STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 7, 2010
v	No. 293580 Kent Circuit Court
GEORGE MICHAEL GRESHAM, Defendant-Appellant.	LC No. 09-001515-FC

Before: M.J. KELLY, P.J., and K.F. KELLY and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with person under 13 years old). He was sentenced to concurrent terms of 25 to 40 years' imprisonment for each conviction. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

Defendant first argues that there was insufficient evidence to prove the element of penetration for both convictions. "To prove CSC I under MCL 750.520b(1)(a), the prosecution was required to show that defendant engaged in sexual penetration with another person under the age of thirteen." *People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321 (2009). "Sexual penetration" is defined as: "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r); see also *Waclawski*, 286 Mich App at 676.

The victim in this case was the foster child of defendant's mother. At trial, the victim testified that defendant entered the bedroom that she shared with her half-sister, went to her bed, removed her clothing and "put his private into mine." The victim testified that by defendant's "private," she meant his "penis," and that by her "private," she meant her "vagina." According to the victim, this occurred "[t]wo or three" times. The victim also testified that when defendant entered her room, he "raped" her. On cross-examination, the victim again confirmed that on two or three occasions, defendant entered her bedroom, took off her clothes and had sex with her. The victim's testimony supports that defendant engaged in "sexual penetration" with the victim as defined in MCL 750.520a(r). Therefore, viewing the evidence in the light most favorable to the prosecution, and resolving all conflicts in the record in favor of the prosecution, we find that there was sufficient evidence for a reasonable trier of fact to conclude that the prosecutor proved the element of penetration beyond a reasonable doubt for both of defendant's convictions.

People v Wolfe, 440 Mich 508, 515-516; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008); MCL 750.520h ("The testimony of a victim need not be corroborated in prosecutions under [MCL 750.520b to MCL 750.520g].")

Defendant next argues that Dr. Sara Jane Brown, the prosecutor's expert witness who examined the victim, improperly vouched for the victim's credibility, and, in doing so, implied that the sexual abuse occurred and that defendant was guilty. We review this unpreserved claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). Plain error occurs at the trial court level if: (1) error occurred, (2) that was clear or obvious, and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings. *Id.* at 763 (citation omitted). We ultimately "will reverse only if we determine that, although defendant was actually innocent, the plain error caused him to be convicted, or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004) (citation omitted).

In *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995), the Supreme Court set forth the following rules regarding the scope of permissible expert testimony in child CSC cases:

> As a threshold matter, we reaffirm our holding in [*People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990)] that (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty. However, we clarify our decision in *Beckley* and now hold that (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.

An expert's testimony will amount to an impermissible lay opinion vouching for the veracity of the complainant where the expert's opinion was based solely on the emotional state of the victim, and was not based on "any findings within the realm of his medical capabilities or expertise[.]" *People v Smith*, 425 Mich 98, 112-113; 387 NW2d 814 (1986).

Here, Dr. Brown testified that she conducted a physical examination of the victim and that the examination was "normal," i.e., it did not reveal any physical evidence of sexual abuse. Nevertheless, Dr. Brown diagnosed "probable pediatric sexual abuse" of the victim, which, she testified, was based on the consistent and detailed statements provided by the victim during the medical history exam and to the investigating officers beforehand. The testimony clearly reveals that Dr. Brown's diagnosis was predominantly based on the statements of the victim, and in the absence of any medical findings or physical evidence of sexual abuse, we conclude that the testimony amounted to an improper vouching of the veracity of the victim. *Peterson*, 450 Mich at 352-353; *Smith*, 425 Mich at 112-113. In spite of the improper veracity vouching, however, we conclude that reversal is not required. Two of the investigating officers provided testimony

that strongly corroborated Dr. Brown's testimony that the victim had provided consistent statements. Therefore, although Dr. Brown's testimony was improper, we conclude that the effect of the testimony was minimized, and the error did not affect the outcome of trial. Moreover, as previously indicated, the victim's testimony alone was sufficient to convict defendant. MCL 750.520h. Thus, plain error affecting defendant's substantial rights did not occur. *Carines*, 460 Mich at 763.

Defendant also argues that his trial counsel was ineffective for failing to object to Dr. Brown's testimony. "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). A "defendant must show that his attorney's conduct fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was deprived a fair trial." *People v Gonzalez*, 468 Mich 636, 644; 664 NW2d 159 (2003). To prove the latter, a defendant must show that the result of the proceeding would have been different but for defense counsel's error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Here, the record supports that counsel's failure to object fell below an objective standard of reasonableness. The prosecutor directly asked Dr. Brown what her diagnosis was, and if prepared for trial, defense counsel would have known what her answer would be and that it would be objectionable. Nevertheless, defendant has not met his burden of demonstrating that the outcome of trial would have been different had counsel objected because, as stated above, two of the investigating officers provided testimony that strongly corroborated Dr. Brown's testimony that the victim had provided consistent statements, and the victim's testimony alone was sufficient to convict defendant. MCL 750.520h. Therefore, although Dr. Brown's testimony was improper, it did not affect the outcome of trial. Defendant is therefore not entitled to relief on this claim of error.

