STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 23, 2001
v	No. 221252 Oakland Circuit Court
JAMES EDWARD COLLEY, Defendant-Appellant.	LC No. 98-161076-FC

Before: Murphy, P.J., and Hood and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and sentenced to four concurrent terms of twelve to twenty years' imprisonment. He appeals as of right. We affirm.

Defendant and the victim were involved in a relationship for nine years, but had stopped seeing each other about three months before the assault. On June 17, 1998, they were both at the home of Shirley Sentimile. Defendant and the victim talked for a while and decided to go to a motel together. The victim testified that she willingly accompanied defendant to the motel with the intent of having sex.

At trial, the victim testified that she and defendant engaged in anal, vaginal and oral sex. She testified that it was typical for defendant to penetrate her rectum with his fingers and speak rough to her. As part of this "game," the victim would try to stop defendant from penetrating her and would tell him to stop and then instruct him to continue. She testified that she consented to this activity, but that on the night involved, their activity got "a little carried away." She testified that defendant left the motel room and that she was able to leave if she had wanted. The victim suffered severe injuries to her rectum, requiring surgery.

The prosecution impeached the victim with her preliminary examination testimony. At the preliminary examination, the victim testified that defendant forcibly raped her anally, vaginally and orally. She testified that defendant penetrated her rectum with his entire fist, causing her to suffer a great deal of pain. He refused to stop when she asked him to stop. Defendant also penetrated her vaginally and forced her to perform fellatio. The victim testified at the preliminary exam that she did not consent to this sex. According to the victim, defendant held her hands above her head during the assault, then later placed a pillow over her face until

she stopped moving. He also held her face when he forced her to perform fellatio. She testified that, at some point, defendant left the motel for a period of time, taking her clothing with him, and that she was too weak and scared to try to leave the motel room.

On June 19, 1998, defendant and the victim left the motel room. They drove to Sentimile's house, where defendant retrieved his car. The victim then drove herself to the home of her daughter, Wendy. Wendy testified that the victim sat in her car in the driveway, honking the horn. Wendy went outside and found the victim crying. The victim told Wendy of the assault, describing the details and telling Wendy that she had been raped and beaten by defendant. She showed Wendy the injuries to her rectum. Wendy testified that the victim had bruises on her face and wrists. Wendy and the victim went to Sentimile's house.

The victim also told Sentimile the details of the assault, telling her that defendant had forcibly put his fist into her rectum. After seeing the victim's injuries, Sentimile took her to the hospital.

Donna Evans, an emergency room social worker, interviewed the victim. The victim again related the sexual conduct, telling Evans that she had agreed to go to the motel to have sex, but that her ex-boyfriend assaulted her. She then told Evans the manner in which defendant penetrated her anally and vaginally. The victim related similar information to the emergency room surgical intern.

A jury found defendant guilty of four counts of first-degree criminal sexual conduct involving force and personal injury. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). Defendant raises four issues on appeal.

Approximately 1-1/2 weeks before trial, and ten months after his arraignment, defendant moved to admit evidence of his past sexual relationship with the victim, pursuant to MCL 750.520j; MSA 28.788(10). The statute requires a defendant, who proposes to offer such evidence, to file a written motion and offer of proof within ten days after the arraignment. The trial court denied defendant's motion, noting that he had failed to comply with this notice provision. Defendant challenges the trial court's exclusion of this evidence as a violation of his Sixth Amendment right of confrontation. US Const, Am VI. We find no error requiring reversal.

The court may admit evidence of past sexual conduct between a sexual assault victim and the defendant as an exception to the rape-shield statute. MCL 750.520j(1)(a); MSA 28.788(10)(1)(a). However, the evidence must be material to a fact at issue in the case and its inflammatory or prejudicial nature must not outweigh its probative value. MCL 750.520j(1); MSA 28.788(10)(1). While such evidence may be precluded, preclusion is not always permissible. *People v Lucas (On Remand)*, 193 Mich App 298, 301; 484 NW2d 685 (1992). When a defendant fails to comply with the ten-day notice provision, the court must consider whether preclusion of the evidence violates the defendant's Sixth Amendment rights. *Id*. at 301-302. The court should consider the purpose of the statute—to protect the victim from surprise, harassment, unnecessary invasions of privacy and undue delay—and the timing of the defendant's offer to produce the evidence. *Id*. at 302-303. If there is admissible evidence, the

court should consider whether to limit the scope of cross-examination to achieve the purpose of the statute. *Id*. at 303.

In this case, the trial court simply denied defendant's motion because he failed to comply with the notice period. The court erroneously failed to properly consider the admissibility of the evidence and the impact of the timing of defendant's motion to admit the evidence.

However, we find any error harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), citing *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994). Defendant sought to admit evidence from the victim that they had engaged in similar sexual conduct in the past and it was her intent to engage in that conduct when accompanying defendant to the motel. The victim testified at trial that the charged sexual activity was the type of sex that they normally engaged in. She testified that she willingly went with defendant to the motel to engage in the type of sex involved. She further testified that she consented to the sex, but that on this occasion defendant simply got carried away. As a result of this testimony, the evidence that defendant sought to introduce, via an exception to the rape shield act, was essentially admitted.

On the morning of trial, the prosecution brought a motion in limine to exclude evidence that the parties had resumed their relationship after the incident. The court granted the motion over defendant's objection. Defendant challenges this ruling. We find any error to be harmless.

Evidence of sexual conduct that occurs between the victim and the defendant after the alleged assault, and before the trial, falls within MCL 750.520j(1)(a); MSA 28.788(10)(1)(a). *People v Adair*, 452 Mich 473, 483; 550 NW2d 505 (1996). The trial court must balance considerations of probative value and prejudice in deciding whether to admit this evidence. *Id*. at 486. The court should consider the time between the resumption of a relationship and the alleged rape in determining whether the evidence should be admitted. *Id*.

Again, the trial court failed to properly consider whether to admit the evidence and it simply granted the prosecution's motion to exclude. However, Sentimile and Wendy testified that the victim and defendant resumed their relationship after the assault and that the victim indicated their intent to get married. The victim also testified that she had no ill will towards defendant. Thus, the jury was aware of the evidence that the victim continued her relationship with defendant after the assault, and any error excluding additional evidence on this matter was harmless beyond a reasonable doubt.

Defendant further argues that he was deprived of the effective assistance of counsel when his counsel failed to make a timely motion to admit the evidence of past sexual conduct discussed previously. Because we find any error in the failure to admit the evidence harmless, defendant cannot show that he suffered prejudice and, therefore, cannot overcome the presumption that his counsel was effective. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999).

Next, defendant challenges the admission of three of the witnesses' testimony. We find any error to be harmless.

The admission of evidence over a proper objection is reviewed for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999). In the absence of an objection to the alleged erroneous admission of evidence, this Court reviews the alleged error under the plain error rule. *Carines*, *supra* at 764. Under this rule, the challenged issue is forfeited unless (1) error occurred; (2) the error was plain, i.e., clear or obvious; and (3) the plain error affected the defendant's substantial rights. *Id*. at 763. The third element requires a showing of prejudice, that is that the error affected the outcome of the lower court proceedings. *Id*.

Defendant objected to the introduction of Evans' testimony concerning the statements the victim made to her. The court allowed the evidence as an exception to the hearsay rule pursuant to MRE 803(4), statements made for purposes of medical treatment or medical diagnosis in connection with treatment. To fall within this exception, the statement must be made with "the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care," and the statement must be reasonably necessary to the diagnosis and treatment of the patient. *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992). The statement need not be made to a medical doctor. *Id*. at 327. Cases of sexual abuse encompass medical, physical, developmental and psychological components, each of which requires diagnosis and treatment. *Id*. at 329.

