STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2002
v	No. 229973 Oakland Circuit Court
TIMOTHY RANDALL MORRISON, Defendant-Appellant.	LC Nos. 00-170439-FC 00-170440-FC

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

PER CURIAM.

Following a consolidated jury trial, defendant was convicted of three counts each of first-degree criminal sexual conduct, MCL 750.520b(1)(a), involving two sisters under the age of thirteen in whose home defendant briefly resided. He was sentenced to concurrent prison terms of twenty to fifty years for each count. Defendant appeals as of right. We affirm.

I. Sufficiency of the Evidence

At trial, defendant moved for a directed verdict on the ground that the trial court lacked jurisdiction over the case. On appeal, defendant argues that the trial court erred in denying the motion because the prosecutor failed to present sufficient evidence to prove that the alleged conduct took place in Oakland County.

When reviewing the sufficiency of evidence in a criminal case, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994).

Venue, although not an element of a crime, is nonetheless part of the prosecutor's case, *People v Swift*, 188 Mich App 619, 620; 470 NW2d 491 (1991), and must be proven beyond a reasonable doubt. *People v Belanger*, 120 Mich App 752, 755; 327 NW2d 554 (1982). However, whenever a felony consists or is the culmination of two or more acts done in the perpetration thereof, the felony may be prosecuted in any county in which any one of the acts was committed. MCL 762.8.

A review of the record readily reveals evidence from which a jury could conclude that the offending conduct took place in Oakland County. There was testimony unequivocally indicating that defendant lived with the complainants in Hazel Park from January through April 1998, and

defendant admitted to the police that he digitally penetrated both complainants in Hazel Park and that he held his penis up to the younger complainant's vagina in Hazel Park. The younger complainant testified that defendant penetrated her with his penis, fingers, and tongue in her house in Hazel Park. The older complainant clearly indicated that defendant penetrated her with his penis and fingers at the house in Hazel Park. Although that witness initially said she could not remember if the oral penetration she experienced occurred at the Hazel Park residence, she did speak of such conduct being interrupted when her mother called from elsewhere in the house, and later recalled defendant "licking" her "private" in the Hazel Park house, then agreed on cross-examination that defendant was living in her home when "this all happened" to her. Further, the physician who examined the older complainant in response to allegations of sexual abuse indicated that the child reported that the abuse had been going on since "about a year ago when that person lived in their household . . . [b]ut continued afterwards to when he moved out." This testimony was sufficient to submit the question where the alleged conduct took place to the jury.

II. Unanimity Instruction

The trial court provided the following instructions that addressed the matter of unanimity:

> A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each [of] you agrees on that verdict.
>
> * * *
>
> The defendant is charged with 6 counts; that is, with 3 counts of First Degree Criminal Sexual Conduct involving [the older complainant] and 3 additional counts of First Degree Criminal Sexual Conduct involving [the younger complainant]. These are separate crimes and the prosecutor is charging that the Defendant committed all of them.
>
> You must consider each crime separately in light of all the evidence of the case. You . . . may find the Defendant guilty of all or any one or combination of these crimes or guilty of any less[er] crime or not guilty.

The court also instructed on the proper use of evidence of other bad acts for which defendant was not on trial, admonishing them, "You must not convict the Defendant here because you think he's guilty of other bad conduct."

Defendant argues that the jury should have been specially instructed that conviction of any count required unanimous agreement of which specific acts out of the many alleged formed the basis for that count. However, defense counsel expressly declined to object to the instructions as read. A defendant raising an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant cites *People v Yarger*, 193 Mich App 532; 485 NW2d 119 (1992), for the proposition that that it is error requiring reversal for a trial court to allow a jury to find a defendant guilty of first-degree criminal sexual conduct without requiring the jury to agree unanimously on specific instances of penetration where various instances were alleged. However, bearing more directly on this case are the pronouncements of our Supreme Court in *People v Cooks*, 446 Mich 503; 521 NW2d 275 (1994):

> [A] specific unanimity instruction is not required in *all* cases in which more than one act is presented as evidence of the actus reus of a single criminal offense. The critical inquiry is whether either party has presented evidence that *materially* distinguishes any of the alleged multiple acts from the others. In other words, where materially identical evidence is presented with respect to each act, and there is no juror confusion, a general unanimity instruction will suffice. [*Id.* at 512-513.]

