STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 20, 2001
v	No. 223135 Van Buren Circuit Court
MARLIN LUDON MILLER, JR., Defendant-Appellant.	LC No. 99-011405-FC

Before: Saad, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and was sentenced to a prison term of fifteen to fifty years. Defendant appeals as of right. We affirm.

I

The complainant testified that she was baby-sitting for a friend when defendant came into the home and sexually assaulted her, scratching her neck, biting her stomach, inner thigh and breast, and "head butting" her in order to force her into submission. The complainant further testified that defendant's use of extreme force during vaginal intercourse prevented her from escaping. The examining nurse testified that she believed the complainant was "truly sincere" in her assertion that she was forcibly attacked. Defendant contends that he was denied a fair trial when the examining nurse vouched for the complainant's veracity.

Because defendant did not object to the testimony, this issue is not properly preserved for appeal. *People v Hannold*, 217 Mich App 382, 391; 551 NW2d 710 (1996). In order to avoid forfeiture of an unpreserved issue on appeal, an appellant must show (1) that an error occurred, (2) that the error was plain, and (3) that the plain error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Here, admission of the nurse's expert testimony regarding the complainant's veracity was improper. See, e.g., *People v Byrd*, 133 Mich App 767, 779-780; 350 NW2d 802 (1984) (an examining physician "may not testify that the complainant was raped by the defendant on the

alleged date, nor may he render an opinion as to the complainant's veracity"[1]). However, defendant has failed to establish that he was prejudiced as a result of admission of the testimony. *People v Grant*, 445 Mich 535, 549; 520 NW2d 123 (1994). The testimony was an unresponsive, volunteered answer to a proper question. Such testimony rarely justifies a new trial. See *People v Gonzales*, 193 Mich App 263, 266-267; 483 NW2 458 (1992) (an unresponsive, volunteered answer to a proper question is not cause for granting a mistrial). Moreover, the jury heard the testimony of both the complainant and defendant and had the opportunity to observe their facial expressions, body language, intonation, and their testimony in determining the credibility of the witnesses. Defendant has failed to show that admission of the remark affected his substantial rights.

II

Defendant next contends that the trial court's failure to instruct the jury on a necessarily included lesser offense warrants the reversal of his conviction. Upon de novo review, we disagree. *People v Hubbard (Aft Rem)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

A trial court's failure to instruct the jury on the necessarily included lesser offense of CSC-3 where the defendant is convicted of CSC-1 is error. *People v Mosko*, 441 Mich 496, 500-501; 495 NW2d 534 (1992); *People v Spivey*, 202 Mich App 719, 727; 509 NW2d 908 (1993). However, the error is harmless where the distinguishing factor between CSC-1 and CSC-3 (in *Mosko*, the presence or absence of a familial relationship with the victim) is not disputed at trial. *Id*. at 505-506.

Here, the record reveals that neither party disputed that defendant inflicted personal injury on the complainant during the sexual assault.[2] The presence of personal injury distinguishes CSC-1 from CSC-3 in this case. Hence, the court's erroneous decision to refrain from instructing the jury on CSC-3 was harmless because the factor distinguishing CSC-1 from CSC-3 was not disputed at trial. *Mosko, supra* at 506.

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell

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[1] The same rule extends to all expert witnesses, including, for example, social workers, crisis counselors, psychologists, and police officers. *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990).

[2] Personal injury is defined as any bodily injury, disfigurement, mental anguish, chronic pain, pregnancy, disease, or loss or impairment of a sexual or reproductive organ. MCL 750.520a(j); MSA 28.788(1)(j). The complainant testified that defendant scratched her and bit her and caused bruising, and that as a result of the assault she has suffered mental anguish. A nurse testified that the complainant had multiple scratches and bite marks on her body. Defendant's testimony reveals that he did not deny leaving marks on the complainant's skin, although he attempted to characterize the marks as "hickeys" and the scratches as "accidental."