STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 28, 2000
v	No. 214349 Kalamazoo Circuit Court
DOUGLAS ALAN WORTINGER, Defendant-Appellant.	LC No. 98-000394-FC

Before: McDonald, P.J., and Neff and Zahra, 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)(1)(a), and was sentenced to fifteen to thirty years' imprisonment. Defendant appeals as of right. We affirm.

In this case, the prosecution alleged that the complainant was asleep on a couch in the living room of a residence shared by the complainant, her mother, and defendant, and that the five-year-old complainant awoke in the middle of the night and discovered that defendant inserted two of his fingers into her vagina. Defendant denied committing the offense.

Defendant first argues on appeal that hearsay statements made by the complainant to Dr. Colette Gushurst, her physician, should not have been admitted as statements made for the purposes of medical treatment or diagnosis in connection with treatment, because there was insufficient indication that the statements were trustworthy. We disagree. The admissibility of evidence is reviewed for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion occurs when an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Plaintiff offered Gushurst's testimony under MRE 803(4), as statements made for the purposes of medical diagnosis or treatment.[1] Under MRE 803(4), two requirements must be met before a statement is admitted. First, the declarant must have the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care. Second, the statement must be reasonably necessary to the diagnosis and treatment of the patient. MRE 803(4); *People v Meeboer* (*After Remand*), 439 Mich 310, 322; 484 NW2d 621 (1992). In *Meeboer*, *supra*, our Supreme Court adopted a ten-factor test for establishing the trustworthiness of a young declarant's statement in recognition that complainants of "tender years" may not have the same understanding of the need to tell the truth to medical professionals that adults do. *Id.* at 323. No single factor is dispositive of the issue of trustworthiness. A reviewing court should consider these ten factors under the totality of the circumstances to determine whether the trial court abused its discretion in rendering the evidentiary ruling under review.

The first factor is the age and maturity of the declarant. *Meeboer*, *supra* at 324. Children over the age of ten are presumed to be reliable. *People v Van Tassel (On Remand)*, 797 Mich App 653, 662; 496 NW2d 388 (1992). Although the complainant was six years old when she made the hearsay statements to Dr. Gushurst, her age is not dispositive. *Meeboer*, *supra* at 332, 334. There was testimony that the complainant understood that it was important to tell the truth on her visit to Gushurst. The complainant's mother testified that she told the complainant that she was going to the doctor's office to ensure that everything was okay, and that the complainant did not know that she was going to the doctor regarding a court case. Any inference that the complainant may have been unable to formulate a self-interested motivation to speak to Gushurst, and therefore that her statements were unreliable, was sufficiently countered by the circumstantial evidence of the complainant's understanding of the need to be truthful. *Meeboer*, *supra*, 439 Mich at 332. Without evidence of immaturity, this factor weighs in the prosecution's favor. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996), lv den 454 Mich 853 (1997); *People v Hyland*, 212 Mich App 701, 705; 538 NW3d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

The second factor is the manner in which the statements were elicited. *Meeboer*, *supra* at 324-325. Spontaneity is an important indicator of reliability, while leading questions may influence the statement and potentially decrease its reliability. *Id.* at 324-324 n 18. We conclude that the statements were made in response to open-ended, non-suggestive questions, and therefore the statements were not elicited in a manner that would undermine their credibility. *Hyland*, *supra* at 705; *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996).

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[1] MRE 803(4) provides that "the following statements are not excluded by the hearsay rule even if the declarant is available as a witness:"

> Statements made for the purposes of medical treatment or medical diagnosis in connection with treatment describing medical history, or past or present symptoms, pain, sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

The third and fourth factors to be considered are the manner in which the statements were phrased and the use of terminology expected in a child of similar years. *Meeboer*, *supra* at 325. Childlike terminology may be evidence that the statement was genuine. *Id.* In the present case, the complainant's use of the words "private area" and "thing" were not scientifically complex and do not indicate that her statements were influenced by an adult. *McElhaney*, *supra* at 281; *Hyland*, *supra* at 705.

The fifth factor involves the reason for the examination. *Meeboer*, *supra* at 325. Prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis or treatment. *Id.* This factor weighs neither for nor against a finding of trustworthiness. Significantly, the investigating officer referred the complainant to Dr. Gushurst, at least in part, to gather evidence based on a possible molestation. However, Dr. Gushurst testified that she had little information regarding the reason for the requested examination, focused on the complainant "as a whole person rather than just focusing on … the genitalia" during the examination, and relied on the complainant's statements to direct treatment. Thus, we conclude that the examination, while initiated for investigative reasons, also encompassed significant medical purposes. *McElhaney*, *supra* at 281; *People v Hackney*, 183 Mich App 516, 528; 455 NW2d 358 (1990).

The sixth and seventh factors involve the timing of the examination in relation to the abuse and to the trial. *Meeboer*, *supra* at 325. If the examination is close in time to the abuse, the child may still be suffering from pain and distress; conversely, an examination close to trial might indicate a nonmedical motive for the examination. *Id.* Here, the complainant was brought to the physician nearly eight months after the abuse, and approximately seven weeks prior to the preliminary examination and more than four months before trial. The complainant testified that she delayed reporting the alleged assault because defendant had threatened her. Thus, we conclude that the timing of the examination does not indicate that it was either too close to the abuse to be trustworthy, or that its proximity to the trial date indicated a nonmedical motive for the examination. *Hyland*, *supra* at 706.

