

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN PAUL FURGALA,

Defendant-Appellant.

UNPUBLISHED

November 17, 2005

No. 256440

Clinton Circuit Court

LC No. 03-007432-FC

Before: Donofrio, P.J., and Zahra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). Defendant was sentenced to seven to thirty years' imprisonment. We affirm.

This case stems from the alleged sexual assault of defendant's six-year-old stepson. The assault became known after warts were discovered on the child's anal area. After initially denying that he had been sexually abused, the boy told a doctor that defendant had sexually abused him. When the police questioned defendant he repeatedly denied sexually abusing his stepson, but a police detective testified that at the end of the second interview defendant said that he had no memory of doing anything and could possibly be "blocking it out."

Defendant first argues that the trial court abused its discretion by excluding testimony from defendant's ex-wife regarding her sexual relations with him after the alleged abuse and her failure to contract warts. The trial court correctly required the defendant to first provide a foundation for the proffered testimony.

This Court reviews the decision of whether to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Hendrickson*, 459 Mich 229, 235; 586 NW2d 906 (1998). Generally all relevant evidence is admissible. MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 763 (1988). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more or less probable than it would be without the evidence. MRE 401; *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). Relevant evidence may be excluded if its probative value is

substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

Here, the proffered testimony from defendant's ex-wife that she had sexual relations with him and did not have visible symptoms of warts, while a necessary fact to the inquiry, was not in and of itself probative and created a substantial and unnecessary risk of confusing the jury. Dr. Guertin testified that a person can be infected with human papilloma virus (HPV), the virus that causes warts, without actually having visible symptoms, i.e. no warts. Tissue biopsy testing can reveal if a person was infected with HPV in the absence of warts. Further, Dr. Guertin testified that a person having sex with an infected person will not necessarily become infected with HPV. Accordingly, and assuming defendant had warts, defendant's ex-wife's lack of symptoms in the absence of other foundational evidence such as defendant's HPV status, or his ex-wife's tissue biopsy results, is not probative and, therefore, not relevant. It appears that defendant was attempting to elicit testimony from her that she did not observe warts on herself so he could argue that he was not an infecting person and therefore, not the origin of the child's anal warts. The absence of visible warts on the part of the ex-wife reveals very little about defendant's status and introduction of such evidence would have risked creating jury confusion over unrelated medical issues, especially given that no evidence of defendant's infection status was proffered. The trial court did not abuse its discretion in first requiring a medical foundation before introduction of the proffered evidence and ruling at the motion in limine the exclusion for lack of relevance of such evidence in the absence of the appropriate foundation. The foundation was not established and counsel did not attempt to reintroduce the proffered testimony directly.

Defendant next argues that the trial court inappropriately admitted hearsay evidence from Dr. Guertin regarding the child's disclosure under MRE 803(4). We disagree.

As noted, this Court reviews the decision whether to admit evidence for an abuse of discretion. *Katt, supra* at 272. Although hearsay is generally not admissible, MRE 803(4)¹ provides an exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). "Under MRE 803(4), the declarant must have 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." *Id.* Where the declarant is a child "further analysis of the circumstances surrounding the examination of [the] child is necessary to determine whether the child understood the need to be truthful to the physician." *People v Meeboer (After Remand)*, 439 Mich 310, 323; 484 NW2d 621 (1992). Our Supreme Court has adopted a totality of the circumstances test for establishing the trustworthiness of a young declarant's statement. *Id.*, 324.

¹ MRE 803(4) provides that, even though the declarant is available as a witness, "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment."

Factors related to trustworthiness guarantees surrounding the actual making of the statement include: (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate. [*Id.*, 324-325 (citations omitted).].

The court did not abuse its discretion in concluding that the child's statement to Dr. Guertin was trustworthy. The record reveals that the child, approximately seven years old when the statements were made, was sufficiently mature. Defendant argues that a previous appointment with the child's family doctor and an interview with the state police, where he denied being assaulted, prompted him to fabricate the sexual abuse because these incidents heavily suggested that people wanted him to tell a story about sexual abuse. This argument is without merit. The child's family doctor merely asked the child if someone had bothered his bottom, and the state police used an open-ended interview technique. However, the child disclosed specific physical details of the incident to Dr. Guertin and was able to recreate the incident with anatomically correct dolls. He also remembered incidental details such as where the incident happened, what he was wearing, and that it was cold outside. Dr. Guertin stated that the child did not use any unexpected terminology, spoke freely and did not seem to be using someone else's language during the interview. Moreover, the record reveals that Dr. Guertin elicited the statements during an open-ended medical history exam. The child also testified that no one told him what to say and that he did not know why he was going to see Dr. Guertin. Finally, both the state police trooper and Dr. Guertin testified that it is common for a child sexual abuse victim to initially deny that he or she had been abused. The evidence strongly indicates that the child's disclosure was genuine and not manufactured or a result of suggestion. The record reveals that remaining considerations outlined in *Meeboer* also indicated that the child's statement was sufficiently trustworthy. Because Dr. Guertin's testimony that sexual abuse as demonstrated by the HPV infection is a medical diagnosis, and an essential component to establish treatment, we also conclude that the child's statements to Dr. Guertin were reasonably necessary to his diagnosis and treatment. *McElhaney, supra* at 283.²

