STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LLOYD HOWARD SHAFER,

Defendant-Appellant.

UNPUBLISHED
May 22, 1998

No. 201145
Berrien Circuit Court
LC No. 96-002497 FC

Before: Fitzgerald, P.J., and Holbrook, Jr. and Cavanagh, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a),[1] and was sentenced to a prison term of eight to sixty years for each conviction. He appeals as of right. We affirm.

The charges against defendant arise from accusations that defendant once digitally penetrated and once inserted his penis into the mouth of his girlfriend's five-year-old son. Defendant resided with his girlfriend and cared for the victim in the evenings. The victim testified that defendant abused him when the two were home alone. He testified that defendant did "different stuff" to him, including putting his "weenie in my mouth" and putting a gloved hand "in my butt." He explained that at times he and defendant would be clothed, and at other times defendant would direct him to take off his clothing. The victim testified that defendant often told him not to tell his mother about these incidents.

I

Defendant argues that he was deprived of a fair trial by the admission of the testimony of plaintiff's expert, Dr. Robin Zollar. Dr. Zollar testified with respect to hypothetical scenarios mimicking the allegations against defendant, but she had not actually met or counseled the victim. She testified that it was not unusual for a child not to disclose the abuse during the time when it was occurring, especially if the child had been told not to tell or was threatened with any other type of physical abuse. She stated that it is not likely that a child would make up a story of this type of abuse just because he witnessed

that his mother was angry with the perpetrator in order to fuel her anger. She testified that though it is possible for children to invent these types of stories, they must have some knowledge of these types of acts in order to do so, but that even if they had observed these acts, they cannot describe how these acts feel unless they had experienced them. She testified that, in general, five-year-old children have a fairly accurate memory of these types of events, but they are no different from adults in their ability to recall precise details, particularly if the acts occur numerous times.

Our Supreme Court has held that an expert in child sexual abuse cases may testify regarding typical 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 abuse victim or to rebut an attack on the victim's credibility. *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857 (1995). In addition, the prosecution may present an expert witness in its case-in-chief to describe certain behavioral characteristics recognizable in victims of child abuse if that evidence is relevant and helpful. *Id*. The prosecution also may argue that from the evidence adduced at trial, certain reasonable inferences may be drawn from the expert's testimony and compared with the facts of the case. *Id*. Furthermore, an expert may not testify that the particular victim's behavior is consistent with that of a sexually abused child unless the defendant raises the issue of the victim's postincident behavior or attacks the child's credibility. *Id*. at 373-374. That testimony would be too similar to the expert's testimony that the particular child victim is a victim of sexual abuse to be admissible. *Id.* at 374. In short, our Supreme Court reasoned:

> We believe that in [*Peterson*] we strike the appropriate balance by allowing an expert to testify about behavioral traits that may, by their very nature, create confusion in the minds of the jury. Because the pertinent inquiry is not the timing of the admission, but rather the reason for the use of the evidence, the admission of expert testimony is not confined to the rebuttal stage of proofs and thus may be introduced, as limited by this opinion, in the prosecution's case in chief. [*Id*. at 375.]

Defendant first contends that Dr. Zollar's testimony was not needed to explain the victim's credibility with respect to his ability to recall dates, times, and the sequence of events and that it was improper because it had nothing to do with sexual abuse. However, the defense had questioned the victim extensively with respect to when each event occurred relative to the others, in which rooms they occurred and what the sequence of events was, attempting to cast doubt on the victim 's credibility. Thus, the prosecution was not only eliciting an explanation about certain characteristics of child sexual abuse victims with respect to how well they can recall specific details, but also attempting to respond to defendant's allegations that the victim was wrong or untruthful. Because defendant attacked the victim's credibility, it was proper for this expert to testify that the victim's behavior was consistent with that of a sexually abused child.

Second, defendant contests Dr. Zollar's testimony with respect to a child's ability to fabricate a story about sexual acts. Here, Dr. Zollar's testimony fits squarely within the stated purpose of our Supreme Court in *Peterson, supra*, in that it was expert testimony about behavioral traits that may, by

their very nature, create confusion in the minds of the jury. Whether a child would be able to lie about details of this nature would reasonably be a question that the jury might have, and Dr. Zollar's testimony clarified this point.

