STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 14, 1999
v	No. 210457 Clinton Circuit Court
DANIEL JAY LATIMER, Defendant-Appellant.	LC No. 96-006124 FC

Before: Bandstra, C.J., and Jansen and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). He was thereafter sentenced to six to fifteen years' imprisonment. Defendant appeals as of right and we affirm.

I

Defendant first contends that the trial court abused its discretion by admitting hearsay statements made by the child victim to her examining physicians concerning the circumstances of the sexual assault and defendant's identity as her assailant. The decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; ___ NW2d ___ (1999).

The child's statements were admitted under MRE 803(4), which provides an exception to the general rule excluding hearsay for:

> Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

In *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992), our Supreme Court held that hearsay statements by a victim of sexual abuse could be admitted through the testimony of an examining physician under MRE 803(4) provided that there was a sufficient showing of both the

trustworthiness of the statement and the necessity of identifying the assailant in order to provide adequate diagnosis and treatment. A totality of the circumstances test must be applied to determine if the proposed statements of a child victim are inherently trustworthy. *Id*. at 322-324.

The following non-inclusive factors should be considered in determining the trustworthiness of the statements: (1) the age and maturity of the declarant; (2) the manner in which the statements are elicited; (3) the manner in which the statements are phrased; (4) use of terminology unexpected of a child of similar age; (5) who initiated the examination; (6) the timing of the examination in relation to the assault; (7) the timing of the examination in relation to the trial; (8) the type of examination; (9) the relation of the declarant to the person identified; (10) the existence of or lack of motive to fabricate. *Id*. at 324-325.

With regard to the first factor, the child was four years old at the time of the sexual assault. One of the doctors testified that the child was mature enough to understand the questions that were being asked, and a Department of Social Services caseworker stated that the child appeared to be a normal or average child developmentally. Regarding the second factor, both doctors testified that they did not use leading questions to elicit statements from the child. Regarding the third and fourth factors, the child did not use any inappropriate terminology. One of the doctors testified that the child stated that she was touched "there" and pointed at her genital area. According to the other doctor, the child indicated that defendant had touched her inside her "private areas" and pointed to the area where defendant had put his finger; this doctor added that she suggested the use of the term "privates" because the child did not use any terms to refer to this area. Regarding the fifth factor, the examination was initiated by the child's mother because the child had wet herself and complained of pain when she urinated. Thus, the examination was undertaken for the purpose of diagnosing the cause of the child's urinary tract problem and providing appropriate treatment. Regarding the sixth and seventh factors, both doctors indicated that the injuries had been inflicted within, at most, forty-eight hours before their examinations. The examinations occurred one and one-half years before trial. Further, regarding the eighth factor, this was a medical examination rather than a psychological examination.

The ninth factor is the relation of the declarant to the person identified so as to determine whether the declarant might have misidentified the assailant. The child identified her father (defendant) as the individual who abused her, thus eliminating the chance of a misidentification. The final factor concerns the existence of a motive to fabricate. There appears to be no motive on the child's part to fabricate her statements. Defendant attacks his former wife's motives to have the child fabricate a false accusation, but there was no evidence demonstrating that she told the child to make a false complaint of sexual abuse and to blame defendant. In fact, the initial examining physician commented that the mother was "shocked" and could not believe that the child indicated that she had been sexually abused by defendant. These factors weigh in favor of the trustworthiness of the child's statements.

Defendant also argues that the child's statements were not trustworthy because she did not testify and submit herself to cross-examination. Exceptions under MRE 803 apply even where the declarant is available as a witness. In *Idaho v Wright*, 497 US 805; 110 S Ct 3139; 111 L Ed 2d 638 (1990), the United States Supreme Court found error in the contention that a child's hearsay statements are presumptively unreliable when the child is found incompetent to testify at trial. Thus, although the

child did not testify in this case, that fact alone did not render her hearsay statements unreliable. Moreover, defendant was given the opportunity to call the child as a witness and to attempt to qualify her as competent to testify and he declined to do so; he will not now be permitted to complain about her failure to testify.

