STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 13, 2004
v	No. 247009 St. Clair Circuit Court
RANDOLPH MARTIN TEPATTI, Defendant-Appellant.	LC No. 02-001209-FC

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction on two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520a(1)(a) (person under thirteen years of age). We affirm.

Defendant first argues that the trial court erred in excluding evidence of the victim's prior sexual acts. We disagree. We review a trial court's decision to admit or exclude evidence for a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). A court has abused its discretion only when an unprejudiced person, considering the facts on which the trial court based its action, would find that the court had no justification or excuse for the ruling. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

The Michigan rape shield law, MCL 750.520j(1), allows introduction of a victim's sexual conduct only in the following limited circumstances:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

This law applies to child sexual assault cases. *People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998).

In limited situations, evidence that the statute normally would exclude may be relevant and its admission required to preserve a criminal defendant's Sixth Amendment right of confrontation. *People v Hackett*, 421 Mich 338, 344, 348; 365 NW2d 120 (1984). This includes cases like the instant case, where the prosecution introduced medical evidence indicating the victim had been vaginally penetrated. *People v Haley*, 153 Mich App 400, 405-407; 395 NW2d 60 (1986); *People v Mikula*, 84 Mich App 108, 111; 269 NW2d 195 (1978). However, introduction of the victim's sexual conduct is not admissible when the prejudicial affect outweighs the probative value. MCL 750.520j(1); *Mikula, supra* at 115. The diary entries defendant sought to introduce offered only speculative proof that the victim had engaged in prior sexual acts. Because of the speculative nature of the victim's diary entries defendant sought to introduce, the evidence's prejudicial nature outweighed its probative value.[1] Therefore, the trial court did not abuse its discretion in excluding the evidence.

Second, defendant contends the prosecution's expert witnesses, a doctor who examined the victim and a Family Independence Agency (FIA) worker who ordered the examination, improperly vouched for the victim's credibility and testified that she had been sexually abused. We disagree.

In child sexual abuse cases, "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995); see also *People v Beckley*, 434 Mich 691, 727-729; 456 NW2d 391 (1990). Defendant concedes that neither witness directly testified that the victim was credible or had been abused; rather, defendant argues, their testimony *implied* the victim was credible or had been abused.

The record reveals the witnesses' testimony was not improper. The doctor's testimony indicated that his findings were consistent with vaginal penetration, but he emphasized that he could not determine who had penetrated the victim. And, the FIA worker merely stated he ordered a sexual abuse examination of the victim based on his interview with her. Therefore, the trial court did not abuse its discretion in allowing this testimony. See *Starr, supra* at 494.

Third, defendant argues the trial court improperly excluded crime scene evidence, specifically, the recliner on which the victim alleged the final sexual assault occurred. We disagree.

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[1] The victim's first diary entry, at best, indicated plans to engage in sexual conduct in the future, and the second entry indicates only that she did *something* to two male classmates, not that she engaged in sex or, more specifically, vaginal penetration with them. Arguably, if the diary entries referenced only possible future sexual acts, as the prosecution contends, they did not fall under the rape shield law. And, proof that the victim *considered* engaging in sexual acts would not have provided an alternative explanation for her physical condition and would not have been relevant.

The trial court allowed defendant to use the recliner for demonstrative purposes but did not allow defendant to admit it into evidence. A photograph of the chair had already been admitted. Thus, the recliner represented cumulative evidence that the trial court had discretion to limit under MRE 403. As such, the trial court did not abuse its discretion in excluding the recliner.

Fourth, defendant argues a prosecution witness committed intentional misconduct by referencing a child sexual abuse investigation that did not involve defendant. But defendant did not include this issue in his statement of questions presented. Generally, no issue will be considered which is not set forth in the statement of questions presented. *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Therefore, we decline to consider this issue, which was not set forth in defendant's statement of questions presented.

Finally, defendant claims he was denied a fair trial because of the cumulative effect of the trial court's errors. We disagree.

Most of the errors defendant alleges attributed to the cumulative error were raised as separate issues on appeal. Because we have concluded that the trial court did not err in those instances, they cannot contribute to cumulative error. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995) ("only actual errors are aggregated to determine their cumulative effect").

However, defendant alleges three additional errors. We conclude no error occurred in each instance. First, defendant contends the doctor's testimony regarding the victim's physical condition was improper because no foundation had been laid with regard to the victim's physical condition before the alleged assault occurred. Defendant cites no authority to support his argument, and we found none to indicate this type of foundation must be laid, except where a doctor testifies that a sexual assault occurred on a particular date. *Mikula*, *supra* at 116; *People v Naugle*, 152 Mich App 227, 236-237; 393 NW2d 592 (1986). Because the doctor in this case testified only that the victim had been sexually penetrated, without specifying a date, this foundation was not required.

Second, defendant contends error occurred because the trial judge was related to the prosecutor. The prosecutor was married to the trial judge's nephew, and this constitutes grounds for possible disqualification under MCR 2.003(B)(6)(b). But a heavy presumption of judicial impartiality exists, and a judge will not be disqualified absent actual personal bias or prejudice. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). Defendant presents no evidence of the trial judge's personal bias or prejudice other than defendant's claims that the judge's rulings improperly favored the prosecution. Judicial rulings themselves almost never constitute a valid basis for alleging bias unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible. See *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003). Defendant has failed to demonstrate this favoritism or antagonism. Moreover, our review indicates defendant's claims of error are without merit.

Finally, defendant asserts that the police failed to investigate the source of a pubic hair found in the victim's bed that did not belong to the victim or defendant. However, neither the prosecution nor the police have an obligation to investigate on behalf of a defendant or to seek exculpatory evidence. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995); *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997), citing *People v Miller (After*

Remand), 211 Mich App 30; 535 NW2d 518 (1995). With regard to this unpreserved issue, the failure of the police to investigate the hair's source did not constitute plain error. See *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999).

Because we have found no individual errors, there is no cumulative effect of errors that denied defendant a fair trial. See *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot