that defendant physically removed his victims to a remote location and, on at least two occasions, employed the identical method of overcoming the victim's refusal to submit to him. Because the evidence showed a consistent, regimented manner of perpetrating the sexual assaults, the evidence was properly introduced to establish defendant's common scheme.. Further, under these circumstances, the evidence was not more prejudicial than probative. Accordingly, the trial court did not err in admitting the other acts evidence.

Next, defendant claims that the trial court erred in failing to give a limiting instruction with respect to other acts evidence. However, this issue is not preserved for review because defendant did not request the instruction and did not object to the instructions given. *People v Welch*, 226 Mich App 461, 463; 574 NW2d 682 (1997). Manifest injustice will not result in our failure to review this issue. See *People v Chism*, 390 Mich 104, 119-120; 211 NW2d 193 (1973).

Next, defendant contends that the trial court abused its discretion in excluding love letters that complainant wrote to the codefendant after the charged incident pursuant to the rape-shield statute, MCL 750.520j; MSA 28.788(10). However, we conclude that the error, if any, is harmless. The record reveals that, despite the trial court's ruling, defense counsel was not only able to elicit from the complainant that she had written the letters to the codefendant, but excerpts of the letters were also revealed to the jury. Accordingly, we do not believe that defendant was prejudiced by the trial court's ruling.

Finally, defendant contends that the trial court erred in excluding testimony from defendant's mother regarding a past relationship that she had with complainant's boyfriend. Defendant, however, failed to make a complete offer of proof and, from the evidence presented, this Court fails to see how the evidence would be relevant. MRE 401. Accordingly, this Court is not equipped with the necessary factual background to review this issue.

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Peter D. O'Connell