Defendant further claims that because the victim did not testify, the statements do not corroborate her testimony. However, the Court in *Meeboer*, *supra* at 325-326, did not indicate that corroboration was supplied by a congruity between the hearsay statements and the child's in-court testimony. Instead, the Court found that corroboration in the form of physical evidence of the assault and evidence that the person identified had the opportunity to commit the assault were considerations that strengthened the reliability of the hearsay statements. In this case, both doctors found "fresh" physical evidence in the form of redness, swelling, and lacerations inside the child's vagina that they stated were strongly indicative of sexual abuse. These findings corroborated the child's description to the doctors of what defendant had done to her. Additionally, the evidence showed that defendant had the opportunity to commit the assault because he had been alone with the child the night before she complained of painful urination. There was also substantial testimony concerning the child's proclivity to touch her genital area. Further, the initial examining physician testified that, in retrospect, the child's numerous prior urinary tract infections were "red flags" that suggested previous sexual abuse. Thus, the physical evidence corroborated the child's claim of sexual abuse and the testimonial evidence demonstrated that defendant had the opportunity to commit the assault. This corroboration strengthened the reliability of the child's statements. *Meeboer*, *supra* at 325-326; *People v McElhaney*, 215 Mich App 269, 282; 545 NW2d 18 (1996).

Defendant further argues that he was denied his right of confrontation by the admission of the child's statements because she did not testify. In *Meeboer*, *supra* at 324, the Court concluded that "there is no risk . . . of violating the Confrontation Clause guarantees, because the admissibility of the hearsay statements is analyzed under MRE 803(4), an established hearsay exception." Because we conclude that the child's statements to the examining physicians were admissible under MRE 803(4), and because that rule is an established hearsay exception, admission of the statements did not violate the Confrontation Clause. US Const, Am VI.

Accordingly, we conclude that the child's statements were properly admitted under MRE 803(4) and that admission of the statements did not violate the Confrontation Clause.

II

Defendant next contends that the trial court abused its discretion by denying his motion in limine to preclude the prosecutor from presenting statements defendant made to two police officers in which he admitted that he smoked marijuana on the night of the alleged sexual abuse. We find no abuse of discretion and conclude that the trial court properly admitted defendant's statements because they provided a context for his assertion that he might have "blacked out." *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996). Additionally, there was no error requiring reversal because the trial court twice admonished the jurors that they could not consider defendant's admission of marijuana use as evidence that he was guilty of the charged offense.

III

Defendant next argues that the prosecutor improperly appealed to the jury's sympathy for the victim at closing argument. Defendant failed to object to the prosecutor's argument and therefore has not preserved this issue for appellate review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of improper prosecutorial argument to determine if a curative instruction could not have eliminated the prejudicial effect of the comment, or where failure to consider the claim would result in a miscarriage of justice. *Id*. No miscarriage of justice resulted from the prosecutor's argument because any prejudicial effect could have been eliminated by an appropriate curative instruction, *People v Bahoda*, 448 Mich 261, 285; 531 NW2d 659 (1995), and because some of the comments were responsive to matters raised by the defense. *People v Duncan*, 402 Mich 1, 16-17; 260 NW2d 58 (1977) (Ryan, J.).

IV

Defendant lastly argues that the trial court abused its discretion when it limited the number of cumulative witnesses he could present. The trial court has the duty to: (1) control the proceedings by "limit[ing] the introduction of evidence . . . with a view to the expeditious and effective ascertainment of the truth," MCL 768.29; MSA 28.1052, (2) "exercise reasonable control over the mode and order of interrogating witnesses . . . to . . . avoid needless consumption of time," MRE 611(a), and (3) exclude evidence where "its probative value is substantially outweighed . . . by considerations of undue delay, waste of time, or needless presentation of cumulative evidence," MRE 403. The trial court did not foreclose defendant from presenting the witnesses if they had something new to offer, but defendant agreed that the proposed witnesses would only offer cumulative testimony. We therefore find no abuse of discretion. *People v Burgess*, 153 Mich App 715, 719; 396 NW2d 814 (1986).

Affirmed.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck