STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 15, 2008
v	No. 272423 Mason Circuit Court
DAVID LEROY MCGORMAN, Defendant-Appellant.	LC No. 06-001590-FH

Before: Kelly, P.J., and Cavanagh and O'Connell, J.J.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to 7 to 30 years in prison. We affirm.

I. Basic Facts

Defendant shared a home with his ex-wife, their two-year-old daughter, and the 14-year-old daughter of his ex-wife, who is the victim in the instant case. The allegations arose from an incident that occurred while the victim's mother was working one evening and defendant was watching the victim and his daughter. The victim claimed that, after defendant's daughter went to bed, she and defendant showered together and he touched her "boobs" and attempted to touch her with his penis. She asserted that defendant pinned her down on his bed after the shower and removed their towels. The victim claimed that defendant touched her vagina with his penis and she felt him penetrate her to the extent of about one inch.

Defendant initially denied ever being in the bathroom at the same time as the victim, but he eventually admitted that he had been in the shower once when she joined him and he may have accidentally touched her buttocks or breasts. Defendant also admitted that he and the victim engaged in wrestling after the shower incident and he held her down on the bed. According to defendant, he was wearing a towel and she was wearing underpants but no shirt. Defendant admitted to being aroused during this incident and acknowledged that there was a chance his towel could have come undone, but he denied that he had touched the victim's vagina.

The victim told her mother about the incident, and they saw an emergency room doctor, who found no physical trauma. Six days later, the victim was examined by a pediatrician with special training in child abuse and neglect. This doctor, who was certified as an expert witness at

trial, found a genital rash or redness but no physical trauma, which resulted in a "nonspecific" physical examination finding. After combining this finding with the victim's history and disclosures, the doctor reported her overall evaluation as "probable abuse."

II. Expert Witness Testimony

Defendant argues that the trial court erred in admitting the expert witness's testimony that the victim suffered "probable abuse" because it constituted an inadmissible opinion regarding the victim's veracity and defendant's guilt. We disagree. We review unpreserved issues for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Even with a showing of prejudice, reversal is necessary only if defendant is actually innocent or the error damaged the integrity of the judicial proceedings. *Id.*

MRE 702 governs expert testimony and provides that an expert witness may testify if the trial court determines that scientific, technical, or other specialized knowledge will assist the trier of fact. However, "[a]n expert may not vouch for the veracity of a victim." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Relying on *People v Smith*, 425 Mich 98; 387 NW2d 814 (1986), and *People v McGillien #2*, 392 Mich 278; 220 NW2d 689 (1975), defendant argues that the challenged testimony constituted improper vouching for the veracity of the victim and opinion regarding defendant's guilt. However, *Smith* does not exclude all expert testimony as an impermissible opinion on the veracity of the victim. Rather, *Smith* specifically approved cases from this Court, i.e., *People v Wells*, 102 Mich App 558, 562; 302 NW2d 232 (1980), and its progeny, which permitted expert testimony based on "physical findings, history given by the victim, [the] victim's emotional state and [the] doctor's experience in examining alleged victims of sexual assault." *Smith*, *supra* at 110-112; see also *Wells*, *supra* at 562. The *Smith* Court held that, when a physician draws a conclusion from the evidence without the specialized training required to permit such inferences, that opinion is no longer expert testimony, but "merely an inadmissible lay witness' opinion on the believability of the complainant's story." *Id*. at 113.

In the present case, the pediatrician who examined the victim was certified "as an expert in the field of pediatrics with special expertise in the area of child abuse and neglect[,]" without objection from defense counsel. She had performed over 1,500 examinations on children where sexual abuse was alleged, and had been previously certified to testify regarding those topics in 13 Michigan counties. Her undergraduate degree was in psychology, she was board certified in pediatrics, and she was a member of the American Academy of Pediatrics, the American Professional Society on the Abuse of Children, and the Michigan Chapter of the Professional Society on the Abuse of Children. Thus, the doctor clearly had the expertise to draw conclusions from the evidence that were lacking in *Smith*. The doctor based her opinion of "probable abuse" on a physical examination, functional neurological testing to assess the child's cognitive level, and the victim's comprehensive background history and past medical history, which were gleaned from interviewing the child and her mother.

Moreover, the lack of physical injury to the victim in the instant case did not automatically convert the doctor's testimony into improper vouching. In *People v Beckley*, 434 Mich 691, 717; 465 NW2d 391 (1990), our Supreme Court found that expert testimony will assist a jury under certain circumstances because of the misconception "that physical injury will almost always result from the incident" and that generally "there will be no physical evidence to corroborate the victim's allegations." Thus, it is the very fact that often there is no evidence of

physical injury that helped persuade the *Beckley* Court to permit expert testimony. At no time did the doctor state that she found the victim credible or affirmatively assert that defendant had abused her. The doctor's testimony that there was "probable abuse" cannot be read as a specific statement identifying defendant as the abuser. Accordingly, defendant has failed to establish error, let alone plain error, affecting his substantial rights. *Carines*, *supra* at 763.

Defendant contends that trial counsel's failure to object to the admission of the doctor's testimony constituted ineffective assistance of counsel. Because we find no error in the admission of the testimony, trial counsel's failure to object cannot constitute ineffective assistance. *People v Wilson*, 252 Mich App 390, 393-394, 397; 652 NW2d 488 (2002).

III. Exclusion of Evidence of A Dream

Defendant next asserts that the trial court erred in excluding evidence regarding a dream the victim allegedly relayed to defendant's sister, claiming that this alleged dream is evidence of bias. The decision whether to admit evidence will not be disturbed on appeal absent an abuse of discretion, *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003), which occurs when the trial court chooses an outcome that falls outside the permissible principled range of outcomes, *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). However, the decision whether to admit evidence often involves a preliminary question of law, which is reviewed de novo. *Katt*, *supra* at 278.

The victim allegedly told defendant's sister that she had a dream in which she "woke up one night, went into the kitchen, got a butcher knife, went into the bedroom, and stabbed [defendant] and killed him." After describing the dream, the victim said that she wanted defendant "out of the picture." When defendant attempted to elicit testimony about this alleged dream from his sister at trial, the prosecution objected on hearsay grounds. Outside the presence of the jury, defendant's sister testified about the content of the dream. The trial court ruled that testimony about the content of the dream was inadmissible without an expert in dream analysis and interpretation because the images in dreams are not always an accurate representation of the dreamer's thoughts and feelings. The trial court ruled that defendant's sister would be permitted to testify that the victim wanted defendant "out of the picture" as long as the testimony was based on something other than the dream.

Defendant correctly notes that "[a] witness's bias is always relevant." *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005). However, the victim's dream is not necessarily evidence of a conscious thought or bias on the part of the victim, and the trial court properly noted that dreams are not always accurate representations of thoughts or feelings. Further, relevant evidence may be excluded pursuant to MRE 403 "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Because the probative value of the dream is minimal, and the danger of misleading the jury without an expert to discuss proper analysis and interpretation of the dream, the trial court's decision to exclude evidence of the dream was not outside the range of reasonable and principled outcomes. *Babcock*, *supra* at 269.

Moreover, exclusion of the evidence did not deprive defendant of his ability to present a complete defense. The record demonstrates that defendant's defense was to show that the victim

was not credible because she was a liar and a thief, and defense counsel vigorously explored the victim's truthfulness and instances of theft with several witnesses. We find nothing in the record indicating that defendant was unable to present a complete defense solely because the trial court excluded the content of the dream, particularly in light of the fact that defendant's sister testified that the victim did not want defendant "in the family."

IV. Resentencing

Defendant claims that he is entitled to resentencing because the trial court failed to recognize that it had the discretion to impose a maximum sentence of less than 30 years. We disagree. Because defendant failed to object during sentencing, this issue has not been properly preserved and may only be reviewed for plain error affecting substantial rights. *Carines, supra* at 763.

In *People v Knapp*, 244 Mich App 361, 388-389; 624 NW2d 227 (2001), this Court rejected the defendant's argument that resentencing was warranted because the sentencing court had "failed to articulate on the record that it had discretion when imposing the maximum sentence." This Court recognized that "there is no legal requirement that a trial court state on the record that it understands it has discretion and is utilizing that discretion." Unless there is "clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law must prevail." *Id.* at 389 (citations omitted). In the instant case, there are no indications that the trial court was unaware of its discretion to impose a sentence lesser than the statutory maximum. In fact, the trial court indicated it was "mindful" of the "guideline range," discussed factors it considered relevant, and considered recommendations made by the parties. Absent any evidence that the trial court believed it lacked discretion, no error occurred, and resentencing is not warranted.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Peter D. O'Connell