

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH PAUL ARNOLD,

Defendant-Appellant.

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UNPUBLISHED

June 10, 2004

No. 247540

Wayne Circuit Court

LC No. 02-011079-01

Before: Smolenski, P.J., and White and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a bench trial of two counts of criminal sexual conduct, third-degree, MCL 750.520d(1)(b). The trial court sentenced defendant to 55 months to fifteen years' imprisonment on each count, to be served concurrently. The court imposed restitution in the amount of \$400.00 as well. We affirm.

The victim, who was 23 years old and "educably mentally impaired," asserted that she was sexually assaulted by defendant, her best friend's boyfriend of several weeks. Defendant asserted that the sex was consensual.

The trial court convicted defendant of two counts of third-degree criminal sexual conduct, noting that there was no question defendant and the victim had had intercourse and there was no question defendant had digitally penetrated her. The court stated that the only question was consent, and that it believed the victim's testimony that the intercourse was done against her will. The court stated that the medical records alone would not substantiate that forcible intercourse had occurred, but that the records and Dr. Turkish's testimony corroborated the victim's testimony. The court did not credit defendant's testimony that the best friend/girlfriend concocted the story as retribution against defendant for his having had sex with the victim. The court also noted that it had observed the victim testify and doubted that she had the capacity to fabricate and recall the lies, given her mental impairment.

At sentencing, the court noted that it had not considered in reaching its verdict the "gratuitous opinion" Dr. Turkish had offered at trial. The victim's mother requested \$400 in restitution to compensate the victim for work she had missed and for doctor bills. Defense counsel objected to restitution for missed work. The trial court noted that restitution for missing work *due to doctor appointments* was appropriate. The court's award of \$400 provided that counsel could move for correction of the amount if some part of it is inapplicable or

inappropriate. The court stated that it assumed the \$400 was for medical bills because the figure was not outrageous on its face.

Defendant first asserts on appeal that the trial court erred in allowing into evidence Dr. Turkish's testimony that the victim made certain statements to her, as those statements constituted inadmissible hearsay since they were not made for the purpose of medical diagnosis or treatment.

Defendant objected to admission of the medical records, thus this Court's review is for abuse of discretion. *People v Williams*, 240 Mich App 316, 320; 614 NW2d 647 (2000). Defendant did not object to Dr. Turkish's testimony, thus appellate review is for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999). Reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*

The victim's statements other than those identifying the alleged perpetrator were admissible as an exception to the hearsay rule, under MRE 803(4), which provides:

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.

The prosecution agrees with defendant that the victim's statements identifying defendant as the perpetrator do not fall within this exception. There is no error, however, because the trial court expressly stated that evidence was inadmissible hearsay and would not be considered. Further, identification was not contested in this case, as defendant admitted that the intercourse and digital penetration took place.

The trial court did not abuse its discretion in admitting the medical records themselves under MRE 803(6), the business records exception to the hearsay rule. As to Dr. Turkish's opinion that the penetration was forcible, any error in its admission was harmless. This was a bench trial; "[a] judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001), quoting *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). At sentencing, the court noted that it had disregarded Dr. Turkish's opinion that the sexual contact had been forcible. Any error in admission of this evidence thus did not affect the outcome of the trial.

Defendant also asserts that his trial counsel was ineffective for failing to object to (or move for a mistrial because of): Dr. Turkish's testimony that the victim was fondled and raped by a single perpetrator, Dr. Turkish's testimony that the victim told her she was forcibly raped by defendant, and Dr. Turkish's testimony that the victim was forcibly penetrated.

This Court reviews claims of ineffective assistance of counsel de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The trial court's factual findings are

reviewed for clear error. *Id.* Because defendant did not raise this issue below, this Court's review is limited to the existing record. *People v Shively*, 230 Mich App 626, 628 n 1; 584 NW2d 740 (1998).

As discussed above, the trial court properly admitted evidence of certain of the victim's statements and medical records. To the extent trial counsel failed to object to inadmissible evidence, defendant cannot show the requisite prejudice because admission of the additional evidence did not affect the outcome of the trial. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

Defendant's next argument is that testimony of the victim's mother and best friend regarding alleged statements the victim made to them was inadmissible hearsay not falling within the excited utterance exception, MRE 803(2).

Defendant objected to the best friend's testimony, thus appellate review is for abuse of discretion. *Williams, supra* at 320. Because defendant did not object to the mother's testimony, this Court's review is for plain error. *People v Coy*, 243 Mich App 283, 286-287; 620 NW2d 888 (2000).

MRE 803 provides in pertinent part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

(2) 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.

The best friend testified that the victim was nervous but not crying when she told her about the incident, and that the victim seemed to be under "some kind of stress." She also testified that the victim was the same when the best friend returned from dropping off defendant. The trial court did not abuse its discretion in admitting the victim's statements. Passage of time between the event and statement is one factor, but is not dispositive of admissibility under MRE 803(2). See *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998) (noting that it is "the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule," and finding no error in admitting 16 year old boy's statement to mother reporting sexual assault, about ten hours following assault.) Nor does the admissibility of such statements hinge on whether the declarant was hysterical. The victim was described as nervous but not crying, and under "some kind of stress." That she reported the event quietly does not preclude a determination that she was under the stress brought on by the assault.

The victim's mother's testimony was that when she got home (about 1 ½ days after the assault), she learned from the best friend's mother that the victim had been sexually assaulted and then got the details from the victim. Assuming that this was evidence of "statements" by the victim, they were not hearsay because they were specifically offered to show why her mother called the police and took her to Dr. Turkish. Further, even if admission was error, it was cumulative and harmless.

Defendant's argument that trial counsel's failure to object to the above testimony or move for a mistrial constituted ineffective assistance of counsel is without merit. Defense counsel did object to the best friend's testimony. Defense counsel need not have objected to admission of the mother's testimony because the admission was expressly limited to a non-hearsay purpose.

Defendant's final argument is that the trial court erred in imposing an arbitrary amount of restitution without findings of fact regarding the actual amount of damages, and requests a remand for an evidentiary hearing on restitution. The prosecution responds that a defendant is entitled to such a hearing if he requests one and contests the issue, and that defense counsel did not avail himself of the trial court's offer that he could make a motion for correction of the restitution order.

This Court reviews the trial court's order of restitution for an abuse of discretion. See *People v Guajardo*, 213 Mich App 198, 202; 539 NW2d 570 (1995). Defendant's contention that this Court's review is for clear error is incorrect.

The trial court's order of restitution was proper. MCL 769.1a(2) and 780.766(2) provide that a trial court order "full restitution." Under MCL 769.1a(4)(a) and (c), and MCL 780.766(4)(a) and (c), if the victim is physically injured from the crime, the court may order payment for medical services and income lost by the victim. If the amount of restitution is contested, an evidentiary hearing is afforded.

In the instant case, defense counsel initially challenged the restitution "for missed work and her doctor bills," but later agreed with the court that it was permissible to award restitution for time she missed from work because of medical appointments. Defense counsel did not move for correction of the amount, as the trial court provided for and suggested he do if he felt necessary. Thus, the trial court did not err by not holding a hearing on restitution.

Affirmed.

/s/ Michael R. Smolenski

/s/ Helene N. White

/s/ Kirsten Frank Kelly