STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	Nos. 285956, 285957 Wayne Circuit Court
ISIAH MEAD, Defendant-Appellant.	LC Nos. 07-021541-FC 07-021542-FC

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

PER CURIAM.

In these consolidated cases, defendant appeals as of right his 11 convictions following a bench trial. In Docket No. 285956, defendant was convicted of six counts of first-degree criminal sexual conduct (CSC 1), MCL 750.520b(1)(b), involving sexual penetrations of his biological daughter MM. In Docket No. 285957, defendant was convicted of two counts of CSC 1, MCL 750.520b(1)(b), and three counts of third-degree criminal sexual conduct (CSC 3), MCL 750.520d(1)(d), involving sexual penetrations of his other biological daughter TM. Defendant was sentenced to 18 to 40 years' imprisonment for each of his CSC 1 convictions, and to 10 to 15 years' imprisonment for each of his CSC 3 convictions. We affirm.

Defendant first argues that there was insufficient evidence to sustain his convictions. We review a sufficiency of the evidence challenge in a bench trial de novo, looking at the evidence in a light most favorable to the prosecution and determining whether the trial court could have found the essential elements of the crime were proven beyond a reasonable doubt. *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

Under MCL 750.520b(1)(b)(ii), defendant is guilty of CSC 1 if he engages in sexual penetration with another person, who is at least 13 but less than 16 years of age and defendant is related to the victim by blood or affinity to the fourth degree. Under MCL 750.520d(1)(d), defendant is guilty of CSC 3 if he engages in sexual penetration with another person and the victim is related to defendant by blood or affinity to the third degree and the sexual penetration occurs under circumstances not otherwise prohibited by this chapter.

At trial, MM testified that defendant was her father, and that he engaged in several sexual penetrations with her while she was 14 years old or younger. She testified that defendant engaged in five specific sexual penetrations with her while she was less than 13 years of age; thus, defendant could have been convicted of five counts of CSC 1 pursuant to MCL

750.520b(1)(a) (sexual penetration with a victim less than 13 years of age). She also testified that defendant engaged in four specific sexual penetrations with her when she was 13 or 14 years of age; thus, defendant could have been convicted of four counts of CSC 1 pursuant to MCL 750.520b(1)(b)(ii). The trier of fact may convict based on the credibility of the victim's testimony without further corroboration. See *People v Jones*, 193 Mich App 551, 554; 484 NW2d 688 (1992), rev'd on other grounds 443 Mich 88 (1993). Viewing the evidence in a light most favorable to the prosecution, we conclude that the trial court found that the essential elements of six counts of CSC 1 with respect to MM were proven beyond a reasonable doubt. *Wilkens, supra* at 738.

TM died before the instant trial commenced, and the trial court admitted her testimony from the preliminary examination. Such testimony was admissible under MRE 804(a)(4) and (b)(1) (declarant unavailable due to death, and declarant previously testified subject to cross-examination). At the preliminary examination, TM testified that defendant engaged in sexual intercourse with her and performed oral sex on her when she was 13 years old. TM also testified that on August 17, 2007, defendant engaged in sexual intercourse with her and performed oral sex on her, as well as touched inside her vagina. TM's statements to other individuals following that incident were admitted as an exception to the rule against hearsay as excited utterances. MRE 803(2). Those statements corroborated her testimony. Further, the trial court found that the incident report, witness statement, and medical records following that incident all corroborated her testimony. Viewing the evidence in a light most favorable to the prosecution, we conclude that the trial court properly found that the essential elements of two counts of CSC 1, MCL 750.520b(1)(b)(ii), and three counts of CSC 3, MCL 750.520d(1)(d), with respect to TM were proven beyond a reasonable doubt. *Id.*

In reaching a conclusion, we note that defendant does not contest the proof of any of the specific elements of either offense; rather, he argues that there was insufficient evidence because the testimony of the victims and their mother was not credible. Essentially, defendant raises a great weight of the evidence argument. Even where there is conflicting evidence, the question of credibility ordinarily should be left for the factfinder. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). As discussed *supra*, the record demonstrated that the prosecution proved all of the elements of CSC 1 and CSC 3 beyond a reasonable doubt. Ultimately, defendant has failed to meet his burden of demonstrating that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. MCR 2.611(A)(1)(e); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Next, defendant asserts that the trial court improperly admitted hearsay statements that did not qualify as excited utterances. A trial court's ruling to admit evidence under a hearsay exception is reviewed for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). "[A]n abuse of discretion standard acknowledges that there will be circumstances in which there will be no single correct outcome; rather, there will be more than one reasonable and principled outcome." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

Hearsay is an out-of-court statement offered for the truth of the matter asserted, MRE 801(c), and such statements are inadmissible unless a specific exception applies, MRE 802. MRE 803(2) provides that a hearsay statement is admissible at trial if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement

caused by the event or condition." There are "two primary requirements for excited utterances: 1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

