STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN VICTOR BARTLETT, JR.,

Defendant-Appellant.

UNPUBLISHED
November 18, 2021

No. 352470
Eaton Circuit Court
LC No. 2019-020132-FC

Before: MARKEY, P.J., and BECKERING and BOONSTRA, JJ.

BECKERING, J., (*concurring*).

I concur in the result. I write separately because I disagree that the "tender years" hearsay exception in MRE 803A applied to the testimony provided by therapist Debra Wright. However, because any potential hearsay statements were elicited by defense counsel, defendant cannot establish that any error occurred.

Hearsay is defined as "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(c). Hearsay evidence is generally inadmissible unless there is an exception. MRE 802. One such exception to hearsay is the tender-years exception, MRE 803A, which excepts from hearsay a child's first disclosure of a sexual act. MRE 803A, in pertinent part, provides:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;

(3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. [Emphasis added.]

In this case, IJ testified that she first disclosed the abuse to her cousin, GL, and then to her mother. GL testified about this initial disclosure at trial. Therefore, IJ's subsequent disclosures to Officer McDaniel, Wright, Donald Trader, and Michelle Foy do not fall under the tender-years exception to hearsay. MRE 803A.

Although IJ eventually disclosed additional details about the abuse to Wright, she testified at trial in regard to a single incident of abuse, which included defendant touching her side, rubbing his penis on her vagina, and forcing her to perform oral sex. In *People v Douglas*, 496 Mich 557, 575; 852 NW2d 587 (2014), the Michigan Supreme Court explained that although MRE 803A did not define the term "incident," it was commonly understood to mean "an occurrence or event," or "a distinct piece of action, as in a story." (Quotation marks and citation omitted.) The Court further concluded that "[t]here is no dispute here that the alleged fellatio and touching were distinct occurrences or events, separated by at least a number of months, taking place under different circumstances, and bearing no particular relation to one another beyond the parties involved." *Id*. at 575-576. As a result, the Court held that the victim's disclosure concerning fellatio during a forensic interview was not admissible pursuant to MRE 803A because she had already told her mother. *Id*. at 576. However, the forensic interviewer could testify about the separate touching incident because the victim had not disclosed anything about it before the interview. *Id*. at 576 n 5.

In this case, unlike the circumstances present in *Douglas*, IJ subsequently provided more details in regard to one "incident" or "event" during her sessions with Wright. The acts she described occurred on the same day at the same approximate time, and under the same circumstances—after defendant asked IJ to join him in his bed after she spent the night at his home. Additionally, the record indicates that IJ disclosed details about the abuse to her father's girlfriend, who attended IJ's next counseling session and held her hand while she spoke to Wright. Therefore, IJ's disclosures to Wright were not her first corroborative statements about "the incident" at issue. See MRE 803A. See also *People v Katt*, 468 Mich 272, 296; 662 NW2d 12 (2003) (explaining that the tender-years rule prefers a child's first statement over subsequent statements because "[a]s time goes on, a child's perceptions become more and more influenced by the reactions of the adults with whom the child speaks").

In any event, in respect to Wright, defendant does not identify the specific testimony to which he objects on appeal. "An appellant may not merely announce a position then leave it to this Court to discover and rationalize the basis for the appellant's claims . . . ." *Cheesman v Williams*, 311 Mich App 147, 161; 874 NW2d 385 (2015). Rather, defendant asserts that the

following testimony shows that any disclosures IJ made to Wright were not spontaneous as required by MRE 803A(2):

> *Q*. At some point in time, were you contacted by law enforcement about [IJ]?
>
> *A*. Yes.
>
> *Q*. And did that change your counseling sessions with [IJ], at all?
>
> *A*. Yes, 'cause there was a request to see if [IJ] could tell me anything.

I agree with defendant that IJ's disclosures were not spontaneous. In *People v Gursky*, 486 Mich 596, 614; 786 NW2d 579 (2010), our Supreme Court explained that "[o]pen-ended, nonleading questions that do not specifically suggest sexual abuse do not pose a problem with eliciting potentially false claims of sexual abuse." However, in a case in which "the initial questioning focuses on possible sexual abuse, the resultant answers are not spontaneous because they do not arise without external cause." *Id*. at 615. In this case, Wright testified that she altered her sessions with IJ in direct response to law enforcement's request to address the sexual abuse allegations. Further, by the time that IJ made her most detailed disclosure to Wright, she had participated in two separate forensic interviews with Officer McDaniel, spoken to members of her family, and written a letter to Wright concerning the abuse. Her father's girlfriend attended the counseling session and held her hand while she disclosed the details of the abuse to Wright. Even accepting that Wright was not specifically pushing IJ to reveal details about the abuse, she was aware that IJ previously disclosed sexual abuse. The girlfriend of IJ's father also knew about the sexual abuse and presumably attended the counseling session so that IJ would feel comfortable talking about it. Examining the surrounding circumstances and the context of the counseling sessions, I conclude that IJ's disclosures to Wright were not spontaneous as required by MRE 803A(2). *Id*.

Because I conclude that IJ's statements to Wright were not spontaneous pursuant to MRE 803A(2), I decline to address whether there is an indication that the statements were manufactured. MRE 803A requires both that the statement be spontaneous *and* without an indication of manufacture. "The language of MRE 803A(2) clearly demonstrates that spontaneity is an independent requirement of admissibility rather than one factor that weighs in favor of reliability or admissibility." *Gursky*, 486 Mich at 615. Accordingly, "because spontaneity is an independent requirement under MRE 803A(2) rather than one factor that weighs in favor of reliability and therefore admissibility, an overall sense of reliability or trustworthiness cannot render nonspontaneous statements admissible under MRE 803A." *Id*. at 617.

As a result, contrary to the analysis in the majority opinion, IJ's statements to Wright were subsequent disclosures that were not spontaneous. Nor, for that matter, were they IJ's first corroborative statements about "the incident" at issue. See MRE 803A. Accordingly, these statements were not admissible pursuant to MRE 803A.

In any event, any potential hearsay statements from Wright were elicited by defense counsel on cross-examination. On direct examination, Wright testified that the former girlfriend of IJ's father "held [IJ's] hand as [IJ] revealed things that had happened." However, Wright's

testimony does not recount any assertion made by IJ, so it is not hearsay. See MRE 801(c). On cross-examination, Wright testified that IJ revealed at her initial counseling session that defendant "had touched her," which prompted Wright to file a referral with Child Protective Services. Defense counsel asked Wright multiple questions about her written report to police, which she testified included statements by IJ that defendant held her down with a blanket, put his penis in her mouth twice, told her to lick it, took of her pants and underwear, and threatened to hurt her cousins and her brother. Even if this testimony would have otherwise been inadmissible hearsay had it been introduced by the prosecutor, "[a] defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Moreover, a review of the record indicates that defense counsel sought to elicit this testimony to show that IJ's allegations became more serious as the investigation progressed and IJ disclosed the abuse to additional people. As a result, counsel made a strategic decision to present such testimony to attack the victim's credibility. This Court will not second guess defense counsel's strategic decisions, and the "fact that defense counsel's strategy may not have worked does not constitute ineffective assistance of counsel." *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Therefore, defendant has not shown that any of Wright's testimony was erroneously admitted.[1]

Otherwise, I agree with the analysis in the majority opinion concerning the testimony provided by Officer McDaniel, Foy, and Trader. Even if any the testimony provided by these witnesses was inadmissible, defendant has not established error requiring reversal.

/s/ Jane M. Beckering

[1] Defendant also argues that Wright's testimony does not fall under the hearsay exception in MRE 803(4) for statements made for purposes of medical treatment or diagnosis. IJ did not disclose the abuse to Wright for the purpose of medical treatment. However, because Wright's testimony on direct examination was not hearsay, this exception is irrelevant to the resolution of defendant's claim on appeal.