

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
September 20, 2012

v

JOEL ALEXZANDER GOMEZ,

Defendant-Appellant.

No. 301706
Cass Circuit Court
LC No. 09-010252-FC

Before: KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of ten counts of first-degree criminal sexual conduct, MCL 750.520b(2)(b) (victim less than 13 years old), and one count of domestic assault, MCL 750.81a(2). Defendant was sentenced to concurrent terms of 25 to 40 years' imprisonment for each of the ten first-degree criminal sexual conduct convictions. Defendant was not sentenced to any term of imprisonment for his misdemeanor domestic assault conviction. For the reasons stated in this opinion, we affirm.

I. FACTUAL BACKGROUND

Defendant's convictions arise from his repeated sexual abuse of his step-daughter. The victim was ten-years-old when the sexual abuse began in 2007. The victim did not report defendant's conduct until March of 2009, after defendant and her mother confronted her about a note from her boyfriend. Defendant discovered the note while working with the victim at the family's restaurant. After reading the note, defendant became angry with the victim and choked her and slapped her in the face with his hand. The victim revealed the sexual abuse to her mother after her mother asked her if she was still a virgin in response to the note.

Defendant and the victim's mother took the victim to speak with her pastor after the victim accused defendant of sexual abuse. The pastor suggested that the victim's mother and defendant contact the authorities, and the victim was taken to the police department where she reported the sexual abuse to Troopers Ben Seal and Chris Shoemaker. The victim explained that defendant first approached her when she was 10-years-old and sleeping on the couch. She testified that defendant pulled down his pants, took her pants off, and attempted penile-vaginal penetration. Defendant was unsuccessful and stopped when the victim told him that it hurt. Defendant attempted penile-vaginal penetration one more time unsuccessfully, and after that was able to completely penetrate the victim's vagina with his penis. The victim testified that forced

penile-vaginal intercourse continuously occurred a couple times a week. The victim described defendant ejaculating, and explained that he sometimes ejaculated onto her bedspread or other blankets. The victim testified that defendant would force her to have intercourse with him at the family's restaurant, on the couch, and in her bedroom. During the trial, Troopers Seal and Shoemaker both testified pursuant to MCL 768.27c about the statements the victim made at the police station. Defendant objected to the troopers' testimony.

Defendant left the family home after the victim's allegations, and the victim remained with her mother and siblings. During this time, the victim was examined by a psychologist, and by a nurse trained in conducting sexual assault examinations. After interviewing the victim, police collected several items from the victim's home for DNA analysis. After the results of the analysis showed defendant's sperm cells and the victim's DNA present on the victim's bedspread consistent with the victim's statement that defendant sometimes ejaculated onto the bedspread, defendant was arrested. During the time that the victim remained in her home with her mother, the victim's mother frequently indicated that she did not believe the victim was being truthful. Eventually the victim recanted her allegations to several people, apologized for her actions at church, and wrote a letter recanting her allegations. However, at trial the victim testified about the sexual abuse and stated that her recantation was false and was made only because she felt like no one believed she was telling the truth.

II. HEARSAY

On appeal, defendant argues that the trial court abused its discretion when it permitted Troopers Seal and Shoemaker to testify pursuant to MCL 768.27c about the statements the victim made to them regarding the sexual abuse. Specifically, defendant maintains that this testimony was not properly admissible because the fact that the victim had a motive for fabricating the statements that she made to the troopers required that the testimony be excluded as untrustworthy pursuant to MCL 768.27c(2)(d).

We review a trial court's decision to admit evidence for an abuse of discretion. *People v Meissner*, 294 Mich App 438, 444-445; 812 NW2d 37 (2011). "A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes." *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). Issues of statutory interpretation are subject to de novo review. *Meissner*, 294 Mich App at 444.

The Legislature "enacted MCL 768.27c as a substantive rule of evidence reflecting specific policy concerns about hearsay in domestic violence cases." *Id.* at 445. By enacting the statute, the Legislature determined that statements made to law enforcement officers are admissible in domestic violence cases under certain enumerated circumstances. *Id.* MCL 768.27c provides:

- (1) Evidence of a statement by a declarant is admissible if all of the following apply:
 - (a) The statement purports to narrate, describe, or explain the infliction or threat of physical injury upon the declarant.

(b) The action in which the evidence is offered under this section is an offense involving domestic violence.

(c) The statement was made at or near the time of the infliction or threat of physical injury. Evidence of a statement made more than 5 years before the filing of the current action or proceeding is inadmissible under this section.

(d) The statement was made under circumstances that would indicate the statement's trustworthiness.

(e) The statement was made to a law enforcement officer.

Defendant contests only the trial court's finding that the requirement that the statement was made under circumstances that would indicate the statement's trustworthiness as set forth in MCL 768.27c(1)(d) was satisfied. Defendant specifically relies on MCL 768.27c(2)(b), which provides that a court should consider whether the declarant had any bias or motive to fabricate when determining whether the statement was made under circumstances indicating its trustworthiness. Defendant argues that because the victim admitted that she was in trouble for having a note from a boy, she was biased and had a motive to fabricate the rape allegations. Defendant supports his argument with the fact that the victim also testified that she told the psychologist she met with after she recanted that she accused defendant of sexual abuse because she was mad at defendant and did not want to get in trouble for the note. No other evidence in this case would support finding that the victim fabricated the charges against defendant.

MCL 768.27c(2) provides guidance to trial courts for determining whether a statement was made under circumstances that would indicate the statement's trustworthiness. Subsection (2) provides that

circumstances relevant to the issue of trustworthiness include, but are not limited to, all of the following:

(a) Whether the statement was made in contemplation of pending or anticipated litigation in which the declarant was interested.

(b) Whether the declarant has a bias or motive for fabricating the statement, and the extent of any bias or motive.

(c) Whether the statement is corroborated by evidence other than statements that are admissible only under this section.

When explaining its decision to admit this evidence, the trial court specifically addressed each factor set forth in subsection (2). In regard to subsection (2)(b), the trial court stated that it was "satisfied that, again, the bias or motive for fabrication is slight, if any." This is the finding with which defendant specifically takes issue. Defendant maintains that the victim's bias or motive for fabrication was significant enough to require a finding that her statements lacked trustworthiness.

We note initially that subsection (2) does not require excluding statements made to police officers in domestic violence cases merely because there is evidence of bias or motive to fabricate the statement. The evidence is merely relevant to the determination of whether the statement is trustworthy. Further, subpart (b) directs that in addition to whether there is evidence of bias or motive for fabrication, courts should assess the extent of any bias or motive. See *Meissner*, 294 Mich App at 449.

Here, the trial court found “the bias or motive for fabrication is slight, if any.” From this statement, it appears that the trial court was cognizant of the evidence of fabrication, but found the extent of the evidence to be minimal. Although arguably the impact of the evidence of fabrication on the determination of trustworthiness of the statements made by the victim to the troopers is a close question, this decision is one addressed to the discretion of the trial court, and we conclude that the trial court’s decision to admit the evidence was within the range of principled outcomes.¹

III. EXPERT TESTIMONY

Defendant argues that the trial court abused its discretion when it permitted Amber Jarnes, the registered nurse who examined the victim, to offer opinion testimony about whether the results of the medical examination were consistent with sexual penetration of the victim.

We review a trial court’s decision to admit or exclude evidence, including expert testimony, for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 93; 732 NW2d 546 (2007). We also review the trial court’s determination regarding whether a witness qualifies as an expert for an abuse of discretion. *People v Whitfield*, 425 Mich 116, 122; 388 NW2d 206 (1986). “A trial court may be said to have abused its discretion only when its decision falls outside the principled range of outcomes.” *Blackston*, 481 Mich at 460. A trial court abuses its discretion when it permits the introduction of evidence that is inadmissible as a matter of law. *Dobek*, 274 Mich App at 93. Issues of law, including the interpretation of the Michigan Rules of Evidence, are reviewed de novo. *Id.* “An error in the admission or exclusion of evidence will not warrant reversal unless refusal to do so appears inconsistent with substantial justice or affects a substantial right of the opposing party.” *Id.*

MRE 702 governs the admission of expert testimony, and provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of

¹ We need not address defendant’s second argument that the victim’s statements did not satisfy the excited utterance hearsay exception in light of our conclusion that the statements were properly admitted pursuant to MCL 768.27c.

reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

“The trial court has an obligation under MRE 702 ‘to ensure that any expert testimony admitted at trial is reliable.’” *Dobek*, 274 Mich App at 94, quoting *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 780; 685 NW2d 391 (2004). “An individual must be qualified by ‘knowledge, skill, experience, training, or education’ to testify as an expert witness.” *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995), quoting MRE 702. See also *Whitfield*, 425 Mich at 122. “Expert testimony may be excluded when it is based on assumptions that do not comport with the established facts or when it is derived from unreliable and untrustworthy data.” *Dobek*, 274 Mich App at 94.

Jarnes testified that she was currently employed as a Sexual Assault Nurse Examiner (SANE) nurse at Lakeland Hospital, and she completed the SANE training course in November 2008, and thereafter completed 40 hours of clinical training under a SANE certified nurse. After completing the course and the clinical training, Jarnes was qualified to perform SANE examinations. Jarnes became a certified SANE nurse in October 2009. Jarnes examined the victim in this case in April 2009, before she was a certified SANE nurse, but after she was qualified to practice as a SANE nurse. Jarnes testified that certification is optional, and not required for practice as a SANE nurse.

Defendant objected to the qualification of Jarnes as a SANE expert, and the trial court sustained the objection, stating: “The objection is sustained, the court is not going to certify her as an expert without the licensing required. That doesn’t mean you can’t elicit testimony from her. I’m just not going to brand her an expert based on that deficiency.” The prosecution asked Jarnes if the findings of her examination were unusual in any way for a child of 12-years-old, and defense counsel objected. Defense counsel maintained that because Jarnes was not qualified as an expert, she could testify only to her observations and not to her interpretation. The trial court asked the prosecution to lay more foundation in regard to what Jarnes’s status as a registered nurse qualified her to discuss, and after inspecting her curriculum vitae, the trial court noted that as a licensed registered nurse Jarnes was qualified to answer the question. Jarnes stated that the “irregular pattern of linear tissue” was in the “area where the majority of injuries from penetration are found.” Defense counsel again objected, and the prosecution moved to qualify Jarnes as an expert in the area of registered nursing. The trial court granted the prosecution’s motion and qualified Jarnes as an expert in nursing.

The prosecution asked Jarnes about the injuries consistent with sexual penetration, and defense counsel objected. The trial court sustained the objection “pending further foundation that [Jarnes] has the training to qualify her to give opinion testimony on sexual penetration.” The prosecution asked Jarnes several questions regarding her background and training. The prosecution then asked Jarnes: “So in this case what did you see that indicated that there was some type of penetration?” Defense counsel objected to the discussion of evidence of penetration, and the trial court stated that the “objection is overruled. The court has determined she does have sufficient training and experience and has been qualified as a registered nurse. It’s up to the jury to determine what weight to give that opinion, and you can cross-examine her as to her qualifications.” Jarnes was then permitted to testify about her findings that were consistent with some type of sexual penetration, including the raised white granular tissue and the irregular

linear pattern both present in areas where injuries from sexual penetration occur. On re-direct the prosecution asked Jarnes: “Bottom line, what you found in [the victim’s] vaginal area, is that consistent with sexual penetration?” Jarnes said yes, and defense counsel objected because Jarnes “hasn’t been sufficiently qualified to testify as an expert in that area.” The trial court stated that the “objection is sustained and the last answer is struck. The jury is instructed to disregard that last answer.”

Based on the evidence of Jarnes’s qualifications, knowledge, and experience, we conclude that the trial court did not abuse its discretion by allowing Jarnes to testify about the results of her examination. It was not disputed that although she was not certified, Jarnes was already practicing as a SANE nurse at the time she examined the victim, and that she had completed her training as a SANE nurse before examining the victim. Accordingly, Jarnes’s knowledge, education, training, and experience supported the trial court’s conclusion to qualify her as an expert capable of testifying about the injuries sustained by the victim and the fact that the injuries were located on an area of the body where victims of sexual abuse are often injured. MRE 702.

IV. ISSUES RAISED IN DEFENDANT’S STANDARD 4 BRIEF

In his Standard 4 Brief, defendant first argues that the trial court did not have subject-matter jurisdiction over this case because the arrest warrant and complaint in this case “lack[ed] any indicia of probable cause for the court to initiate proceedings on.”

While defendant did not raise a challenge based on jurisdiction in the trial court, a party may challenge the subject-matter jurisdiction of a court at any time. See *People v Gonzalez*, 256 Mich App 212, 234; 663 NW2d 499 (2003). Whether the trial court had subject-matter jurisdiction is a question of law that we review de novo. *Id.* at 234.

In Michigan, charges may be brought by a prosecutor either by information or indictment. MCR 6.112(B). The district court acquires jurisdiction over felony charges under either charging mechanism. MCL 767.1; MCR 6.112(B). The lower court record contains a Felony Information stamped as filed on October 8, 2009. Accordingly, the trial court in this case acquired subject-matter jurisdiction over defendant’s felony charges when the prosecutor filed the Felony Information. Moreover, this Court has held that once the trial court obtains jurisdiction over defendant, “proof of an invalid arrest warrant does not divest the court of jurisdiction.” *People v Hernandez*, 41 Mich App 594, 598; 200 NW2d 447 (1972). Thus, even if defendant’s arrest warrant was invalid, the trial court still had subject-matter jurisdiction.²

² Nevertheless, we note that defendant’s arrest warrant complies with MCR 6.102(C), which sets forth the required contents of an arrest warrant, including the accused’s name, a description of the charged offense, and a command for a peace officer to bring the accused before a judicial officer of the judicial district. The court rule also requires the arrest warrant to be signed by the court. The arrest warrant in this case was in full compliance with the court rule. Defendant

Defendant also alleges that several instances of prosecutorial misconduct require reversal of his convictions and sentences.

This Court typically reviews alleged prosecutorial misconduct de novo to determine whether the defendant was denied a fair and impartial trial due to the actions of the prosecutor. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, “[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). In this case, defendant failed to object to any of the alleged instances of prosecutorial misconduct in the trial court. Accordingly, we review the alleged errors for plain error affecting defendant’s substantial rights. *Id.* “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.* If a curative instruction could have alleviated any prejudicial effect, this Court will not find error requiring reversal. *Id.* at 329-330.

When reviewing a claim of prosecutorial misconduct, we consider the pertinent portion of the lower court record in order to evaluate the prosecutor’s remarks in context. *Id.* at 330. Analysis of alleged prosecutorial misconduct is fact specific. *Id.* “Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence.” *Id.*

Defendant claims that references to the presence of the victim’s vaginal fluid mixed with defendant’s seminal fluid on the bedspread in the prosecutor’s opening statement, in his questions to witnesses, and his closing argument constituted misconduct because defendant maintains that the evidence in this case does not support the argument that the victim’s vaginal fluid was detected on the bedspread and that it was mixed with defendant’s seminal fluid.

In regard to the argument about the victim’s vaginal fluid, defendant correctly points out that the experts testified that there is no test that specifically identifies a bodily fluid stain as vaginal fluid. However, defendant’s argument ignores the fact that the DNA expert explained that it was possible, and even likely, that the stain was from vaginal secretions. Additionally, the victim specifically testified to sexual intercourse with defendant on the bedspread from which the stain that was analyzed for DNA was collected. Thus, the prosecution’s argument that the victim’s DNA on the stain was the victim’s vaginal fluid constituted a proper argument based on a reasonable inference that could arise from the evidence. *Id.*

Similarly, in regard to the “mixed” nature of the stain, defendant correctly argues that the expert testified that she could not tell if the two stains were deposited on the bedspread at the same time. However, the expert did use the term “mixed stain” several times, and referenced the “mixed” nature of the sample several times, including stating that she found “a mixture that was consistent with” the victim’s DNA and defendant’s DNA. The prosecution specifically

argues that the warrant was invalid in part because it failed to list the complainant’s name; however, MCR 6.102(C) does not require inclusion of the complainant’s name on the warrant.

asked the expert whether the stain had two separate DNA donors, and she testified that yes, the stain had two separate donors.

Moreover, defense counsel asked the expert whether there is any way to determine how long the DNA was present on the bedspread, and she explained that the DNA would remain until the item is washed, and that there is some degradation of DNA over time based on the conditions it is subject to such as high heat and humidity. The prosecution asked the expert whether the DNA samples analyzed in this case were in any way degraded, and she testified that the samples were not degraded and she obtained a full profile. Accordingly, based on the testimony regarding the DNA evidence in combination with the victim's testimony, we conclude that the prosecution's arguments regarding the victim's vaginal fluid and the mixed nature of the stain were supported by the evidence because those arguments were based on reasonable inferences that may arise from the evidence. *Id.* Thus, defendant has failed to demonstrate plain error affecting his substantial rights in connection with the alleged prosecutorial misconduct involving the prosecution's opening statement, closing argument, and alleged misleading of the jury.

Defendant also argues that the prosecution committed misconduct by bolstering the credibility of the victim through improper questioning of James Henry, Ph.D, an expert in child sexual abuse. Specifically, defendant takes issue with the prosecutor's question: "hypothetically speaking, if a mother who has been telling a 12-year-old girl who has been sexually abused that she's lying, doesn't believe her, and then makes her write that letter of recantation, would that have an impact on her?" Henry answered "absolutely," and explained that such behavior by the mother makes a victim feel powerless, and causes the victim to feel like recantation is required to maintain her mother's love.

Expert testimony in child sexual abuse cases is directed by the Michigan Supreme Court's holding in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), further explained in *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). In *Peterson*, the Court reaffirmed its holding in *Beckley* that an expert may not testify that the sexual abuse occurred, that an expert may not vouch for the credibility of the victim, and that an expert may not testify regarding the guilt of the defendant. *Id.* at 352. The Court explained that 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." *Id.*

Applying the guidelines for expert testimony in child sexual abuse cases set forth in *Peterson* to the circumstances in this case, we conclude that the hypothetical posed to the expert was properly designed to explain the victim's specific behavior, her recantation in this case, that might be incorrectly construed by the jury as inconsistent with actual abuse. A jury might reasonably believe that recantation by a victim would not occur unless the victim was originally fabricating the sexual abuse; therefore, the expert testimony was required to demonstrate to the jury that victims of sexual abuse may recant their allegations for several reasons. Thus, the expert testimony in this case was proper under *Peterson's* guidelines. *Id.* Accordingly,

defendant has failed to demonstrate that the prosecutor's hypothetical question constituted plain error affecting his substantial rights.

Affirmed.

/s/ Michael J. Kelly

/s/ Joel P. Hoekstra

/s/ Cynthia Diane Stephens