Evans, a social worker, testified that she was assigned to the emergency room to respond to assault cases. She provided treatment and counseling to patients and referred them to the appropriate services. Evans testified, however, that she simply interviewed the victim and documented the interview. She noted that the police were there "and there's really nothing for me to do because the incident had already been reported to the police." While Evans may have the responsibility to provide treatment and counseling, it appears that she did not perform those functions in this case. In effect, Evans did nothing more than take a statement from the victim.

The prosecution, as the proponent of the testimony, bears the burden of demonstrating its relevance and admissibility. *People v Crawford*, 458 Mich 376, 386 n 6; 582 NW2d 785 (1998). We find that the prosecution inadequately satisfied its burden of proof in this case. There is no evidence that Evans actually provided or offered the victim treatment or counseling. Thus, the trial court abused its discretion in admitting the testimony.

The erroneous admission of this testimony is subject to the harmless error test. Because the admission of Evans' testimony constitutes preserved, nonconstitutional error, it is not grounds for reversal unless "'after an examination of the entire cause, it shall affirmatively appear' that it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In light of all the similar testimony admitted, specifically the testimony of Sachin Shah (the emergency room surgical intern), Wendy, and Sentimile, any error in the admission of Evans' testimony was not outcome determinative and was harmless.

Defendant also challenges the admission of Wendy's and Sentimile's testimony as it relates to statements the victim made to them. Defendant did not object to this testimony at trial. The court admitted the testimony under the excited utterance exception to the hearsay rule, MRE 803(2). We find no error in its admission.

Under the excited utterance rule, there must be a startling event and the resulting statement must be made while the declarant is under the excitement caused by that event. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The statement must be made "before there was time to contrive and misrepresent, and . . . [it must be] related to the circumstances of the startling occasion." *Id*. at 550-551. The focus is on whether there was a lack of capacity to fabricate—that is the lack of the possibility of conscious reflection—not whether there was a lack of time to fabricate. *Id*. at 551. While the amount of time that passes between the event and the statement is important in determining whether the declarant remained under the stress of the event when she made the statement, that amount of time is not dispositive. *Id*. The court must consider whether there was a plausible explanation for the delay. *Id*. As the *Smith* Court explained:

> there is no express time limit for excited utterances. 'Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum.' The trial court's determination whether the declarant was still under the stress of the event is given wide discretion. [*Id*. at 551-552 (citations omitted).]

The victim related her statements of the assault to Wendy and Sentimile shortly after she and defendant left the motel. The victim testified at the preliminary examination that she could not leave the motel earlier because she was weak and afraid. When she arrived at Wendy's she could not get out of her car by herself. She was crying, and Wendy described her as hysterical. They went to Sentimile's shortly afterwards, and the victim was still upset. The circumstances indicated that the statements made by the victim were made while she was under the stress of excitement caused by the assault. Therefore, the admission of this evidence was not erroneous.

Defendant next challenges the admission of a statement made by the victim and transcribed by Wendy. However, in light of the similar admissible testimony regarding the assault, any error in admission of this particular statement was harmless because its admission was not outcome determinative. *Lukity*, *supra*.

Finally, defendant contests that his sentences are disproportionate. Defendant argues that the trial court should have sentenced him below the sentencing guidelines' recommended range. He notes that the victim did not want him incarcerated and wished to continue their relationship.

The trial court's sentencing of a defendant is reviewed for an abuse of discretion. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (2000). The sentence must be proportionate to the seriousness of the crime and the defendant's criminal record. *Noble*, *supra* at 661. Defendant's twelve to twenty year sentence is within the guidelines range of 120 to 360 months and is therefore presumptively valid. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987).

While the sentencing court may depart from the recommended range when the range is disproportionate to the circumstances of the offense and offender, *People v Haywood*, 209 Mich App 217, 233; 530 NW2d 497 (1995), the reasons offered by defendant to justify a lighter

sentence are unconvincing. We find that defendant's sentences are proportionate to the serious nature of the offenses he committed. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

Affirmed.

/s/ William B. Murphy
/s/ Harold Hood
/s/ Jessica R. Cooper