STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS WILLIAM SKINNER

Defendant-Appellant.

UNPUBLISHED
December 21, 1999

No. 208906
Ingham Circuit Court
LC No. 96-070981 FC

Before: Talbot, PJ., Gribbs and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3),[1] and was sentenced to concurrent terms of five to fifteen years' imprisonment on each count. Defendant appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion by ruling that Connie Shewchuck could testify regarding a statement she overheard complainant make to her son. Defendant contends that the statement constituted inadmissible hearsay and was irrelevant. We disagree. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Adams*, 233 Mich App 652, 656; 562 NW2d 794 (1999).

On direct examination, Shewchuck testified that while she could not remember the exact statement, she became startled when she overheard complainant "say something about being in bed." She stated that, as a result of what she overheard, she informed complainant's aunt of the statement. We agree with the trial court's ruling that the statement was not offered to prove the truth of the matter asserted, but to show the effect of the statement on the person who heard it. Accordingly, the statement was not hearsay and was properly admitted at trial. *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987). Likewise, the admission of the statement was proper because it provided the jury with "an intelligible presentation of the full context in which disputed events took place." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Complainant testified that he told Shewchuck's son what defendant had done to him and complainant's mother testified that she first learned of the abuse from her sister (complainant's aunt).

The disputed evidence was also relevant. At trial, defendant advanced the theory that complainant's mother fabricated the charges against him in order to seek revenge because he left her. Thus, evidence establishing the manner in which complainant's mother received the report of possible molestation and that it did not originate with her, had some tendency to make a fact of consequence to the action – that she fabricated the allegations of sexual abuse – less probable. MRE 401; *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909, modified 450 Mich 1212 (1995). Moreover, we note that a more complete version of the statement, which actually implicated defendant, was elicited by defense counsel during cross-examination. A defendant is not permitted to assign error on appeal to something his own counsel deemed proper at trial because to do so would allow a defendant to harbor error as an appellate parachute. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Accordingly, we find no abuse of discretion.

Defendant next contends that the trial court abused its discretion in allowing Dr. Gurten to testify concerning statements complainant made to him during a medical examination. While defendant raised this issue before trial, the court held its ruling in abeyance and defendant failed to renew his objection during Dr. Gurten's testimony. Therefore, this issue is not preserved, *People v Parker*, 230 Mich App 677, 687; 584 NW2d 753 (1998), and our review is limited to whether defendant has demonstrated a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

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 sensation, 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 this exception is the existence of (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care. Where the patient is over ten years old, as here, the trustworthiness factors set forth in *Meeboer, supra*, have no application and a rebuttable presumption arises that the minor understands the need to tell the truth to medical personnel. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662; 496 NW2d 388 (1992); see also *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1996).

At trial, Dr. Gurten testified that complainant told him that defendant sucked his penis, asked complainant to suck and touch his penis, and tried to put his finger and penis into complainant's anus. Dr. Gurten stated that this information was necessary to make a diagnosis regarding possible sexual abuse, to determine the presence of sexually transmitted diseases, and to recommend treatment or psychological therapy. In addition, while the police initiated the examination which occurred at least one year after the alleged assault, the statements were not elicited through the use of leading questions, complainant's use of words to describe the incidents were consistent with his age and level of maturity, and the record is devoid of evidence suggesting that complainant had a motive to lie. Because this evidence establishes that the statements were reasonably necessary for diagnosis and were sufficiently

trustworthy, we conclude that defendant has failed to demonstrate plain error that affected his substantial rights.

Defendant next argues that the prosecutor improperly appealed to the jury's sympathy during final arguments when he consistently referred to complainant's age and that "none of this was his fault." However, defendant neither objected nor requested curative instructions in response to the allegedly improper remarks. Therefore, appellate review is precluded unless the misconduct was so egregious that no curative instruction could have eliminated the prejudice to defendant or failure to consider the issue would result in manifest injustice. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998).

After a contextual review, we find that the prosecutor's comments were proper responses to defendant's consistent attempts throughout trial and closing argument to attack the motives, behavior, and lifestyle of complainant's mother and to impute her motive to fabricate the charges to complainant. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Further, any prejudice resulting from the prosecutor's remarks was cured by the court's instruction that the attorneys' arguments were not evidence and that the jurors should only accept the comments supported by the evidence. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). Therefore, manifest injustice will not result from our failure to consider this issue.

Defendant next asserts that he was denied a fair trial as a result of the cumulative effect of the alleged errors. Given our resolution of the preceding issues, this claim is without merit. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Defendant finally contends that the trial court incorrectly calculated his sentencing guidelines range and imposed a disproportionate sentence. We disagree. Application of the scoring guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1977).

In this case, the factual predicate challenged by defendant was neither wholly unsupported by the evidence nor materially false. The court's scoring of Offense Variable 12 to reflect three sexual penetrations when the jury only convicted defendant of two sexual contacts was not improper because there was evidence to establish, by a preponderance of the evidence, that more than three penetrations occurred. See *People v Ratkov (After Remand)*, 201 Mich App 123, 125-126; 505 NW2d 886 (1993) (the court may consider all record evidence before it when calculating the guidelines; a guidelines scoring decision need only be supported by a preponderance of the evidence); *People v Wiggins*, 151 Mich App 622, 626; 390 NW2d 740 (1986) (the sentencing guidelines instructions permit the court to consider admitted or proven facts in calculating the guidelines score even though the facts are inconsistent with the offense for which defendant is convicted); *People v Harris*, 190 Mich App 652, 663; 476 NW2d 767 (1991) (a sentencing court may consider criminal activity for which the defendant was acquitted).

In addition, defendant's minimum five-year sentence falls within the guidelines range and is, thus, presumptively proportionate, and defendant has presented no evidence of "unusual circumstances" to rebut this presumption. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d

593 (1996). Therefore, defendant has failed to state a cognizable guidelines scoring claim on appeal.

Affirmed.

/s/ Michael J. Talbot
/s/ Roman S. Gribbs
/s/ Patrick M. Meter

[1] Defendant was charged with three counts of first-degree CSC, MCL 750.520b; MSA 28.788(2), but the jury acquitted him on one count and convicted him of the lesser charge on the remaining counts.