STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 8, 2005
v	No. 257440 Eaton Circuit Court
ERIC R. BAKER, Defendant-Appellant.	LC No. 03-000232-FC

Before: Hoekstra, P.J., and Neff and Davis, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under thirteen years of age), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years of age). He was sentenced to serve concurrent prison terms of eleven to twenty years for each CSC I conviction and three to fifteen years for the CSC II conviction. Defendant appeals as of right. We affirm.

The complainant was ten years old at the time of trial. She lived with her mother and defendant, her stepfather, at the time of the alleged sexual assaults. She first told three of her friends at school, also girls, about defendant sexually abusing her. All three girls recalled that the complainant told them suddenly after she started to cry, and one girl testified that the complainant told the girls about defendant after another friend mentioned a friend whose father sexually assaulted her. The complainant's friends told the school counselor about the assaults, and she eventually told the counselor herself. The complainant testified that defendant had sexually abused her multiple times after she returned home from school and told her not to tell anyone else because it was a secret.

The complainant's mother testified that defendant would have been alone with the complainant and the complainant's sister for up to an hour after they returned home from school. She also testified that the complainant's glasses went missing the day before the complainant disclosed the alleged abuse. She and defendant could not afford new glasses, so defendant required the complainant to choose between attending soccer and getting new glasses. The complainant testified that defendant hurt her emotionally when he forced her to choose between soccer and glasses, but she said that it did not cause her to disclose what had happened. The complainant's mother also testified that the complainant was aggressive and sometimes had problems with lying.

Gina Gough, a protective services employee, interviewed the complainant. Gough testified that the complainant became tearful and indicated that defendant had touched her under her underwear and "put his thing in her mouth." Gough and Detective Timothy Fandel then drove to defendant's house, where they informed defendant and the complainant's mother of the allegations. Defendant denied the allegations, and the complainant's mother did not believe them. Gough concluded that the children were not safe and arranged to place them with the complainant's grandparents. On cross-examination by defendant, Gough admitted that she had been deceived by children in the past. On redirect examination, she indicated that she did not believe she had been deceived in this case.

Dr. Stephen Guertin, a physician member of the child safety program at Sparrow Hospital, physically examined and interviewed the complainant. On that basis, he concluded that defendant had had intercrural intercourse with complainant, which is placing the penis between another's legs and down along the vaginal area. He found no signs of physical injury and that the complainant had a normal hymen, which would be normal if there had not been vaginal intercourse. He found evidence of labial fusion, but he explained that he saw that often in children who had not been molested. Dr. Vernon Westervelt, a child psychologist who testified for the defense, examined the complainant and diagnosed her with attention deficit hyperactivity disorder ("ADHD") and oppositional defiant disorder ("ODD"). However, Dr. David Fugate, a child psychologist who testified for the prosecution, stated that he did not believe complainant had either disorder.

Defendant first argues that his trial attorney inappropriately failed to object to Gough's testimony that she felt the children were unsafe and that she did not believe the complainant had deceived her. Defendant argues that Gough's statement that she did not feel she had been deceived sent a message to jury that she had independently determined that the complainant was telling the truth, effectively asserting that defendant was guilty. Therefore, defendant argues that his defense counsel's failure to object to this testimony was so objectively unreasonable that it rose to the level of ineffective assistance of counsel. We disagree.

Defendant did not move for a new trial or for an evidentiary hearing in the trial court. Therefore, review of his claim is limited to errors apparent on the record. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). An expert in a childhood sexual abuse case may not testify that the charged sexual abuse occurred or vouch for a complainant's veracity. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857, mod 450 Mich 1212 (1995). Even if Gough had actually been offered as an expert, we do not believe that any inappropriateness in her testimony or failure to object thereto prejudiced defendant to the point of depriving him of a fair trial. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Gough's statement about the children's safety was an explanation for why she took a certain step in the investigation rather than a comment on defendant's guilt, and it was in response to a proper, open-ended question. Her statement that she did not believe she had been deceived took place after defendant's attorney elicited testimony that there was no physical evidence of or eyewitnesses to the assaults, that Gough had no personal knowledge of the events, that some children lie, and that she had been fooled before. She also testified that children who lie tend not to provide specific information, and her judgments involved interviews with everyone involved and sometimes other investigative tools. The jury had the opportunity to observe the complainant to determine her credibility firsthand. Most significantly, none of the

statements to which defendant now objects told the jury anything they did not already know: implicit in Gough's testimony was the conclusion that she had not been fooled. Sound trial strategy could include "leaving well enough alone" after having already established that Gough had little supporting evidence and had, by her own admission, been wrong in the past.

Defendant next argues that he was denied a fair trial by the prosecution improperly questioning his expert witness. We disagree.

Defense counsel objected to the prosecution's questions and moved for a mistrial, but only after the questions had been answered, so the issue is unpreserved. *People v Jones*, 468 Mich 345, 354-355; 662 NW2d 376 (2003). We review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Thus, defendant must show that the plain error caused prejudice, that he was actually innocent, or that the "error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999) (internal quotations omitted).

The trial court ruled before trial that defendant's prior conviction for domestic violence involving the complainant was inadmissible unless defendant opened the door. The trial court also refused to allow the prosecution to rebut the complainant's mother's testimony with incidents of domestic violence involving defendant. During cross-examination of Dr. Westervelt, the prosecutor elicited testimony that the complainant had told him about instances of domestic violence at home. However, Dr. Westervelt also clarified that there is no correlation between physical and sexual abuse. Defendant's conviction for domestic violence was not mentioned anywhere in the presence of the jury. Dr. Westervelt indicated that the complainant had oppositional defiant disorder, which often results in children being manipulative and deceptive, and that the complainant had a tendency to play adults against each other. Both defendant and the prosecution mentioned the domestic violence briefly during their closing arguments to the jury.

We perceive no prejudice. Dr. Westervelt indicated that "what's going on in the family" was essential to know because "children do not exist in a vacuum." The jury was informed that the physical abuse had no bearing on defendant's charged offenses, and the trial court cautioned the jury that the basis for an expert's opinion was admissible but not necessarily true. Finally, Dr. Westervelt's characterization of the complainant as deceitful and manipulative supports the trial court's cautionary instruction. Under the circumstances, any error in Dr. Westervelt's testimony about domestic violence did not affect defendant's substantial rights.

Defendant finally argues that he is entitled to resentencing on the basis of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), in which the United States Supreme Court struck down Washington's determinate sentencing system. However, *Blakely* does not apply to Michigan's indeterminate sentencing guidelines. *People v Claypool*, 470 Mich. 715, 730 n 14; 684 NW2d 278 (2004); *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004). We therefore reject defendant's sentencing challenge.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Janet T. Neff
/s/ Alton T. Davis