STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 20, 2010
v	No. 288258 Oakland Circuit Court
JARRON DONTI GEORGE, Defendant-Appellant.	LC No. 2005-205374-FC

Before: GLEICHER, P.J., and O'CONNELL and WILDER, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age), and sentenced as an habitual offender, third offense, MCL 769.11, to 28 to 60 years' imprisonment, with 808 days' credit for time served. He appeals as of right. We affirm.

I. ADMISSION OF THE VICTIM'S SISTER'S TESTIMONY UNDER MRE 803(24)

Defendant argues that the trial court erred in ruling that the victim's statements to her older sister describing the sexual assault, which the victim made approximately 11 months after the charged assault, were admissible under MRE 803(24). We disagree. We review a trial court's decision to admit evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008).

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801. Hearsay is inadmissible at trial unless a specific exception allows its introduction. MRE 802. MRE 803(24) provides a residual or "catch-all" exception to the hearsay rule and allows for the admission of "[a] statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness . . . ."[1] For a statement to be

[1] MRE 803(24) states in its entirety:

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admissible under MRE 803(24), it must not be covered by any other MRE 803 hearsay exception, but admission is not precluded merely because it "nearly missed" being admissible under another exception. *Katt*, *supra* at 279, 286. To be admissible under MRE 803(24), a statement must satisfy four elements:

> (1) it must have circumstantial guarantees of trustworthiness equal to the categorical exceptions, (2) it must tend to establish a material fact, (3) it must be the most probative evidence on that fact that the offering party could produce through reasonable efforts, and (4) its admission must serve the interests of justice. [*Id.* at 279.]

"The first and most important requirement is that the proffered statement have circumstantial guarantees of trustworthiness equivalent to those of the categorical hearsay exceptions." *Id.* at 290. A court "should consider the 'totality of the circumstances' surrounding each statement to determine whether equivalent guarantees of trustworthiness exist." *Id.* at 291. "There is no complete list of factors that establish whether a statement has equivalent guarantees of trustworthiness," *id.*, but relevant factors include:

> "(1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which [s]he spoke, (7) to whom the statements were made, and (8) the time frame within which the statements were made." [*People v Geno*, 261 Mich App 624, 634; 683 NW2d 687 (2004), quoting *People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000).]

In this case, the six-year-old victim's first statement was made to her six-year-old friend, a former neighbor who could not be located to testify at trial. After overhearing the victim's disclosure to her friend, the victim's sister merely asked the victim why she had said what she did and whether she was telling the truth. The victim then made the disclosure to her sister, a

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> A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of the statement makes known to the adverse party, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

person she was familiar with, using child-appropriate terms, i.e., "he put his thing in me." These circumstances indicate the victim's reliability. The victim did not believe that her sister was angry with her, and there is no indication that the sister was demanding or intimidating, as suggested by defendant. The victim's statement was clear and factual, and included details such as the specific time and place of the incident, the birthday party that had occurred earlier that day, and the dress she had been wearing that day. There was no evidence of bias or of a motive to fabricate or falsely accuse defendant, who is the victim's uncle. The victim's fearful demeanor as she made the statement, as well as her offer to take what she believed was a lie detector test, also supports the trustworthiness of the statement. In addition, the victim believed that she would get in trouble by disclosing the incident, and the statement was not made during any criminal investigation or in anticipation of litigation. Although there was an 11-month gap between the incident and the disclosure, the victim's subsequent disclosures, including one to a physician and those made in court, were consistent, and the victim never recanted or repudiated her statement that defendant had sexually assaulted her. At trial, the victim, then age ten, testified and corroborated her earlier statement, and was subjected to cross-examination concerning the statement. The treating physician also provided expert testimony that the victim's hymen had been ruptured and that no alternative sources were given for the rupture. In addition, the victim experienced adverse consequences as a result of her disclosure, including being removed from her mother's custody and her home, and being placed in several foster homes. The trial court did not err in finding that the totality of the circumstances provided circumstantial guarantees of trustworthiness.

Defendant concedes that the second requirement for admissibility under MRE 803(24) is satisfied, i.e., that the proffered statement is directly relevant to a material fact in the case. The third requirement "'essentially creates a "best evidence" requirement.'" *Katt*, *supra* at 293, quoting *Larez v Los Angeles*, 946 F2d 630, 644 (CA 9, 1991). In *Katt*, the Court observed that a child's earlier statement is more probative than one repeated at trial.[2] *Id.* at 295-296. Again, the victim's friend to whom she first disclosed the assault could not be located for trial and, therefore, the victim's statement to her sister, which the victim made almost immediately after her disclosure to her friend, was the most probative evidence that the prosecution could offer, particularly considering the passage of time between the victim's disclosure and trial. The final requirement was satisfied because admission of the statement serves the interest of justice. *Id.* at 293. As the trial court observed, the victim's statement to her friend could have been introduced but for the inability to locate the victim's friend for trial. For these reasons, the trial court did not abuse its discretion in admitting the victim's disclosure of the sexual assault to her sister under MRE 803(24).[3]

[2] The *Katt* Court explained, "As time goes on, a child's perceptions become more and more influenced by the reactions of the adults with whom the child speaks." *Id.* at 296.

[3] The dissent claims that "the evidence supplied by Marquayla failed to satisfy the admissibility criterion in MRE 803(24)(B)." Assuming arguendo that we did agree with the dissent, we would also agree with the dissent that the evidence was cumulative and "Marquayla added no facts of consequence to the victim's account of the crime," and therefore, by definition, it is harmless error and is not outcome determinative to this case.

II. PROSECUTOR'S CONDUCT

Defendant also argues that he was denied a fair trial because the prosecutor impermissibly argued facts not in evidence. We disagree. Because defendant did not object to the prosecutor's remark at trial, we review this unpreserved claim of misconduct for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We will not reverse if the alleged prejudicial effect of the prosecutor's remark could have been cured by a timely instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant relies on the following remark made during the prosecutor's closing argument to establish prosecutorial misconduct:

> Your job here is not a - - it's a search for the truth. It's a search to find out, in simple terms, did this happen. [The victim] has testified since she was six years old, and not only testified, she has told her sister Marquayla, *she has told her mother*, she told a doctor, she came in, in several court hearings and said it. And did you hear one scintilla of evidence that she did not say that her uncle had sex with her? Not once. It's very important. [Emphasis added.]

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Defendant contends that the prosecutor's statement was improper because the victim's mother did not testify at trial, and no prior statement from her was read into evidence. Although that is true, there was testimony that the victim repeated the allegation that defendant assaulted her to her mother, and that the victim's sister also told the victim's mother about the allegation. In addition, there was testimony that the victim's mother questioned the victim about the incident, that the victim showed her mother the dress that she had been wearing at the time of the assault, and that the victim's mother took the victim to the emergency room. The treating physician testified that she took a history from the victim and her mother upon meeting them, and that they were there because of the victim's allegation that her uncle had sexually assaulted her. The prosecutor argued that the victim's consistency in repeating her story was a factor that supported her credibility. Prosecutors are "'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).[4] The prosecutor's statement that the victim told her mother about the alleged sexual assault was a proper statement supported by the evidence and by reasonable inferences arising from the evidence. Thus, there was no plain error.

Further, even if the statement could be considered improper, any prejudicial effect could have been cured by a timely instruction upon request. *Watson*, *supra* at 586. Indeed, the trial court instructed the jury that the statements and arguments by counsel for each party are not

[4] In subsequent remarks during closing argument, the prosecutor discussed the particulars of only those who actually testified, i.e., the victim, the doctor, and Marquayla.

evidence, that it was to decide the case based only on the properly admitted evidence, and that it was to follow the court's instructions. These instructions were sufficient to dispel any possible prejudice. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Within this issue, defendant contends in passing that because this case was previously reversed in part because of the erroneous admission of the victim's mother's testimony about the victim's disclosure to her,[5] the prosecutor's mere reference to the fact that the victim had told her mother about the allegation requires reversal. We disagree. At defendant's first trial, the victim's mother testified in great detail regarding statements made by the victim, including allegations that defendant had hit her to prevent her from telling her mother. As noted in this Court's dissenting opinion in defendant's prior appeal, the prosecutor highlighted the mother's testimony during closing argument and described it as one of two powerful moments of the trial, noting the mother's emotional state as she testified. *People v George*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 271892) (Gleicher, J., dissenting). Conversely, at defendant's second trial, the prosecutor made a brief, passing reference to the fact that the victim had told her mother about the allegation, without revealing any of the victim's actual statements to the mother. The prosecutor's brief remark at defendant's second trial cannot reasonably be compared to the victim's mother's extensive and emotional testimony at the first trial. Consequently, defendant's claim that reversal is required simply because the prosecutor mentioned that the victim told her mother about the allegation lacks merit.

III. EFFECTIVE ASSISTANCE OF COUNSEL

Finally, we reject defendant's argument that defense counsel was ineffective for failing to object to the prosecutor's remark. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or request for an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin* (*On Second Remand*), 242 Mich App 656, 658-659; 620 NW2d 19 (2000). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007).

In light of our conclusion that the prosecutor's remark was not clearly improper, and that the trial court's instructions were sufficient to dispel any possibility of prejudice, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the

[5] See *People v George*, 481 Mich 867; 748 NW2d 568 (2008), reversing *People v George*, unpublished opinion per curiam of the Court of Appeals, issued November 20, 2007 (Docket No. 271892), "for the reasons stated in the Court of Appeals dissenting opinion."

result of the proceeding would have been different. *Id*. Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kurtis T. Wilder