In this case, a startling event occurred, where defendant allegedly sexually assaulted TM on August 17, 2007. *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988). Admissibility in this case turns on whether her resulting statements were made while she was under the excitement caused by the event. *Smith, supra* at 550. The record demonstrates that defendant and TM had unsupervised visitation on the day in question. After lunch at a restaurant, defendant took TM to his apartment, where she alleged that he sexually assaulted her. TM subsequently returned earlier than expected to the group home where she resided. After a brief telephone call from TM, her mother believed she was "really upset." Unfortunately, a poor telephone connection prevented the mother from speaking to TM at that time. According to her mother, TM sounded "really upset." The mother testified regarding her subsequent efforts to speak with or see TM that evening and the following morning. Only when the group home staff observed how upset TM was did they acquiesce to her demand to speak with her mother. Approximately 19-1/2 hours passed from when TM returned to the group home until she ultimately talked to her mother. According to TM's mother, at that time "[TM] sounded like, she sounded like she couldn't talk, but I brought it out of her." TM then indicated that she wanted to speak to the group home worker. When the group home worker went to TM's bedroom, she observed: "[TM] was a little nervous. [TM], again she was fidgety, she was walking, pacing back and forth in her bedroom, just pacing back and forth. She was picking up things and putting them back down. And she was, I could tell she was angry or not happy." The group home worker believed that TM was upset and more angry than emotional.

In an MRE 803(2) ruling, "[t]he trial court's decision regarding whether the declarant was still under the stress of the event is given wide discretion." *People v Walker*, 265 Mich App 530, 534; 697 NW2d 159 (2005), vacated in part on other grounds 477 Mich 856 (2006). Even though approximately 19-1/2 hours passed from when TM returned to the group home until she ultimately talked to her mother, the delay in communication between TM and her mother was outside their control. Unlike *People v Gee*, 406 Mich 279, 283; 278 NW2d 304 (1979), there is a plausible explanation for the delay in this case that would excuse the delay and permit an extension of the excited utterance exception to the hearsay rule to these facts. See also *People v Garland*, 152 Mich App 301, 307; 393 NW2d 896 (1986), remanded 431 Mich 855 (1988) ("[A]n overnight delay or even a delay of several days does not negate application of the excited utterance exception if there was a plausible explanation for the delay."). TM was still under the stress of the startling event when she talked to the group home worker following the telephone conversation with TM's mother. We conclude that the trial court did not abuse its discretion in admitting TM's statements to her mother and the group home worker as excited utterances, where the alleged sexual assault constituted a startling event, and that TM's resulting statements were made while she was under the excitement caused by that event. *Smith, supra* at 550.

Additionally, defendant claims on appeal that the admission of TM's statements violated the confrontation clause[1] and deprived defendant of his due process rights. Defendant has

[1] The Confrontation Clause provides in pertinent part that "[i]n all criminal prosecutions, the (continued…)

provided only self-serving assertions regarding these allegations of error without addressing their merits; as such, these claims are abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

We also reject defendant's claim that TM's statements as conveyed through MM's trial testimony amounted to inadmissible hearsay. Defendant again has provided only cursory treatment of this allegation of error. *Kelly, supra* at 640-641. Nonetheless, this allegation of error lacks merit, where the challenged testimony did not constitute inadmissible hearsay, because the statements were not offered for the truth of the matter asserted. *People v Mesik*, ___ Mich App ___; ___ NW2d ___ (No. 282088, issued September 10, 2009), slip op at 3-4.

Defendant next contends on appeal that the trial court improperly precluded defense counsel from questioning prosecution witnesses regarding bias and credibility. Defendant specifically complains that the trial court improperly sustained the prosecutor's objections when defense counsel questioned MM about whether she fought with her foster parents and why she was removed from her mother's residence; and when defense counsel questioned the mother whether her abuse involved only MM and TM and not her other children. We reject these unpreserved allegations of error, because defendant failed to establish plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

First, there was no evidence regarding MM's relationship with her foster parents, and no indication that her foster parents had any role in the instant case. Moreover, MM denied that there had been any altercations with her foster parents. There is no indication that such evidence had any tendency to make any fact of consequence more probable in this case. MRE 401. Particularly, it did not make the defense of fabrication more likely, contrary to defendant's arguments. We conclude that the trial court did not abuse its discretion in excluding further testimony on MM's relationship with her foster parents. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). Moreover, there is no indication that defendant suffered any prejudice by not questioning MM on this topic, as defense counsel was able to cross-examine her on other relevant topics in which to undermine her credibility.

Second, defense counsel abandoned his line of questioning regarding why MM was removed from her mother's residence. The trial court properly excluded MM's testimony on this topic, where there was no evidence that she had any personal knowledge as to why she was removed from her mother's residence. MRE 602. Further, defense counsel questioned the mother and the foster care worker regarding MM and TM's removal, and the CPS report also provided why MM and TM were removed from their mother's residence. Thus, preclusion of the questioning did not prejudice defendant.

Finally, defendant complains that the trial court improperly excluded testimony during the mother's cross-examination about whether she physically abused her other children. Defense counsel posed no such question to the mother; rather, he posed that question to the foster care worker, who responded to that line of questioning. As noted previously, the CPS report is

(…continued)

accused shall enjoy the right . . . to be confronted with the witnesses against him." US Const, Am VI.

replete with examples of allegations of physical abuse of the children by the mother, including three instances involving her other children.

Next on appeal, defendant claims that defense counsel failed to conduct an adequate investigation in this case, where he did not obtain two exculpatory witnesses for trial. We reject defendant's self-serving claim that defense counsel failed to conduct an adequate investigation by failing to obtain those witnesses. With no evidentiary hearing, there is no evidence of what defense counsel did or did not do. Defendant provided affidavits of the witnesses. However, one of the witnesses' testimony would have been generally inadmissible as hearsay, and the other witnesses' vague testimony would have added nothing to the defense. Ultimately, the record does not support defendant's claims. Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The mere assertion that there might be some evidence out there, somewhere, does not adequately substantiate a claim of ineffective assistance of counsel. See *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). We will not second-guess defense counsel's decision to call or question a witness without the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). On this record, defense counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms, and we cannot conclude that, but for counsel's deficient performance, the outcome of trial would have been different. *People v Matuszak*, 263 Mich App 42, 57-58; 687 NW2d 342 (2004).

Defendant also claims that defense counsel rendered ineffective assistance of counsel by failing to object to the foster care worker's testimony regarding hearsay statements from one of TM's foster parents and the mother's testimony about TM's hearsay statements. With respect to the former, defense counsel could have raised an objection on hearsay grounds, where the objectionable testimony was used to prove the truth of the matter asserted, namely, that defendant had unsupervised telephone contact with TM. However, there is no indication that defendant suffered any prejudice as a result of defense counsel's failure to object. Significantly, there is no indication that the trial court gave the objectionable testimony any weight in this bench trial. See also *People v Lanzo Constr Co*, 272 Mich App 470, 484-485; 726 NW2d 746 (2006) (in a bench trial, the court is presumed to know the applicable law and the difference between admissible and inadmissible evidence). Defendant failed to establish that, but for defense counsel's performance, the outcome of his trial would have been different. *Matuszak, supra* at 58. With respect to the latter, the record demonstrates that challenged testimony was elicited not for the proof of the matter asserted, but for some other purpose. *Mesik, supra*, slip op at 3-4. Again, we also presume that the trial court used the testimony in an appropriate manner. *Lanzo Constr Co, supra* at 484-485. Defendant's ineffective assistance of counsel claim must fail, because defense counsel does not have to make meritless objections. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Finally, defendant raises two allegations of error in his supplemental brief, neither of which have any merit. First, defendant claims that the trial court failed to consider his foreseeable indigence before assessing attorney fees at sentencing. Defendant failed to raise this

issue at sentencing; thus, it is not preserved. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). More importantly, the trial court did not assess attorney fees at sentencing,[2] but it ordered defendant to pay court costs, crime victim assessments, and state minimum costs. The trial court was authorized by statute to impose such costs in this case pursuant to MCL 769.34(6) (the trial court may order defendant to pay any combination of a fine, costs, or applicable assessments); MCL 780.905(1)(a) (the trial court shall order defendant to pay an assessment of $60 for a felony conviction); and MCL 769.1k(1)(a) (the trial court shall impose state minimum costs). See *People v Nance*, 214 Mich App 257, 258-259; 542 NW2d 358 (1995) ("A trial court may require a convicted defendant to pay costs only where such a requirement is expressly authorized by statute."). The relevant statutes make no reference to consideration of a defendant's ability to pay. Defendant failed to establish plain error affecting his substantial rights. *Carines, supra*. Because the trial court properly imposed such costs at sentencing, defendant's assertion that defense counsel rendered ineffective assistance of counsel for failing to object to such costs must also fail. *Cox, supra* at 453.

Defendant also injects a cumulative error argument into his supplemental brief, contending that the imposition of costs and assessments, as well as the claims of ineffective assistance of counsel raised in his appellant's brief, clearly deprived him of a fair trial. This argument lacks merit, because defendant has failed to demonstrate any errors, plain or harmless. Cumulative error requires reversal only where several minor errors of consequence, when combined, had the effect of denying defendant a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens

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[2] As such, defendant's reliance on *People v Dunbar*, 264 Mich App 240; 690 NW2d 476 (2004), overruled in part by *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009), is misplaced and has no applicability to this case. In *Dunbar, supra* at 251, this Court addressed whether a trial court must assess a defendant's ability to pay before requiring the defendant to pay his court-appointed attorney. Recently, our Supreme Court held:

> *Dunbar* wrongly held that a trial court is required to assess a convicted defendant's ability to pay before imposing a fee for a court-appointed attorney. The ability-to-pay assessment is only necessary when that imposition is enforced and the defendant contests his ability to pay. This ability-to-pay assessment is initially obviated under MCL 769.1l, in relation to imprisoned defendants, because the procedure in this provision creates a presumption that the prisoner is not indigent. [*Jackson, supra* at 298.]

Defendant cannot use *Dunbar, supra*, as a means to avoid paying the costs imposed at sentencing in this case.