STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 26, 2012
v	No. 306681 Berrien Circuit Court
ANTHONY ALAN YOUNG, Defendant-Appellant.	LC No. 2010-005701-FC

Before: SHAPIRO, P.J., and HOEKSTRA and WHITBECK, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b, and sentenced to serve 25-75 years in prison. Defendant appeals as of right, arguing that improperly admitted evidence and misconduct by the prosecutor denied him a fair trial. We affirm.

The complainant in this case is defendant's daughter, who was twelve years old at the time of the assaults. The complainant testified that two different times in one night defendant made her undress and penetrated her with his fingers both vaginally and anally. He also told her to perform oral sex on him, but she refused. Approximately one week later, defendant attempted to have intercourse with the complainant. When unable to do so, he masturbated in front of her. Though defendant told her not to tell anyone, the complainant revealed at least some of what had happened to a friend and eventually to an assistant principal at her school.

I. STATEMENTS FOR MEDICAL TREATMENT OR DIAGNOSIS

Defendant first challenges the testimony of Teresa Spitler, a registered nurse with specialized training in assessing and treating sexual assault victims, who examined the complainant around a week after the last assault. Defendant argues that Spitler's testimony relating the complainant's description of the assaults constitutes hearsay and does not fit within MRE 803(4)'s exception for statements made for the purposes of obtaining medical treatment or diagnosis.

We review a trial court's decision to admit evidence for an abuse of discretion, except that "[t]o the extent that this requires examination of the meaning of the Michigan Rules of

Evidence, we address such a question in the same manner as the examination of the meaning of a court rule or a statute, which are questions of law that we review de novo." *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002).

In support of his contention, defendant cites *People v Meeboer* (*After Remand*), 439 Mich 310, 322; 484 NW2d 621 (1992), which states:

> Traditionally, further supporting rationale for MRE 803(4) is the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.

Defendant argues that neither prong of this rationales apply in the present case. He argues that the complainant did not have any physical injuries that required medical care at the time she was examined by Spitler, and that her statements to Spitler were not reasonably necessary to her treatment because Spitler's activities served an entirely forensic, rather than medical, purpose.

More specifically, because the complainant was not suffering any apparent physical injury at the time of the examination, defendant likens the case to *People v LaLone*, 432 Mich 103, 109-110; 437 NW2d 611 (1989), in which our Supreme Court held that statements to psychologists were less reliable than statements to physicians, speculating that a patient is more likely to lie about psychological symptoms than physical symptoms. However, the complainant's statement was not made to a psychologist or psychiatrist, but to a nurse. Further, plaintiff correctly points out that many physical ailments—such as sexually transmitted diseases—do not manifest themselves by objectively verifiable symptoms. It is irrelevant whether the complainant suffered "any immediately apparent physical injury." *People v Mahone*, 294 Mich App 208, 215; ___ NW2d ___ (2011). Her description of the assault was necessary for Spitler to determine what medical treatment, if any, was necessary.

Further, defendant argues that because the complainant received no medical treatment, her statements to Spitler were not "reasonably necessary" to her treatment. However, the rationale for MRE 803(4) is not limited to treatment, but also includes diagnosis. A statement may be necessary for diagnosis even when no treatment is ultimately provided.

Defendant also argues that the complainant's statement to Spitler was testimonial under *Davis v Washington*, 547 US 813; 126 S Ct 2266; 165 L Ed 2d 221 (2006). The Confrontation Clause of the Sixth Amendment "bars 'admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.'" *Id.*, quoting *Crawford v Washington*, 541 US 36, 53-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Because the complainant testified at trial and was subject to cross-examination, it does not matter whether her statement to Spitler was testimonial or not, but we note that this Court has held that statements to a sexual assault nurse are not necessarily testimonial, even though the nurse does collect evidence and is required to report the assault and turn over the evidence to police. *People v Garland*, 286 Mich App 1, 11; 777 NW2d 732 (2009).