Third, defendant complains that he discovered, during his cross-examination of Dr. Zollar, that she had been given copies of reports and interviews with the victim in addition to videotapes of his prior court testimony. He argues that with that knowledge the jury could easily have viewed her opinion as the same as that gained from a personal interview and taken it as her opinion that the victim was telling the truth. However, the jury did not become aware that Zollar had access to this information about the victim until defense counsel elicited that testimony during his cross-examination. Thus, as presented by the prosecution and allowed by the court, Dr. Zollar's testimony was nothing more than general information about postincident behavior of child sexual assault victims and was proper under *Peterson*, *supra*. Because error necessitating reversal must be that of the trial court, and not error to which the aggrieved party contributed by plan or negligence, *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993), defendant cannot now complain that the jury was unduly influenced by this information, nor can he complain that the trial court should have granted a mistrial based on the admission of this testimony.

Fourth, defendant argues that Dr. Zollar's testimony that the circumstances under which the complainant disclosed the allegations in this case were consistent with the behavior of a child sex abuse victim was not an issue for an expert. Again, however, the defense had presented a theory that the victim was composing this story to come between his mother and defendant, and that the reason that he disclosed while his mother was angry with defendant was that he was attempting to add fuel to the fire. The prosecution's evidence that it is not unusual for a child victim to wait months or even years, until he is no longer threatened by the immediate presence of the attacker, to disclose was simply proper evidence of general traits of the victim's postincident behavior. Thus, Dr. Zollar's testimony was not improper.

II

Defendant argues that the statements from the victim to his mother and to Deputy Hopkins were inadmissible hearsay and should not have been admitted. We conclude that the statements were admissible under MRE 803(24).

MRE 803(24) permits the admission of a statement that is not specifically covered by the other hearsay exceptions if the statement has the equivalent circumstantial guarantees of trustworthiness and 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.

This Court recently interpreted the new hearsay "catch-all" provision in *People v Welch*, 226 Mich App 461; ___ NW2d ___ (1997), adopting the federal court's conclusion that "[i]n order to determine whether a statement meets [the proper] standard, the trial court must examine the totality of the circumstances surrounding the making of the statement and those rendering the declarant particularly worthy of belief." *Id*., quoting *United States v Barrett*, 8 F3d 1296, 1300 (CA 8, 1993). The trustworthiness factors appropriate for the court to consider with respect to the child's statements included (1) the spontaneity of the statement, (2) the consistent repetition of the statement, (3) the child's lack of a motive to fabricate, and (4) the reason for the child's inability to testify at trial. *Welch, supra* at 467.

Based on the young age of the victim, the greater tendency of younger victims to be more truthful ,and the timing of the statement at a time when he could see his mother was angry with defendant and thus more likely to feel comfortable that she would take his side over defendant's, the trial court found that the victim's statement to his mother that defendant hurt him displayed the requisite elements of trustworthiness and, therefore, admitted the mother's statement. Furthermore, the victim's consistent recitation of the events and the spontaneity of his statement, indicating that he was not being coached, lent credibility and indicia of trustworthiness. Despite defendant's persistent efforts, there was no credible evidence that the victim possessed a motive to fabricate this story. With respect to the victim's statements to the police officers, the trial court noted the victim's age and the fact that the language he used in talking to the officers was age-appropriate. The court noted the open-ended nature of the questions asked the victim, and the fact that the victim explained, without prompting, the difference between a bad touch and a good touch. Thus, the trial court properly found that the statements by the victim to his mother and to Deputy Hopkins had equivalent circumstantial guarantees of trustworthiness to the other hearsay exceptions.

Furthermore, the statements were offered as evidence of a material fact, as these acts were the central element in the case. The court found that the question of whether these statements were more probative than any other reasonable provable evidence was to be left until the victim testified. Though the mother's testimony of the victim's statement that "he hurt me" was perhaps not the best evidence of this point, the effect of this testimony was relatively minor given the lengthy recitation the victim then provided in his own testimony describing how defendant hurt him. Therefore, its admission is, at most, harmless error. The victim's statement to Hopkins was extremely probative, especially in light of the fact that this was his first recitation of the abuse and it remained consistent throughout the investigation, counseling, and two trials. It was also the most detailed version of the abuse that the victim endured. His own testimony, though telling, was not as descriptive, given the difficulty that a young child has describing these events to a room full of strangers. Finally, the general purposes of the hearsay rules and the interests of justice are best served by allowing Hopkins' statements of what the victim told him.

III

Last, because of the strong stereotype that abuse victims become abusers themselves, defendant argues that he was unduly prejudiced by the evidence that defendant was sexually abused as

a child. Defendant first argues that over objection, the prosecutor was allowed to ask defendant's brother questions about his own molestation and experience by his father. However, defendant, in fact, failed to object to this line of questioning until well after defendant's brother had admitted that his father had abused him. Accordingly, there was already evidence of this abuse and any subsequent evidence did not further prejudice defendant. Moreover, the evidence elicited from defendant's brother did not reveal that defendant himself had been abused. Therefore, defendant was not prejudiced by the admission of this evidence.

IV

Defendant also contends that he was prejudiced by a deputy's testimony that defendant admitted to being abused. Though defendant does not take issue with the admission of his own statement within his confession that he was abused, he points out that the deputy was erroneously allowed to testify that generally when a person molests, that person has himself been molested. However, defendant entered a timely objection to this statement, which was sustained, and the court precluded any further comment along these lines. This was not an error so egregious that a new trial is warranted, especially in light of defendant's own statement that he had been abused and that he needed help.

V

Defendant maintains that there was insufficient evidence to support the verdict because the victim's testimony was inconsistent and incredible. Defendant does not highlight any specific instances in which that inconsistency occurs, and argues only generally that the victim could not remember in which rooms the alleged assaults took place and that he stated that there were things that confused him. However, this Court will generally not overturn a conviction on the basis of the credibility of a witness, and we decline to do so in this case. *People v Hughes*, 217 Mich App 242, 248-249; 550 NW2d 871 (1996).

VI

Defendant argues that several instances of prosecutorial misconduct deprived him of a fair trial. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The propriety of a prosecutor's remarks depends on all the facts of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Appellate review of allegedly improper remarks is precluded if the defendant fails to timely and specifically object unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Thus, in the absence of an objection, review

is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977).

Defendant first complains that the prosecutor improperly evoked sympathy for the victim and his family by asking the victim's mother what impact the trial process, counseling, and aftermath of the abuse has had on her family. She answered that it had been devastating, and when the prosecutor asked her why it was devastating, she responded that she was having to "live this all over again. I was abused by my father." At that point, defendant objected and the court sustained his objection, finding that any further response would be primarily for the purpose of evoking sympathy. The prosecutor then moved on to another line of questioning. Thus, defendant's objection cured any error.

Defendant next contends that the prosecutor's references to the victim as a "cute little guy," "a little five-year-old" and a "bright little kid" were an attempt to draw attention to the victim's age and thus evoke sympathy. He also contends that the prosecutor's reference during closing arguments improperly focused the jury's attention on the "devastation" the family experienced. Defendant did not object to the comments, and we decline to review this argument because any prejudicial effect of the comments could have been alleviated by an appropriate instruction.

Finally, defendant argues that the prosecutor improperly vouched for the credibility of certain police witnesses when he stated that the police officers were good people who would not risk their reputations by submitting testimony that was untrue. Defendant did not object to the allegedly improper comments. Because a proper curative instruction would have alleviated any undue prejudice, we decline to review this issue.

VI

Defendant asserts that the trial court's sentencing decision was improperly influenced by his failure to admit guilt. We disagree. The exchange between the sentencing judge and defendant with respect to the fact that defendant continued to maintain his innocence even after his conviction resulted from the trial court's concern that, because defendant once admitted his guilt while taking a polygraph examination and then recanted, counseling and rehabilitative efforts would not be useful. The trial court indicated that the reason he was concerned with defendant's recantation in trial testimony was that the original confession was the result of a series of questions and answers elicited during a polygraph examination and designed to have defendant agree to the definition of molestation and then admit, under the constraints of the polygraph, whether he committed such an act. Though the confession was admitted as a trial exhibit, any reference to the polygraph examination was omitted, and the trial court commented at sentencing that defendant's willingness to take advantage of the situation in which the jury was unaware of the existence of the polygraph to try to change his story was of concern with respect to whether defendant was amenable to rehabilitation. The judge never tried to get defendant to admit guilt, and there is no indication that if defendant had admitted his guilt, the sentence would have been reduced. See *People v Wesley*, 428 Mich 708, 713; 411 NW2d 159 (1987). The court several times commented on the heinous nature of the crime and the need for defendant to get help, but nowhere was

there any hint that counseling, probation, or any other alternative for a lesser sentence was a possibility in light of the severity of this crime.

Finally, defendant argues that the cumulative effect of all of these errors mandates reversal and a new trial. We disagree. Where this Court has found no error, there cannot be a cumulative effect which mandates reversal.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh

[1] This was defendant's second trial on these charges.