

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GENE ANDREW DEBASSIGE,

Defendant-Appellant.

UNPUBLISHED
October 16, 1998

No. 204691
Delta Circuit Court
LC No. 96-006008 FH

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of second-degree criminal sexual conduct (CSC II), MCL 750.520(c)(1)(a); MSA 28.788(3)(1)(a). He was sentenced to two years probation, with six months in jail, and appeals as of right. We affirm.

Defendant argues that it was an abuse of discretion for the trial court to allow three prosecution witnesses to testify to out-of-court statements made by the victim. The statements delineated the victim's reasons for failing to report her allegations against defendant to the police or other authorities. These statements included that the victim said she did not want to tell the police, protective services, or other authorities because she was afraid her mother would not believe her; that she would be thrown out of her home; that defendant would be angry with her mother; or that she would be disowned. Defendant claims that the statements were inadmissible hearsay.

MRE 802 generally precludes the introduction of hearsay statements, which are defined as statements made by someone other than the declarant that are offered "to prove the truth of the matter asserted." See MRE 801(c). There are exceptions and exclusions, however. Prior consistent statements are admissible and not considered hearsay if:

The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive. [MRE 801(d)(1)(B).]

To satisfy this exception, the statements must predate the motive to fabricate. *People v Rodriguez (On Remand)*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996). MRE 803(3) also provides that the following is not excluded by the hearsay rule:

A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of the declarant's will.

The testimony about the victim's reasons for failing to report defendant's conduct at an earlier time was not hearsay. It was not introduced to show the truth regarding her fears. Rather, the testimony was admitted after defense counsel elicited information on cross-examination that implied that the victim had recently fabricated the allegations and had motives for doing so.¹ The victim's statements, as reported by the three witnesses, predated her alleged motives to fabricate allegations and were therefore admissible under MRE 801(d)(1)(B) to rebut defendant's charge of recent fabrication. *Rodriquez, supra* at 331-332. The trial court did not abuse its discretion by admitting this testimony.

In so holding, we note that the trial court admitted the statements pursuant to MRE 803(3) and not pursuant to MRE 801(d)(1)(B). The trial court found that the testimony was admissible as evidence of the victim's state of mind. We also agree that the testimony was admissible under MRE 803(3). The testimony was admitted to explain why the victim failed to report the allegations to the proper authorities and not to show that she was afraid of being disowned or disbelieved. The victim's state of mind with regard to reporting the allegations became relevant when defendant suggested that the plaintiff had recently fabricated the allegations for several reasons. The prosecution's attempt to rehabilitate the victim with statements evidencing her state of mind was appropriate under the circumstances. See *People v Kozlow*, 38 Mich App 517, 532; 196 NW2d 792 (1972).

Defendant next argues that he received ineffective assistance of counsel. He claims that his counsel should have timely objected to the admission of certain testimony by six prosecution witnesses. Each of the six testified that the victim had informed them of defendant's sexual misconduct. Defendant claims that this testimony improperly bolstered the victim's credibility and that prior consistent statements are not admissible as substantive evidence pursuant to MRE 613.²

In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's error, there was a reasonable probability that the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant "must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Mitchell, supra*. In this case, our review of defendant's claim of ineffective assistance of counsel is limited to errors that are apparent from the trial court record because defendant failed to move for an evidentiary hearing or new trial. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

As a preliminary matter, we note that defendant's argument that the testimony was barred by MRE 613 is nonsensical. MRE 613 is not applicable to this case. MRE 613(a) provides:

In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel and the witness.

MRE 613(b) speaks to extrinsic evidence of prior inconsistent statements and not prior consistent statements. This rule does not stand for the proposition that prior consistent statements are not admissible as substantive evidence.

MRE 801(d), a hearsay rule of evidence, speaks to prior consistent statements. Based on that rule, we disagree that defense counsel was ineffective.

Four of the six witnesses testified on direct examination, without providing any details, that the victim had informed them of the alleged criminal conduct. These witnesses did not testify about the content of the victim's prior statements beyond acknowledging that statements were actually made. Where a witness simply testifies that a statement was made but does not provide details of that statement, the statement is not hearsay. *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). Because the statements of four of the witnesses did not amount to reiterating prior consistent statements of the victim and because they were not hearsay statements, there was no legal basis upon which to object to them. Defense counsel's failure to object could not, therefore, constitute ineffective assistance of counsel.

With regard to the testimony of the other two witnesses, Elizabeth Anderson and Officer Dufek, the record supports that they testified as to the details of the victim's prior consistent statements. On redirect examination, Anderson testified in great detail about the incident, which led to the charges in this case.³ Her testimony was not hearsay and was properly admitted pursuant to MRE 801(d)(1)(B). It rebutted the inference that the victim had recently fabricated the allegations against defendant. *Rodriquez, supra* at 331-332. Therefore we find that defense counsel's failure to object to it did not amount to ineffective assistance of counsel.

Dufek's testimony about what the victim told him was not admissible pursuant to the hearsay exception set forth in MRE 801(d). Dufek confirmed the details of the victim's allegations. The victim's statements to Dufek, however, did not predate her alleged motives to fabricate the testimony and thus, did not fit within the exception. Nevertheless, we conclude that Dufek's testimony did not prejudice defendant where it "only reiterated the complainant's testimony that she had been [sexually] abused." *Rodriquez, supra* at 331-332. More importantly, defendant has failed to demonstrate with any reasonable probability that the trial would have resulted in a different outcome if his counsel had objected to Dufek's testimony. Because defendant has not met his burden of showing prejudice, his claim for ineffective assistance of counsel must fail. *Mitchell, supra* at 157-158.

Affirmed.

/s/ Henry William Saad

/s/ Harold Hood

/s/ Roman S. Gribbs

¹ Defendant claims on appeal that the defense never attacked the victim's credibility by arguing "the lateness of the reporting of the incident to proper authorities." Therefore, he argues that the testimony as to why she failed to report the conduct earlier was not admissible under any hearsay exceptions or exclusions. We disagree. A review of the record reveals that the defense did attack the victim's credibility with regard to her failure to timely report the allegations. First, the defense implied and argued on opening that the victim fabricated the allegations of sexual misconduct after getting into her own legal troubles and encountering her own difficulties. His counsel implied that she made up the allegations three years after the alleged conduct. Second, the defense, on cross-examination of the victim, elicited numerous pieces of information to demonstrate recent fabrication, including asking her questions designed to demonstrate that she wanted to get defendant into trouble and questions about her own problems at the time the allegations were reported to the proper authorities. Finally, during closing, defendant suggested that the allegations were fabricated and offered reasons why the victim would fabricate. We also note that a charge of recent fabrication can be made by negative evidence that the victim did not speak about the matter when it would have been natural to speak. *People v Stricklin*, 162 Mich App 623, 629; 413 NW2d 457 (1987). Defendant's questioning produced such negative evidence.

² Defendant fails to cite to the testimony that he claims was improperly admitted as prior consistent statements. He simply makes a general argument with regard to the six witnesses.

³ On cross-examination, defense counsel elicited testimony from Anderson about instances of defendant's conduct that the victim had described to her. Defense counsel did this in order to impeach Anderson's credibility because Anderson did not report the alleged sexual misconduct to any authorities even though she claimed to have a great amount of information about it. On appeal, defendant does not claim that his counsel was ineffective for eliciting this testimony. Even if he did, the questioning was sound trial strategy and does not require reversal. *Stanaway, supra* at 687.