STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 11, 2007
v	No. 271801 Oakland Circuit Court
DWIGHT THERONE BULEY, Defendant-Appellant.	LC No. 2006-206911-FC

Before: Wilder, P.J., and Borrello and Beckering, JJ.

PER CURIAM.

Defendant was convicted on three counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) and (b), and one count of second-degree CSC, MCL 750.520c(1)(b). He was sentenced, as an habitual offender, second offense, MCL 769.10, to 25 to 50 years' imprisonment for each CSC-1 conviction and 15 to 22 ½ years' imprisonment for the CSC-2 conviction. Defendant appeals as of right. We affirm.

I.

Defendant first argues on appeal that the trial court committed plain error by allowing inadmissible hearsay testimony from Dorian DeMarias, Carol Fleming, Lori Woodmore, Arlee Ewing and Chris DeBoer. Excepting Ewing's testimony, we agree. This Court reviews an unpreserved claim for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763.

Hearsay is a "statement, other than [the] one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *People v Martin*, 271 Mich App 280, 316; 721 NW2d 815 (2006), quoting MRE 801(c). Generally, hearsay is inadmissible. *Id*. at 315; MRE 802.

Prior Consistent Statements and Motive to Fabricate

A party may offer prior consistent statements of a declarant upon establishing four elements:

> (1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose. [*People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (internal citations omitted).]

Prior consistent statements offered to rebut a charge of motive to fabricate are nonhearsay under MRE 801(d)(1)(B).

The prosecution argues under *Jones*, *supra* at 709-711, that MRE 801(d)(1)(B) should not be interpreted to preclude a prior consistent statement made after *any* motive to fabricate occurred, but rather, only the statements that were made after the purported motivation arose as argued by defense counsel at trial. The prosecution contends that defendant posited two theories of motivation at trial: one being the victim's dislike of defendant and the other her purported discovery in the summer of 2005 that making sexual abuse allegations was a way to get rid of defendant. Therefore, according to the prosecutor, since one defense theory is that the victim's motive to fabricate arose in the summer of 2005, any statements she made to DeMarias and Fleming before that date regarding sexual abuse should be admissible as prior consistent statements.

We hold that defendant correctly frames the victim's alleged motive to make sexual abuse allegations as being her dislike of defendant. The prosecution appeared to concede the point when she stated during her closing argument:

> Defense, [sic] also talks about her motive, that she didn't like Dwight Buley. Can you blame her for that either? Sure, there may have been independent reasons for him not liking her, and they were certainly reasonable ones. He's calling her father a slob and lazy. He's telling – he's saying that he's embarrassed to be with her mother in public with her [sic]. He's coming down on her parents, he's coming down on her. Sure, those are reasons not to like him, as well. She also didn't like him because of what he was doing to her.

Whatever the victim purportedly discovered in the summer of 2005 would simply have been the means of getting rid of defendant, which was motivated by her dislike of him.

We further note that the only time defendant argued that the victim developed a means to get rid of defendant in the summer of 2005 was during the closing argument. Consequently, DeMarias and Fleming's testimony that the victim told them about the sexual abuse in the spring of 2005 could not have been offered to rebut defendant's theory that she fabricated the allegations in the summer of 2005, since the theory had not yet been argued when DeMarias and Fleming testified. Therefore, the witnesses' testimony recounting what the victim told them about being sexually abused is not admissible as prior consistent statements under MRE 801(d)(1)(B).

Prior Consistent Statements Offered as Nonhearsay

The prosecution further argues that because defendant cast doubt on whether the victim disclosed sexual abuse to DeMarias and Fleming, the prosecution could rebut defendant's impeachment of the victim by offering her prior consistent statements. The prosecution contends that in such a situation, the victim's out-of-court statements were offered to prove that the statements were made and not to prove the truth of the matter asserted.

In addition to being admissible to rebut a claim of recent fabrication, a prior consistent statement may be admissible to rebut a claim that a prior inconsistent statement was made. *People v Stricklin*, 162 Mich App 623, 627; 413 NW2d 457 (1987). Such statements are only admissible "where a witness is impeached with evidence of a prior inconsistent statement and the witness denies making the prior statement," and they are not admissible as substantive evidence. *Id*. at 627-628.

Here, the victim testified that she told DeMarias about the sexual abuse. Defense counsel asked the victim, "In your diary, you never told or mention or recorded that you told . . . [DeMarias] about these alleged instances . . . isn't that true?" The victim responded affirmatively. Later, DeMarias testified that the victim told her defendant was "doing sexual things" to her and that she was afraid she was pregnant by defendant. DeMarias' testimony could be admissible as nonhearsay to prove that the victim disclosed the sexual abuse to her, given that defendant implied that she did not disclose to DeMarias.

We note, however, that during closing argument the prosecution argued that the victim should be believed because, among other reasons, her story was "corroborated by Dorian. Dorian DeMarias came in here and said yes, [the victim] told me [around] April of 2005 that she had been touched by her mother's boyfriend." The prosecutor did not argue that DeMarias' testimony proved that the victim had in fact made the statement to her. Rather, the prosecutor argued that the testimony *corroborated* the victim's allegations of sexual abuse. Consequently, we hold that DeMarias' testimony that the victim told her about the sexual abuse was inadmissible hearsay because it was primarily offered to prove the truth of the matter asserted.

The prosecution also asserts that Fleming's testimony regarding the victim having told her about the sexual abuse was admissible to show that she had in fact disclosed such information to Fleming given defendant's argument that the victim only told Fleming that defendant was bothering her. Again, the prosecution asserts that the testimony was admissible to rebut defendant's implications that such statements were never made. In her closing argument, however, after remarking that DeMarias corroborated the victim's allegations, the prosecutor stated:

> [The victim] testified then that in May of 2005, she told her teacher, Ms. Powe. Ms. Powe took her to Ms. Fleming. And you heard Ms. Fleming's testimony. You heard about the actions that Mrs. Fleming took or didn't take at that time. You heard that she told Ms. Fleming that he had been bothering her, that he had been touching her and Ms. Fleming called her mother.
>
> * * *
>
> [The victim] then testified after the last incident in November or December of 2005 that she told her teachers again. She told Ms. Woodmore who

> took her to Ms. Ewing, the principal. She told Chris DeBoer from [Child Protective Services] and Amy Allen from Care House. All this information was corroborated, as well. What [the victim] told you on that stand was true. She told these people that corroborated it. She told her teachers, they corroborated it. She told her teachers again when her mother didn't do anything, and they corroborated it.

While it is possible that Fleming's testimony was offered to prove that the victim in fact disclosed sexual abuse to her, the prosecutor's closing argument implies that Fleming's testimony was primarily offered to prove the truth of the matter asserted, and therefore, was inadmissible hearsay.

Disclosure Delay/Chronology of Events

The prosecution also contends that testimony from witnesses regarding the victim's statements to them would be admissible to show the chronology of events; otherwise, the jury would be left with a void regarding events that led to the accusations made by the victim. For instance, the flawed procedures at the victim's school were essential to show the jury why the molestation took so long to come to the attention of authorities, and DeMarias' testimony that the victim feared her mother, Veronica Vanderbilt, also helped to explain any delay.

The prosecution's reliance on *People v Starr*, 457 Mich 490, 500-502; 577 NW2d 673 (1998), where witnesses testified regarding the chronology of events to explain the victim's delayed disclosure, is misplaced. The contested evidence in *Starr* was MRE 404(b) similar act evidence, not hearsay testimony. Here, the issue is whether the victim's out-of-court statements were offered to prove the truth of the matter asserted or to establish a chronology of events. As discussed *infra*, the prosecutor argued extensively in closing argument that all of the witnesses corroborated the victim's sexual abuse allegations, but made no mention of delayed disclosure. The prosecutor could have established the chronology of events through the victim's own testimony, without her out-of-court statements as recounted by others. Thus, we hold that the victim's out-of-court statements as recounted by DeMarias, Fleming, Woodmore, and DeBoer were inadmissible hearsay, primarily offered to prove the truth of the matter asserted.

