STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2010
v	No. 290271 Oakland Circuit Court
EDWIN CORREA, Defendant-Appellant.	LC No. 2008-221670-FC

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct (CSC), MCL 750.520b(2)(b). He was sentenced as a second habitual offender, MCL 769.10, to 25 to 50 years' imprisonment. We affirm.

This case arises out of an August 2007, incident wherein defendant digitally penetrated his girlfriend's nine-year-old daughter while she lay sleeping in defendant's living room.

I

Defendant argues on appeal that he was denied a fair trial as a result of statements made by the prosecutor during closing argument regarding defendant's failure to testify. We disagree. Generally, a claim of prosecutorial misconduct is a constitutional issue that is reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). As this issue was not preserved in the trial court, however, this Court reviews the issue for plain error. *Id*. Under the plain error rule, a defendant must establish that 1) error occurred, 2) the error was plain (i.e., clear or obvious), and 3) the error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* Reversal is only warranted if the plain error resulted in the conviction of an actually innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings' independent of defendant's innocence." *Id*. at 763-764 (internal quotations and citation omitted). See also *People v Shafier*, 483 Mich 205, 219-220; 768 NW2d 305 (2009).

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*,

260 Mich App 450, 454; 678 NW2d 631 (2004). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Brown*, 279 Mich App at 135.

A prosecutor may not comment on a defendant's silence or his failure to testify. *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005); *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Moreover, a prosecutor may not remark regarding the failure in general of a defendant to present evidence. *Abraham*, 256 Mich App at 273. On the other hand, a prosecutor may argue that certain evidence is uncontradicted or undisputed. *People v Callon*, 256 Mich App 312, 331; 662 NW2d 501 (2003). A prosecutor may contest evidence presented by the defendant, *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999), and comment on the failure of the defense to produce evidence on which it relies, *McGhee*, 268 Mich App at 634.

In this case, the prosecutor made two statements that defendant argues amounted to misconduct. In the first instance, she stated:

> The defendant's claiming I didn't do it, I didn't do it. What didn't he do? Did he ever question anybody about what are these allegations? He knows immediately I didn't do it? He touched my daughter? Did he ask anything else about that? What did I touch her with? Where? When? He knows exactly what mom's talking about because he was the one that did this.
>
> I think in this trial, some of the unanswered questions really do answer the question about whether this defendant is guilty beyond a reasonable doubt.

In the second instance, the prosecutor stated:

> Now what I meant by some of these unanswered questions really answer the question about the defendant's guilt, why would this defendant be up at four in the morning outside pacing back and forth? That's the only evidence you heard. There's nothing to the contrary about that.

Defendant argues that such statements amounted to burden-shifting, requiring defendant to provide evidence that he did not commit the crime rather than the burden being on the prosecution to prove the elements of the crime. Defendant also argues that the reference to "unanswered questions" is a comment on defendant's right to remain silent. Upon review of the record, it is clear that the prosecutor's arguments concerned defendant's manifestations of consciousness of guilt immediately after the incident, not whether the burden was on defendant to prove something or whether defendant should have testified. The prosecutor's implication that defendant appeared to know more about the alleged incident than his girlfriend's accusations revealed is misguided, as it is not supported by the testimony. That said, it is undisputed that after the victim told her mother what had just happened and stood crying in the bathroom, the mother went to confront defendant and found him outside the house, in the early morning hours, pacing in the driveway area. Subject to her unsupported implications regarding defendant's pre-existing knowledge, the prosecutor properly argued based on the evidence presented that defendant's actions after the incident erased any reasonable doubt that he committed the crime.

The prosecutor did not explicitly comment on the burden being on defendant to present other evidence or on defendant's failure to testify.

Even if the prosecutor engaged in misconduct, her misconduct was remedied by the instructions from the trial court. A miscarriage of justice will not be found "if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (internal quotations and citation omitted). The trial court instructed the jury that the burden was on the prosecution to prove the elements of the crime and the jury should not consider in its deliberations the fact that defendant did not testify. The court also instructed the jury that it should only accept things the lawyers have said that are supported by the evidence. Therefore, we conclude that the trial court remedied any potential prejudice suffered by defendant through its jury instructions.

II

Defendant argues that the trial court erred by admitting hearsay evidence in the form of testimony by nurse Pamela Willis and medical records regarding statements made by the victim during a physical examination. We disagree. Generally, evidentiary decisions are reviewed for an abuse of discretion. *People v Starr*, 457 Mich 490, 491; 577 NW2d 673 (1998). When an evidentiary issue is not preserved in the trial court, this Court reviews the issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764. In this case, defendant stipulated to the admission of the medical records and did not object to Willis's testimony regarding the victim's statements as reflected in the records.

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801(c); *People v Breeding*, 284 Mich App 471, 487; 772 NW2d 810 (2009). Hearsay is not admissible unless it falls within an exception provided in the rules of evidence. MRE 802; *People v Stamper*, 480 Mich 1, 3; 742 NW2d 607 (2007). "Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy." *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992). One exception to the hearsay rule exists for statements made for purposes of medical treatment or diagnosis in connection with treatment. MRE 803(4). To be admitted under the medical treatment exception to the hearsay rule, "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 the injury." *Meeboer*, 439 Mich at 322.

In *Meeboer*, the Michigan Supreme Court determined that a special inquiry must be made with regard to statements made to a physician by children who have suffered a sexual assault. *Id*. at 323. In determining the trustworthiness of a child's statement regarding a sexual assault to a physician, a court must examine the totality of the circumstances. *Id.* at 324. Relevant factors include: (1) the age and maturity of the child; (2) the manner in which the statements were elicited; (3) the manner in which the statements were phrased; (4) the use of terminology unexpected of a child of similar age; (5) who initiated the examination; (6) the timing of the examination in relation to the assault; (7) the timing of the examination in relation to the trial; (8) the type of examination; (9) the relation of the child to the person identified; and (10) the existence or lack of a motive to fabricate. *Id.* at 324-325.

With regard to the first *Meeboer* factor—the age and maturity of the child—defendant argues that the victim's statements were not reliable because she was only nine years old at the time of the sexual assault. We disagree. Children over the age of ten are presumed to understand that they need to tell the truth to medical personnel. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662; 496 NW2d 388 (1992). Further analysis in accordance with the *Meeboer* test needs to be performed for children of tender years—those under the age of ten. *Id*. at 663. Although the victim in this case was only nine years old at the time of the incident, she was just under the age when children are presumed to understand the need to tell the truth to medical personnel. Further, there was no evidence that the victim was immature for her age. Thus, we will weigh her age and maturity in her favor. See *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996).

With regard to the second factor—the manner in which the statements were elicited—defendant argues that it is impossible to know the manner in which Willis elicited the statements from the victim because Willis did not testify from personal knowledge but testified exclusively on the basis of her notes. Defendant argues that not knowing the manner in which the statements were elicited favors against their admission. We disagree. Based on the testimony of Willis, Willis was well aware that the manner of eliciting a statement affects whether a statement is reliable. She testified:

> We try to not question them too much about that because they get confused of their age and we usually let the doctor examine them and get a better idea because we don't want to put ideas in their head so we ask them, you know, did they go inside you and usually they'll tell us yes or no and it's sometimes hard for a nine-year-old to know what inside means.

Based on this testimony, Willis appears to appreciate the powers of suggestion and the need to avoid much discussion about the episode other than as necessary for purposes of the examination. Moreover, the victim's statements to Willis were consistent with prior statements she had made to her mother, which lends some degree of trustworthiness for purposes of evaluating this factor. Therefore, we find that factor two weighs in favor of admission.

Defendant further argues that because Willis's testimony was based not on personal knowledge but instead based on her notes, the third factor—the manner in which the statements were phrased—and the fourth factor—whether the terminology used was unexpected for a child of similar age—weigh against admission. Statements that are scientifically complex or appear to have been influenced by adults should not be admitted. *People v Hyland*, 212 Mich App 701, 705; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). Willis testified that the victim stated, "he was pushing hard and moving his fingers in her private area." The victim's use of "private parts" was not scientifically complex or influenced by adults. While testifying, the victim used the term "private parts" in addition to the term "coo coo." These factors weigh in favor of admission.

The fifth factor concerns the person who initiated the examination. In this case, Pontiac police officer Robert Ludd initiated the examination of the victim. He brought the victim and her mother to the hospital for the examination. The prosecution argues that although Ludd brought the victim to the hospital for the examination, the examination was for the purpose of treatment, not just investigation. Although police involvement in initiating an examination may

call into question whether it is truly for purposes of medical treatment, under the circumstances presented, this factor is either equivocal or weighs slightly in favor of admission. Although a rape kit was gathered during the examination, the evidence reveals a medical purpose for the examination as well. After the incident, the victim complained of pain and being "sore." She was noted in the medical records to be in moderate to severe distress as well as tearful. Given the victim's description of defendant "pushing hard," moving his fingers in her private area, and pain following the incident, it was reasonable for all concerned to question whether the victim had sustained a medical injury, such as a laceration requiring treatment or at risk of infection.

