STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 21, 2000
v	No. 212032 Clinton Circuit Court
DEBRA LYNN KETCHUM CARPENTER, Defendant-Appellant.	LC No. 98-006412-FH

Before: Kelly, P.J., and Markey and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree child abuse, MCL 750.136b(2); MSA 28.331(2), for the physical and mental abuse of her mentally retarded, emotionally disturbed, seventeen-year-old, adopted son.[1] She was sentenced to serve ten to fifteen years in prison. Defendant appeals by right her conviction and sentence. We affirm.

In the early morning hours of October 16, 1997, police officers responded to an anonymous report of suspected child abuse in defendant's home. Defendant led them to a basement bedroom where the child was chained to a broken bed. Defendant claimed that she normally used soft "Posey" cuffs which had been prescribed by a physician to restrain the child, but because they were being laundered, she had no choice but to restrain her unruly child with the metal chains. The officers left the scene without taking any evidence or removing the child from the home.

Later that morning, two officers and a Family Independence Agency (FIA) worker returned to the home to investigate further. A pair of Posey cuffs, chains, and padlocks were recovered from the bed where the child had been chained. Photographs were taken of the area. The child, who had numerous scars and bruises, was taken into protective custody and to the hospital where he was photographed. At trial, defendant did not object to the admission of the physical evidence and photographs.

[1] The son will be referred to throughout this opinion as either the victim or the child.

On October 17, 1997, defendant was placed under arrest. Thereafter, a sheriff's detective and two FIA workers returned to defendant's home. The photographs taken the previous day of the dimly lit basement had revealed a pair of metal handcuffs on the bed. The child's sixteen-year-old sister, who is also a special needs child, apparently told the detective that the handcuffs were in the trunk of defendant's car. Without calling for an officer to stand by, the detective left and returned to the station to retrieve the keys to defendant's car. No search warrant was requested or obtained. Using defendant's keys to gain access, the detective seized handcuffs, leg chains, and padlocks from the trunk of defendant's car. Keys to the padlocks were found on defendant's key ring. The sister was also taken into protective custody.

At trial, defendant objected to the admission of the cuffs and chains taken from the trunk of her car. Defendant had previously objected to the admission of the evidence on Fourth Amendment grounds and preserved those objections. She also argued that the prosecution failed to lay a sufficient chain of custody for the admission of the evidence, and that the police had altered the evidence by treating it with WD-40. The court admitted all of the items over defendant's objection.

Defendant also objected to the admission of testimony regarding statements the child made to his teacher, a pediatric physician, and a psychologist. Specifically, defendant argued that the testimony constituted inadmissible hearsay. The court allowed the testimony over defendant's objection. On appeal, defendant argues that the trial court abused its discretion in allowing the hearsay testimony, and that as a result, she was denied a fair trial. Defendant also argues that her sentence violated the principle of proportionality stated in *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990).

I.

Standard of Review

The decision whether to admit evidence is within the trial court's discretion. An abuse of discretion is found only if "an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Nelson*, 234 Mich App 454, 460; 594 NW2d 114 (1999).

II.

Evidence Seized from Defendant's Vehicle

The undisputed facts show that on the day the child victim was taken into protective custody, officers seized the chains and padlocks that had been used to restrain him to his bed. The following day, a detective returned to the residence, and, using defendant's car keys, opened the trunk to her vehicle and seized a box containing leg chains, handcuffs, padlocks and a piece of chain. Before placing the items in the evidence room, the detective sprayed the handcuffs with WD-40 to prevent rusting and to try to free parts locked by rust.

At trial, the items seized from defendant's trunk were admitted into evidence over counsel's objection. Defendant argues on appeal that the evidence should have been excluded

because the prosecution did not show that the items found in the trunk of defendant's car were those used to restrain the victim and because the prosecution failed to show that the items were in substantially the same condition as when seized. We disagree.

The rule governing the admission of physical evidence requires that a proper foundation be laid, that the articles be identified as that which they purport to be, and that the articles are shown to be connected with the crime or with the accused. *People v Furman*, 158 Mich App 302, 331; 404 NW2d 246 (1987). "In short, there must be sufficient evidence of (1) the exhibit's identity and (2) its connection to the crime to support its admission at trial." *People v Hence*, 110 Mich App 154, 162; 312 NW2d 191 (1981).

The testimony established that the chains and cuffs were located in the trunk of defendant's car. There was no direct testimony supporting the conclusion that the specific items were used to chain the victim to the bed on October 16, 1997. Detective Flint testified, however, that on October 16, 1997, when Flint first went to the basement of defendant's home, he took pictures of the bed, chains, and padlocks. When the pictures were developed, one could see the handcuffs on the bed. Moreover, when he returned to the home the next day, he asked the victim's sister about handcuffs being used to restrain him. She told him they were in defendant's car trunk. Flint, then believing that the handcuffs were in defendant's car, opened the trunk and discovered three sets of handcuffs, two padlocks, and leg chains. Both the padlocks and one set of handcuffs matched those in the photograph Flint had taken the day before of the victim's bed in the basement.

As to the leg chains, Dr. Guertin's testimony indicated that the victim told him that defendant had restricted both his arms and legs on several occasions. Further, Guertin testified that the permanent scarring on the victim's wrists and ankles could have been caused by the chains and handcuffs. The victim described being restrained with chains, handcuffs, and leg chains; the victim exhibited scars on his legs and ankles consistent with the items found in the trunk, and photographic evidence placed the chains, padlocks, and handcuffs at the scene (the basement bedroom). We believe that with this evidence, a proper foundation was established at trial to warrant admission of the items into the record. MRE 901.

Defendant also contends that when Flint sprayed the padlocks and handcuffs with WD-40, he altered their condition so that they were presented as evidence in a materially different fashion. As noted by this Court on numerous occasions, the admissibility of real evidence does not require a perfect chain of custody. *People v White*, 208 Mich App 126, 130; 527 NW2d 34 (1994); *People v Prast* (*On Rehearing*), 114 Mich App 469, 490; 319 NW2d 627 (1982); *People v Stevens*, 88 Mich App 421, 424; 276 NW2d 910 (1979). In *White*, this Court stated:

> It will be readily apparent that when real evidence is offered an adequate foundation for admission will require testimony first that the object offered is the object which was involved in the incident, and further that the condition of the object is substantially unchanged. If the offered item possesses characteristics which are fairly unique and readily identifiable, and if the substance of which the time is composed is relatively impervious to change, the trial court is viewed as having broad discretion to admit merely on the basis of testimony that the item is

> the one in question and is in a substantially unchanged condition. [*White, supra*, quoting 2 McCormick, Evidence (4th ed), § 212, pp 7-8.]

Further, a deficiency in the chain of custody "goes to the weight of the evidence rather than its admissibility once the proffered evidence is shown to a reasonable degree of certainty to be what its proponent claims." *White, supra* at 130-131. The prosecution, in laying the foundation for the admission of the chains and cuffs, had to show that the condition of the items was "substantially unchanged." *Prast, supra.*

As to the use of WD-40 on the padlocks and handcuffs, Flint testified that he sprayed these items with the lubricant to ensure that they would not rust while being stored in the evidence room at the county jail. According to Flint, the items were already showing signs of rusting, so he wanted to preserve their condition as found. Defendant claims that by applying the lubricant, any hope of identifying any finger prints on the items was lost. However, defendant never challenged who owned or had control over these items. After all, the items were found in defendant's car trunk, and the padlock key was on defendant's personal key chain. Rick Vorase[2] testified at the suppression hearing that the items removed from the trunk were "[o]ld; you know, dusty, rusty." When asked if he specifically remembered the items being rusty, he replied, "Yeah, I do, because I know that that car always had water in the trunk, because I have sucked it out with a shop vac a few times for Debbie." The detective admitted spraying WD-40 on the handcuffs to keep them from rusting and to try to free one that was inoperative because of rust. His attempt was unsuccessful, however, and any alteration the lubricant caused was minor. Because these items, being constructed of steel, are relatively impervious to change, the application of lubricant did not substantially change the condition the items were in at the time of their discovery. *White, supra* at 130.

The trial court did not abuse its discretion in admitting into evidence the contents of defendant's car trunk.

III.

Hearsay Evidence

Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v Fisher*, 220 Mich App 133, 152; 559 NW2d 318 (1996). Unless the contested statements fall within one of the enumerated exceptions, the evidence is inadmissible. MRE 802.

After the victim was removed from defendant's home, he was placed in foster care and began attending special education classes. His teacher testified at trial regarding his state of being. She specifically recalled an occasion when the victim saw a picture of a gun and began to

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[2] Rick Vorase was defendant's live-in boyfriend. They lived together with four children and an adult foster-care individual under defendant's care.

rant that he was going to kill defendant and bury her. The trial court overruled defendant's hearsay objection and allowed the teacher's testimony. Initially, the trial court ruled that the teacher's testimony was not hearsay because it was not being offered to establish the truth of the matter asserted, i.e., that the victim was actually going to kill and bury defendant, but, rather to show his then existing state of mind. Statements offered to show that they were made or to show their effect on the listener are not hearsay. *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987).

The prosecution argued that the statements were being offered to show the victim's mental state. MRE 803(3) provides the following exception to 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 declarant's will.