Defendant next argues that the victim's grandmother improperly testified that she did not want the victim and the victim's younger half-sister sister to be placed in the foster home with defendant's mother because there was a history of sexual activity and pedophilia among the older male members of defendant's family. Defendant challenges the testimony as improper character evidence in violation of MRE 404(a), and he also appears to challenge the testimony as improper other-acts testimony under MRE 404(b). Defendant failed to preserve this issue; thus, our review is for plain error affecting his substantial rights. *Carines*, 460 Mich at 764-765.

MRE 404(a) governs the admissibility of character evidence, generally:

> **(a) Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> (1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same; or if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under subdivision (a)(2), evidence of a trait of character for aggression of the accused offered by the prosecution;
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> * * *

> (4) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

MRE 404(b)(1) governs the admissibility of other crimes, wrongs or acts:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Here, on cross-examination, the victim's grandmother testified that she had known defendant's mother and her family for "many moons." She also stated that there had been a lot of "sexual conducts" in the family. She testified that she had known generations of men in the family, and that "back in the days" some of the men in defendant's family had sexual intercourse with some of the boys, and that they touched each other. She stated that the behavior continued for years. Her vague character and other-acts evidence of the men in defendant's family was not proffered to show that those men acted in conformity with any previous conduct. Rather, the only logical inference to be gained from the testimony was that defendant acted in conformity with the character or prior other-acts of other men. This type of testimony falls outside the scopes of both MRE 404(a) and MRE 404(b). See *People v Crawford*, 458 Mich 376, 384; 582 NW2d 785 (1998) ("Underlying the rule [MRE 404(b)] is the fear that a jury will convict the defendant inferentially on the basis of *his* bad character rather than because he is guilty beyond a reasonable doubt of the crime charged." (Emphasis added)); *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994) (Evidence pertaining to other-acts violates MRE 404(b) if "it is offered solely to show the criminal propensity of an individual and establish that *he* acted in conformity therewith." (Emphasis added.)); *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009) ("MRE 404(a) prohibits the introduction of evidence concerning a person's character 'for the purpose of proving action in conformity' with that character."); *People v Watson*, 245 Mich App 572, 576; 629 NW2d 411 (2001) (Under MRE 404(a): "[E]vidence of a person's character is not admissible to show *that the person* acted in conformity with that character on a particular occasion." (Emphasis added)); *People v Gimotty*, 216 Mich App 254, 259; 549 NW2d 39 (1996).

Because the testimony of the victim's grandmother did not violate MRE 404(a) or MRE 404(b), there was no plain error in this case. Similarly, because the testimony was not inadmissible under MRE 404(a) or MRE 404(b), we reject defendant's claim of ineffective assistance of counsel based on defense counsel's failure to object to the testimony because any objection would have been futile. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

Defendant next argues that the prosecutor failed to provide notice and/or disclose, under MCL 769.27a(1), his intent to introduce evidence that defendant previously attempted to have the victim's younger sister touch his genitals. We review this unpreserved error for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764-765.

MCL 768.27a(1) provides, in pertinent part:

> Notwithstanding [MCL 768.27], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant.

Here, the record is clear that the prosecutor elicited testimony from the victim's seven-year-old half-sister that on one occasion, defendant asked her to touch his "privates." This constitutes a "listed offense." See MCL 768.27a(1), (2)(a); MCL 28.722(e)(*x*), (*xiii*); MCL 750.520a(e), (q); MCL 750.520c. Thus, the prosecutor was bound to follow the "disclosure" requirements contained in the remainder of MCL 768.27a(1), which provides:

> If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney shall disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered.

After a thorough search of the lower court file, we conclude that the prosecutor failed to meet this disclosure requirement. As the language of MCL 768.27a(1) requiring disclosure is plain and unambiguous, we conclude that clear or obvious error occurred. *Carines*, 460 Mich at 764-765. However, defendant successfully impeached the credibility of the victim's half-sister on cross-examination, thus minimizing the impact of her testimony, by eliciting testimony that the victim told her to lie so they would not have to return to the foster home owned by defendant's mother. In addition, the sister's testimony was relatively short. For these reasons, we find that defendant was not prejudiced by the plain error, and reversal is not required.

We further reject defendant's corresponding claim of ineffective assistance of counsel. We presume counsel is effective, and defendant bears a heavy burden of proving otherwise. *Solmonson*, 261 Mich App at 663. Sometimes it is better not to object and draw further attention to an improper comment. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). Counsel's conduct in failing to object did not fall below an objective standard of reasonableness.

Finally, defendant argues that the prosecutor failed to give notice under MRE 404(b)(2) of his intent to introduce the other-acts evidence of sexual conduct and pedophilia of the men in defendant's family. However, as we previously determined, this testimony was not subject to MRE 404(b)(1), and thus, the prosecutor was not bound to comply with the notice requirements of MRE 404(b)(2). No plain error occurred. Because no error occurred, any objection by defense counsel would have been futile. *Mack*, 265 Mich App at 130. We thus reject defendant's claim of ineffective assistance of counsel.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Stephen L. Borrello