Defendant concedes that the sixth factor—the timing of the examination in relation to the assault—and the seventh factor—the timing of the examination in relation to the trial—weigh in favor of admission. The examination occurred only hours after the assault and before defendant was charged.

Defendant argues that the eighth factor—the type of examination—weighs against admissibility. Defendant argues that a physical examination was conducted for the sole purpose of gathering evidence, not for treatment. We disagree. This factor does not concern whether the examination was for treatment or for investigation, it concerns the type of examination. In *Meeboer*, the Michigan Supreme Court indicated that statements made in the course of treatment for psychological disorders may not be as reliable as those made in the course of treatment for physical disorders. *Meeboer*, 439 Mich at 324, citing *People v LaLone*, 432 Mich 103, 109-110; 437 NW2d 611 (1989) ("It is therefore fair to say that, while medical patients may fabricate descriptions of their complaints and the general character of the causes of these complaints, we would think it less likely that they will do so than psychological patients."). In contrast, "a physical examination in a hospital's emergency room provides no indicia of unworthiness." *McElhaney*, 215 Mich App at 282. As the victim had a physical examination in an emergency room, this factor again weighs in favor of the statements being admitted.

The ninth factor is the relation of the child to the person who committed the assault and concerns whether the child could have been mistaken about the identity of the assaulter. In this case, defendant concedes that the victim knew him, and likely did not mistakenly identify him. The tenth and final factor is whether the child has a motive to lie. Defendant again concedes that the victim had no motive to lie.

In this case, most if not all of the factors in *Meeboer* weigh in favor of admission. Based on the totality of the circumstances, the victim's statements made to Willis and admitted through Willis's testimony and the medical records were reliable and were properly admitted. Therefore, we find the trial court did not err in admitting the evidence, and defendant suffered no prejudice.

III

Defendant argues that the trial court abused its discretion in admitting testimony by Officer Ludd regarding statements made to him by the victim. Preserved evidentiary issues are reviewed for an abuse of discretion. *Starr*, 457 Mich at 491.

Defendant argues that Officer Ludd's testimony regarding the victim's statements amounted to inadmissible hearsay. We disagree. As noted above, hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801(c); *Breeding*,

284 Mich App at 487. Conversely, a statement not offered for the truth of its contents is not hearsay. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009). A statement offered to show the effect on the listener, when relevant, rather than to prove the truth or falsity of the matter asserted, is admissible for such limited purposes. *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995).

In this case, Officer Ludd testified as follows:

> *Q*. And did she describe something to you?
>
> *A*. Yes.
>
> *Q*. And based on what [the victim] described to you, what did you do next?
>
> *A*. *Based on what she said to me, umm, I decided that she needed an exam done by a, by a doctor or nurse for CSC.* I then contacted a program which we generally deal with which is called the START Program. They said they don't do anybody under the age of 13— [Emphasis added.]

The statement made by Officer Ludd is not hearsay. First, Officer Ludd did not indicate exactly what the victim said. Instead, he testified regarding what he did as a result of what the victim told him. His reference to the victim's statements was not offered for its truth but was offered to show the sequence of events. Therefore, the trial court did not abuse its discretion in admitting Officer Ludd's references to the victim's statements.

Defendant further argues that the prosecutor's statements during closing argument regarding Officer Ludd's testimony indicate that the testimony was offered for its truth and amounted to hearsay. The prosecutor stated:

> At one point the police are called, Officer Ludd appears. He questions the complainant. Based on that questioning, he thinks she needs a physical exam. Now I'm not allowed to get into certain statements because it's called hearsay, but based on what [the victim] told the officer and even [her mother] said on her way to the aunt's house, she gave her, [the victim] gave her more description. [The victim] said his fingers were in my coo-coo. Based upon that statement, based upon what [the victim] then told Officer Ludd, he brings the family or [the victim] and her mother to Pontiac Osteopathic Hospital and that's where the physical exam is done.

Although rather inarticulately worded, the prosecutor's argument does not render Officer Ludd's testimony regarding the victim's statements hearsay. Officer Ludd testified regarding what he did as result of what the victim said, but not what the victim actually said. The prosecutor was quoting testimony from the victim herself or from the victim's mother when she stated, "[the victim] said his fingers were in my coo-coo." She was not quoting Officer Ludd, as Officer Ludd did not relay explicitly what the victim told him. Therefore, the arguments by the prosecutor do not render Officer Ludd's testimony impermissible hearsay and the trial court did not abuse its discretion in admitting his testimony.

IV

Defendant argues that the trial court erred in admitting Willis's testimony vouching for the credibility of the victim. We disagree. Because this issue was not preserved in the trial court, our review is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Because Willis testified based on her knowledge, experience, and training, "it would appear that [her] testimony constituted expert opinion testimony and not lay opinion testimony under MRE 701." *People v Dobek*, 274 Mich App 58, 77; 732 NW2d 546 (2007). In cases involving alleged child sexual abuse: "(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." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). Even an indirect reference by an expert may contravene these prohibitions because the jury may be looking "to hang its hat" on the testimony of an impartial witness to back up the complainant's allegations. *Id.* at 376. An expert's testimony that his findings are consistent with the alleged victim's history is impermissible when based solely on what the alleged victim told him unless the expert has been qualified as an assessor of credibility, *People v Smith*, 425 Mich 98, 109; 387 NW2d 814 (1986), as credibility matters are to be determined by the jury, *Dobek*, 274 Mich App at 71.

In this case, Willis testified as follows:

Q. You talked to [the victim], or [the victim], correct?

A. Correct.

Q. And you were present during the exam, correct?

A. Yes.

Q. And you'd also been present you said during hundreds of exams of this type of nature of the female genitalia, correct?

A. Correct.

Q. Based on what [the victim] had described had occurred, were the results of her exam inconsistent?

A. No.

Upon review of this testimony in context with the rest of the record, it is apparent that the prosecutor was attempting to solicit testimony from the witness that a negative physical exam does not necessarily mean that a sexual assault did not occur. The manner in which the prosecutor's question was worded, however, could arguably be viewed as a back door attempt at implying that if Willis did not find the results of the exam inconsistent with the child's description of what occurred, it was therefore consistent. The prosecutor could have asked Willis whether, in general, a sexual assault can occur and generate no physical findings, but the question here was directed specifically in regard to the victim and whether her physical exam

was inconsistent with her claims. In any event, Willis testified extensively regarding what the exam (according to the medical records) did and did not reveal in terms of physical findings. She never expressed her opinion or belief regarding whether sexual abuse occurred, but rather, indicated that the exam findings did not rule out the possibility.[1] Even assuming admission of the testimony was erroneous, it does not require reversal because we do not find that it affected the outcome of the lower court proceedings. See *Carines*, 460 Mich at 763-764.

V

Defendant argues that the prosecutor engaged in misconduct and attacked the veracity of defense counsel by suggesting that he was intentionally attempting to mislead the jury, implying that he did not believe his own client. Because this issue was not preserved in the trial court, our review is for plain error affecting defendant's substantial rights. *Id.*

A prosecutor may not personally attack defense counsel. *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). "[A] prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008) (internal quotations and citation omitted). A prosecutor's remarks, however, must be considered in context with defense counsel's comments. *Watson*, 245 Mich App 572 at 592-593. An otherwise improper remark may not constitute an error requiring reversal if it responds to defense counsel's argument. *Id*. at 593.

In this case, defendant challenges two remarks by the prosecutor. In the first instance, the prosecutor stated:

> Now I think what [defense counsel] is going to probably hinge on, couple of things. First of all I guess when there isn't any reasonable doubt, you may have to try to create a reasonable doubt.

In the second instance, the prosecutor argued:

> I'll try not to belabor this, just touch upon some of the things [defense counsel] said, but again deflecting, trying to deflect your attention off of what's important here, let's create reasonable doubt.

Defendant, however, has taken both of these statements by the prosecutor out of context.

After making the first statement, the prosecutor went on to clarify. She was attempting to preemptively rebut an argument by defense counsel that there was no CSC on the basis of a

[1] During her rebuttal closing argument, the prosecutor referenced Willis's testimony in an appropriate manner by stating, "you don't have to be a medical expert to understand if somebody put their finger between labia majora, you are probably not going to have an injury, no scrapes . . . . That's not inconsistent with what was found in the medical exam and that was from Nurse Willis."

check mark made by the doctor that there was no digital penetration of the victim's vulva. The prosecutor further stated:

> The one thing that I guarantee [defense counsel] is going to probably try to hinge on is when you look at this little check list here, act described by patient. Dr. Frankowiak stated fondling, yes. Digital under-vulva penetration? No. Well, unfortunately Dr. Frankowiak was not the one in the room with [the victim] when defendant penetrated her genital opening, [the victim] was. So don't allow, I'm asking you don't allow defendant to make you think that a little tiny checklist is going to determine whether or not this actually happened and whether or not penetration existed.