With regard to the testimony of the victim's principal Ewing, the prosecution contends that it was offered to establish the chronology of events. Defendant claims that Ewing "testified that because [the victim] told her she had been 'touched inappropriately,' she instructed Fleming to file a protective services report," and that such testimony was inadmissible hearsay offered to prove the truth of the matter asserted. Ewing, however, did not testify that the victim told her she had been touched inappropriately. Rather, Ewing testified that Woodmore told her that the victim wanted to share some personal information about being touched inappropriately. Thus, Woodmore made the out-of-court statement, not the victim. Even if defendant argues that the statement was hearsay within hearsay, the prosecutor did not offer this portion of Ewing's testimony to prove that defendant touched the victim inappropriately. Rather, the statement was offered to show how the victim came to be in Ewing's office. Additional testimony from Ewing that defendant contends is inadmissible hearsay is her statement, "It is mandatory to file a report any time a child alleges that something has happened that's inappropriate." Ewing's statement did not include an out-of-court statement, and therefore, it is not hearsay. See MRE 801(c). Consequently, Ewing's testimony was admissible nonhearsay.

MRE 803(24), Catch-all Exception

Defendant asserts that the victim's statements regarding sexual abuse allegations as recounted by the witnesses are not admissible under the "catch-all" exception to the hearsay rules, MRE 803(24), since there was other admissible nonhearsay testimony from the victim herself which was the most probative evidence establishing that the sexual abuse occurred. For a hearsay statement to be admitted under MRE 803(24), it must satisfy four elements: "(1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice." *People v Katt*, 468 Mich 272, 279; 662 NW2d 12 (2003). We hold that, because the statements do not satisfy the third element as defendant correctly argues, the statements are not admissible under MRE 803(24).

Harmless Error

While this Court finds that certain inadmissible hearsay testimony was presented at trial, given the evidence that was properly admitted we hold that defendant is unable to establish that he is actually innocent or that the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. See *Carines, supra* at 763.

In *People v Rodriquez (On Remand)*, 216 Mich App 329, 330; 549 NW2d 359 (1996), the defendant appealed his conviction of second-degree CSC after alleged hearsay statements were admitted as prior consistent statements. At trial, the complainant's teachers testified that the complainant had told them about the sexual abuse. *Id*. at 331. This Court originally affirmed the trial court's ruling that the testimony was admissible as prior consistent statements by the complainant introduced to rebut the defendant's charge of recent fabrication pursuant to MRE 801(d)(1)(B). *Id*. at 330. In lieu of granting leave to appeal the Supreme Court remanded, instructing this Court to consider on remand whether MRE 801(d)(1)(B) allows the admission of prior consistent statements of witnesses made after the motive for fabrication arose. *People v Rodriquez*, 450 Mich 924; 543 NW2d 318 (1995). On remand, this Court held that the statements made after the complainant allegedly fabricated the charges against the defendant should not have been admitted. *Rodriquez (On Remand)*, *supra* at 332. It found the erroneous admission harmless, however, because it did not prejudice the defendant given that the complainant testified about the alleged sexual abuse at trial, and the teachers' testimony only reiterated the complainant's testimony, and thus, was mere cumulative evidence. *Id.* See also *People v Smith*, 456 Mich 543, 554-555; 581 NW2d 654 (1998) (Even if a mother's testimony regarding her son's statement about being sexually molested constituted inadmissible hearsay, its admission was harmless because it was cumulative of the complainant's own testimony, and the remainder of the mother's testimony "was replete with evidence of the complainant's distress" after the molestation).

The admissible testimony in this case consisted of the victim's own recounting of the sexual abuse, including detailed descriptions regarding what happened, how it happened, and when it happened. Further, DeMarias, Fleming, and Woodmore gave admissible testimony regarding their observations as to the change in the victim's mood and behavior, her failure to complete assignments, and her becoming upset and crying when approached about what was going on in her personal life. Fleming testified regarding her encounter with Vanderbilt,

Vanderbilt's crying and claiming that the defendant had moved out of the house, that she had put a lock on her daughter's door, and that she did not want this to happen to her daughter. Ewing testified that she had disciplined the victim's teachers for failing to report the abuse to authorities when they first heard about it. DeBoer testified that based on what the victim told him, he recommended that she undergo a forensic interview and instituted negligence proceedings against Vanderbilt.

Vanderbilt's testimony in favor of defendant, with whom she was romantically involved at the time of trial, was weak. She contended that she put the lock on her daughter's door in May of 2005 merely because her daughter had been asking for a lock for four to five years. She denied everything that the victim, Fleming, and DeBoer testified to regarding their conversations with her, and she claimed that she happened to find the victim's diary while searching for a bible. Further, defendant's argument that because the jury acquitted him of one incident not recounted by any of the corroborating witnesses, the inadmissible corroborating testimony could have tipped the scales against him on all of the remaining allegations lacks merit. The witnesses did not recount or corroborate any specific instances of sexual abuse. Rather, they testified generally that the victim told them she had been touched inappropriately. Given that there was ample admissible evidence to convict defendant, we hold that the erroneous admission of hearsay testimony did not affect defendant's substantial rights, and therefore, reversal is not warranted.

II.

Defendant next argues on appeal that the trial court abused its discretion by not granting his request for a ten-day adjournment so he could locate and prepare his expert witness. We disagree. This Court reviews a trial court's decision to grant or deny an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000); MCR 2.503(D)(1). A party must show good cause to invoke a trial court's discretion to grant an adjournment. *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002); MCR 2.503(B)(1). Pursuant to MCR 2.503(C)(2), "An adjournment may be granted on the ground of unavailability of a witness or evidence only if the court finds that the evidence is material and that diligent efforts have been made to produce the witness or evidence." *Id*. at 277.

Defendant presented no evidence that he attempted to contact his expert to see if he would be available to testify. Additionally, defendant merely assumed his expert could not testify regarding the subject matter allowed by the trial court, but did not present any evidence that he discussed the proposed subject matter with the expert. Because defendant has not shown good cause for adjournment or that he used diligent efforts to produce his expert witness, we find that the trial court did not abuse its discretion by denying defendant's request to adjourn.

III.

Finally, defendant claims that he was denied the effective assistance of counsel. We disagree. When reviewing an unpreserved claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that this performance was so prejudicial that it denied the defendant a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668, 687; 104 S Ct

2052; 80 L Ed 2d 674 (1984). A defendant must overcome the strong presumption that his counsel was effective and engaged in sound trial strategy. *Id*.; *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant first claims that his trial counsel was ineffective for failing to object to the hearsay testimony regarding the victim's disclosure of sexual abuse. The defense theory of the case was that the victim made allegations of sexual abuse to others because she disliked defendant. Therefore, defense counsel's failure to object to the hearsay statements may have been part of his trial strategy given that defendant did not outrightly deny that the victim made the allegations to others, and "this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Moreover, defendant cannot show that but for his counsel's failure to object to the hearsay statements the result of the trial would have been different, given that there was ample nonhearsay testimony to convict defendant, as discussed *infra*.

Defendant also claims that his trial counsel was ineffective for failing to call the victim's cousin, George Ciccone, and Dr. Mary Smith to testify. Defense counsel's failure to investigate and call a witness does not amount to ineffective assistance of counsel unless the defendant shows prejudice as a result. *People v Caballero*, 184 Mich App 636, 640-642; 459 NW2d 80 (1990). In other words, defense counsel's failure to call a witness can only constitute ineffective assistance of counsel if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 900 (1996). A substantial defense is one which might have made a difference in the outcome of the trial. *Hyland*, *supra* at 710. Moreover, the decision whether to call a witness is presumed to be a matter of trial strategy. *Dixon*, *supra* at 398.

Defendant asserts that Ciccone's testimony would have demonstrated that the victim's allegations were planned, premeditated, and carefully fabricated and that Dr. Smith would have testified that she found no physical evidence of sexual abuse when she examined the victim. However, the witnesses' proposed testimonies are not of record. Even on appeal defendant has failed to present an affidavit or offer of proof demonstrating how these witnesses would have testified. Furthermore, Dr. Smith's alleged testimony would have been cumulative to the testimony of Vanderbilt, who stated that no one told her there was anything wrong with the victim's genitalia after her medical examination, and of Detective Michael Thomas, who testified that the medical examination produced no DNA evidence. The prosecution also admitted in closing that that there was no medical or DNA evidence. Thus, defendant has not established that he was denied a substantial defense by defense counsel's failure to call Ciccone and Dr. Smith. Defendant has failed to overcome the presumption of effective assistance of counsel.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Stephen L. Borrello
/s/ Jane M. Beckering