This exception to the hearsay rule applies if the declarant's state of mind is at issue in the case. *People v Howard*, 226 Mich App 528, 553-554; 575 NW2d 16 (1997); *People v Stubl*, 149 Mich App 42, 45; 385 NW2d 719 (1986).

Because "serious mental harm" is an element of the crime, the victim's "mental state" was at issue in this case. MCL 750.136b(2); MSA 28.331(2). Some of the teacher's testimony went directly to the victim's mental state: he hated defendant; he wanted to see her in jail; he wanted to shoot her. MRE 803(3) provides an exception for this testimony; thus, it was properly admitted.

The trial court also noted in overruling the objection that the statements could, in the alternative, be admitted as exited utterances. This is inaccurate. MRE 803(2) states the following exception to the hearsay rule:

> **(2) Excited Utterance**. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

We believe that it is much more problematic to conclude that any statement the victim made three weeks after any of the described abuse occurred was made under the stress of excitement caused by the event. *People v Jensen*, 222 Mich App 575, 582; 564 NW2d 192 (1997), vacated in part on other grds 456 Mich 935; 575 NW2d 552 (1998). However, because the trial court also properly ruled that the statements demonstrated the victim's state of mind, defendant's argument is moot.

Further, defendant's argument that the statements were unfairly prejudicial against defendant so as to substantially outweigh any probative value is without merit. Defendant did not object to the admission of the statements based on MRE 403. Further, while the statements are prejudicial to defendant, in light of the tremendous amount of physical evidence documenting

the child's abuse, we cannot conclude that such statements unfairly prejudiced defendant. *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). The trial court did not abuse its discretion.

The Clinton County FIA referred the victim to Dr. Stephen Guertin, a pediatrician, on November 3, 1997, on the agency's concern that he had been physically and/or sexually abused. Dr. Stephen Guertin testified that he examined and treated the victim on November 3, 1997, for suspected physical abuse. During the course of the examination, the victim was asked about various scars and markings on his body. He then described for Dr. Guertin how each of those scars had occurred. Dr. Guertin testified that during his examination, the victim described how he had been chained to the dog kennel and to the bed in the basement, and that, at various times, defendant had hit him with a broom, a knife, and a 2" x 4" board. Dr. Guertin noted that the victim had deep, permanent scars on his wrists that appeared to match the description of the chains and handcuffs used to restrain him. Dr. Guertin further concluded that the cylindrical scars on his wrists caused substantial body disfigurement and that eventually they could cause serious physical harm. Defendant objected to this portion of the doctor's testimony. Without stating a basis for its ruling, the trial court allowed the testimony over defendant's hearsay objection.

MRE 803(4) provides the following exception to the hearsay rule:

> 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. [Emphasis added.]

Certainly Dr. Guertin was questioning the victim so as to ascertain the "general character of the cause or external source" of his various injuries. This information, in our opinion, was elicited and was reasonably necessary to the proper diagnosis and treatment of the child victim.

In reaching this conclusion, we also find guidance in *People v Meeboer (After Remand)*, 439 Mich 310; 484 NW2d 621 (1992). In *Meeboer*, our Supreme Court examined the issues surrounding the admission into evidence of various statements made by child sexual abuse victims to physicians and psychologists. Specifically, the *Meeboer* Court held that "we believe that neither the rationale supporting the medical treatment exception to the hearsay rule, MRE 803(4) nor our decision in *LaLone*[3] requires the exclusion of all statements made to treating medical health care providers by the victims of child sexual abuse which identify their assailants . . . ." *Meeboer*, *supra* at 315.

After carefully reviewing the rationale of the *Meeboer* Court and applying it to the instant facts, we conclude that the concerns and issues addressed by *Meeboer* as well as the analyses employed are equally applicable to the case at hand.

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[3] *People v LaLone*, 432 Mich 103; 437 NW2d 611 (1989).

The *Meeboer* Court first stated that "[e]xceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy." *Id*. at 322. The Court further noted that the supporting rationale for MRE 803(4) is the existence of

> 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. The trustworthiness of the child's statement can be sufficiently established to support the application of the medical treatment exception. Furthermore, we find that the identification of the assailant is necessary to adequate medical diagnosis and treatment. [*Meeboer*, *supra*.]

Turning to the trustworthiness of a statement, the *Meeboer* Court looked to federal law for guidance. In doing so, it held that the totality of the circumstances test should be employed in ascertaining whether the child's statements are trustworthy. *Id*. at 324 ("The inquiry into trustworthiness should therefore consider the totality of circumstances surrounding the declaration of the out-of-court statement.").

The *Meeboer* Court clarified that the trustworthiness of the declarant's statement is simply the first prong of the analysis under MRE 803(4). *Id*. The Court further pointed out that it is extremely important that the declarant had a full understanding of the importance of telling the truth to the physician. *Id*. The Court then outlined numerous factors to be considered in establishing this second prong. *Id.* at 324-325.

Applying these factors to the instant case convinces us that the testimony of Dr. Guertin was properly admitted. The victim here was seventeen years old but was suffering from a severe mental impairment, though no one could definitively conclude whether he were retarded or suffering from some other type of disability. The physician questioned the child in an open, direct manner pointing to various injuries and simply asking what happened. By his demeanor and answers, it appears to us that this child understood the importance of answering truthfully. It is patent that the physician believed the victim always answered these questions candidly. Moreover, he attributed his injuries to more than one source, i.e., not just the defendant. He also used some descriptions and terminology which to the doctor, and to this Court, provide credence and trustworthiness to his statements.

The examination was certainly intended for purposes of medical diagnosis and treatment, notwithstanding the fact that it was initiated by the FIA. This child was so injured physically and mentally that he very obviously needed medical and psychological treatment. The doctors examined him shortly after being removed from the home, but quite some time before trial. The nature of the examinations required that the doctors inquire as to the source of the child's injuries so that he could be properly diagnosed and treated. Additionally, and as just noted, as the victim here identified more than one person and cause for his injuries, his identification of the defendant as the primary abuser was not likely to be mistaken. Finally, after reading both of the doctors' testimony, it appears that this victim had no real ability to fabricate.

Finally, the *Meeboer* Court also discussed the relevance of any corroborating evidence that might relate to the out-of-court statement and whether it should be considered in determining

the admissibility of the statement. Again, the *Meeboer* Court emphasized that the reliability of the alleged hearsay is strengthened when it is supported by other evidence. *Id*. at 325-326. Here, that is precisely the case. Many people testified as to the abuse, including a teacher, another sister, and police officers. There was a great deal of corroborating evidence for the victim's statements to his physicians. Consequently, we conclude that it was properly admitted.

All of the above analysis also applies to the admission of the testimony of Dr. Andrew Barclay who performed a psychological assessment of the victim, also at the FIA's request in November, 1997. He also testified regarding the victim's mental health, and had questioned him about his home life and any abuse that he had suffered. Again, the trial court overruled defendant's hearsay objections noting that the physical abuse related to the victim's mental state while living with defendant. We conclude that these were statements given during the course of diagnosis and treatment, and that Dr. Barclay's testimony was also properly admitted.

IV.

Harmless Error

Moreover, even were we to deem the medical and psychological testimony inadmissible hearsay, we would consider its admission harmless. The harmless-error rule states that no judgment or verdict shall be reversed in any criminal case on the ground of the improper admission of evidence unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice. MCL 769.26; MSA 28.1096, see, also, MCR 2.613(A) and MRE 103. MCL 769.26; MSA 28.1096 creates a presumption that preserved, nonconstitutional error is harmless, which presumption may be rebutted by a showing that it was more probable than not that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 493-496; 596 NW2d 607 (1999). If, after an examination of the entire cause, it affirmatively appears that it was more probable than not that the error was outcome determinative, reversal is required. *Id.* at 495-496. The statute, with its rebuttable presumption, clearly places the burden on the defendant to demonstrate that the admission of the hearsay testimony resulted in a miscarriage of justice. *Id.* at 493-494.

We believe defendant has failed to meet this burden. In this case, the testimony and evidence against defendant was overwhelming. Although defendant argues that she would have been acquitted had the evidence been excluded because she had not intent of harming the victim when she chained him to the bed, we disagree.

V.

Proportionality of sentence

Defendant argues that the sentence imposed by the court is disproportionate. We disagree. This Court reviews a claim of disproportionality for an abuse of discretion. *Milbourn, supra* at 636; *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). An abuse of

discretion may be found where a sentence is disproportionate "to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn, supra*.

First, we note that the sentencing guidelines do not apply to the crime of first-degree child abuse. See *People v Spicer*, 216 Mich App 270, 274; 548 NW2d 245 (1996); *People v Price*, 214 Mich App 538, 548; 543 NW2d 49 (1995). Defendant's ten-year minimum sentence is less than the fifteen-year maximum sentence allowed by law for first-degree child abuse. MCL 750.136b(2); MSA 28.331(2). Here, the record reveals that the trial court duly considered the seriousness of the offense and defendant's circumstances and background in rendering sentence. The facts of this case indicate a severe case of child abuse that occurred over a long period of time. We conclude that the trial court did not abuse its discretion in sentencing defendant.

We affirm.

/s/ Jane E. Markey
/s/ Jeffrey G. Collins