STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 6, 2001
v	No. 221723 Wayne Circuit Court
LEONARD EARL STICKLER, Defendant-Appellant.	Criminal Division LC No. 99-002244

Before: Smolenski, P.J., and McDonald and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was thereafter sentenced to a term of eight to thirty years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first claims that he was denied the effective assistance of counsel at trial. To this end, defendant contends that his trial counsel should have questioned defendant's sister regarding her observation of the victim "humping the handle of a hairbrush," which would have provided an alternative theory for the tear in the victim's hymen. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, our review is limited to the facts contained on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness and that the representation was prejudicial so that defendant was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Initially, we note that the affidavit provided by defendant's sister is not properly before us because it was not part of the lower court record. MCR 7.210(A)(1). In any event, contrary to defendant's argument, it is highly unlikely that the jury would have accepted the "hairbrush masturbation theory" as an alternative cause of the tear in the victim's hymen. In her affidavit, defendant's sister did not aver that the victim actually inserted the hairbrush handle into her vagina. Moreover, the doctor who examined the victim plainly testified that the location of the tear in the victim's hymen is consistent with the victim being penetrated by an adult male penis and supports sexual abuse. He further testified that, given the location of the tear, it would be unusual for it to have been caused by masturbation or self-exploration.

Further, even assuming that the evidence had some minimum probative value, defense counsel could have strategically chosen not to introduce this testimony for various reasons, including the fact that it would have been injurious to defendant's case. Indeed, testimony concerning the victim masturbating subsequent to when the assault occurred may have served to corroborate her claim of sexual abuse. If a defendant raises the issue of the child victim's post-incident behavior, an expert may testify that the particular child victim's behavior is consistent with that of a sexually abused child. See *People v Peterson*, 450 Mich 349, 373-374; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). In addition, according to defendant's sister's affidavit, defense counsel apparently chose not to proffer the hairbrush incident for fear that the defense may be viewed by the jury as "beat[ing] up" on the young victim. We will not substitute our judgment for that of counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Stewart*, 219 Mich App 38, 42; 555 NW2d 715 (1996); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Because defendant has failed to prove that he was denied the effective assistance of counsel, he is not entitled to a new trial on this basis.

II

Next, defendant argues that he was denied a fair trial by the admission of his statement to the police because it was an out-of-court statement, i.e. hearsay, and contained none of the indicia of reliability required for admissibility. Because defendant did not object to the admission of his statement on this basis in the trial court, this issue is not preserved for appellate review. MRE 103(a); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). We therefore review this unpreserved claim of error under the plain error rule. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the plain error rule, error must have occurred, it must have been plain, and the plain error must have affected the defendant's substantial rights. Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id*. at 763-764.

Here, defendant has failed to demonstrate that admission of his statement constituted plain error because his statement is not hearsay, but is an admission of a party opponent and, thus, admissible under MRE 801(d)(2). We likewise reject defendant's claim that he is entitled to a new trial because defense counsel was ineffective for failing to move to suppress his statement on the above-discussed basis. Counsel is not required to make futile objections or

advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

III

Defendant also claims that he is entitled to a new trial because the trial court failed to instruct the jury on the limited use of a prior inconsistent statement. To this end, defendant relies on the victim's trial testimony that defendant inserted his penis into her vagina, and the doctor's testimony that the victim told him that she was not sure if defendant penetrated her. Because defendant failed to request the instruction or otherwise object to the instructions as given, this issue is not preserved. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996); *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1997). We therefore review this unpreserved claim of error under the plain error rule. *Carines*, *supra*.

When no request has been made for a limiting instruction on the use of prior inconsistent statements, the general rule is that relief will not be given when there is no demonstration or likelihood of prejudice and where neither the court nor the prosecutor suggested to the jury that prior inconsistent statements could be used as substantive evidence. *People v Hodges*, 179 Mich App 629, 632; 446 NW2d 325 (1989); *People v Kohler*, 113 Mich App 594, 599-600; 318 NW2d 481 (1981); *People v Mathis*, 55 Mich App 694; 223 NW2d 310 (1974).

Here, there was no plain error that affected defendant's substantial rights because it is highly improbable that defendant was prejudiced by the omission of the instruction. Review of the record fails to disclose that the prosecutor or defense counsel suggested to the jury that the victim's prior inconsistent statement could be used as substantive evidence. Further, during closing argument, defense counsel argued concerning the inconsistencies in the victim's details of what occurred. Likewise, during cross-examination of the doctor, defense counsel highlighted the fact that the victim told the doctor that she was not sure if defendant penetrated her. Moreover, although the doctor indicated that the victim was unsure if defendant penetrated her, she also told him that she thought he did. In addition, the instructions that were given accurately informed the jury about how to view and consider the testimony, and also accurately reflected the burden of proof and elements of the crime. Defendant is not entitled to any relief on this basis.

IV

Defendant's final claim is that the trial court violated his right of confrontation when it granted the prosecutor's motion in limine to exclude evidence of the victim's previous false allegations of sexual assault against her mother's boyfriend. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A preliminary issue of law regarding admissibility based upon construction of a statute or court rule, however, is subject to de novo review. *Id.*

Evidence of a victim's past sexual conduct with others is generally legally irrelevant and inadmissible under the rape-shield statute, MCL 750.520j. *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). In certain limited situations, however, such evidence may be relevant and its admission required to preserve a criminal defendant's Sixth Amendment right of

confrontation. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). For example, a victim's prior sexual conduct may be admissible for the narrow purpose of showing that the victim has made false accusations of rape in the past. *Id*. at 348-349. In order to gain admission of such evidence, the defendant must make an offer of proof regarding the evidence and demonstrate its relevance to the purpose for which it is sought to be admitted. *Id*. at 350; *People v Byrne*, 199 Mich App 674, 678; 502 NW2d 386 (1993).

Here, the trial court properly precluded evidence of the victim's prior accusation of sexual touching against her mother's former boyfriend where defendant failed to proffer any credible evidence that the accusation was false. Further, the victim never acknowledged that the accusation was false and would not have done so during trial. As stated in *People v Garvie*, 148 Mich App 444, 449; 384 NW2d 796 (1986), "[w]e do not believe that defendant's right to confront [a victim] extends to turning the trial into a fishing expedition on the question of [another person's] guilt or innocence." Accordingly, the trial court did not err in applying the rape-shield law to prohibit defendant from placing evidence of the victim's accusation against her mother's former boyfriend before the jury where "defendant's efforts to characterize the accusation as false would have been futile." *Id*. at 449.

Affirmed.

/s/ Michael R. Smolenski
/s/ Gary R. McDonald
/s/ Kathleen Jansen