STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED March 9, 2001
v	No. 215418 Oakland Circuit Court
JAMES CARL AIRD, Defendant-Appellant/Cross-Appellee.	LC No. 98-159346-FC

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b) (at least thirteen but less than sixteen years of age and related by blood). Defendant was sentenced to concurrent terms of eight to twenty-five years in prison for each count. Defendant appeals as of right, and the prosecution cross appeals the proportionality of defendant's sentence. We affirm.

Defendant first argues that he did not receive effective assistance of counsel. Defendant failed to make a motion for an evidentiary hearing in the trial court; accordingly, this Court's review is limited to errors apparent from the record. *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

"Effective assistance of counsel is presumed, so a defendant bears a heavy burden of proving otherwise." *People v Murray*, 234 Mich App 46, 65; 593 NW2d 690 (1999). To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *Noble, supra* at 661. The requisite prejudice requires a showing that there is a reasonable probability, but for counsel's error, that the result of the proceeding would have been different. *Noble, supra* at 662; *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). This Court will neither assess counsel's performance with the benefit of hindsight, *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995), nor substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Decisions regarding what evidence

to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant contends that his counsel was ineffective for failing to admit into evidence the entire letter defendant wrote to the victim. Defendant argues the excerpts about which the prosecution questioned defendant were taken out of context. When the letter is read in its entirety, defendant argues, it is clear that the letter is an apology for defendant's alcoholism and not for any sexual abuse. Defendant relies on the "rule of completeness" set forth in *People v McReavy*, 436 Mich 197; 462 NW2d 1 (1990).[1] However, as previously noted, this Court's review of this issue is limited to errors apparent from the lower court record. *Noble, supra*. Because the letter was never admitted in its entirety, the letter is not part of the lower court record. Consequently, this Court need not consider this issue further.[2]

Defendant also contends that his counsel was ineffective for failing to object to the hearsay testimony elicited from Dr. Mary Smyth, the physician who examined the victim, in which she recounted the victim's statements to her detailing sexual abuse by defendant. Defendant argues this testimony was hearsay and does not come within any recognized exception to the hearsay rule because it was not given in the course of medical treatment. We disagree.

"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" are not excluded by the hearsay rule, even though the declarant is available as a witness. MRE 803(4). Further, when the patient is over ten years old, a rebuttable presumption of truthfulness arises. *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1996). "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." *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996).

In *Crump, supra* at 212, this Court determined that the defendant "failed to overcome the presumption of truthfulness" and found no abuse of discretion in admitting evidence of the victim's statements to medical personnel. The Court explained:

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[1] As explained by the *McReavy* Court, *supra* at 214-215:

> Under the rule of completeness, all is admissible. The premise of the rule is that a thought or act cannot be accurately understood without considering the entire context and content in which the thought was expressed.

[2] In any event, we note that in considering the letter as attached to defendant's brief, we agree with the prosecution that the letter is also consistent with a person who is blaming his alcoholism for his sexual abuse. In light of the evidence against defendant, the failure to admit the letter did not affect the outcome of the trial. *Pickens, supra*.

> The victim's statements to the medical personnel merely described the beatings and rape that led to her injuries. We find such statements to be well within the parameters of MRE 803(4). Further, the statements were cumulative evidence; the victim testified at trial to essentially the same facts as contained within the medical statements. Accordingly, we find no abuse of discretion in allowing this testimony into the record. [*Id.*]

Similarly, in the case at bar, Smyth's testimony regarding the victim's statements to her was cumulative because the victim testified at trial to essentially the same facts. Defendant argues the victim did not have the self-interested motive to speak the truth because the examination was done in January 1998, almost a year after the time that the alleged sexual abuse occurred, and was not conducted for medical treatment. We disagree. In *McElhaney, supra* at 282-283, this Court addressed this issue:

> Defendant also argues that the statements were not reasonably necessary to the diagnosis and treatment of the complainant. However, we find that the complainant's statements allowed Bittner to structure the examination and questions to the exact type of trauma that the complainant had recently experienced. . . . Sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment.
>
> We hold that the trial court did not abuse its discretion in allowing Bittner to testify concerning the statements that the complainant made to her. . . . In any case, the statements were cumulative to the complainant's testimony and, therefore, harmless. [Citations omitted.]

