

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEONARD RAYMOND KOCH,

Defendant-Appellant.

UNPUBLISHED

April 28, 2000

No. 215178

Kalamazoo Circuit Court

LC No. 98-000723-FC

Before: Jansen, P.J., and Hoekstra and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(a), and sentenced as a fourth habitual offender, MCL 769.12; MSA 28.1084, to eight to fifteen years' imprisonment. Defendant appeals as of right and we affirm.

I

Defendant first argues that the trial court abused its discretion in allowing the victim's pediatrician to testify concerning statements made by the victim during a physical examination conducted approximately two weeks after the assault. Defendant claims that this testimony constituted inadmissible hearsay because the child's statements failed to meet the requirements for admission under MRE 803(4), the medical treatment exception to the rule against hearsay.

The decision to admit evidence will not be reversed absent an abuse of discretion by the trial court. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995). MRE 803(4) allows for admission of statements made for purposes of medical treatment or diagnosis which "describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source" of an injury. The rationale supporting the admissibility of such statements is grounded in the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and the reasonable necessity of such statements to the diagnosis and treatment of the patient. *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992).

In *Meeboer*, our Supreme Court identified several factors to be considered in assessing the trustworthiness of statements made by child sexual abuse victims during a medical examination. Among the factors to be considered in such cases are (1) the manner in which statements were elicited, and (2) who initiated the examination. *Id.* at 324-325.

Citing *Meeboer*, defendant argues that the statements of the nine-year-old victim were not sufficiently trustworthy inasmuch as these statements were made in response to leading questions from the physician during a police-initiated examination. Although “leading questions may undermine the trustworthiness of a statement,” *id.* at 325, we do not believe that the mode of questioning at issue here detracts from the reliability of the child’s statements to her physician. See *People v McElhaney*, 215 Mich App 269, 281; 545 NW2d 18 (1996). Here, the physician testified that while physically examining the child’s vaginal region, she asked the child whether anyone else had ever touched her there. The physician explained that before responding the child looked to her mother and then indicated that defendant had touched her in that area. The physician then asked, “When he touched you, what did he touch you with?” The response from the child was that defendant had touched her with his hands and mouth. At trial, the physician explained that it was necessary at that point to determine whether there had been any skin-to-skin contact and, thus, she asked the child whether, at the time defendant touched her, her underwear was on or off. The child responded that it was on and thus the physician followed with a question as to whether defendant had moved the underwear in order to touch her. The child responded that defendant did, and when asked “how,” indicated that he did so by pulling the underwear to the side. Even were we to characterize the physician’s questions as leading, we do not believe that the child’s statements were “elicited in a manner that would undermine their credibility.” *Id.*

Nor do we believe that these statements were unreliable as statements made during a physical examination conducted at the request of the police. As noted by this Court in *McElhaney*, *supra* at 281, “if the prosecutor scheduled the medical examination, it might indicate that the examination was not for the purposes of medical treatment.” However, in this case the victim’s mother testified that after learning of defendant’s actions, she informed the police and then scheduled the examination to make certain that the child was not injured. The mother explained that she did this as a result of her personal concerns and not at the request of police. Moreover, although the physician indicated during her testimony that she believed the examination was conducted at the request of police, the investigating detective denied ever requesting that a physical examination be had, and noted that the examination had been completed before she had even been assigned to investigate the matter. On the basis of these facts, we conclude that the examination was conducted for purposes of medical diagnosis and treatment and not for purposes of defendant’s prosecution. See *McElhaney*, *supra*.

Our decision in this regard is strengthened by the corroborating testimony offered at trial by both the victim and her minor brother, who testified that he witnessed the assault from another room. As noted in *Meeboer*, *supra* at 325-326, the reliability of a child’s statement to a physician is strengthened when it is supported by other evidence which corroborates the declarant’s out-of-court statements. Here, because the testimony offered by the physician was supported at trial by the recounting of the incident by both the victim and her brother, we find that the statements were sufficiently trustworthy to warrant admission.

However, defendant also argues that the statements were inadmissible because they were not reasonably necessary to the declarant's diagnosis and treatment. Defendant's claim is based on the physician's finding no discernible evidence of physical injury during the examination. However, the absence of visible physical injury does not negate the need to develop the factual underpinnings of the event for which the patient is being seen. As explained by the physician at trial, discussing the incident with the child was important to her diagnosis and treatment of that patient because this allowed her to better understand the child's perception of what had happened. Moreover, the physician explained that it was important to know the extent of the abuse because vaginal interactions with other parts of the body can sometimes cause infections which would not necessarily be apparent from the examination itself, but would require additional testing. Therefore, we find that the victim's statements were reasonably necessary to allow the physician to structure an examination appropriate to the abuse actually suffered. See *McElhaney*, *supra* at 282-283.

Moreover, as recognized by the Court in *Meeboer*, *supra* at 329, "psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment." Therefore, we reject defendant's claim that the trial court abused its discretion in allowing the physician to testify concerning the statements made by the victim during examination.

II

Defendant next argues that the trial court's refusal to charge the jury with supplemental instructions regarding consideration of the age and suggestibility of child witnesses seriously impaired his defense at trial. Specifically, defendant claims that in a case such as this, where the verdict will rest heavily upon the credibility of child witnesses, it is essential that the jury be cautioned as to the possibility that the children's testimony may have been influenced by others.

This Court reviews de novo the instructions given a jury, *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999), and in doing so views the instructions as a whole to determine whether error requiring reversal exists, *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998).

While we do not dispute that the suggestibility of a child witness is a legitimate consideration for the trier of fact, we find that the trial court's instructions, when viewed as a whole, were sufficient to place such considerations before the jury and protect defendant's rights.

After instructing the jurors that it was they who were to decide the facts of the case based upon their assessment of the credibility of each witness who testified, the trial court offered the following suggestions for assessing witness credibility:

Does the witness' age or maturity affect how you judge his or her testimony?

Does the witness have any bias, prejudice or personal interest in how this case is decided? *Have there been any promises, threats, suggestions, or other influences that affected how the witness testified?* [Emphasis added.]

In light of these instructions, we believe that the jury was sufficiently informed of the appropriate considerations to be made when determining the credibility of the child witnesses who testified at defendant's trial.

Affirmed.

/s/ Kathleen Jansen

/s/ Joel P. Hoekstra

/s/ Jeffrey G. Collins