

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LEE FORBES, II,

Defendant-Appellant.

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UNPUBLISHED

May 19, 2009

No. 282629

Saginaw Circuit Court

LC No. 06-028351-FC

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under age 13). Defendant was sentenced to serve four concurrent prison terms of 210 months to 27 years. We affirm.

Defendant was convicted of sexually assaulting his six-year-old nephew when the boy spent the night at defendant's apartment. The victim told his grandmother about the abuse a week later and then repeated the story to his mother. A month later he was physically examined and underwent a forensic interview at the Children's Advocacy Center.<sup>1</sup> He repeated his accusations at that time. Defendant denied any sexual contact with his nephew.

I. Testimony of Rebuttal Witnesses

Defendant first argues on appeal that the testimony by the rebuttal witnesses was improperly admitted because it related to collateral issues. Defendant also argues that the prosecutor committed misconduct by seeking to admit this rebuttal evidence because it was other-acts evidence used to establish action in conformity with the charged acts. Although this second assertion is framed as an issue of prosecutorial misconduct, it is in essence an evidentiary issue. See *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007). Neither argument was timely presented below, so our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

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<sup>1</sup> The facility is also known as the Children's Assessment Center.

Rebuttal evidence is evidence that is admitted to contradict, explain, or disprove evidence offered by the other party. *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Only rebuttal evidence that is properly responsive to evidence introduced or a theory developed by the opponent is proper. *People v Pesquera*, 244 Mich App 305, 314; 625 NW2d 407 (2001). Rebuttal evidence must relate to a substantive rather than a collateral matter, and “contradictory evidence is admissible only when it directly tends to disprove a witness’[s] exact testimony.” *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994).

In the instant case, the prosecution offered three rebuttal witnesses who testified about complaints concerning defendant’s work as an attendant at the community pool in defendant’s mother’s trailer park, that defendant watched pornography with and made sexually oriented comments to young teenagers, and that defendant possessed a garbage bag full of pornography. One of the rebuttal witnesses also testified that defendant appeared to be masturbating while watching the pornography with her, and another testified that defendant related a dream to her about having sex with a 12-year-old boy. At trial, the prosecution said that this evidence was raised to contradict testimony that defendant was fired from the pool due to inattention, that he had a diminished libido, and that he was unable to maintain an erection.

One of defendant’s theories at trial was that he could not have sexually violated anyone because he was suffering from Klinefelter’s syndrome, a chromosomal abnormality that has diminished his libido and impacted his ability to achieve an erection. Defendant testified that his condition has caused him to suffer from erectile dysfunction for ten years, and that he has been completely unable to achieve an erection or perform any type of sex act with his penis for a long time. Defendant also called his treating physician to testify as a fact and expert witness on this issue. The testimony of the rebuttal witnesses directly contradicted this theory as it attested to defendant’s active libido and ability to engage in sexual acts with his penis despite his condition.

Defendant was not asked on direct examination about pornography or his relationship with minors while working at the pool. When asked on cross-examination if he possessed or watched pornography, defendant testified that he had not viewed or owned pornography since 2003. However, a prosecutor may not elicit a denial on cross-examination of a defendant in order to create an issue for rebuttal. *Figures, supra* at 401. Further, cross-examination cannot be used as a mechanism to introduce evidence that could have been introduced in the case-in-chief. *People v Rice (On Remand)*, 235 Mich App 429, 442; 597 NW2d 843 (1999).

Nonetheless, rebuttal evidence may address a matter that the prosecutor cross-examined on if the cross-examination merely addressed details of a subject raised by the defense. *People v Losey*, 413 Mich 346, 352 n 5; 320 NW2d 49 (1982). Defendant’s level of libido and ability to sexually perform were issues interjected into the case by defendant. The prosecutor cross-examined defendant on these issues with questions about pornography and sexuality with minors, and contradicted defendant’s responses with rebuttal testimony. The admission of the rebuttal testimony on these matters was not plain error that substantially affected defendant’s rights.

However, the reasons that defendant lost his job at the pool were certainly collateral to the charges against him and his defense and were, therefore, not the proper subject of rebuttal. *City of Westland, supra*. Nonetheless, although introduction of this evidence was plain error, it did not result in a violation of defendant’s substantial rights because it did not “affect[] the

outcome of the lower court proceedings” in light of the evidence of guilt adduced. *Carines, supra*. Moreover, in light of that evidence, defendant cannot establish his actual innocence. *Id.* Additionally, the court gave the following limiting instruction on the proper use of the rebuttal evidence:

You have heard evidence that was introduced to show that the defendant has engaged in improper sexual conduct or pornography for which the defendant is not on trial. If you believe this evidence, you must be very careful to consider it for only one limited purpose, and that is to help you judge the believability of testimony regarding the acts for which defendant is now on trial. You must not consider this evidence for any other purpose.

For example, you must not decide that it shows that the defendant’s a bad person or that the defendant’s likely to commit crimes. You must not convict the defendant here because you think he’s guilty of other bad conduct.

In light of the well-established principle of appellate practice “that jurors are presumed to follow their instructions,” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), the court’s instructions alleviate the possibility that the fairness, integrity, or public reputation of the judicial system in general, or this trial in particular, were undermined.

Use of other acts as evidence of character is excluded, except as allowed by MRE 404(b), “to avoid the danger of conviction based on a defendant’s history of misconduct.” *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). Generally, to be admissible under MRE 404(b), other-acts evidence (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant’s character to show his propensity to commit the offense. *Johnigan, supra*. Generally, a prosecutor must provide reasonable notice of his intent to present other-acts evidence. See MRE 404(b)(2). However, as is the case here, the notice requirement does not apply to evidence introduced to rebut a defendant’s evidence. *People v Lukity*, 460 Mich 484, 499; 596 NW2d 607 (1999).

Relevant evidence is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. In this case, the evidence admitted was certainly relevant to examining defendant’s libido and ability to perform sexually, which were issues raised by defendant. This evidence was provocative and certainly may have impacted the jury in a way that extended beyond establishing defendant’s libido and sexual performance. However, the probative value of the evidence was not “substantially outweighed by the danger of unfair prejudice,” particularly in light of the limiting instruction quoted above. MRE 403.

Defendant also asserts that the prosecutor improperly referred to the prior bad acts during closing argument. Although he has quoted at length from the closing argument, defendant does not advance an argument on why these comments were improper. “A party may not merely announce a position and leave it to this Court to discover and rationalize the basis for the claim.” *Nat’l Waterworks, Inc v Int’l Fidelity & Surety, Ltd*, 275 Mich App 256, 265; 739 NW2d 121

(2007). Assuming that defendant's position is that the prosecutor's references to the evidence during closing were improper because the evidence was improper other-acts evidence, defendant's argument fails for the reasons set forth above. The prosecutor did not argue that the evidence should be used for a purpose other than that for which it was admitted. See *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992).

## II. Bolstering of Victim's Credibility by Prosecution Witnesses

Defendant next argues that testimony was improperly elicited from the prosecution's witnesses that bolstered the credibility of the victim's statements and denied defendant a fair trial. Defendant's challenge is focused on the testimony of four witnesses: the victim, Dr. Harry Frederick, Cheryl Courtney, and Arlene Forbes, the victim's grandmother. This issue was not preserved for appeal and will be reviewed for plain error that affected defendant's substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

It is the province of the jury to assess the credibility of witnesses. *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007). Generally, it is "improper for a witness to comment or provide an opinion on the credibility of another witness." *Dobek, supra* at 71. Further, an expert is not allowed to vouch for the veracity of a victim. *Id.* This Court in *People v Izzo*, 90 Mich App 727, 730; 282 NW2d 10 (1979), explained that an expert may not engage in "unwarranted reinforcement of the complaining witness's testimony" by giving a "stamp of scientific legitimacy to the truth of the complaining witness's factual testimony concerning the [crime]."

Bolstering evidence is evidence offered for the purpose of enhancing a witness's credibility. Black's Law Dictionary (8th ed), p 186. *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995), amended on other grounds 450 Mich 1212 (1995), provides:

(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, . . . (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.<sup>2</sup>

Regarding the victim, it is not improper to ask a witness if he or she is testifying truthfully, especially when the witness is a young child. See *Dobek, supra* at 71 (stating that it is generally improper for a witness to comment on the credibility of *another* witness).

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<sup>2</sup> Consistent with the common law, MRE 608(a)(2) provides that "evidence of truthful character [of a witness] is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise."

Dr. Frederick, the physician who examined the victim at the Children's Advocacy Center, was asked if there was anything about the victim's behavior during the doctor's examination that made Dr. Frederick suspect the boy's veracity. Dr. Frederick responded, "No." Because the question was focused on the victim's specific behavior, the first exception recognized by *Peterson* does not apply. The only witness to testify at trial prior to Dr. Frederick was the victim. Defendant's cross-examination of the victim was extensive and tried to uncover any inconsistencies in his story, but it cannot be characterized as an attack on the boy's character for truthfulness. Thus, the second exception recognized by *Peterson* does not apply. Accordingly, the question and answer were improper attempts to bolster the victim's credibility.

Courtney, a child sexual abuse expert employed by the prosecutor's office, testified that when examining a suspected child victim of sexual abuse, she makes an assessment of the child's credibility. She explained that her process for doing so included examining the child's description of how the assault felt. She was then asked if a child would know what it feels like to have an object placed into his anus from watching a pornographic movie, facts from the instant case. Courtney responded, "Absolutely not. . . . [Y]ou don't feel sensation watching a movie." She then stated that the victim's report that something came out of defendant's penis that was white and tasted badly was not something a child would learn from watching a pornographic movie. While this testimony did not directly comment on the victim's truthfulness, it did in essence enhance the boy's credibility by pointing out that he had knowledge he could not have gained elsewhere. As with the doctor's testimony, neither of the *Peterson* exceptions applies to this testimony.

As for Forbes, she was asked if she had any reason to suspect that the victim was making this story up, and responded, "No." On its own motion, the court instructed the jury to disregard the question and answer. However, Forbes was then allowed to testify that the victim's story had not changed. It is presumed that the jury followed the court's instruction to ignore the disregarded question and answer. *Graves, supra*. The testimony that the victim's story had not changed, however, was not being offered to counter a charge of recent fabrication or improper influence. MRE 801(d)(1)(B).

At issue is whether these repeated plain errors require reversal of defendant's conviction. Expert testimony is provided to "assist the trier of fact to understand the evidence or to determine a fact [of consequence]." MRE 702. Such assistance can also include assisting in the examination of the veracity of the witnesses. However, an expert may not supplant the jury's role—or more to the point, care should be taken that juries do not abdicate their role—in assessing witness credibility and determining the facts. Such a danger exists when experts provide opinions on the veracity of the alleged victims of abuse.

Arguably, the solicited bolstering of the victim's credibility by the prosecution's witnesses may have impacted the outcome of the proceedings by adding a stamp of approval to the victim's testimony. In light of the properly admitted evidence, however, including the victim's testimony, Forbes' appropriate corroboration of his testimony as described below, and other admissible testimony by Dr. Frederick and Courtney, defendant is unable to establish that he is actually innocent of the charges. Further, the court's clear instructions on the jury's role in determining the facts and assessing credibility and the role expert witnesses play at trial, which we presume was followed absent any evidence to the contrary, *Graves, supra*, sufficiently

alleviated the possibility that the fairness, integrity, or public reputation of the judicial system in general, or this trial in particular, has been undermined.

### III. Hearsay Evidence

Finally, defendant argues that hearsay was improperly admitted at trial, and that defense counsel rendered ineffective assistance when he did not raise an objection to the testimony. Because defendant's hearsay argument is also unpreserved, that issue will be reviewed for plain error affecting defendant's substantial rights. *Carines, supra*. "Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted." *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007), citing MRE 801(c). Hearsay is generally not admissible unless it meets the requirements of one of the hearsay exceptions set forth in the Michigan Rules of Evidence. MRE 802; *Stamper, supra*. Defendant's assertion that the statements do not qualify as non-hearsay statements as defined in MRE 801(d) is correct. MRE 801(d)(1)(B) states that a prior statement of a witness who testifies at trial and is subject to cross-examination is not hearsay if the statement is consistent with the witness's testimony and offered to rebut a charge of recent fabrication or improper influence or motive. At the time that Forbes and the expert witnesses testified, there was no implication that the victim's testimony was not genuine.

In this case, both of the prosecution's expert witnesses, Dr. Frederick and Courtney, testified about what the victim said regarding the assault. The victim's grandmother, Forbes, also testified about the details of the incident as told to her by the victim. Presumably, the testimony was offered to prove the truth of the matters asserted, even though the prosecution may have been able to offer other justifications if there had been an objection at trial.

With respect to Forbes' testimony, Michigan provides a "tender years" exception to the general rule excluding hearsay. *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995). MRE 803A, which codified the Michigan tender years hearsay exception, provides in relevant part:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
- (4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

Here, the six-year-old victim's statement to Forbes was the first time he had disclosed the incident. This was approximately a week after it occurred, a short delay that was excusable due to his fear. See *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996). The victim's statement to Forbes was made spontaneously while he was taking a bath, at which time he told her that he and defendant shared a "secret." Forbes' testimony about the statement corroborated the victim's previous testimony. Forbes' testimony was thus admissible under MRE 803A.

Dr. Frederick testified regarding the victim's subsequent disclosure of the incident during his physical examination and interview at the Children's Advocacy Center. The prosecution argues that the victim's statements to Dr. Frederick were made for purposes of medical treatment or diagnosis in connection with treatment, and thus, are excepted from the hearsay exclusion under MRE 803(4). In order to be admitted under MRE 803(4), a statement must be made for purposes of medical treatment or diagnosis in connection with treatment, and must describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of injury insofar as reasonably necessary to such diagnosis and treatment. MRE 803(4). The rationale underlying admission through MRE 803(4) is a patient's self-interest in speaking the truth to treating physicians "in order to receive proper medical care," and the "necessity of the statement to the diagnosis and treatment of the patient." *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992). The admissibility of hearsay as a statement necessary to medical treatment requires a showing of trustworthiness based on the totality of the circumstances. *Id.* at 324.

According to Dr. Frederick's own testimony, however, the Children's Advocacy Center is an organization designed to facilitate and aid children and their families in the initial assessment and evaluation of children who may be victims of sexual abuse by conducting forensic interviews and/or medical examinations of these children. The evaluation was conducted at an off-site location, not on hospital premises. As explained by Courtney, the purpose of a forensic examination is to obtain information for use by law enforcement and child welfare agencies. The victim in this case was taken to Dr. Frederick a month after the family was aware of the alleged abuse. Clearly, the victim was not presented to Dr. Frederick for purposes of medical treatment, but rather, evaluation of whether a crime had occurred for purposes of prosecution. Defendant is correct that Dr. Frederick's testimony regarding the victim's description of the alleged abuse was hearsay and not admissible under MRE 803(4).

Courtney observed a forensic interview of the victim from an observation room at the Children's Advocacy Center. At trial, she related the details of the alleged incident that the victim reported to the interviewer. The prosecution argues that Courtney's recount of the victim's statements was not offered to establish the truthfulness of the statements, but to show

how a child victim reacts to a sexual assault. This argument is not convincing considering that Courtney's testimony specifically pertained to the victim's statements and included how she assessed his truthfulness. As such, the victim's statements about the alleged incident as relayed by Courtney were not admissible.

Although inadmissible hearsay statements by Dr. Frederick and Courtney were admitted at trial, careful review of the record reveals that this did not substantially affect the rights of defendant. Through direct and cross-examination, the victim testified repeatedly and consistently for a child of his age and intellect regarding the facts of the alleged incident, and Forbes properly corroborated the testimony through statements the victim spontaneously made to her within a week of the incident. The additional hearsay accounts regarding the incident did not give the jury any new information on which to base its decision. The cumulative nature of the testimony reduced any prejudice to a minimum degree. *People v Hackney*, 183 Mich App 516, 530; 455 NW2d 358 (1990). By hearing the same story several times, it is possible that this repetition enhanced the victim's credibility, which could have been compounded by the witnesses also addressing the victim's veracity. However, the jury was also free to believe that the victim merely repeated the same false accusations to different people. In fact, the trial record reveals that defendant may have purposefully failed to object to the hearsay testimony as part of his defense strategy. In his case in chief, defense counsel called the victim's mother as a hostile witness and elicited similar hearsay testimony from her, then questioned why she refused to continue taking her child to counseling but actively encouraged him to tell family members and others about the details of the incident. In his closing argument, defense counsel suggested that the victim's mother had an ax to grind against defendant, her brother, so she undertook to have him repeatedly tell the story to others in order to "rehearse" and memorize it like an actor. Under the circumstances of this case, defendant has not met his burden of proving that any error either resulted in the conviction of an innocent person or seriously affected the fairness, integrity, or public reputation of the proceedings. *Jones, supra*.

Defendant also asserts that trial counsel was ineffective in not objecting to the admission of the alleged hearsay statements. A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963 art 1, § 20. This right to counsel encompasses the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Id.* The effective assistance of counsel is presumed, and the defendant bears the heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Here, defendant argues that trial counsel's failure to object to the alleged hearsay statements was deficient performance and prejudicial to defendant. As discussed above, Forbes' testimony about the victim's statements to her was admissible under MRE 803A, and thus, counsel cannot be faulted for failing to object. See *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008). However, an objection to Dr. Frederick's and Courtney's recount of



what they heard the victim say was sustainable. Regardless of defense counsel's failure to object to this hearsay testimony, it is not reasonably probable that the outcome of the case would have been different. The jury properly heard the victim recount details of the abuse, which facts were corroborated by Forbes, as well as other admissible testimony by Dr. Frederick and Courtney. Based on our review of the entire record, we deem it unlikely that these additional consistent statements were decisive to any of the jurors in ascertaining defendant's culpability.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Mark J. Cavanagh

/s/ Jane M. Beckering