² In light of this conclusion, we need not address whether the relevant testimony from Dr. Guertin was also admissible under MRE 803A.

Next, defendant argues that the prosecutor violated his constitutional rights during closing arguments by making references to defendant's constitutional right not to testify. We disagree.

Because defendant did not preserve the allegation of prosecutorial misconduct by objection below, review is for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Thus, where a curative instruction could have alleviated any prejudicial effect the Court will not find error requiring reversal. *Ackerman, supra* at 449. Also, the test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 585; 629 NW2d 411 (2001). This Court considers issues of prosecutorial misconduct "on a case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant's arguments." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "A defendant in a criminal case has a constitutional right against compelled self-incrimination and may elect to rely on the 'presumption of innocence.'" *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995), citing US Const, Am V; Const 1963, art 1, § 15. Accordingly, a prosecutor may not comment upon a defendant's failure to testify. *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965); *Fields, supra* at 108; MCL 600.2159. Such remarks "are prohibited because they ask the jury to draw the inference that the defendant is guilty or hiding something merely because he has not taken the stand." *People v Buckey*, 424 Mich 1, 14; 378 NW2d 432 (1985). A direct comment on a defendant's failure to testify is forbidden by the Fifth Amendment. See *Griffin, supra* at 613-614. Although this Court has not adopted a specific rule related to indirect comments, the United States Court of Appeals for the Sixth Circuit held that indirect comments on a failure to testify require reversal only if "the comments were manifestly intended by the prosecutor as a comment on the defendant's failure to testify or were of such a character that the jury would naturally and reasonably take them to be comments on the failure of the accused to testify." *United States v Hines*, 398 F3d 713, 717 (CA 6, 2005) (citations omitted).

During closing argument and rebuttal the prosecution commented that defendant's "final words" in the case were that he could not remember and could be blocking. Defendant challenges that reference to defendant's "final words . . . in this case" had the effect of drawing the jury's attention to the fact that defendant failed to testify at trial. However, the comment is focused on statements that defendant made, and not on his silence at trial. Here, the record discloses that the prosecution's reference to defendant's "final words" clearly is meant to draw the jury's attention to the fact that defendant seemed to change his posture over the course of the interview, drawing his denials into question and not to the fact that defendant failed to testify at trial. In addition, defense counsel argued that "He [defendant] denied it; he didn't change his mind. He didn't say, 'I don't remember.'" The prosecutor's remarks in rebuttal responded to this proposition. Prosecutorial remarks which might otherwise be improper may not require reversal when they address issues raised by defense counsel. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Moreover, any potential prejudice was dispelled by the trial court's instruction to the jurors that defendant had the right not to testify and that they could not allow his refusal to testify to affect their verdict. See *People v Abraham*, 256 Mich App 265,

276; 662 NW2d 836 (2003). Finally, we conclude that a curative instruction specifically directed at the comment could have alleviated any prejudicial effect and accordingly, reversal is not required. *Ackerman, supra* at 449.

Finally, we reject defendant's argument that *Blakely v Washington*, 542 US ____ ; 124 S Ct 2531; 159 L Ed 2d 403 (2004), mandates reversal because the trial judge scoring points for OV 3 and OV 4 violates defendant's right to trial by jury. Under controlling Michigan precedent, *Blakely* is inapplicable to Michigan's sentencing system. *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), lv gtd 472 Mich 881; 693 NW2d 823 (2005).³

Affirmed.

/s/ Pat M. Donofrio
/s/ Brian K. Zahra
/s/ Kirsten Frank Kelly

³ We note that our Supreme Court has granted leave in *Drohan* expressly to consider whether *Blakely* and *United States v Booker*, 543 US ____; 125 S Ct 738; 160 L Ed 2d 621 (2005), apply to Michigan's sentencing scheme.