STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2001
v	No. 218554 Kalamazoo Circuit Court
CLARENCE M. DUNIFIN, Defendant-Appellant.	LC No. 96-000861-FC

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

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to concurrent terms of ten to twenty-five years' imprisonment for each of the first-degree CSC convictions and five to fifteen years' imprisonment for each of the second-degree CSC convictions. Defendant appeals by delayed leave granted. We affirm.

Defendant was convicted of sexually assaulting his step-granddaughter. The allegations arose in March 1996, after the victim, who was then eight years old, attended a sexual abuse prevention program at her elementary school.

At trial, the victim testified regarding ten separate incidents, which began when she was five or six years old. The victim claimed that during the first incident, defendant took her into his bedroom, had her remove her shorts and underpants, and "rubbed" her "front part." During the second incident, defendant showed her how to rub his "front part." According to the victim, defendant soon began to put his "private part" into her "private part" and they "moved up and down." Often it would hurt and she would ask him to stop. After the first time this occurred, the victim went into the bathroom and noticed "brown bubbly stuff" come out of her. The second time, she saw "red stuff" that looked like blood on the toilet paper. She also saw blood the next time and had a stomach ache.

One incident allegedly occurred when the victim and her brother were playing hide-and-go-seek with defendant, and she and defendant went into his barn. Defendant shut the barn door and rubbed her front part. Another incident allegedly occurred in some tall grass, when the victim and defendant went outside to wait for others to go for a walk. The victim testified that

another incident occurred when she and defendant were on defendant's couch and he put his private part in her private part and moved up and down. That time she did not see any blood. The victim remembered another incident, which occurred during a slumber party at defendant's house.

Defendant was interviewed by the police and gave a statement in which he admitted that, on one occasion, he "made a mistake." He explained that the victim got on his lap, unzipped his pants, took out his penis and played with it until it got hard. Then she climbed on him and "started riding" him. His "penis went into her vagina a couple humps," and then he asked her to stop. He pushed her off of him, zipped up his pants, and asked her not to do that again. He felt very sorry for this.

At trial, defendant denied participating in any sexual activity with the victim and claimed that he signed the police statement in order to get out of the interview because he was being intimidated. He asserted that the police officer made up all of the words in his statement and wrote them down and that because he did not have his glasses with him, he was unable to read the statement. He maintained that he signed the statement only because the police officer told him to.

Defendant first argues on appeal that the trial court erred by refusing to dismiss for cause two jurors who reported that they had been sexually abused. We disagree. During extensive voir dire in chambers, neither contested juror expressed or articulated a "particularly biased opinion" which would have a direct effect upon her "ability to render an unaffected decision." *Poet v Traverse City Osteopathic Hosp*, 433 Mich 228, 238; 445 NW2d 115 (1989). Further, defendant failed to demonstrate that either juror was excusable for cause under MCR 2.511(D)(13). In each case, the abuse occurred years earlier and the jurors indicated that their experiences would not prevent them from rendering an impartial and unbiased verdict. Thus, the trial court did not abuse its discretion in denying defendant's challenges for cause. *Poet, supra*; *People v Anderson*, 166 Mich App 455, 468; 421 NW2d 200 (1988).

Next, we find no merit in defendant's claim that he was denied a fair trial because of judicial misconduct that prejudiced him in the eyes of the jury. A defendant is entitled to expect a "neutral and detached magistrate." *People v Moore*, 161 Mich App 615, 616; 411 NW2d 797 (1987). "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of impartiality is whether the trial court's conduct or comments 'were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial.'" *People v Burgess*, 153 Mich App 715, 719; 396 NW2d 814 (1986), quoting *People v Rogers*, 60 Mich App 652, 657; 233 NW2d 8 (1975); see also *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). "[A] party who challenges a judge on the basis of bias must overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996).

Our review of each of the alleged instances of misconduct cited by defendant shows that defendant has failed to overcome the presumption of judicial impartiality. The court's conduct and comments were not of such a nature to unduly influence the jury to the detriment of defendant's case. While the court demonstrated some impatience, the court did not improperly hurry the proceedings such that defendant was denied a fair trial. The court acted within its

allowable discretion to control the proceedings, to limit the introduction of evidence and arguments to relevant and material matters, to question witnesses, and to remind counsel about the time constraints of the trial. MCL 768.29; MSA 28.1052; *Burgess*, *supra*.

Defendant next argues that the court abused its discretion in allowing the victim's mother and Dr. Gushurst to testify concerning statements made to them by the victim. Defendant contends that neither statement was admissible because the school counselor had already testified, without objection, to the statements made to her by the victim after the victim attended the presentation on sexual abuse, and only one corroborative statement is admissible under MRE 803A. However, while MRE 803A provides that only one corroborative statement is admissible under that rule, there is nothing in the rule to suggest that admission of another hearsay statement that properly falls under one of the exceptions enumerated in MRE 803 is precluded by admission of a statement under MRE 803A. We conclude that the trial court properly admitted Dr. Gushurst's testimony under MRE 803(4), the medical treatment exception to the hearsay rule, but erred in admitting the victim's mother's testimony under MRE 803(2), the excited utterance exception. However, because we find that error harmless, reversal is not required.

MRE 803(2) defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." In *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), the Supreme Court explained that

> [t]he rule allows hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the "sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy." 5 Weinstein, Evidence (2d ed), ¶ 803.04[1], p 803-19.

Thus, concluded the Court, "[t]he question is not strictly one of time, but of the possibility for conscious reflection." *Smith*, *supra*, citing 5 Weinstein, § 803.04[4], p 803-23.

Here, the court found that the movie shown as part of the sexual abuse presentation was a startling event and found that the victim was still under the stress of that event when she made the disclosures to her mother. Assuming without deciding that the movie viewed by the victim at the sexual abuse presentation could be considered a startling event for purposes of MRE 803(2), the victim's statements in the counselor's office after the victim's mother arrived were not a spontaneous response to the viewing of the movie. Rather, they were prompted by the counselor's request that the victim tell her mother what the victim had told the counselor about her grandfather. Further, the counselor testified that when she told the victim that she was calling the victim's mother and asking her to come to the office, the victim became upset and stated that it was her fault and that she was going to be punished. The counselor then comforted her and told her that she was "doing the right thing." Thus, the after viewing the movie and before disclosing the allegations about her grandfather to her mother, the victim engaged in reflective thought regarding the allegations and was encouraged by the counselor to disclose those allegations to her mother. We find that these circumstances do not serve as a proper foundation for admission of the victim's mother's testimony under the excited utterance exception to the hearsay rule.

However, any error in admitting the victim's mother's testimony does not require reversal because defendant has not shown that it is more probable than not that such error was outcome determinative, i.e., that it undermined the reliability of the verdict. *People v Rodriguez*, 463 Mich 466, 474; 620 NW2d 13 (2000); *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). The victim's mother's testimony was substantially similar to that of the counselor, who, as stated above, asked the victim to tell her mother what she had told the counselor. Thus, the mother's testimony regarding those same statements was merely cumulative and thus not prejudicial to defendant.

With regard to Dr. Gushurst's testimony, sufficient foundation was established to admit the victim's statements as statements made for the purpose of medical diagnosis or treatment under MRE 803(4). *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). The victim's statements described past symptoms, including pain, and the cause or source of the injury. *Id.* Further, the doctor's questions to the victim were structured to understand the exact type of trauma that the victim had experienced and to determine what medical or psychological treatment, if any, should be provided. *People v McElhaney*, 215 Mich App 269, 282, 283; 545 NW2d 18 (1996). Finally, our review of the record shows that under the ten-factor test established in *Meeboer, supra* at 324-325, the victim's statements to the doctor were trustworthy.

Defendant next argues that the trial court abused its discretion in allowing the victim's father to be impeached by evidence of his prior inconsistent statements. *People v Daoust*, 228 Mich App 1, 17; 577 NW2d 179 (1998). We disagree. The statements were relevant for purposes of evaluating the victim's father's credibility. MRE 401; *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995). The bias or interest of a witness and the witness's credibility are always relevant subjects of inquiry on cross-examination. *People v Morton*, 213 Mich App 331, 334; 539 NW2d 771 (1995); *People v Coleman*, 210 Mich App 1, 8; 532 NW2d 885 (1995). Further, the probative value of the testimony was not substantially outweighed by the potential for unfair prejudice. MRE 403; *Mills, supra* at 75. The court properly instructed the jury that evidence of prior inconsistent statements could not be used as substantive evidence, but could be used only in determining whether a witness was truthful. See *People v Avant*, 235 Mich App 499, 511; 597 NW2d 864 (1999).

Next, defendant argues that the prosecutor violated MRE 404(b) by asking his wife and him about alleged uncharged allegations by another granddaughter without complying with the requirements of MRE 404(b). Because defendant did not timely object to the alleged improper questioning on the basis of MRE 404(b), this issue was not properly preserved. Therefore, appellate relief is not warranted absent a showing of plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even assuming that MRE 404(b) was plainly violated, *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994), we conclude that reversal is not required. Both witnesses denied the allegations and the matter was not pursued further. Accordingly, defendant's substantial rights were not affected. *Carines, supra*.

Defendant next argues that the trial court abused its discretion when it ruled that an expert witness would not be permitted to testify as to the color of defendant's pubic hair or whether it had been dyed. *People v Sawyer*, 222 Mich App 1, 5; 564 NW2d 62 (1997). We disagree. The color of defendant's hair was not a matter that required expert testimony, nor would such testimony aid the trier of fact. MRE 702. Whether hair color has been accurately described is largely a matter of perception. Short of actually viewing defendant's pubic hair, the jurors would not be in a position to judge whether the victim's description of defendant's hair was reasonably accurate. Once some of the jurors indicated that they would be uncomfortable if defendant were to show his pubic hair in court, defendant chose not to pursue that option. Further, the court did not abuse its discretion when it refused to admit photographs of defendant's pubic hair when, after reviewing both the photographs and defendant's actual pubic hair, it determined that the photographs were not an accurate depiction of the color of defendant's pubic hair. *Mills*, *supra* at 76.

Next, the trial court did not err in refusing to instruct the jury on the element of penetration in accordance with defendant's requested instruction, because the instruction was improperly structured to invade the jury's exclusive province as the finder of fact. *People v Barker*, 411 Mich 291, 300-301; 307 NW2d 61 (1981). Further, the instruction provided by the trial court on this issue was supported by the evidence and fairly presented the issue. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). On the basis of the language in the applicable statute, this Court has interpreted "penetration" of the "genital openings" to include penetration of the labia majora. MCL 750.520a(m);[1] *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981); see also *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992). Accordingly, this issue does not warrant reversal.

Finally, limiting our review to the record, defendant has failed to show that he is entitled to relief due to ineffective assistance of counsel. *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). Defendant has failed to demonstrate that his counsel's performance fell below an objective standard of reasonableness or that defense counsel's representation so prejudiced defendant that he was denied the right to a fair trial. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). Further, defendant has not shown any error that affected the outcome of the trial or caused the proceedings to be fundamentally unfair or unreliable. *Id.*

Affirmed.

/s/ Jeffrey G. Collins
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

[1] Subsection (m) of the statute was formerly subsection (l). 2000 PA 505, effective March 28, 2001.