The eighth factor is the type of examination. *Meeboer*, *supra* at 325. Statements made during treatment for psychological disorders may not be reliable. *Id.* The examination in the present case, involving an intrusive genital examination, provides no indicia of untrustworthiness. *McElhaney*, *supra* at 282.

The ninth factor relates to the relationship between the declarant and the person identified. *Meeboer*, *supra* at 325. This factor is meant to ensure that the child did not misidentify her assailant. *Id.* Here, the complainant testified that she previously lived in the same household as defendant, and that she was sure that it was defendant that assaulted her. Therefore, this factors supports a finding of trustworthiness. *Id.* at 333; *Hyland*, *supra* at 707.

The tenth factor is the existence of a motive to fabricate. *Meeboer*, *supra* at 325. Defendant's little, if any, evidence regarding a motive to fabricate was strongly contradicted at trial and the remaining evidence indicated that the complainant did not fabricate the present allegations. *Id.* at 332. The reliability of this type of hearsay is strengthened when it is supported by other evidence, including the

resulting diagnosis and treatment. *Id.* at 325-326. In the instant case, the physical examination revealed that the complainant had irregularities in her hymen. This physical evidence corroborated the complainant's account of what happened.

Based upon our review of the ten-factor test our Supreme Court adopted in *Meeboer, supra*, we find that the trial court did not abuse its discretion in finding that the complainant's statements were sufficiently trustworthy.

Defendant next argues that the complainant's statements to Dr. Gushurst regarding the identity of her assailant were not reasonably necessary for medical treatment or diagnosis. We disagree. The complainant's statements permitted Dr. Gushurst to structure the examination and inquire regarding the exact type of trauma that the complainant had experienced. *Meeboer, supra* at 329; *McElhaney, supra* at 283. Sexual abuse cases involve medical, physical, developmental, and psychological components that all require diagnosis and treatment. *Meeboer, supra* at 329. Thus, the trial court did not abuse its discretion in allowing Dr. Gushurst to testify regarding statements that the complainant made to her. *Id.* at 325, 329. Moreover, the statements were cumulative to the complainant's testimony. Therefore, any error was harmless. *Van Tassel, supra* at 653; *McElhaney, supra* at 283.

Defendant's next claim of error is that the prosecutor's remarks during closing argument improperly shifted the burden of proof to defendant and denied him a fair trial. Defendant did not object at trial regarding this claim. Thus, we conclude that the claim is unpreserved for appeal because he has failed to establish that a plain error occurred at trial that affected the outcome of the case. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, ___ Mich App ___; ___ NW2d ___ (2000) (Docket No. 213259), slip op at 3.

Defendant's last argument on appeal is that his sentence should be vacated and the cause remanded for resentencing because the trial court erred in considering his refusal to admit guilt when the trial court sentenced him. This Court reviews a defendant's sentence for an abuse of discretion. *Rice, supra* at 445; *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

A defendant's refusal to admit guilt is not a proper factor in setting a defendant's sentence. *People v Randle*, 104 Mich App 1, 4; 304 NW2d 9 (1981); *People v Earegood*, 383 Mich 82, 85; 173 NW2d 205 (1970). In determining whether sentencing was improperly influenced by defendant's failure to admit guilt, three factors are relevant: (1) the defendant's maintenance of innocence after conviction, (2) the judge's attempt to get the defendant to admit guilt, and (3) the appearance that had the defendant affirmatively admitted guilt, his sentence would not have been so severe. *People v Wesley*, 428 Mich 708, 712-714; 411 NW2d 159 (1987). If the record suggests that all three factors were present, then a reviewing court may conclude that the sentence was improperly influenced by the defendant's persistence in his innocence. However, if the court merely addressed defendant's lack of remorse as it bore on his rehabilitation, resentencing is not required. *Id.* at 713-714.

In the present case, defendant maintained his innocence at sentencing. However, there was no evidence that the trial court attempted to get him to admit guilt. Although the trial court encouraged defendant to accept responsibility regarding the acts for which he was convicted, the trial court did

nothing to indicate that it attempted to get him to change his story from one of innocence to guilt before sentencing. *People v Gray*, 66 Mich App 101, 110; 238 NW2d 540 (1975). Further, the trial court gave no indication that defendant's sentence would have been less severe had he accepted responsibility. *Id*. at 110; Compare *People v Grable*, 57 Mich App 184, 189; 225 NW2d 724 (1974). The trial court's reference to defendant's failure to admit guilt simply addressed the factor of remorsefulness as it related to his rehabilitation and the need to protect society, which are proper considerations in imposing sentence. *Wesley*, *supra* at 713-714; *People v Steele*, 173 Mich App 502, 506; 434 NW2d 175 (1988). Accordingly, there is no basis for defendant's argument that the trial court enhanced his sentence because he maintained his innocence. *Wesley*, *supra* at 713-714; *Gray*, *supra* at 110.

Affirmed.

/s/ Gary R. McDonald
/s/ Janet T. Neff
/s/ Brian K. Zahra