Likewise, we conclude that the statements in the present case fall within the parameters of MRE 803(4), defendant did not suffer prejudice from the admission of this testimony, and defense counsel was therefore not ineffective for failing to object to the testimony on hearsay grounds.

Defendant next argues he was denied a fair trial because the prosecution's comments during closing argument constituted misconduct. Issues of prosecutorial misconduct are decided on a case by case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *Rice, supra* at 435. "The test is whether defendant was denied a fair trial." *Id*. at 434; *Noble, supra* at 660. See also *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995).

Defendant contends that during closing argument, the prosecution improperly referred to defendant as a "monster." However, even assuming arguendo that such a comment was improper, any error in this regard does not require reversal in light of the trial court's prompt curative instruction that arguments of counsel are not evidence, the prosecutor's apology for this remark in rebuttal, and the evidence presented at trial. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *McElhaney, supra* at 284-285.

Defendant also argues that the prosecution improperly attempted to shift the burden of proof and made an inappropriate civic duty argument. *Bahoda, supra* at 282-283. We find that defendant was not prejudiced by any improper remarks because the prosecution clarified the

burden of proof in its rebuttal and the trial court gave a curative instruction and also instructed on the requisite burden of proof. Moreover, the allegedly inappropriate civic duty argument cannot be so construed; viewed in context, the remarks related to the prosecutor's theory of the case and "neither injected issues broader than [defendant's] guilt or innocence of the charges nor encouraged the jurors to suspend their powers of judgment." *People v Truong*, 218 Mich App 325, 340; 553 NW2d 692 (1996).

Finally, defendant argues the trial court erroneously admitted testimony by Dr. Smyth that exceeded the scope of proper expert testimony. The decision whether to admit evidence is within the trial court's discretion; this Court reverses such decisions only where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Crear*, 242 Mich App 158, 169; 618 NW2d 91 (2000). Objections raised on one ground at trial are insufficient to preserve an appellate attack based on different grounds. *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999); *People v Thompson*, 193 Mich App 58, 62; 483 NW2d 428 (1992); MRE 103(a)(1).

Defendant's argument with regard to this issue rests on two grounds, only one of which has been properly preserved for our review. At trial, defendant objected to Smyth's testimony on the ground that her opinion was based on the research of another doctor set forth in a medical journal. However, defendant failed to preserve his objection that Smyth's testimony went beyond the proper scope of expert testimony because she purportedly testified that the abuse occurred. Accordingly, this Court will review this latter claim "only if manifest injustice would otherwise result." *Cain, supra* at 115.

Defendant claims that Smyth improperly testified on direct examination that the lack of physical evidence is not inconsistent with the occurrence of penetration, thereby amounting to a statement that in her expert opinion the sexual assaults actually occurred. We reject defendant's characterization of the testimony. Pursuant to MRE 704, "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Moreover, defendant's reliance on *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), amended 450 Mich 1212; 548 NW2d 625 (1995), is misplaced. In *Peterson*, our Supreme Court addressed the proper scope of expert testimony in childhood sexual abuse cases in the context of syndrome evidence. The Court stated the issue was "whether evidence of specific *behaviors* common in abuse victims is admissible in child sexual abuse cases in order to rebut the inference that the victim's behavior was inconsistent with that of an actual sexual abuse victim." *Id*. at 363 (emphasis added). In the instant case, Dr. Smyth neither testified about the victim's behavior nor stated that the abuse had occurred. Rather, Smyth merely testified that, in her clinical experience, it is possible that a thirteen-year-old girl could have experienced penetration and yet showed no physical evidence of abuse. This was permissible expert testimony, MRE 704, and no manifest injustice has been demonstrated. *Cain, supra*.