II. ARGUING FACTS NOT IN EVIDENCE

Defendant submits that the prosecutor improperly bolstered the complainant's credibility in his closing argument by arguing that her testimony was consistent with her statements to Spitler and to forensic examiner Brooke Rospierski of the Children's Assessment Center (CAC). Claims of prosecutorial misconduct are reviewed de novo to determine whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Rospierski testified at trial that the complainant's demeanor and the period of time between the assault and the complainant's disclosure were not out of the ordinary, but did not relate the substance of the complainant's statement to her. At closing arguments, the prosecutor stated "[The complainant] was consistent. She was consistent in her testimony here, her testimony at the hospital. (Inaudible) testimony from the CAC."

Defendant argues that by describing the complainant's testimony as "consistent" with the testimony from Rospierski, the prosecution was informing the jury that the substance of the complainant's non-admitted statement to Rospierski was the same as the complainant's testimony at trial. However, the prosecutor never referred to that statement and it is far from clear that the prosecutor was even implying such a claim. The statement was made in the context of a general discussion of the complainant's credibility including her performance on cross examination, the specificity of her recollection of the assaults, and other factors. A more reasonable reading of the prosecutor's statement would take it to mean only that Rospierski's testimony in no way contradicted or cast doubt on the complainant's truthfulness.

The record does not reveal that the prosecutor argued facts not in evidence or used inadmissible evidence to bolster the credibility of the complainant. Therefore, defendant was not denied a fair trial by the prosecutor's remarks during closing arguments. Similarly, defendant's claim that his trial counsel was ineffective for failing to object to the prosecutor's argument fails because any objection would have been meritless. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

III. APPEAL TO JURY'S SYMPATHY

Defendant next argues that the prosecutor committed misconduct by improperly appealing to the jury's sympathy for the complainant during closing arguments. "It is improper for the prosecutor to appeal to the jury to sympathize with the victim." *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). During closing arguments, the prosecutor stated:

> And how do you determine credibility? Well, first of all, you watched her very intently when she testified. And I know you felt her pain when she gave you very specific incidents of what happened to her. You felt her pain by the expressions on her face. You felt the pain in her eyes when she told you what her dad did to her. You felt the pain through her tears describing those despicable acts.
>
> You want more physical evidence? There's nothing more physical than pain. Very, very descriptive. When these acts were performed on her, not only what he used, how he used it, what he did, but each act had a specific pain. Let's start

> with the pain she was sexually assaulted when the defendant placed his finger into her anus. No twelve year old is going to know what that pain feels like. . . . No one can describe that pain unless you've, again, had it done to you.

Defendant argues that these statements distracted the jury from the issue to be decided and led it to convict defendant because of the nature of the offense and their sympathy for the complainant.

However, it is clear from the record that the prosecutor did not ask the jury put itself in the complainant's shoes, but rather was explaining why the jury should find the complainant to be a credible witness. The thrust of the prosecution's argument was that the jury could tell that the complainant had actually suffered the assaults alleged by her behavior on the stand, and the accuracy of her description of pain that she would not otherwise be familiar with. The prosecutor began with the rhetorical question, "And how do you determine credibility?" and the rest of the language objected to by defendant was the prosecutor's answer to that question. "It is well-established that the prosecutor may comment upon the testimony and draw inferences from it and may argue that a witness . . . is not worthy of belief." *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985). "Moreover, a prosecutor may use emotional language during closing argument and such argument is an important weapon in counsel's forensic arsenal." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003) (citation and internal quotations omitted).

This line of argument was not improper. Therefore, defendant's argument that his trial counsel was ineffective for failing to object also fails. *Thomas*, 260 Mich App at 457.

IV. MANDATORY MINIMUM SENTENCE

Defendant finally argues that the 25-year mandatory minimum sentence required in this case by MCL 750.520b(2) constitutes cruel and unusual punishment in violation of the Eighth Amendment and Const 1963 art 1, § 16. However, in *People v Benton*, 294 Mich App 191, 203-207; ___ NW2d ___ (2011), this Court rejected the same arguments made by defendant here. *Benton* is binding upon this Court, MCR 7.215(J)(1), so defendant's argument must fail.

Affirmed.

/s/ Douglas B. Shapiro
/s/ Joel P. Hoekstra
/s/ William C. Whitbeck