

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESTER SINGLETON, JR.,

Defendant-Appellant.

UNPUBLISHED

March 17, 2009

No. 282082

Wayne Circuit Court

LC No. 07-008882-FC

Before: Jansen, P.J., and Borrello and Stephens, JJ

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree criminal sexual conduct (victim under 13 years of age), MCL 750.520b(1)(a), and second-degree criminal sexual conduct (multiple variables), MCL 750.520c. Defendant was sentenced to 25 to 60 years' imprisonment for the first-degree criminal sexual conduct conviction, and 6 to 15 years' imprisonment for the second-degree criminal sexual conduct conviction. We affirm.

Defendant first argues that the trial court improperly received hearsay statements of complainant's teacher and principal, to whom complainant initially reported the sexual assault. This claim of error was not preserved at trial. Generally, a trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). However, where a challenge to the admission of evidence is unpreserved, this Court reviews the admissibility of the evidence for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). A plain error affects a defendant's substantial rights when the error results in outcome-determinative prejudice. *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006). A criminal defendant may obtain relief based on an unpreserved error if the error is plain and affected substantial rights, and it either resulted in the conviction of an innocent person, or seriously affected the fairness, integrity, or public reputation of the proceedings. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Defendant argues that the trial court improperly admitted statements of teacher Cindy Tumas and principal Michelle Hernandez, which consisted, in turn, of the statements of complainant, which described the sexual assault and identified her mother's boyfriend, "Snoop," as the perpetrator. Specifically, defendant contends that the statements are not prior consistent statements pursuant to MRE 801(d)(1)(B), and are inadmissible under the catch-all exception set forth under MRE 803(24).

Although we conclude that the challenged statements of Hernandez and Tumas were improperly admitted where they were not admissible prior consistent statements under MRE 801(d)(1)(B), and the catch-all exception pursuant to MRE 803(24) is inapplicable, defendant cannot show that the trial court's admission of the hearsay statements resulted in outcome-determinative prejudice. *Pipes, supra* at 279. The prosecution presented sufficient evidence through complainant herself for a rational trier of fact to conclude that defendant penetrated complainant's vagina with his finger and his penis. The prosecution did not attempt to tie together complainant's testimony and the statements that Tumas and Hernandez attributed to complainant. Instead, the prosecution argued that complainant's testimony alone could support a conviction for first-degree and second-degree criminal sexual conduct. Finally, defendant elected to testify, which provided the jury not only with his version of the events, but also with the opportunity to assess his credibility. Because defendant cannot demonstrate that the admission of the evidence resulted in outcome determinative prejudice, his challenge to the admissibility of Tumas's and Hernandez's testimony fails.

With respect to defendant's unpreserved challenge to Dr. Dev's testimony, MRE 803(4) provides an exception to the rule regarding the inadmissibility of hearsay where the declarant's statement is made for purposes of medical treatment or medical diagnosis in connection with treatment, and provides:

Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

In *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992), our Supreme Court delineated the application of MRE 803(4) in child sexual abuse cases, concluding that the "trustworthiness of a child's statement can be sufficiently established to support the application of the medical treatment exception," and "the identification of the assailant is necessary to adequate medical diagnosis and treatment." The *Meeboer* Court explained the rationale underlying the admissibility of hearsay statements under MRE 803(4) as "the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." *Meeboer, supra* at 322. In order to determine whether the hearsay statements are inherently trustworthy, consideration of the circumstances surrounding the medical examination is required to ascertain whether the child comprehended the necessity of being truthful to the physician. *Id.* at 323. In analyzing the trustworthiness of a hearsay statement to which MRE 803(4) may apply, the *Meeboer* Court set forth ten factors relating to the trustworthiness of the statement:

(1) [T]he 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. [*Meeboer, supra* at 324-325 (internal citations omitted).]

The child in this case was relatively young, not subject to a detailed questioning, used child-like terminology such as “pee-pee”, knew the assailant and, according to defendant, had a long-term amicable relationship with him. The physician indicated further that the nature of assault was important to the treatment to be given. While the identity of the perpetrator was not relevant to treatment, the examination occurred when the child was not under immediate pain and distress and the examination was at the behest of prosecutorial authorities and apart of the development of a criminal case. A preponderance of the *Meeboer* factors weigh in favor of admissibility and four weigh in favor of inadmissibility. Therefore, we conclude that complainant’s statements were sufficiently trustworthy, and because the other requirements for admissibility under MRE 803(4) were met, Dr. Dev’s hearsay testimony was properly admitted.

Additionally, even if Dr. Dev’s hearsay statements were inadmissible, defendant is not entitled to relief on the basis of this unpreserved issue because defendant cannot demonstrate outcome-determinative prejudice. *Pipes, supra* at 279. Dr. Dev testified that, pursuant to her examination, she found no physical evidence of sexual abuse. This testimony was favorable to defendant because it underscored defendant’s position that the prosecution presented no physical evidence that connected defendant to the charged crimes. Moreover, in light of the other, overwhelming evidence, including complainant’s testimony relating the details of the sexual assault, defendant cannot demonstrate that the outcome would have been different had the trial court excluded Dr. Dev’s hearsay statements. Accordingly, even if Dr. Dev’s statements were inadmissible hearsay, because defendant cannot demonstrate outcome-determinative prejudice, his claim fails.

Defendant next argues that the prosecution presented insufficient evidence for a rational trier of fact to conclude beyond a reasonable doubt that defendant penetrated complainant’s vagina. We disagree. This court reviews the record de novo when presented with a claim of insufficient evidence. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). Reviewing the evidence in a light most favorable to the prosecution, this Court determines whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v McKinney*, 258 Mich App 157, 165; 670 NW2d 254 (2003). This Court will not interfere with the fact-finder’s role in weighing the evidence and judging the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). It is for the trier of fact to decide what inferences can be fairly drawn from the evidence and to judge the weight it accords to those inferences. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Conflicts in the evidence are resolved in the prosecution’s favor. *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

The elements of first-degree criminal sexual conduct are: (1) that the defendant engaged in sexual penetration with another person; and (2) the other person was under 13 years of age. MCL 750.520b(1)(a); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). “Sexual penetration” is statutorily defined as “sexual intercourse . . . or any other intrusion,

however slight, of any part of a person's body" MCL 750.520a(o). Here, viewing the evidence in a light most favorable to the prosecution, complainant testified that when she woke up on the night of the incident, defendant was lying on top of her. Complainant was aged 12 years at the time the incident took place, and defendant was over 17 years of age. Complainant's pajama pants had been pulled down to her knees, and complainant's underpants were twisted to one side. Defendant was touching complainant's "hole" with his finger. Complainant explained that her "hole" was where she "peed" and "wiped." A short time thereafter, defendant, clothed only in boxer shorts, exposed his penis and attempted to insert his penis in complainant's "hole," but was unsuccessful in his attempt to insert it completely into complainant. Defendant moved "back and forth" while touching her with his penis, and when defendant eventually released complainant, her vagina felt "sticky" and "nasty." Dr. Dev testified that the anatomical part where a person urinates is the urethra, and is located inside the labia majora.

From this evidence, a rational trier of fact could conclude that defendant penetrated, to at least a slight degree, complainant's vagina with his finger. We conclude that the prosecution presented legally sufficient evidence for a rational trier of fact to conclude, beyond a reasonable doubt, that defendant penetrated complainant with his finger. MCL 750.520b(1)(a); MCL 750.520a(o). *Hammons, supra* at 557.

Defendant next argues that the trial court improperly denied defendant his right under the United States and Michigan constitutions to represent himself at trial. We disagree. This Court reviews a trial court's factual findings with respect to a defendant's knowing and intelligent waiver of the right to counsel for clear error. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). "However, to the extent that the ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo." *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). Where a trial court erroneously denies a defendant the right to self-representation, the error is considered structural and reversal is required. *United States v Gonzales-Lopez*, 548 US 140, 148-149; 126 S Ct 2557; 165 L Ed 2d 409 (2006).

The Sixth Amendment of the United States Constitution guarantees the right to counsel at all stages of the criminal process to defendants who may be subject to incarceration. US Const, Am VI. The Sixth Amendment right to counsel has been incorporated into the substantive due process clause of the Fourteenth Amendment, and has thus been made applicable to the states. US Const, Am XIV; *Gideon v Wainwright*, 372 US 335, 345; 83 S Ct 792; 9 L Ed 2d 799 (1963). The United States and Michigan Constitutions also protect a defendant's right of self-representation at trial; however, this right is subject to the discretion of the trial court. *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005).

That a defendant did not waive his or her right to counsel is presumed. *Willing, supra* at 220. Rather, "[t]he record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer." *Willing, supra* at 220, quoting *People v Williams, supra* at 641.

Here, the record reveals that once defendant asserted his right to represent himself, the trial court properly advised defendant regarding the dangers and disadvantages of self-representation. In doing so, the trial court inquired regarding the reasons why defendant desired to represent himself at trial. Defendant expressed his concern that the jury would not be

informed of defendant's version of events. The trial court responded that if that was defendant's concern, he should proceed to trial with the representation of counsel, and testify as a witness in order to present his side of the story. Defendant agreed and the trial proceeded. Defendant did, in fact, testify at trial.

Here, the record demonstrates that the trial court did not exercise its discretion in either allowing or forbidding defendant to represent himself. *Willing, supra* at 219 (holding that the right of a criminal defendant to represent himself is subject to the discretion of the trial court). Rather, the record shows that the trial court would have allowed defendant to exercise his right of self-representation if defendant had ultimately chosen to proceed in propria persona. Defendant stated to the trial court that he desired the opportunity to be heard, rather than try his case himself. At the conclusion of the colloquy, defendant unequivocally stated that he wanted to retain defense counsel, and also wanted an opportunity to be heard. Defendant elected to testify at trial.

Thus, although defendant's initial assertion of his right to represent himself was arguably unequivocal, after advising defendant of the dangers and disadvantages of self-representation, defendant unequivocally asserted his request to proceed with the representation by defense counsel. With respect to defendant's suggestion that the written motion received, but not considered, by the trial court constituted a renewed assertion of defendant's right of self-representation, the record demonstrates that the document was dated October 17, 2007, the day before trial, and the document was filed on October 19, 2007, the day after the first day of trial. The trial court refused to accept the document for filing, apparently in reliance upon MCR 2.114(C)(1), which provides that "every document of a party represented by an attorney shall be signed by at least one attorney of record," and MCR 2.114(C)(2), which requires a trial court to strike a document "unless it is signed promptly after the omission is called to the attention of the party," in conjunction with MCR 6.001(D), which provides that the rules of civil procedure apply in criminal cases unless otherwise provided by statute, the rule of civil procedure clearly applies only to civil cases, or "when a statute or court rule provides a like or different procedure." The trial court provided defense counsel with its copy of the motion. Significantly, defendant did not subsequently re-file the motion through counsel. Defendant does not attach a copy of the motion to his brief on appeal to substantiate his argument that the motion represented a re-assertion of defendant's right of self-representation, and a copy of the motion does not appear in the lower court record. An appellant "may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Thus, we conclude that defendant has provided this Court with an insufficient factual basis to assess whether the written motion was a renewed request by defendant to reassert his right of self-representation, or in the alternative, whether the issue was mooted by defendant's unequivocal decision to proceed with the representation by counsel.

Because the record demonstrates that trial court never exercised its discretion in either allowing or forbidding defendant to represent himself, no error occurred. That is, the trial court could not abuse discretion it never exercised. Further, because defendant unequivocally expressed his desire to proceed with counsel's representation, defendant's argument, that the trial court denied him his right to represent himself, fails.

Defendant next argues that the trial court abused its discretion in declining to grant a continuance in order for defendant to prepare for trial. We disagree. A trial court's decision

whether to grant a continuance is reviewed for an abuse of discretion.” *People v Jackson*, 467 Mich 272, 276; 650 NW2d 665 (2002); MCR 2.503(D)(1).

This Court has articulated an analytical framework for determining whether a trial court abused its discretion in denying a request for a continuance:

(1) [W]hether the defendant is asserting a constitutional right, (2) whether the defendant has a legitimate reason for asserting the right, such as a bona fide dispute with his attorney, (3) whether the defendant was negligent in asserting his right, (4) whether the defendant is merely attempting to delay trial, and (5) whether the defendant demonstrated prejudice resulting from the trial court's decision. [*People v Echavarria*, 233 Mich App 356, 369; 592 NW2d 737 (1999).]

In addition, if the trial court did err in denying defendant's request for a continuance, because, in this case, the denial of the continuance is a preserved, non-constitutional error, defendant has the burden of showing that “after examination of the entire cause, it shall affirmatively appear that the error asserted has resulted in a miscarriage of justice.” *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999) (quoting MCL 769.26).

In this case, defendant made the statement that he was unprepared for trial in conjunction with his request that he be allowed to represent himself at trial. A defendant has the right of self-representation, subject to the discretion of the trial court. *Willing, supra* at 208. Thus, we conclude that, in requesting a continuance, defendant was asserting a constitutional right. *Echavarria, supra* at 369. With respect to the second factor, “whether the defendant has a legitimate reason in asserting the right,” we observe that defendant requested a continuance because “a lot of my evidence is being withheld to prove my innocence.” In explaining the dangers and disadvantages of proceeding to trial in propria persona, the trial court explained that if defendant wanted to explain his version of the facts, he could exercise his right to testify at trial, and discharging his attorney was unnecessary. Following the trial court's inquiry into the reasons underlying defendant's assertion of his right to self-representation, defendant agreed to be represented by counsel, but also advised the trial court that he wanted to explain his version of the events to the jury. Thus, this second factor balances in favor of the trial court's decision not to grant a continuance based upon the lack of a legitimate reason to do so. *Echavarria, supra* at 369.

With respect to the third element, “whether the defendant was negligent in asserting the right,” and the fourth element, “whether the defendant is merely trying to delay trial,” the trial court observed that “[t]his case has gone on long enough.” *Echavarria, supra* at 369. Defendant asserted his right of self-representation on the first day of trial, and defendant did not advise his attorney regarding his decision to proceed in propria persona before bringing his request to the attention of the trial court. Further, the record shows that on August 2, 2007, the trial court entered an order granting defendant's previous request to discharge his previous trial counsel. Thus, although the trial court merely stated that it would not grant an adjournment, because the trial court could have reasonably concluded that defendant was negligent in failing to assert his right to self-representation earlier, and in doing so on the first day of trial was merely attempting to delay the proceedings, elements three and four are satisfied as well. *Echavarria, supra* at 369. The trial court did not abuse its discretion in declining to grant a continuance in order for defendant to prepare for trial. Further, defendant cannot demonstrate prejudice, because the

record shows that defendant agreed to proceed to trial with the representation of counsel, and, in fact, testified as a witness, thus fulfilling defendant's stated objective in bringing his version of the facts of the case to the attention of the jury.

Lastly, defendant argues that the trial court abused its discretion when it sentenced defendant to 25 years' imprisonment for defendant's first-degree criminal sexual conduct conviction. Specifically, defendant argues that there were substantial and compelling reasons to depart from the mandatory minimum sentence, and as such, the trial court was required to depart downward. We disagree. This Court reviews an unpreserved sentencing issue for plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 670; 672 NW2d 860 (2003). Statutory construction presents an issue of law that this Court reviews de novo. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007).

The primary goal of statutory interpretation is to ascertain and effectuate the Legislature's intent. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003). When construing a statute, this Court first examines the language of the statute. *Id.* Where the language of the statute is clear and unambiguous, further construction is unnecessary and unwarranted, and the statute will be applied as written. *Id.*

MCL 750. 520b provides, in pertinent part:

(2) Criminal sexual conduct in the first degree is a felony punishable as follows:

* * *

(b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment of life or any term of years, but not less than 25 years.

Here, defendant's claim, that the trial court abused its discretion in failing to depart downward from the statutorily mandated 25-year minimum sentence fails.

The language of MCL 750.520b(2)(b) clearly and unambiguously provides that a person convicted of first-degree criminal sexual conduct under the circumstances of this case, specifically where the perpetrator is aged 17 years or older, and the victim is less than 13 years of age, shall be sentenced to imprisonment for not less than 25 years. Thus, the trial court did not have discretion, or any legal authority, for that matter, to exercise discretion, even if presented with what it believed to be substantial and compelling reasons for doing so, to sentence defendant to a minimum sentence of less than 25 years' imprisonment. Accordingly, defendant's argument that substantial and compelling reasons existed for the trial court to sentence defendant to less than the statutory minimum sentence of 25 years' imprisonment and the trial court abused its discretion when it failed to do so, lacks merit.

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Cynthia Diane Stephens