Defendant also argues that Smyth's "opinion" in this regard was actually based on an article published in the medical journal *Pediatrics*. Defendant argues that the source for Smyth's opinion is lacking in objectivity: "those who write about sexual abuse of children are normally child advocates who research and write with the paramount goal of protecting children," and "it

is inevitable that those who treat a child victim will have an emotional inclination toward protecting the child victim." Defendant's argument is without merit. Dr. Smyth, while initially citing the written article, ultimately testified that based "on my clinical experience," someone who claimed to have been sexually assaulted by finger or penile penetration could have a normal physical examination without evidence of scarring or tearing. In any event, MRE 703 provides that an expert witness may base an opinion on hearsay evidence. *People v Caulley*, 197 Mich App 177, 194-195; 494 NW2d 853 (1992). The underlying facts or data on which an expert's opinion is based need not be disclosed "unless the court requires otherwise." MRE 705. Dr. Smyth testified that the journal *Pediatrics* is "widely accepted throughout the medical community as authoritative on subjects" dealing with pediatrics and defendant failed to demonstrate that the admission of such evidence would result in unfair prejudice. MRE 403; *Caulley*, *supra*; *Thomas v McPherson Community Health Center*, 155 Mich App 700, 708-710; 400 NW2d 629 (1986). The trial court therefore did not abuse its discretion in admitting Dr. Smyth's testimony in this regard.

The prosecution cross appeals the proportionality of defendant's sentences, arguing the trial court incorrectly scored offense variable twelve (OV 12) regarding additional penetrations. The prosecutor contends that although defendant was only charged with two counts of criminal sexual conduct, the victim testified to repeated sexual penetrations by her father over a ten-month period and, therefore, more points should have been assigned to OV 12, resulting in an enhanced sentence. The statutory sentence for first-degree criminal sexual conduct is life or any term of years in prison. MCL 750.520b; MSA 28.788(2)(1). The trial court sentenced defendant to concurrent terms of eight to twenty-five years in prison.

"[T]he claim of a miscalculated variable is not in itself a claim of legal error." *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998). "[A]pplication of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *Id.* at 497-498, quoting *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). Sentencing decisions are reviewed for an abuse of discretion. *People v Kowalski*, 236 Mich App 470, 475; 601 NW2d 122 (1999). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990); *People v Paquette*, 214 Mich App 336, 344-345; 543 NW2d 342 (1995).

Although the prosecution argues the factual basis underlying the trial court's scoring of the guidelines is wholly unsupported and materially false, the prosecution in effect challenges the trial court's interpretation and application of the guideline variables. The Supreme Court in *Mitchell*, *supra* at 176-177, has rejected the viability of such claims:

> The challenge here asserted is directed not to the accuracy of the factual basis for the sentence, but, rather, to the judge's calculation of the sentencing variable on the basis of his discretionary interpretation of the unchallenged facts. The challenge does not state a cognizable claim for relief. There is no jurisdictional basis for claims of error based on alleged misinterpretation of the

guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables.

The trial court's calculation of OV 12 was consistent with the two *charged* acts of criminal sexual conduct. Accordingly, the prosecution is not entitled to review of the trial court's scoring of the sentencing guidelines.

Further, we conclude that defendant's sentence does not violate the principle of proportionality. *Milbourn, supra*. Defendant's eight-year minimum terms for first-degree criminal sexual conduct were within the guidelines range of 96 to 180 months adopted by the trial court and are thus presumed to be proportionate. *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997). Moreover, as this Court has noted in *People v Harris*, 190 Mich App 652, 666; 476 NW2d 767 (1991), "a sentence within the guidelines, particularly at the outer limits of the guidelines, is not a mere slap on the wrist. The guidelines attempt to take into account all the factors that a trial court is required to consider, including the seriousness of the offense and the prior record of the offender." The present defendant has no prior record and was employed prior to his arrest. Defendant complied with the conditions of his bond and had no contact with his daughter while this case was pending. After our review, we conclude that the trial court did not abuse its discretion in assessing the nature of the offense and the offender's background and by appropriately tailoring the sentence to the particular circumstances.

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy