

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW DWAYNE ROUSH,

Defendant-Appellant.

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UNPUBLISHED

December 1, 1998

No. 202850

Calhoun Circuit Court

LC No. 96-003122 FC

Before: Whitbeck, P.J., and Cavanagh and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted on one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The trial court sentenced him to life in prison. Defendant now appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in admitting, pursuant to MRE 803(4), the hearsay testimony of a doctor who examined the victim nearly three years after the alleged sexual abuse. Defendant contends that the examination was conducted to further a police investigation, that the statements made to the doctor by the victim were unrelated to medical diagnosis or treatment, and that the prosecution laid insufficient evidentiary foundation to establish that the ten-year-old victim had the understanding of an adult with regard to the significance of the medical examination or the need to tell the truth. We disagree.

A

Hearsay is defined as an out-of-court statement offered to establish the truth of the matter asserted. MRE 801(c); *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Hearsay is not admissible at trial, unless it falls within an exception under the Rules of Evidence. MRE 802; *Tanner, supra*. We review a trial court's decision to admit evidence for an abuse of discretion. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). An abuse of discretion will be found only when an unprejudiced person, considering the facts upon which the trial court made its

decision, would find there was no justification or excuse for the ruling. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

## B

We find that the hearsay testimony of the doctor who examined the victim was admissible pursuant to MRE 803(4), the exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. “Under MRE 803(4), the declarant must have the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to the diagnosis and treatment of the patient.” *McElhaney*, *supra* at 280 (citation omitted).

We find that the trustworthiness of the victim’s statements to the doctor was adequately established. Where, as here, the person who is the subject of the medical interview and examination is ten years of age or older, there exists a rebuttable presumption that he or she understands the need to tell the truth to medical personnel. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662; 496 NW2d 388 (1992). Defendant suggests that the information provided by the victim was not trustworthy because there were numerous reasons that she may have fabricated what she told the doctor, including a desire to please her mother and grandmother, both of whom, she testified, disliked defendant. However, we note that the victim never identified her assailant to the doctor, but only described what was done to her, thus suggesting no motive beyond a patient seeking treatment. See *People v Meeboer (After Remand)*, 439 Mich 310, 327; 484 NW2d 621 (1992). Defendant failed to rebut the presumption that the victim’s statements to the doctor were trustworthy.

We likewise reject defendant’s argument that the victim’s statements were not reasonably necessary to the diagnosis and treatment of the complainant. The trial court questioned the doctor extensively to determine that he had a proper medical purpose for conducting the examination and interview. The doctor stated that his interview and examination of the victim were for the purpose of diagnosis and possible medical treatment. The doctor explained that it was critical that he ask for and hear the victim’s description of her attack because, with the passage of time, physical evidence, such as anal lesions, was less obvious. The doctor stated that he relied on the victim’s account to determine that rectal smears, to detect possible venereal disease, were necessary.

Although the examination and interview may have furthered the criminal investigation of defendant, we are satisfied that there was a medical need to conduct such an examination and interview, given the allegations made by the victim. See *Van Tassel*, *supra* at 659-660. Accordingly, we conclude that the trial court did not abuse its discretion in determining that the statements were admissible under MRE 803(4).

## II

Defendant’s next argument on appeal is that the trial court erred in allowing the doctor to testify, based on his physical examination of the victim, the history she provided, and his experience as a medical doctor, that the victim had been sexually molested. Defendant also argues that the

prosecution's reference to that testimony in its closing argument constituted reversible error as well. However, because defense counsel did not object to the introduction of the doctor's opinion, we review this issue only to the extent that a substantial right of defendant's was affected. MRE 103(a)(1); *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995).

We find that defendant's substantial rights were not affected when the doctor, who had been qualified as an expert by the court, testified that he believed that the victim had been sexually molested. MRE 702 allows the admission of expert testimony when such testimony will aid the factfinder to understand the evidence or determine a fact in issue. *People v Smith*, 425 Mich 98, 105-106; 387 NW2d 814 (1986). The facts on which an expert bases his testimony may be perceived by him or made known to him at or before trial. MRE 703; *People v Webb*, 458 Mich 265, 277; 580 NW2d 884 (1998). An expert's testimony, otherwise unobjectionable, may address an ultimate issue to be decided by the trier of fact. MRE 704; *People v Beckley*, 434 Mich 691, 727; 456 NW2d 391 (1990); *People v Williams (After Remand)*, 198 Mich App 537, 542; 499 NW2d 404 (1993).

In the present case, the doctor's testimony was admissible because his opinion was based on his physical examination of the victim, which revealed the diagonal scar in her anus, as well as the history that the victim provided. *People v Swartz*, 171 Mich App 364, 376-378; 429 NW2d 905 (1988). Furthermore, penetration is an element of first-degree sexual criminal conduct that the prosecution must prove beyond a reasonable doubt, *People v Whitfield*, 425 Mich 116, 126; 388 NW2d 206 (1986), and the doctor's testimony would be helpful to the triers of fact in determining that penetration did, in fact, occur. Finally, the doctor did not testify that he believed the victim's story or that she was telling the truth, but only testified that he believed abuse occurred, based on the physical evidence that was consistent with the history given.

We also find no error in the prosecutor's reliance on the doctor's testimony during his closing argument. A prosecutor may comment upon and suggest reasonable inferences from evidence presented at trial as it relates to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

### III

Defendant's final argument on appeal is that he received ineffective assistance of counsel at trial because defense counsel did not object when the doctor testified that he believed the victim had been sexually molested. However, we find that counsel was not ineffective in failing to object to the doctor's expert opinion testimony, because the testimony was admissible under MRE 702 and such an objection would have been futile. *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989).

Affirmed.

/s/ William C. Whitbeck  
/s/ Mark J. Cavanagh  
/s/ Janet T. Neff