The prosecutor did not argue that defense counsel was trying to intentionally mislead the jury. Instead, the prosecutor was attempting to rebut a legitimate argument by the defense counsel that there was a reasonable doubt regarding whether penetration occurred as a result of the medical records and the check mark by Dr. Frankowiak indicating that it did not occur.

The prosecutor's second statement, made during her rebuttal argument, was responding to defense counsel's arguments during closing that there was reasonable doubt regarding defendant's guilt. Defense counsel argued that there was no physical evidence tying defendant to any crime despite the doctor taking a rape kit. He questioned the veracity of the victim's testimony because the victim did not yell out when defendant was assaulting her and she did not immediately run to her mother. Finally, defense counsel pointed to the checklist where the doctor noted there was no vulva penetration, creating reasonable doubt as to defendant's guilt. In response, the prosecutor made her second statement at issue—that defense counsel was trying to deflect the jury's attention away from what was important. The prosecutor went on to refute each of defense counsel's arguments. She argued that the victim had no reason to misrepresent what happened to her. She responded to defense counsel's argument about the rape kit by going over testimony that sometimes rape kits are not submitted because the costs are high and the likelihood of obtaining evidence is low. The prosecutor's statement that the defense counsel was "creating reasonable doubt" was made in response to defense counsel's closing argument. It was not an improper comment on whether defense counsel was intentionally misleading the jury or whether defense counsel believed defendant. There was no error.

In any event, any harm resulting from the prosecutor's statement was remedied by instructions from the trial court. See *Watson*, 245 Mich App 572 at 586. In the jury instructions, the trial court stated, "[t]he lawyers' statements and arguments are also not evidence. They're only meant to help you understand the evidence and each side's legal theories."

VI

Defendant argues that his sentence of 25 to 50 years' imprisonment was cruel and unusual punishment under the United States Constitution and cruel or unusual punishment under the Michigan Constitution. We disagree. Constitutional questions are reviewed de novo, but this Court reviews unpreserved sentencing challenges and constitutional claims for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764; *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002).

The United States Constitution prohibits "cruel *and* unusual" punishment, whereas the Michigan Constitution prohibits "cruel *or* unusual" punishment. US Const, Am 8 (emphasis added); Const 1963, art 1, § 16 (emphasis added). The Michigan Constitution's prohibition against cruel or unusual punishment is more broadly interpreted than the federal prohibition. Const 1963, art 1, §16; US Const, Am 8. See also *People v Bullock*, 440 Mich 15, 30-35; 485 NW2d 866 (1992). Under the Michigan Constitution, determining whether a punishment is cruel or unusual "requires consideration of the gravity of the offense, the harshness of the penalty, a comparison of the penalty to penalties for other crimes in this state, a comparison of the penalty to penalties imposed for the same offense in other states, and the goal of rehabilitation." *People v Dipiazza*, 286 Mich App 137, 153-154; 778 NW2d 264 (2009). Legislatively mandated sentences are presumptively proportionate. *People v Ealy*, 222 Mich App 508, 512; 564 NW2d 168 (1997).

In *Bullock*, 440 Mich at 21, 37, the Michigan Supreme Court held that mandatory imprisonment for life for mere possession of cocaine without proof of intent to sell or distribute violated the Michigan Constitutional protection against cruel or unusual punishment. The Supreme Court found the mandatory term grossly disproportionate to the crime. *Id*. The Supreme Court noted that the defendants in the case were "punished more severely than they could have been for second-degree murder, rape, mutilation, armed robbery, or other exceptionally grave and violent crimes." *Id*. at 40.

CSC in the first degree is a felony punishable in part as follows:

> 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 for life or any term of years, but not less than 25 years. [MCL 750.520b(2)(b).]

Under the Michigan Constitution, sentencing defendant to a minimum of 25 years' imprisonment for first-degree CSC is not cruel or unusual punishment. First, the gravity of the offense in this case is great. Defendant used his relationship with his girlfriend to sexually assault a nine-year-old child in the middle of the night. While the crime in this case occurred only once, it still was grave given how young the victim was. The Legislature carefully considered the age of the victim in creating its sentencing scheme by tying the term of imprisonment to the age of the victim. *People v Cash*, 419 Mich 230, 242-243; 351 NW2d 822 (1984).

In addition, Michigan's mandatory terms of 25 years' imprisonment for the sexual assault of a child less than 13 years old is in line with other states. Rhode Island punishes anyone who engages in sexual penetration with a child 14 years old or younger with a mandatory term of imprisonment of not less than 25 years. RI Gen Laws 11-37-8.1, 11-37-8.2. In addition, Utah punishes anyone who commits object rape of a child under the age of 14 with a mandatory term of imprisonment of not less than 25 years. Utah Code Ann 76-5-402.3. Many other states have similar statutory schemes. See, e.g., Ark Code Ann 5-14-103(c)(2); Kan Stat Ann 21-4643(a)(1)(B); Ohio Rev Code Ann 2971.03(A)(3)(d)(i). Therefore, Michigan's scheme is in line with schemes from other states. Defendant has not overcome the presumption that the sentence was valid and the trial court did not plainly err in sentencing defendant to a minimum of 25 years' imprisonment.

VII

Defendant argues in his *in propria persona* brief that the prosecutor denied him his right against self-incrimination by commenting on defendant's failure to make a statement to the police. We disagree. Constitutional questions are reviewed de novo, but an unpreserved constitutional error is reviewed under the plain error standard. *Shafier*, 483 Mich at 211.

A defendant in a criminal case has a constitutional right under the Fifth Amendment of the United States Constitution against compelled self-incrimination and may choose to rely on the presumption of innocence. US Const, Am 5; *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995). "To effectuate this right, no reference or comment may be made regarding defendant's failure to testify." *Fields*, 450 Mich at 108-109. In addition, "the right against self-incrimination prohibits a prosecutor from commenting upon the defendant's silence in the face of accusation, but does not curtail the prosecutor's conduct when the silence occurred before any police contact." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). See also *Shafier*, 483 Mich at 217-218. Evidence of flight does not implicate a defendant's Fifth Amendment protection against self-incrimination and may be commented upon by the prosecutor. *Goodin*, 257 Mich App at 433. Moreover, the Fifth Amendment does not completely bar comment by the prosecutor on a defendant's failure to testify or make another statement, in that under certain circumstances he or she may fairly respond to an argument of the defendant by referring to that silence. *Fields*, 450 Mich at 110-111.

In her rebuttal closing argument, the prosecutor stated in pertinent part:

> Her mother testified that when she got up, [defendant is] out of the bed. When she went to bed, [defendant is] there; when see [sic] gets up, he's gone. [The victim] said he was in the bed with her. [The victim] said that he was outside. [The mother] corroborates that. When she got up, she saw him outside. Officer Ludd said he tries to rouse him, get him from the house, knocking on the door, banging on the windows, you know, Pontiac police, you know, let me in or can I talk to you. If nothing happened, why wouldn't he go to the door? My God, wouldn't you try to explain to a police officer if somebody accused you of putting your finger in some child's genital opening, do you think that maybe he should have gotten up and answered the door? That's not corroboration?

When viewed in context, it is apparent that the statement was not an improper comment on defendant's invocation of the right to remain silent. Rather, it was a comment on defendant's odd behavior immediately following the incident used to demonstrate his consciousness of guilt. While the last portion of the prosecutor's remarks could potentially be viewed as inappropriate if taken out of context, even assuming they were improper we do not find that they affected defendant's substantial rights. See *Shafier*, 483 Mich at 211.

VIII

Defendant argues that his right to confront the witnesses against him was violated when the prosecutor read statements in the medical records by Dr. Frankowiak into the record even though Dr. Frankowiak did not testify at trial. We need not reach this issue, as it is waived. An appeal is waived if defense counsel intentionally abandons a known right. *People v Carter*, 462

Mich 206, 215; 612 NW2d 144 (2000). In this case, defendant did not object to the admission of the medical records at trial even though they contained statements from Dr. Frankowiak. Rather, defendant affirmatively indicated that he had no objection to their admission. Moreover, defendant did not object when the trial proceeded without the testimony of Dr. Frankowiak. In fact, defense counsel expressly waived Dr. Frankowiak's testimony at trial, indicating that defendant had no objection to Dr. Frankowiak's failure to testify.[2]

Defendant further argues that the prosecutor engaged in misconduct when she read the statements from Dr. Frankowiak to the jury. We disagree. When an issue concerning prosecutorial misconduct is not preserved in the trial court, this Court reviews the issue for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

The statements made by the prosecutor are as follows:

> It does state in here according to the emergency physician record child staying with mother at house with boyfriend, boyfriend allegedly got into bed with child, positive finger vaginal area. It's in the records here.

Defendant argues that the prosecutor improperly speculated that an addition symbol in the medical records meant "positive." A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Unger*, 278 Mich App at 241. He or she is free, however, to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In this case, the prosecutor was reading from medical records that were properly admitted into the record. She made a proper inference that an addition symbol in the medical records meant "positive." Therefore, the prosecutor did not engage in misconduct when reading and interpreting the medical records in her closing argument.

IX

Defendant argues that he was denied a fair trial due to prosecutorial misconduct because, during closing argument, the prosecutor improperly vouched for the credibility of the victim, argued facts not in evidence, relied on the prestige of the prosecutor's office, and appealed to the sympathy of the jury. We disagree.

Because this issue was unpreserved, our review is for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. As indicated, prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Thomas*, 260 Mich App at 454. "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Brown*, 279 Mich App at 135.

[2] The medical records indicate that the victim claimed not to have had any penetration, which is likely why defendant stipulated to their admission.

A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Seals*, 285 Mich App 1, 21; 776 NW2d 314 (2009). A prosecutor may, however, argue from the facts in evidence that the defendant or another witness is worthy or not worthy of belief. *Dobek*, 274 Mich App at 67. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Unger*, 278 Mich App at 241. He or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case. *Bahoda*, 448 Mich at 282.

The prosecutor did not vouch for the credibility of the victim. Instead, she pointed out that the victim had no motive to lie, by stating, "[d]o you really think that a kid's going to come in and lie about, in front of you about what happened in August of 2007?" Such an inference was proper based on the facts. Moreover, the prosecutor did not rely on facts not in evidence. Stating that it would be difficult for a nine-year-old to articulate that she was sexually assaulted does not require the testimony of an expert witness but is based instead on common sense. Finally, the prosecutor was not relying on the prestige of the prosecutor's office when she stated, "We're claiming he used his finger and put it in the labia majora[,]" but was instead setting forth the prosecutor's view of the case. The prosecutor's statements were not improper.

In addition, a prosecutor may not appeal to the jury to sympathize with the victim. *Watson*, 245 Mich App at 591. According to defendant, the prosecutor invited the jury to decide the case on the basis of the victim's age, not the evidence. Defendant does not point to any particular statements by the prosecutor during the closing. The prosecutor asked the jury to evaluate the credibility of the victim keeping in mind her age, but did not ask the jury to decide the case solely on the basis of age. As a result, the prosecutor did not improperly appeal to the sympathy of the jury.

Any harm caused by the prosecutor's statements was remedied by jury instructions. See *id*. at 586. The trial court instructed the jurors that they were to decide the credibility of witnesses. Moreover, jurors should decide what they believe based on their own common sense and experiences. In addition, the trial court instructed the jury not to be influenced by sympathy or prejudice. Therefore, the instructions cured any potential harm.

X

Defendant argues that the trial court erred in admitting the victim's mother's testimony regarding statements made by the victim after the assault under MRE 803A. The first statement was admissible under MRE 803A. While the trial court should not have admitted the testimony regarding the subsequent statements under MRE 803A, we conclude that the testimony was admissible under MRE 803(2). Because defendant did not object at trial to the testimony at issue, our review is for plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

As indicated, hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. MRE 801(c); *Breeding*, 284 Mich App at 487. Hearsay is inadmissible unless it falls within an exception provided in the rules of evidence. MRE 802; *Stamper*, 480 Mich at 3. MRE 803A provides, in 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 [sic] 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.

See also *People v Dunham*, 220 Mich App 268, 271-272; 559 NW2d 360 (1996).

Another exception to the hearsay rule 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." MRE 803(2); *McLaughlin*, 258 Mich App at 659. An excited utterance must be made by a person who is still under the sway of excitement precipitated by an external startling event so that he or she does not have the reflective capacity essential for fabrication. *McLaughlin*, 258 Mich App at 659, quoting *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The focus is not strictly one of time, but on the capacity to fabricate and the possibility for conscious reflection. *Smith*, 456 Mich at 551.

The mother testified with regard to at least three statements made by the victim after the sexual assault by defendant. The first statement occurred when the child approached the mother's bedside immediately after the incident, shook her mother awake, and told her what defendant had done. The mother testified as follows:

> *Q.* What did [the victim] say to you at that time? That's all right. Take your time.
>
> *A.* She told me that he touched her coo-coo.
>
> *Q.* Who did she say touched her coo-coo?
>
> *A.* She said Goo-Goo[3] touched my coo-coo.

[3] Goo-Goo was defendant's nickname.

The mother testified that she got out of bed and accompanied the victim to the bathroom, where she asked her daughter to explain again what happened:

> *Q*. When you went to the bathroom, what happened?
>
> *A*. I asked [the victim] again, umm, what happened and she repeated the same thing.

The third statement took place after the mother and her children packed their belongings and promptly left defendant's home:

> *Q*. Did you have anymore [sic] conversations with [the victim] in the car?
>
> *A*. Yeah. After I got off the phone with my sister, I asked [the victim] what happened, you know, and I told her to tell me and she told me that [defendant], well, Goo-Goo she called him, Goo-Goo put his finger in her coo-coo and he pushed it in and moved it around.

Defendant concedes on appeal that the first statement was admissible under MRE 803A, but contends that the subsequent statements were not admissible. We disagree. It is true that only the first statement was admissible under MRE 803A and any subsequent statements were inadmissible if the only analysis occurred under MRE 803A.[4] However, the subsequent statements were admissible under MRE 803(2) as excited utterances. The statements made by the victim to her mother were inherently trustworthy because they were made during the excitement after being startlingly awoken by defendant's sexual assault. The statements were made shortly after the assault when the victim was still under the stress of the assault and, as a result, the victim did not have time for conscious reflection. The second statement was made in the bathroom almost immediately after the first statement. Very little time had passed. The third statement was made in the car after the mother, the victim, and the mother's son had rushed out of defendant's house and it was made while everyone was still frantic. Therefore, while defendant is correct that the mother's testimony regarding only the first of the victim's statements was admissible under MRE 803A, testimony regarding the second and third statements was admissible under MRE 803(2).

XI

Defendant argues that the trial court denied defendant a fair trial because it coerced the verdict through comments that created an atmosphere conducive to hasty deliberations. "Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, including the particular language used by the trial court, must be considered." *People v Vettese*, 195 Mich App 235, 244; 489 NW2d 514 (1992).

[4] Arguably, the second statement was made as part of a continuing conversation between the victim and her mother, and thus, could be considered part of one disclosure as argued by the prosecution; however, we need not scrutinize this issue because the statement was admissible on other grounds.

In the instant case, after delivering instructions on the law to the jury and before dismissing the jurors to the jury room for deliberations, the trial court stated as follows:

> All right. Let me tell you what our schedule is at this time and I'm telling you this not because I'm trying to suggest in any shape, manner or form how long you should deliberate for, just want you to know what our schedule is. It's about 3:30 at this point. We'll go today until 4:30. If you have reached a verdict by 4:30 today, we'll call you back in here and receive your verdict at that time and that will conclude your service on this jury. If you are not able to reach a unanimous verdict by 4:30 today, we will send you home at that time and you will have to come back then tomorrow morning at 8:30. I do want to just alert you to the fact that Wednesday morning is motion day here in Oakland Circuit Court and that means every courtroom is going to be filled with lawyers and the parking lot's going to be a lot fuller than it has been yesterday and today. I'm just alerting you to that fact so you can build in a little more time in your driving, you may be parking just a little bit further away in the parking lot than you did yesterday and today and I also don't want you to be surprised if you see the hallways and our courtroom with a lot more lawyers than you have seen on these two days.

Aside from the fact that defendant expressly stated he had no objections to the jury instructions immediately following the above comments by the judge, we find that the trial court's comments were not an attempt to force a verdict; instead, they merely informed the jurors regarding necessary logistical information.

XII

Defendant claims that the cumulative effect of all of the alleged errors is that he was denied a fair trial. We disagree. The cumulative effect of several minor instances of prosecutorial misconduct and evidentiary errors can warrant reversal even if the individual errors in the case would not. *McLaughlin*, 258 Mich App at 649. "Reversal is warranted only if the effect of the errors was so seriously prejudicial that the defendant was denied a fair trial." *Id.*

In this case, as discussed at length above, defendant has failed to show any prosecutorial misconduct and any evidentiary errors. Therefore, defendant has failed to show cumulative error necessitating reversal.

Affirmed.

/s/ Patrick M. Meter
/s/ Christopher M. Murray
/s/ Jane M. Beckering