The Court in *Cooks* elaborated:

> [I]f alternative acts allegedly committed by defendant are presented by the state as evidence of the actus reus element of the charged offense, a general instruction to the jury that its decision must be unanimous will be adequate unless 1) the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives), or 2) there is reason to believe the jurors might be confused or disagree about the factual basis of defendant's guilt. [*Id.* at 524.]

The Court noted that *Yarger* and related cases concerned "a separate defense or . . . materially distinct evidence of impeachment regarding any particular act," *Cooks, supra* at 528, concluding that where the sole task for the jury is to determine the credibility of the victim concerning allegations of a single course of conduct, the factual basis for specific unanimity instruction required by *Yarger* and related cases does not exist. *Cooks, supra* at 528-529.

The present case is more akin to *Cooks* than to *Yarger*. Although the complaining witnesses were not able to offer much specificity concerning the times and places of specific sexual assaults, each described a pattern of sexual transgressions that may fairly be characterized as a single course of conduct. Further, the defense maintained a posture of flat denial, coupled with the implication that the guilty party was a family member other than defendant. This position brings to bear no materially separate theories of defense. For these reasons, we hold that the lack of a special unanimity instruction in this case did not constitute plain error affecting substantial rights. *Carines, supra* at 774.

Defendant additionally argues that defense counsel's failure to request a special unanimity instruction constituted ineffective assistance of counsel. We disagree.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the

proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996).

The jury's evident acceptance of the testimony of the complaining witnesses identifying defendant as their assailant, plus inculpatory indications from defendant's statement to the police, militate against concluding that the outcome of the case would have been different had defense counsel persuaded the trial court to provide a special unanimity instruction. At best, the latter would have caused the prosecuting attorney to tailor closing arguments to highlight certain of the witnesses' specific allegations. This argument too must fail.

III. Expert Testimony

Defendant argues that the trial court erred in admitting expert testimony from the complainants' regular pediatrician, Dr. Marijana Popovic, concerning what the physical medical evidence suggested about what the complainants had experienced. Defendant additionally argues that reversal is required because Dr. Popovic improperly vouched for the complainants' credibility. We reject both arguments.

The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995). An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996).

A. Qualifications

When the prosecutor moved to qualify Dr. Popovic as an expert in pediatric medicine, defense counsel objected. Dr. Popovic admitted that she had never been qualified as an expert witness before, but provided an impressive array of credentials establishing her expertise in general pediatrics. Defense counsel maintained that Dr. Popovic lacked expertise in the specific kind of gynecological examination that the occasion demanded. Dr. Popovic stated plainly that she was not an expert in sexual abuse. In agreeing to hear her testimony, the trial court explained that Dr. Popovic was qualified "as to her experience in genital exams and her findings in that area."

Dr. Popovic testified that on April 7, 1999, she examined both complainants when their mother brought them to her for an examination regarding sexual abuse. According to Dr. Popovic, the older sister reported digital but not penile penetration, and the girl's vaginal examination revealed ridges, bumps, and scarring indicative of penetration. Dr. Popovic further explained that she could not determine the object of penetration, or how many times it had taken place, but stated that only penetration, and no benign childhood activity, could account for what she found.

Dr. Popovic testified that the younger complainant showed similar characteristics that were attributable to penetration only, and added that the girl initially admitted experiencing only digital penetration but after the examination said that she had suffered penile penetration.

On cross-examination, Dr. Popovic stated that she had performed genital examinations, not gynecological examinations, elaborating that the former involved no instruments and only limited use of the fingers. According to Dr. Popovic, she normally referred the alleged victims of sexual abuse to practitioners with greater expertise in that area, but the instant case was the only one in which the evidence of abuse was so plain that she did not feel the need to do so.

The trial court did not abuse its discretion in allowing this testimony. MRE 702 authorizes a trial court to admit evidence from a witness "qualified as an expert by knowledge, skill, experience, training, or education" where the court "determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ." Defendant cites no authority for the proposition that a general pediatrician is not qualified to offer expert testimony pursuant to routine genital examinations, and the rule of evidence itself does not imply that expert testimony is limited to persons whose expertise is very narrowly focused on the area in question. The trial court properly recognized Dr. Popovic's expertise in this matter.

B. Vouching

The defense did not object to any of Dr. Popovic's testimony on the ground that it constituted improper vouching for the credibility of other witnesses, thus leaving the issue unpreserved. MRE 103(a)(1); *People v Welch*, 226 Mich App 461, 464; 574 NW2d 682 (1997). Our review is thus limited to plain error affecting substantial rights. *Carines, supra* at 774.

Credibility is a matter for the trier of fact to ascertain. *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990). An expert cannot be used as a human lie detector to give a stamp of scientific legitimacy to the truth or falsity of a witness' testimony. *People v Graham*, 173 Mich App 473, 478; 434 NW2d 165 (1988). A physician testifying as an expert in a sexual-assault case may not offer a purely subjective opinion that the complaining witness told the truth. *People v Smith*, 425 Mich 98, 109, 113; 387 NW2d 814 (1986). Further, such an expert may not testify to a belief that the defendant raped the complainant at a specific time or place. *Id.* at 110, 111. However, "[i]t is . . . well-established that expert opinion testimony will not be excluded simply because it concerns the ultimate issue . . . ." *Id.* at 106, citing MRE 704.

Defendant argues that Dr. Popovic acted as a "human lie detector," bolstering the credibility of the complainants. In support of this argument, defendant points only to Dr. Popovic's testimony that this was the only case in which the evidence was so obvious that she was able to ascertain that penetration had taken place herself rather than refer the complainants to a child-abuse expert. Defendant refers to this testimony as "vouching for the penetration claimed by the . . . sisters," but that characterization is inapt. Dr. Popovic nowhere offered a credibility assessment of either complainant. The testimony of which defendant complains was simple, and proper, corroboration of the complainants' accounts with medical evidence. Dr. Popovic never actually opined that specifically defendant had assaulted the complainants at a specific time or place, and her opinion that the girls had been penetrated was an objective one resulting from her observations and experience pursuant to her field of expertise. There was no plain error affecting substantial rights in this instance.

IV. Suppression Hearing

Defendant argues that the trial court erred by denying his motion to suppress his statements. Although this Court reviews de novo the denial of a motion to suppress, this Court will not disturb a trial court's factual findings regarding a knowing and intelligent waiver of *Miranda* rights unless that ruling is found to be clearly erroneous. *People v Cheatham*, 453 Mich 1, 29-30; 551 NW2d 355 (1996).

Statements of an accused made during custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives his Fifth Amendment rights. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). Whether a waiver was voluntary and whether an otherwise voluntary waiver was knowingly and intelligently tendered form separate prongs of a two-part test for a valid waiver of *Miranda* rights. *People v Abraham*, 234 Mich App 640, 644-645; 599 NW2d 736 (1999). Both inquiries must proceed through examination of the totality of the circumstances surrounding the interrogation. The state has the burden of proving by a preponderance of the evidence that there was a valid waiver of the suspect's rights. *Id.* at 645.

A. Voluntary Waiver

The voluntariness prong is determined solely by examining police conduct. *Howard, supra* at 538. Defendant implies that the police acted improperly by writing down defendant's answers to questions concerning his *Miranda* rights on a form that defendant signed, by failing to ascertain whether an attorney had been appointed for defendant, by failing to inquire into defendant's state of literacy, by failing to electronically record the interviews, and by encouraging defendant to talk during one interview by telling him that they wished to help him prove his innocence. Defendant cites no authority for the proposition that any of these actions constitute misconduct, and we are aware of none. Instead, the question of police misconduct ordinarily involves an inquiry into such malfeasance as might stem from lengthy detention, prolonged questioning, delay in bringing the suspect before a magistrate, physical abuse, threats, or deprivation of food, sleep, or medical attention, considered along with the suspect's age, education, intelligence, state of intoxication or illness, and experience with the police. *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988). Because defendant does not allege any of these suspect tactics, and fails to persuade us that those that defendant does allege constitute misconduct, we reject defendant's challenge to the trial court's finding that his statements were voluntarily given.

B. Knowing and Intelligent Waiver

To establish a valid waiver of *Miranda* rights, the prosecution need only present evidence sufficient to demonstrate that the accused understood that he did not have to speak, that he had the right to the presence of counsel, and that the state could use what he said in a later trial against him. *Abraham, supra* at 647. That basic understanding is all that is required; a suspect need not possess a sophisticated legal understanding of the countless nuances of the law in this area. *Abraham, supra* at 652 n 7.

Defendant asserts that the trial court incorrectly ruled that the waiver issue was solely a function of police conduct, but provides no record citation to indicate that the trial court

maintained such a position. In fact, the court's statements from the bench indicate a reasoned inquiry into whether defendant knowingly and intelligently waived his rights.

The trial court acknowledged that two experts concluded that defendant's intelligence was deficient to the point of retardation and recited that there was no dispute "that the Defendant's ability to read and write is very limited. . . . [T]here was much testimony that if there is a signature from the Defendant, much of it would be based on essentially rote and practice." The court observed that one expert witness opined that defendant "should have had an ability to comprehend his *Miranda* [w]arnings" and that another expert felt otherwise. The court further credited police testimony that defendant did not appear confused when interviewed, and observed that defendant had been through this process pursuant to an earlier arrest. The court additionally noted that defendant spontaneously demonstrated an understanding of the words "waiver" and "entitled."

Defendant does not take issue with any of these factual findings except for the conclusion that he understood his rights, but instead argues that his retardation and illiteracy, coupled with the disinclination of the police to make special accommodations in light of them, rendered him incapable of understanding his *Miranda* rights. Concerning the latter, defendant neither suggests what accommodations might have assisted him in understanding his rights, nor cites authority for the proposition that suspects who have below-average intelligence or are functionally illiterate require special accommodations.

Although defendant's mental limitations were a relevant consideration, the trial court did not clearly err is concluding that defendant had the capacity to understand his rights.

> Conceding that there is a level of mental deficiency so severe that under no circumstances would a defendant be able to knowingly waive his rights, we observe that short of this level of incapacity, a defendant's mental ability of necessity must be only one factor in the "totality of circumstances" inquiry. To hold otherwise would effectively immunize the mentally limited from interrogation and preclude the socially beneficial use of confessions, despite the absence of any indications of overreaching by the police. [*Abraham, supra* at 649.]

The trial court's unchallenged factual findings suggest that defendant was not so severely mentally deficient as to be wholly incapable of effecting a valid waiver of his *Miranda* rights, and that under the totality of the circumstances defendant had a reasonable understanding of those rights.

Further, we note that at an early stage of the investigation defendant denied ever having had any sexual contact with the complainants and then exercised his right to terminate the interview. Although defendant eventually offered some incriminating information, his earlier denial and exercise of his right not to speak demonstrated a mind capable of a reasonable measure of calculation regarding his interests. See *Abraham, supra* at 655 n 10.

Defendant's arguments on appeal are merely an invitation to reweigh and reassess the evidence, and arrive at conclusions different from those of the trial court. We decline that invitation. *Cheatham, supra* at 29. The record does not compel the conclusion that the trial

court clearly erred in concluding that defendant effected a valid waiver of his *Miranda* rights, and that defendant's incriminating statements to the police were admissible.

V. Child Witness

The defense challenged the competency of the younger of the two child complainants to testify. After its own and defense counsel's questioning of the child, the court ruled her competent. Defendant argues that the trial court erred in this regard. We disagree.

This Court reviews a trial court's determination of a child witness' competency for an abuse of discretion. *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991). All persons are presumed competent to testify. *Coddington, supra*. Where competency is challenged, the trial court questions the witness to determine whether the witness knows the difference between telling the truth and telling a lie, and understands the duty to do the former. MRE 601; *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001).

A review of the trial court's thorough questioning reveals that this witness demonstrated that she knew what the truth was and was aware of her duty to tell the truth in these proceedings. Therefore, the trial court did not abuse its discretion in finding the witness competent to testify. *Coddington, supra.* Any subsequent contradictions in the witness' testimony went to the weight of her testimony, not to her competence to testify. *Id.* at 597.

VI. Cumulative Error

Defendant argues that the cumulative effect of the errors alleged previously denied him a fair trial. Having found no error, we disagree. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell