STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 21, 2009
v	No. 283023 Wayne Circuit Court
MICHAEL JOHN CRAWFORD, Defendant-Appellant.	LC No. 2007-215940-FH

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13 years of age). He was sentenced, as a third habitual offender, MCL 769.11, to 5 to 30 years in prison. We affirm.

Defendant first argues on appeal that the trial court abused its discretion in finding the four-year-old victim, AC, competent to testify because it was obvious from her answers to the judge's questions that she did not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably. Defendant further argues that AC's testimony was not harmless because it bolstered the testimony of her therapist, Ruth Kusiak. We disagree.

A defendant must "object to the admission of the testimony of a child witness as incompetent" in order to preserve the issue for appeal." *People v Cobb*, 108 Mich App 573, 575; 310 NW2d 798 (1981); MRE 103(a)(1). Defendant did not object to AC's testimony, and furthermore, after the trial judge finished his voir dire of AC at the preliminary examination, defense counsel stated: "I'm satisfied for the purposes of her being competent to testify." Defendant has therefore waived the issue. "Waiver is the intentional relinquishment or abandonment of a known right. It differs from forfeiture, which . . . [is] the failure to make the timely assertion of a right. One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal citations omitted).

Defendant next argues on appeal that AC's statement to Kusiak during therapy – that defendant pulled down her pants and touched her "private places" – was not admissible under MRE 803A because (1) it was not shown to be "spontaneous and without indication of manufacture," and (2) AC made the comments to Kusiak months after the Care House interview

conducted by Amy Allen, chief forensic interviewer, and this delay was inexcusable because neither Allen nor Kusiak offered any reason for it. We disagree.

MRE 803A 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.
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> If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. [*People v Dunham*, 220 Mich App 268, 271-272; 559 NW2d 360 (1996), quoting MRE 803A.]

In *Dunham*, the six-year-old victim made statements alleging sexual abuse by the defendant to a mediator in a divorce proceeding, several months after the alleged incident. *Id.* at 272. "The mediator testified that the victim made the statements in response to the customary, open-ended questions asked of all children of divorcing parents." *Id*. This Court concluded that, "[u]nder these circumstances, the trial court did not err in finding that the victim's statements were spontaneous. Further, the trial court did not abuse its discretion in ruling the eight- or nine-month delay in reporting the sexual abuse was excusable on the basis of the victim's well-grounded fear of defendant." *Id.*

In the case at bar, the length of delay was just under three months – much shorter than in *Dunham.* Here, on November 15, 2006, AC initially disclosed to her mother, Sarah Joy Butler, that, similarly to the soapy water going into the laundry tub, "my daddy's got white stuff in his pee pee." Then, on approximately February 9, 2007, according to Kusiak, during a therapy session AC said that "daddy pulled down her pants and touched her pee pee and she said no, no, no and that they were at Nana's house."

As far as a justification for the delay, there was evidence that AC was afraid to be around defendant, as was the case in *Dunham,* because she no longer wanted to visit him and refused to get out of the car when emergency circumstances forced her mother to leave her with defendant on one occasion. In addition, Allen agreed that often child victims are interviewed two or three times before disclosing abuse, and they are more likely to tell someone who is not in the immediate family. Regarding any indicia of manufacture and the spontaneity of the comments, whereas in *Dunham* the child made the remarks in response to open-ended questions, in the case bar, Kusiak had not asked AC *any* questions, but rather, AC was taking part in an exercise where she had to label body parts on a "doughboy"-shaped figure. Kusiak explained that the exercise was a type of therapy normally used with sexual abuse victims. It was not Kusiak's role to conduct any sort of interview. Finally, Kusiak agreed that the comments were spontaneous.

Defendant further argues that case law interpreting MRE 803(2), the excited utterance exception, should be used to analyze the appropriateness of AC's statement to Kusiak. Defendant cites no authority for this position. "It is not enough for appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *People v Kevorkian*, 248 Mich App 373, 388; 639 NW2d 291 (2001), quoting *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959). Therefore, because Annie's statement to Kusiak was spontaneous, without indication of manufacture, and there was an excusable delay, it was not error for the trial court to admit it under MRE 803A.

Defendant next argues on appeal that he was denied effective assistance of counsel. He first asserts that counsel was ineffective for failing to object to AC's testimony on the grounds that she was incompetent to testify, because it was obvious from her answers to the judge's questions that she did not have the sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law . . . This Court reviews a trial court's factual findings for clear error and reviews de novo questions of constitutional law." *People v Dendel*, 481 Mich 114, 124; 748 NW2d 859, amended 481 Mich 1201 (2008). "[B]ecause the trial court did not hold an evidentiary hearing, . . . review is limited to facts on the record." *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

"An accused's right to counsel encompasses the right to the 'effective' assistance of counsel." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007), citing US Const, Am VI, Const 1963, art 1, § 20, and *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Generally, to establish ineffective assistance of counsel, a defendant must show that "(1) counsel's performance was below an objective standard of reasonableness under professional norms and (2) there is a reasonable probability that, if not for counsel's errors, the result would have been different and the result that did occur was fundamentally unfair or unreliable." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland, supra* at 694. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

It was not error for the trial court to find AC competent to testify, and therefore, trial counsel did not render ineffective assistance by failing to object to her testimony. "The determination of the competency of a witness is a matter within the discretion of the trial court. Such determination will be reversed only for an abuse of discretion." *People v Breck*, 230 Mich App 450, 457; 584 NW2d 602 (1998). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Pursuant to MRE 601, "[u]nless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules." *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001). "The test of competency is thus whether the witness has the capacity and sense of obligation to testify truthfully and understandably. Where the trial court examines a child

witness and determines that the child is competent to testify, 'a later showing of the child's inability to testify truthfully reflects on credibility, not competency.'" *Id.*, quoting *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991).

In *Watson*, the victim's brother, AK, was seven years old and this Court found that the record as a whole demonstrated that "AK knew the difference between telling the truth and telling a lie and that he promised to tell the truth. Accordingly, the trial court did not abuse its discretion in holding that AK was competent to testify." *Id.* at 583. Similarly, in the case at bar, AC was subjected to a thorough voir dire at the preliminary examination. For example, when the prosecutor asked if it would be right or wrong to say that she, the prosecutor, was a boy, AC stated that it would be "a wrong" because the prosecutor was a girl. AC said that she would give "the right" answers when questioned by the prosecutor, defense counsel, and the trial judge.

At this point defense counsel did protest that the oath is worded in terms of telling the truth, as opposed to saying what is right or wrong, after which the trial judge engaged AC in further voir dire. AC then demonstrated that she knew the difference between telling a lie and telling the truth when the trial judge pointed to his black dress shoes and asked AC what it would mean if he stated that he was wearing tennis shoes. AC knew that this would be a lie because the judge was not, in fact, wearing tennis shoes. AC said that she was going to tell the truth about what happened, she would not lie, and she knew that telling the truth was important. The trial judge then allowed AC to testify.

While AC's trial testimony was often confusing and unfocused, as this Court further explained in *Watson*, "any difficulty AK displayed in remembering specific events or in testifying audibly relate to his credibility, not his competency. Indeed, this Court has upheld a trial court's determination of competency where a child witness' testimony displayed confusion and contradiction, or even a reluctance to answer some questions." *Id.* at 584. Therefore, the trial court did not abuse its discretion when it found AC competent to testify.

Finally, even if the trial court's finding that AC was competent to testify *were* error, defendant cannot show that the error was outcome-determinative. The confused and unfocused nature of the testimony – in addition to the fact that AC told defense counsel that she was just saying "yeah" for the sake of answering the questions – reflected negatively on her credibility. In addition, the jury could still consider (1) Kusiak's testimony that, during a therapy session, AC described an incident of sexual touching by defendant, (2) Butler's recounting of AC's comments in the laundry room, which indicated that defendant might have engaged in inappropriate behavior, (3) Butler's testimony that a person standing in the bathroom door could not see the sink, which refuted defendant's explanation that AC walked in on him in the bathroom and saw him masturbating, (4) the fact that defendant changed his story several times when asked to explain the comments AC made in the laundry room, and (5) defendant's guilty mind, shown by his statement during his interview with Detective Collins, wherein he insisted that he never touched AC, even though he had not been accused, at that point, of doing so. *People v Cutchall*, 200 Mich App 396, 402; 504 NW2d 666 (1993), disapproved in part on other grounds, *People v Edgett*, 220 Mich App 686, 692; 560 NW2d 360 (1996). Therefore, even if the trial court erred in finding AC competent to testify, the error was not outcome-determinative.

For these same reasons, any objection to AC's testimony would have been futile, and "[c]ounsel is not ineffective for failing to make a futile objection." *People v Thomas*, 260 Mich

App 450, 457; 678 NW2d 631 (2004). Moreover, trial counsel's decision to impeach the witness on cross-examination rather than challenge the competence of the witness to testify "is presumed to be sound trial strategy." *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). "[T]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). That a chosen strategy "ultimately failed does not constitute ineffective assistance of counsel." *Kevorkian*, *supra* at 414-415.

Second, defendant asserts that he received ineffective assistance when trial counsel failed to object to Kusiak's testimony because AC's statement to Kusiak was neither spontaneous nor made immediately after the alleged incident, and there was no excuse for the delay. These arguments are without merit. For the reasons stated above, it was not error, nor did it prejudice defendant, to admit the statement under MRE 803A, and therefore, counsel is not ineffective for failing to make a futile objection. *Thomas, supra* at 457.

Defendant further argues that trial counsel should have requested a limiting instruction stating that Kusiak's testimony could be considered only to the extent that it corroborated testimony given by AC during the same proceeding but it could not be considered as substantive evidence. As the prosecution points out, however, this argument is not a correct interpretation of the rules of evidence. "Hearsay is defined as an out-of-court statement offered in evidence to prove the truth of the matter asserted" and is inadmissible as substantive evidence at trial *except* when offered under one of the exceptions to the hearsay rule as provided for in the Rules of Evidence. *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997), citing MRE 801(c) and MRE 802. As noted above, we agree with the trial court that the evidence was admissible hearsay under MRE 803A. Once again, counsel was not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Therefore, because the trial court did not err in finding AC competent to testify and admitting AC's statement through Kusiak's testimony, trial counsel was not ineffective for failing to object.

Affirmed.

/s/ Richard A. Bandstra
/s/ Donald S. Owens
/s/ Pat M. Donofrio