STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL R. MURDAUGH,

Defendant-Appellant.

UNPUBLISHED
August 10, 1999

No. 208007
Oakland Circuit Court
LC No. 97-153839 FC

Before: Bandstra, C.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f) (personal injury). He was sentenced to eight to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court erred in allowing medical personnel to testify concerning statements complainant made to them about the circumstances surrounding the sexual assault under the medical diagnosis and treatment exception to the hearsay rule. Defendant contends that certain parts of the statements should not have been admitted because they were not reasonably necessary for diagnosis or treatment. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998); *People v Sullivan*, 231 Mich App 510, 514; 586 NW2d 578 (1998).

MRE 803(4) allows for the admission of statements that are made for the purposes of medical diagnosis in connection with treatment and that 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. *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992); *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1996). The rationale supporting the admission of statements under MRE 803(4) is the existence of (1) the declarant's 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*; *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). MRE 803(4) is not limited to statements made to medical doctors, *In re Freiburger*, 153 Mich App 251,

257; 395 NW2d 300 (1986), but rather, it also encompasses statements made to nurses, *People v Van Tassel (On Remand)*, 197 Mich App 653, 656; 496 NW2d 388 (1992); *People v Zysk*, 149 Mich App 452, 456-458; 386 NW2d 213 (1986).

The complainant was nine months pregnant when she was admitted to the hospital after defendant's brutal attack. Given the complainant's situation, the doctors and nurses needed to know the extent of the trauma she experienced, including any stressful or disruptive events that may have preceded the sexual assault, in order to effectively evaluate both her condition and the condition of her unborn child See *Crump*, *supra* at 212 (the victim's statements to medical personnel describing the beatings and rape that led to her injuries were admissible under MRE 803(4)). Thus, as every physician and nurse at issue testified, the information concerning the assaultive and violent events surrounding the sexual assault was necessary to properly diagnose and treat the complainant. *Meeboer*, *supra* at 329; *McElhaney*, *supra* at 283 (sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment). Moreover, defendant has failed to overcome the presumption that the complainant's statements were truthful. *Crump*, *supra* at 212. Accordingly, we conclude that the trial court did not abuse its discretion in admitting the statements under MRE 803(4). Further, the statements were cumulative to the complainant's testimony and were therefore harmless. *Crump, supra*; *McElhaney, supra.*

Next, defendant argues that the trial court erred in admitting hearsay testimony from complainant's mother regarding what complainant told her about the incident during a phone call made ten minutes after she left defendant's apartment and when she arrived home shortly thereafter. Defendant contends that the statements cannot be deemed excited utterances because they were made after defendant had apologized for his actions and displayed other signs of remorse. We disagree.

A statement is admissible under MRE 803(2) if: (1) there was a startling event, and (2) the resulting statement was made while the declarant was under the excitement caused by that event. *Smith*, *supra* at 550; *People v Straight*, 430 Mich 418, 423-424; 424 NW2d 257 (1988). 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 of the possibility for conscious reflection." *Smith*, *supra* at 551. "The trial court's determination whether the declarant was still under the stress of the event is given wide discretion." *Id.* at 552.

After a thorough review, we conclude that the trial court did not abuse its discretion in admitting the statements as excited utterances. There is little doubt that the alleged sexual assault and the circumstances surrounding the assault constituted a startling event. According to complainant, defendant forced her to drive to his apartment, coerced her out of the car and into the apartment with threats and physical force, took her keys so she could not leave, slapped her several times, knocked her to the ground and tried to choke and suffocate her, and then had sex with her against her will. See *Straight*, *supra* at 425 ("[f]ew could quarrel with the conclusion that a sexual assault is a startling event"). Therefore, the first requirement, that there be a startling event, was satisfied.

In addition, the record reveals that complainant was still under the stress of the excitement from the incident at the time she told her mother what happened over the phone and at home. When

complainant made the statements to her mother, she was "very upset," "frazzled," "crying," "not in the right mind," concerned for her unborn child, and bruised and scratched. Complainant's physical condition and emotional state, coupled with the fact that both statements were made within an hour after the actual sexual assault occurred and before the police were called, weighs heavily against the risk of fabrication. We reject defendant's claim that he mitigated complainant's stress by apologizing to complainant, offering to take her to the hospital, and offering to buy her something to drink after the assault. Even after defendant's apology, he would not give her the keys to her car so she could leave, he insisted that they go to the store to get something to drink despite complainant's request to go home, and, when he finally allowed complainant to leave, she refused to give him a hug despite his request to do so and testified that she "wanted to get out of there as fast as [she] could." Thus, the record belies defendant's claim that his apology or other alleged signs of remorse somehow diminished the stress of excitement caused by the event.

Finally, defendant argues that the trial court impermissibly sentenced him on the basis of his refusal to admit guilt because the trial court's conclusion that he lacked remorse was not supported by the record and was based on a statement in the presentence investigation report that stated that "the defendant adamantly denies his guilt . . . . Consequently, the defendant does not display remorse." We disagree.

In the circumstances of this case, we need not consider whether a trial court may permissibly consider a defendant's failure to admit guilt as an aggravating factor in sentencing because the record does not reflect that the trial court considered a failure to admit guilt in sentencing defendant. Rather, the trial court indicated that it considered the distinct factor that defendant lacked remorse. It is well-established that a sentencing court may consider a lack of remorse as an aggravating factor in sentencing. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *People v Steele*, 173 Mich App 502, 506; 434 NW2d 175 (1988).

Upon review of the record, we find no indication that the trial court sentenced defendant based on his refusal to admit his guilt. There was sufficient evidence to support the trial court's conclusion that defendant lacked remorse for his actions. Moreover, although defendant maintained his innocence after conviction, there is no evidence on the record that the trial court attempted to get defendant to admit guilt or implied that had defendant admitted his guilt, his sentence would have been less severe. Finally, the presentence report, without more, does not establish that the trial court relied on defendant's refusal to admit guilt in imposing his sentence. In the present case, the trial court permissibly based the sentence on the serious nature of the offense as well as defendant's failure to show lack of remorse for his actions. Accordingly, the trial court did not abuse its sentencing discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990)

We affirm.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot