STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 1999
v LILLIAN FISHER, Defendant-Appellant.	No. 211200 Kalamazoo Circuit Court LC No. 97-001263 FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v CLARENCE STERNAMAN, JR., Defendant-Appellant.	No. 211295 Kalamazoo Circuit Court LC No. 97-001264 FC

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Defendant Lillian Fisher appeals by right from her convictions, following a bench trial, of three counts of first degree criminal sexual conduct ("CSC I"), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), one count of attempted CSC I, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), MCL 750.92; MSA 28.287, and one count of pandering, MCL 750.455; MSA 28.710. Defendant Clarence Sternaman, Jr., appeals by right from his convictions by a jury of three counts of CSC I and one count of attempted CSC I.

The trial court sentenced Fisher to (1) three terms of twenty-five to fifty years' imprisonment for the CSC I convictions, (2) forty to sixty months' imprisonment for the attempted CSC I conviction, and (3) twelve to twenty years' imprisonment for the pandering conviction. Applying a fourth-offense

habitual offender enhancement under MCL 769.12; MSA 28.1084, the court sentenced Sternaman to (1) life imprisonment for one of the CSC I convictions, (2) two terms of thirty to sixty years' imprisonment for the remaining CSC I convictions, and (3) fifteen to thirty years' imprisonment for the attempted CSC I conviction. We affirm the convictions and sentences of both defendants, but we remand Fisher's case for the correction of her presentence investigation report ("PSIR").

Defendants contend that the trial court erred by allowing into each of their trials the examining doctor's hearsay testimony regarding the victim's identification of defendants as her abusers. Defendants claim that the statement in which the victim identified them was unrelated to any medical diagnosis or treatment and therefore did not fall within the MRE 803(4) hearsay exception for statements relating to medical diagnoses or treatments. We review a trial court's admission of evidence for an abuse of discretion. *People v Bartlett*, 231 Mich App 139, 158; 585 NW2d 341 (1998).

We disagree that the trial court abused its discretion by admitting the doctor's testimony. In *People v Meeboer (After Remand)*, 439 Mich 310, 322-330; 484 NW2d 621 (1992), the Supreme Court indicated that a hearsay statement in which a sexual assault victim identifies her assailant to a doctor can be admissible if the statement was reasonably necessary for medical diagnosis and treatment. The *Meeboer* Court further indicated that if the victim is young, certain "reliability factors" first must be analyzed to determine if the child, while making the statement at issue, understood the need to tell the doctor the truth in order to receive proper medical treatment. *Id*. at 322-326.

Here, the examining doctor testified that knowing the identity of a sexual assault victim's assailant or assailants is helpful in determining whether a sexually transmitted disease might be present. Therefore, notwithstanding defendants' allegations to the contrary, the victim's statement was reasonably necessary for medical diagnosis under MRE 803(4).[1] *Meeboer*, *supra* at 328-329. Moreover, since the victim was eleven years old at the time she made the statement to the doctor,[2] the *Meeboer* "reliability factors" were inapplicable and there existed a rebuttable presumption that the victim understood the need to tell the truth to medical personnel. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662; 496 NW2d 388 (1992). Neither defendant rebutted this presumption. Accordingly, the trial court did not abuse its discretion in admitting the victim's identification statement under MRE 803(4).[3]

Fisher argues that the trial court gave her a disproportionately long term of incarceration. She does not specifically state which of her sentences she deems disproportionate, but the context of her argument indicates that she is referring solely to her three concurrent sentences for CSC I. We review a trial court's sentencing decision for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it violates the principle of proportionality, which mandates that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id*.; *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995). Here, because Fisher's CSC I sentences fell within the sentencing guidelines' recommended range, they were presumptively proportionate. *People v Moseler*, 202 Mich App 296, 300; 508 NW2d 192 (1993). If unusual circumstances existed, however, they nonetheless could have violated the principle of proportionality. *Milbourn*, *supra* at 661. In *People v Sharp*, 192

Mich App 501, 505; 481 NW2d 773 (1992), the Court defined "unusual" in this context as "[u]ncommon, not usual, [or] rare."

Fisher implies that her case presented unusual circumstances because she (1) was suffering from mental illness and substance abuse problems when the assaults occurred, (2) had no history of assaultive crimes, and (3) allegedly was not present when the assaults occurred. We first note that this Court already has held that a lack of criminal history is not an unusual circumstance that can overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Moreover, the trial court – the trier of fact in Fisher's case – concluded that Fisher had indeed been present during the assaults. Finally, we note that mental instability and substance abuse problems are not particularly rare in felony cases, either individually or collectively. Accordingly, Fisher's CSC I sentences did not violate the principle of proportionality, especially given the heinous circumstances of this case, in which Fisher had her ten-year-old daughter engage in various sex acts with Sternaman, in order to obtain money.[4]

Fisher additionally contends that her case should be remanded to the trial court for the correction of her PSIR. She contends that two items should be struck from the report: (1) a statement that her driver's license suspension had been extended for non-payment of fines, and (2) a statement that her doctor was considering weaning her from a certain mental health medication. Whether Fisher's PSIR must be corrected is a question of law. This Court reviews questions of law de novo. *People v Walker*, 234 Mich App 299, 302; 593 NW2d 673 (1999).

MCR 6.425(D)(3) provides that when information in a PSIR is challenged, "the court must make a finding with respect to the challenge or determine that a finding is unnecessary because it will not take the challenged information into account in sentencing." If the court finds the challenge meritorious or determines that it will not consider the challenged information, "it must direct the probation officer to correct or delete the challenged information in the report. . . ." MCR 6.425(D)(3)(a). See also MCL 771.14(6); MSA 28.1144(6). Here, the court indicated (1) that it was not considering the information about the extension of the driver's license suspension, and (2) that it would accept Fisher's assertion that her doctor had not considered any medication weaning. Accordingly, the court should have ordered this information stricken from the PSIR, and we remand Fisher's case for the correction of the report.

Sternaman contends that the trial court abused its discretion by allowing the admission of hearsay testimony by Thomas Szekely, the police detective who investigated the case, regarding what the victim said about the acts committed by Sternaman. We agree that portions of this testimony should not have been admitted because they did not fall within any exclusions or exceptions to the general rule excluding hearsay. We conclude, however, that any error in admitting Szekely's testimony was harmless, given that the victim herself testified at trial regarding the same acts about which Szekely testified. Indeed, given the cumulative nature of the evidence, it could not reasonably have affected the outcome of the trial. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999) (nonconstitutional error does not require reversal unless "it is more probable than not that the error was outcome determinative") and *People v Rodriquez (On Remand)*, 216 Mich App 329, 332; 549

NW2d 359 (1996) (where sexual assault victim testified about the same subject matter contained in hearsay testimony, error in admitting the hearsay testimony was harmless).

Next, Sternaman argues that the prosecutor committed misconduct requiring reversal by eliciting testimony in which a police officer gave an allegedly "editorialized version" of an informal statement by Sternaman given prior to a formal, written statement. We review alleged prosecutorial misconduct to determine whether the defendant was denied a fair trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). We view each case on its own particular facts and analyze allegedly improper conduct in context. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). A determination of impropriety must rest on an evaluation of all the facts, evidence, and arguments in a case. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Here, even assuming that Sternaman had preserved this issue by objecting to the officer's testimony (which he did not), we find no error requiring reversal. The prosecutor did nothing more than elicit Sternaman's statements, which were admissible as admissions of a party-opponent under MRE 801(d)(2). See also *People v McGillen # 1*, 392 Mich 251, 263; 220 NW2d 677 (1974) (a defendant's statements are admissible against him at trial). There was no indication that the officer attempted to inflate or invent any of the statements, and the testimony was therefore proper. See *People v Stander*, 73 Mich App 617, 627; 251 NW2d 258 (1976).

Sternaman additionally argues that the prosecutor committed misconduct requiring reversal by allegedly indicating during closing arguments that (1) the jurors should convict Sternaman based on sympathy for the victim, (2) Sternaman lied on the witness stand, (2) he (the prosecutor) personally believed in Sternaman's guilt, and (3) the prosecutor's office as a whole believed in Sternaman's guilt. We disagree that any misconduct requiring reversal occurred. Examined in context, the prosecutor's comments did not evidence an improper sympathy argument but instead focused on the believability of the victim as compared to the believability of Sternaman. This credibility contest was a proper focus. See *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). Also proper was the prosecutor's comment that Sternaman lied during trial, since the prosecutor based this comment on the evidence introduced at trial. *Id*. Indeed, a trial is not a vacuum wherein subtle nuances are de rigueur and counsel are shackled into using stilted, archaic phraseology (e.g. "mendacity" or "prevarication" versus "lie"). See *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996) (prosecutor is not required to argue in blandest possible terms). Finally, the prosecutor at no time mentioned his personal belief, nor the belief of the prosecutor's office as a whole, in Sternaman's guilt. Accordingly, even assuming that Sternaman had properly preserved this issue by objecting to the prosecutor's comments at trial (which he did not), we find no error requiring reversal.

Next, Sternaman argues that his four sentences were disproportionate and that during sentencing, the trial court failed to consider and discuss appropriate sentencing factors. We disagree. As noted earlier, we review a trial court's sentencing decision for an abuse of discretion. *Milbourn, supra* at 636. Whether the court failed to consider and discuss appropriate sentencing factors, however, is a question of law. We review questions of law de novo. *Walker, supra* at 302. During sentencing, the court considered the severity and nature of Sternaman's crimes and the circumstances surrounding the criminal behavior. The court characterized the offenses as "beyond all bounds of

decency" and "universally condemned by society." Additionally, the court stated that Sternaman's conduct made him a danger to people in general and to young children in particular. It is clear from these statements that the court took into account the particular facts of Sternaman's case. We therefore conclude that the court adequately considered and discussed appropriate sentencing factors, especially since the court was not required to expressly mention each goal of sentencing when imposing Sternaman's sentences. See *People v Johnson*, 173 Mich App 706, 709; 434 NW2d 218 (1988). Moreover, we conclude that Sternaman's sentences were proportionate. Given Sternaman's repeated sexual abuse of a ten-year-old girl and his significant criminal history, his sentences were "proportionate to the seriousness of the circumstances surrounding the offense[s] and the offender." *Milbourn, supra* at 636.

Finally, Sternaman contends that he is entitled to reversal because of cumulative error. We disagree. It is possible that the cumulative effect of a number of errors may constitute error requiring reversal, even though each individual error, in itself, does not require reversal. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). However, since only one of defendant's claims evidences error, and since this error was harmless, no cumulative error requiring reversal has been shown.

The convictions and sentences of both defendants are affirmed, but we remand Fisher's case for the correction of her judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter

Markman, J. did not participate

[1] We note that at one point in the *Meeboer* opinion, the Court implies that the assailant's identity is *always* necessary for medical diagnosis and treatment in sexual assault cases. See *Meeboer, supra* at 322 ("Furthermore, we find that the identification of the assailant is necessary to adequate medical diagnosis and treatment."). We also note that the one-year delay between the assaults and the doctor's examination in the instant case did not, as defendants imply, indicate that the examination was conducted for purposes of litigation, since the delay was caused by the victim's fear-based failure to report the

assaults during this time period. See *People v Hyland*, 212 Mich App 701, 706; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

[2] The victim was ten years old at the time of the criminal acts that formed the basis of defendants' convictions.

[3] Even if the *Meeboer* "reliability factors" *had* been relevant (i.e., even if the victim had been ten years old or younger when she spoke with the doctor), the victim's statement would have nonetheless been admissible, since nearly all the factors weighed in favor of admissibility, and since *every* factor need not be satisfied to justify admission. See *Meeboer, supra* at 326.

[4] Although defendant does not specifically argue that her sentences for attempted CSC I and for pandering constituted an abuse of discretion, we note that these sentences, too, were proportionate, given the egregious circumstances surrounding the assaults. *Milbourn, supra* at 636.