

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BEVERLY KIM TYLER,

Defendant-Appellant.

UNPUBLISHED

April 30, 1999

No. 203723

Berrien Circuit Court

LC No. 96003212 FC

Before: McDonald, P.J., and Sawyer and Collins, JJ.

PER CURIAM.

Defendant appeals by right her conviction on two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) & (b); MSA 28.788(3)(1)(a) & (b), entered after a jury trial. The jury found defendant not guilty on two other counts of criminal sexual conduct in the first degree, MCL 750.520b; MSA 28.788(2). Defendant was sentenced to five to fifteen years in prison on each count, to run concurrently. We affirm.

This case arises from allegations by defendant's two sons that defendant sexually molested them. The older victim provided detailed descriptions about the sexual encounters he experienced with defendant and also testified, over defense objection, that both he and his younger brother molested their younger brother and sister because defendant molested them. The younger victim provided similar testimony about the sexual contact with defendant, but he also testified that his sexual encounters included penetration. Additionally, the younger victim testified that he got in trouble for touching his younger brother and sister and an unrelated boy. He testified that after he told what defendant was doing, he felt better, his grades improved, and he stopped wetting the bed and defecating in his pants.

The victims' father [defendant's ex-husband] testified about changes in the victims' personalities and behaviors. Another witness, a licensed psychologist and social worker who did not treat either victim, testified for plaintiff as an expert in the area of sexual abuse of children and psychology. She testified about the indicators of sexual abuse, many of which occur in children with divorced parents. Among other witnesses, defendant also took the stand and denied touching either of the victims in a sexual manner.

On appeal, defendant first argues that the trial court erred when it excluded evidence that one of the victims had been sexually assaulted by or had sexual contact with two older boys. We disagree. The admission of evidence at trial is within the discretion of the trial court. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). This Court will not disturb a trial court's decision on evidentiary matters absent a clear abuse of discretion. *Id.*

During the hearing on plaintiff's motion in limine, defendant sought permission to introduce at trial information from a police report that two older boys had anally penetrated the younger victim as evidence of a prior false accusation of rape by that victim. The trial court determined that defendant was not entitled to an in camera hearing to determine the admissibility of such evidence because defendant failed to show that the victim's allegations of molestation were false, and thus the trial court determined that such information was protected by the rape-shield statute, MCL 750.520j; MSA 28.788(10).

In *People v Williams*, 191 Mich App 269, 272-274; 477 NW2d 877 (1991), this Court summarized the Michigan Supreme Court's handling of the rape-shield law with regard to false accusations and a defendant's right to confrontation:

[A]s the Supreme Court noted in *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1984), the rape-shield statute does not preclude introduction of evidence to show that a victim has made prior false accusations of rape. Such false accusations are relevant in subsequent prosecutions based upon the victim's accusations because the fact that the victim has made prior false accusations of rape directly bears on the victim's credibility and the credibility of the victim's accusations in the subsequent case, and preclusion of such evidence would unconstitutionally abridge the defendant's right to confrontation. See *id.*

* * *

As the [C]ourt explained in *Hackett, supra* at 350, the defendant is obligated initially to make an offer of proof with regard to the proposed evidence and to demonstrate its relevance to the purpose for which the evidence is sought to be admitted. If necessary, the trial court should conduct an evidentiary hearing in camera to determine the admissibility of the evidence, and at the hearing, the trial court has the responsibility of restricting the scope of cross-examination to prevent questions that would harass, annoy, or humiliate the victim and to guard against fishing expeditions. *Id.* at 350-351.

* * *

However, in *Hackett, supra* at 350-351, an evidentiary hearing in this regard should not be utilized as a fishing expedition. In short, if defendant had evidence of a prior false accusation, that could be presented to the court. But defendant was not

entitled to have the court conduct a trial within the trial to determine whether there was a prior accusation and whether that prior accusation was true or false.

Here, defendant's only evidence that the accusation was false was a police report which contained denials from both of the accused boys. The trial court addressed the concerns noted in *Hackett, supra*, 421 Mich 350-351. We conclude that the trial court did not abuse its discretion when it excluded defendant's proffered evidence where defendant failed to offer concrete evidence to establish that the victim had made a prior false accusation of sexual abuse. *Williams, supra*, 191 Mich App 274.

At trial, defendant objected to the older victim's testimony that the victims molested their siblings because defendant molested them and sought to have the comment stricken from the record, which the trial court denied. Although defendant, during a bench conference, maintained that she was entitled to show that one or both of the victims had been molested by others than defendant because testimony was allowed regarding the victims' motive or their explanation of why they engaged in molesting people (that defendant molested them), defendant did not request a hearing. We have stated previously:

While the rape-shield statute discusses the requirements to be followed where the proffered evidence falls within MCL 750.520j(1)(a) and (b); MSA 28.788(10)(1)(a) and (b), our Supreme Court has held that such a hearing procedure applies where the defendant claims that he would be denied his right of confrontation by the exclusion of the victim's prior sexual conduct with third persons. *Hackett, supra* at 350. Moreover, our Supreme Court held that the trial court retains the discretion to exclude relevant evidence where its probative value is substantially outweighed by the risks of unfair prejudice or where it would lead to confusion of the issues or misleading the jury. *Id.* at 351. [*People v Wilhelm*, 190 Mich App 574, 581; 476 NW2d 753 (1991).]

Here, defendant did not request such hearing and had the opportunity to cross-examine the younger victim with regard to the alleged incidents involving defendant, an incident of theft, a previous incident of lying to the police, some sort of touching with his mom's friend's son, and the sexual abuse of his siblings, including his abuse of his younger siblings, and the sexual touching with the older victim, his brother. Although defendant claims that plaintiff elicited the only mention of the incident, which was during the cross-examination of a defense witness, defendant had the opportunity for re-direct examination, during which defendant highlighted the information that defendant reported to her counselor that the younger victim had been molested by older boys.

In *Hackett, supra*, 421 Mich 349, the Michigan Supreme Court stated:

The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion

of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation.

We conclude that the trial court did not abuse its discretion in excluding evidence of the younger victim's sexual encounter with two older boys, despite the testimony that the victims molested their siblings because defendant molested them.

Defendant also argues that her constitutional right to confrontation was violated when the trial court denied her the opportunity to offer an alternative explanation for the younger victim's characteristics of child sexual abuse accommodation syndrome ("CSAAS"). Defendant did not properly preserve this issue for appeal. An issue is unpreserved where a party fails to present on appeal the same ground for which the party objected below. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). However, appellate review of an unpreserved issue is appropriate "where an important constitutional question is raised regarding the admissibility of the evidence and is decisive of the outcome of the case." *People v Catey*, 135 Mich App 714, 722; 356 NW2d 241 (1984). Where the trial court did not address the specific issues raised on appeal, the standard of review is de novo. *Id.* A constitutional error is harmless if it had no effect on the verdict and was not so offensive to the maintenance of a sound judicial system that it can never be regarded as harmless; however, an error is too offensive to be harmless if it deprived the defendant of a fundamental element of the adversarial process. *People v Minor*, 213 Mich App 682, 685-686; 541 NW2d 576 (1995).

Defendant argues that the trial court allowed the younger victim to testify that he exhibited one of the characteristics of CSAAS, sexually acting out, because defendant had molested him, but denied defendant the opportunity to offer an alternative explanation for his exhibited characteristics, thus denying defendant due process and her rights under the confrontation clause. Defendant relies on the decision in *United States v Bear Stops*, 997 F2d 451 (CA 8, 1993), in support of her position.

Although *Bear Stops* bears some similarity to the case at hand, it has no precedential binding force in the Michigan court system, *Radtko v Everett*, 442 Mich 368, 381-382; 501 NW2d 155 (1993); *Lee v Nat'l Union Fire Ins Co*, 207 Mich App 323, 328; 523 NW2d 900 (1994), and we decline to adopt the federal court's reasoning as our own. Michigan law provides its own analysis and process for dealing with constitutional issues with regard to Michigan's rape-shield law.

In *People v Arenda*, 416 Mich 1; 330 NW2d 814 (1982), the Michigan Supreme Court upheld the trial court's ruling, based on the rape-shield law, excluding evidence of sexual conduct between the victim and any other person other than defendant where defendant had wanted the right to introduce such evidence, if he found any, to explain the victim's detailed description of the events. *Id.*, 6, 15. The Court determined that the statute was not unconstitutional as applied in *Arenda*, and left the determination of the constitutionality of future cases to a case by case analysis. *Id.*, 13; see *Hackett, supra*, 421 Mich 338.

The Michigan Supreme Court has held that the in camera hearing procedure provided in the rape-shield statute applies where the defendant claims that exclusion of the victim's prior sexual conduct

with third persons would deny defendant the right of confrontation. *Wilhelm, supra*, 190 Mich App 574. As we explained in *People v Byrne*, 199 Mich App 674; 502 NW2d 386 (1993):

The defendant is obligated initially to make an offer of proof regarding the proposed evidence and to demonstrate its relevance. Absent a sufficient showing of relevancy in the offer of proof, the motion for admission, whether presented at trial or in limine, must be denied.

Even where the defendant surmounts that first hurdle, the next step is not admissibility at trial, but an in camera evidentiary hearing to determine the admissibility of the evidence in light of the constitutional inquiry. [*Byrne, supra*, 678-679 (citations omitted); see also *People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998).]

At trial, defendant failed to make an offer of proof with regard to defendant's theory on appeal regarding CSAAS characteristics. Based on the circumstances of this case, we conclude that it was not an abuse of discretion for the trial court to prohibit testimony of the sexual contact between the younger victim and two older boys where defendant made no offer of proof with regard to CSAAS.

Because we conclude that the trial court did not err in precluding defendant from presenting evidence of the younger victim's sexual contact with two older boys, we need not address defendant's argument that any error is inextricably intertwined with defendant's conviction based on the other victim's allegations.

Next, defendant provides two arguments that the trial court erred in allowing the older victim's testimony that both he and his younger brother had molested another brother and sister because defendant had molested them: (1) the victim lacked the expertise to opine on the cause of his behavior and (2) syndrome type evidence is inadmissible to show that the abuse occurred. We review this issue for an abuse of discretion. *Starr, supra*, 457 Mich 494.

At trial, the older victim testified as follows:

Q. Why do you live--why do you stay the night at your grandmother's? Why do you and [the younger victim] stay there as opposed to staying the night in your father's home?

A. 'Cause we did something that we had to get out of the house about.

Q. Okay. And can you tell the jury what that was? Without going into detail, just what happened.

A. I molested my brother and sister.

Q. Okay. What about [the younger victim]?

A. He did the same thing.

Q. And why did you do that?

A. 'Cause my mother molested us.

Defendant's arguments are without merit. Defendant relies on *People v Peterson*, 450 Mich 349; 537 NW2d 857, amended 450 Mich 1212; 548 NW2d 625 (1995), which addresses the proper scope of expert testimony in child sexual abuse cases; not the scope of the victim's testimony, and *People v Beckley*, 434 Mich 691, 456 NW2d 391 (1990), which deals with expert testimony on syndrome evidence. Here, the witness was the older victim and he was merely testifying as to his own behaviors and the motivations behind these behaviors. Plaintiff never offered the victim as an expert nor suggested that he had some sort of expertise in the area of child sexual abuse. The victim was the first witness at trial and no evidence had been introduced regarding the characteristics of any syndrome.

Any witness is qualified to testify about his physical observations and any opinions he has formed as a result of such observations. *Lamson v Martin*, 216 Mich App 452, 459; 549 NW2d 878 (1996), MRE 701. The Michigan Supreme Court has "steadfastly supported the right of the trier of fact, particularly the jury, to believe, or disbelieve, in whole or in part, any of the evidence presented." *People v Fuller*, 395 Mich 451, 453; 236 NW2d 58 (1975). Because this situation is distinguished from both *Peterson* and *Beckley* and because the trial court's decision to allow the older victim's testimony, over defense objection, was not so grossly violative of fact and logic that there is no justification for the ruling, the trial court did not abuse its discretion in allowing the victim to testify as to why he believed he acted in a particular manner.

Finally, defendant argues that the trial court erred when it allowed a police officer to testify that, in his opinion, the younger victim was truthful. As admitted by defendant, this issue was not preserved for appeal. Generally, issues not properly raised before the trial court cannot be raised on appeal absent compelling or extraordinary circumstances. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Where a defendant fails to object to the admission of evidence, this Court reviews the issue only for manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). We conclude that the police officer's testimony as to the younger victim's truthfulness was improperly admitted where plaintiff failed to establish that such opinion was based on the victim's reputation in the community for truthfulness, not his own personal experience and observation. *People v Walker*, 150 Mich App 597, 602; 389 NW2d 704 (1985). However, no manifest injustice exists because defendant had the opportunity to cross-examine the witness, to establish that the witness had very limited contact with the victim, and to present defense witnesses, many of whom testified that the younger victim was not very truthful. In addition, the record reflects that the jury did not fully rely on such testimony.

Affirmed.

/s/ Gary R. McDonald

/s/ David H. Sawyer

/s/ Jeffrey G. Collins