STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2004
v	No. 245195 Hillsdale Circuit Court
FRANK GERALD WOOD, II, Defendant-Appellant.	LC No. 00-249100-FC

Before: Hoekstra, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Defendant was charged with two counts of first-degree criminal sexual conduct in violation of MCL 750.520b(1)(b) based on allegations that he sexually abused his thirteen-year-old daughter on or about September 21, 2000. Following a jury trial, defendant was found guilty of the first count, but not guilty of the second. Defendant appeals as of right. We affirm.

Defendant first asserts that certain testimony introduced by Dr. Ruth Ann Worthington, an expert witness in the field of child abuse called by the prosecution, was improperly admitted because it vouched for the credibility of the victim. Defendant also asserts that his trial counsel was ineffective for failing to object to the challenged testimony. Because defendant did not object to the challenged testimony during trial, our review is limited to plain error that affected substantial rights, and "[r]eversal is warranted only if the unpreserved error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." MRE 103(a)(1); *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002), citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). This Court reviews claims of ineffective assistance of counsel de novo. *In re CR*, 250 Mich App 185, 197; 646 NW2d 506 (2002).

Defendant's assertion centers on the following testimony from Worthington, which she gave in response to questioning by the prosecution after she had explained her physical examination of the victim revealed a complete transection laceration in the victim's hymen:

> Q: Now, Doctor, did you categorize your findings on [the victim] in any way?
>
> A: Yes. Studies over the past 20 years and publications in journals have given those who evaluate these children a classification system. And, of course, this is a suggested or proposed classification system. And

evaluators through their training, I guess, are licensed to vary – maybe licensed is a poor choice of words. But are trusted to vary from there, if – if needs be. But there is a very clear classification system, and that system exists in two parts. The first part discusses only the genital or the rectal findings in children. The second part takes into consideration not only the physical findings but also other information that's been gathered either by behavioral history from the parents' observations, other people seeing what might have happened, or from what the child himself or herself may actually have to tell you, and your assessment of the validity of what the child says to you.

Q: What – in [the victim's] case what specific information of – kind of information did you consider?

A: Okay. Well, obviously in physical findings I considered that very heavily. Any complete transection of the hymen – and this is the way the literature suggests that we put it – is diagnostic evidence of penetrating injury or sexual contact. Now, penetrating injury could include something that happened in an accident or it could include surgical procedures involving that particular area. Obviously, it could also include sexual abuse with penetration. So she has clearly got diagnostic evidence of penetrating injury or sexual contact, which puts her in the highest class and in that first section. So that was taken into consideration.

Now, going down to the overall assessment of the likelihood of abuse, there are also four categories. No evidence, possible, probable, and definite. And I classified her as probable, first of all, because of her story and, second of all, because the physical evidence supported that. And I had not gotten in my history taking any evidence of genital trauma or surgical repair.

And you may wonder why I didn't put it in class four. In class four we require definite evidence. And that definite evidence includes someone having seen this happen, evidence of a sexually transmitted disease, or a pregnancy, the findings of sperm. So it's – it's pretty rigid. Most things will fall into – most kids that I evaluate will either be class one, two, or three. There are occasional children where other children have witnessed or been party to it.

In *People v Lukity*, 460 Mich 484, 500; 596 NW2d 607 (1999), quoting *People v Peterson*, 450 Mich 349, 353; 537 NW2d 857, amended 450 Mich 1212 (1995), our Supreme Court restated the general principles regarding expert testimony in sexual abuse cases, stating, "(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." In the present case, Worthington did not testify that abuse had in fact occurred, stating that she did not place the victim in the fourth class, "definite," because no definitive evidence existed. Moreover, defendant does not assert that Worthington's testimony evinces that abuse did, in fact,

occur, but instead asserts that Worthington's testimony impermissibly bolstered the victim's credibility. We do not believe defendant's assertion has merit.

Worthington specifically stated that part of her classification involved consideration of a child's behavioral history, as well as her assessment of the validity of what the child had told her. Worthington did not directly testify that the victim was telling the truth about having been abused. However, our Supreme Court stated in *Peterson* that a direct reference is not required because "the jury in these credibility contests is looking 'to hang its hat' on the testimony of witnesses it views as impartial." *Id.*, 376. Worthington testified about the process she engaged in to arrive at her expert opinion, explaining that part of her classification system involves the assessment of the validity of what a child tells her together with her conclusions based on physical findings. After carefully reviewing the testimony, we do not believe Worthington's testimony impermissibly bolstered the victim's credibility because the methodology used to arrive at an expert opinion is not vouching for the veracity of a victim.

With regard to Worthington's testimony, defendant alternatively asserts that counsel was ineffective. In order to prevail on his claim of ineffective assistance of counsel for failure to object, "defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). In light of the fact that the challenged testimony did not impermissibly vouch for the victim's veracity, defendant's ineffective assistance of counsel claim must fail.

Defendant next asserts that the trial court erred by excluding testimony concerning the circumstances surrounding his having given a written confession to the police. Specifically, defendant points to an instance during his testimony wherein his counsel asked him whether he had asked the police what would happen to him if he confessed. Thereafter, the prosecutor objected on the ground that defendant's answer might involve a response concerning penalties, which the trial court sustained. On appeal, however, defendant asserts that the substance of his response would have been that the police had promised defendant that he would get "help" rather than go to prison or jail if he were to confess.

The trial court's ruling appears to have only appropriately prevented defendant from testifying regarding potential penalties, *People v Goad*, 421 Mich 20, 25-26; 364 NW2d 584 (1984) (citations and footnotes omitted), and did not specifically exclude testimony that either of the officers who interviewed defendant told him that if he confessed, he would receive help rather than be criminally charged and sent to prison. Nor did it prevent defense counsel, from asking the officers, who both testified at trial, if they had made such a promise. Moreover, under MRE 103(a)(2), if a party seeks to challenge the trial court's exclusion of evidence, the substance of the evidence excluded must have been made known to the court by an offer of proof or have been apparent from the context within which the question was asked. It is not apparent from the context defendant was asked the question that the substance of his testimony would have been that the police promised to get him help if he confessed, and defendant did not make an offer of proof to show that such would have been the substance of his response. Thus, any review of this issue would require this Court simply to speculate that defendant's response would have related to an offer of help rather than penalty. As such, this issue is not preserved because we are unable to conclude whether the trial court erroneously excluded any testimony that would have affected defendant's substantial rights. MRE 103(a); see also *People v Hampton*, 237 Mich

App 143, 154; 603 NW2d (1999). Further, we can not conclude that counsel did not abandon the line of questioning given the inferences of guilt implicit by such a line of questioning. If defendant had testified that the police had promised that he would get help rather than go to jail, such testimony may have left the jury to wonder why defendant needed help if he was innocent.

Defendant's final assertion is that the conduct of the trial court deprived him of a fair trial. Defendant also asserts his trial counsel was ineffective for failing to object to the challenged conduct. This issue is not preserved because defendant did not object to any of the challenged conduct. *People v Paquette*, 214 Mich App 336; 543 NW2d 342 (1996). Therefore, our review is limited to plain error. *Carines, supra,* 752-753.

This Court has recognized that a trial court has wide discretion and power in the matter of trial conduct. Its discretion and authority, however, are not unlimited. *Paquette, supra,* 340. Specifically, if the court questions a witness, it must do so in a manner as to "avoid any invasion of the prosecutor's role and exercise caution so that its questions will not be intimidating, argumentative, prejudicial, unfair, or partial." *People v Sterling*, 154 Mich App 223, 228; 397 NW2d 182 (1986); MRE 614(b). "If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed." *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988). In determining whether the trial court's conduct pierced the veil of judicial impartiality, the appropriate test is whether its conduct or comments unduly influenced the jury and thereby deprived the defendant of a fair and impartial trial. *Paquette, supra*, 340. "Portions of the record should not be taken out of context in order to show trial court bias against defendant; rather the record should be reviewed as a whole." *Id*.

In support of his assertion, defendant cites approximately a dozen instances during the trial wherein he alleges that the trial court's conduct either pierced the veil of judicial impartiality or equated to an invasion of the prosecutor's role. Our review of the record reveals that defendant cites many of the instances out of context. Also, a review of the record as a whole indicates that in each instance the trial court was either appropriately exercising its discretion and authority in the matter of trial conduct by limiting testimony to definitive statements rather than guesses, *Paquette, supra,* 340, questioning witnesses in order to clarify testimony, *Sterling, supra,* 228, exercising its duty to limit the introduction of evidence to relevant matters, MCL 768.29; *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996), or ensuring that improper hearsay testimony was not introduced. The fact that some of the court's rulings or comments could have been "tempered" or were "sharper" than necessary and that the court could have shown more restraint does not require reversal. *People v Wigfall*, 160 Mich App 765, 774; 408 NW2d 551 (1987). We do not find that the trial court invaded the role of the prosecutor or pierced the veil of judicial impartiality by showing bias against defendant and unduly influencing the jury to deprive him of a fair and impartial trial. As counsel is under no obligation to raise meritless objections, and because we conclude that the trial court's conduct was appropriate, the claim of ineffective assistance of counsel in failing to object to the court's conduct must

necessarily fail. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

Affirmed.

/s/ Peter D. O'Connell
/s/ Pat M. Donofrio

I concur in result only. /s/ Joel P. Hoekstra