STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RYAN DALE COLTER,

Defendant-Appellant.

UNPUBLISHED
December 20, 2005

No. 257636
Washtenaw Circuit Court
LC No. 04-000084-FC

Before: Fitzgerald, PJ. and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct (relationship), MCL 750.520b(1)(b)(i) for which the trial court sentenced him to 18 to 40 years' imprisonment. We affirm.

Defendant's convictions arose from anal sex and oral sex he engaged in with the victim, his fiancée's fifteen-year-old daughter. Defendant, his fiancée, and the victim had been living together for over a year when defendant forced the victim to engage in several acts of fondling, oral sex, and anal sex over three months' time. During an investigation of the victim's reported abuse, police found many pornographic images and videos on defendant's computer. Consequently, defendant was also charged with eight counts of possession of child pornography, MCL 750.145c and eight counts of using a computer to commit a crime, MCL 752.796. However, on these charges, defendant was either acquitted or the charge was dismissed.

Defendant alleges several instances of prosecutorial misconduct, which he contends denied him a fair trial. We review allegations of prosecutorial misconduct de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted). Prosecutorial-misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Id.* at 272-273 (citation omitted).

First, defendant claims the prosecutor attempted to elicit testimony about inadmissible evidence to imply defendant "had lots of child pornography." Specifically, defendant contends that the prosecutor tried to introduce images found on defendant's computer that the court had earlier ruled inadmissible. We disagree. The prosecutor asked Detective Kolpacki about images he found on defendant's computer during his investigation. Kolpacki testified that most of the

roughly 75 images relevant to the investigation were legal adult pornography. The prosecutor never attempted to admit the photographs that the trial court already ruled were inadmissible. Further, there was no implication that the images were child pornography. Therefore, there was no impropriety here.

Defendant also contends that the prosecutor improperly attempted to introduce Kolpacki's testimony about the titles of the files containing the inadmissible images even after the trial court ruled that the images were inadmissible. We disagree. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). "The prosecutor is entitled attempt to introduce evidence that he legitimately believes will be accepted by the court, as long as that attempt does not prejudice the defendant." *Id.* at 660-661. The trial court sustained defendant's objection to this testimony on the basis that the prosecutor had not established the relevance of the testimony. Thereafter, the prosecutor asked several questions attempting to establish relevance. However, trial court again ruled that the prosecutor failed to establish relevance. Because there is no indication that the prosecutor's further attempt to establish relevance was in bad faith or prejudicial to defendant, we discern no impropriety here.

Second, defendant claims the prosecution failed to provide defendant with a police report regarding the vibrator the prosecutor sought to enter into evidence. Defendant argues that without the report, he was unprepared to "meet the evidence," and could not make a proper objection. However, the record does not indicate that any such reports even existed, and defendant cites no record support for his assertion to the contrary. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Defendant claims the prosecutor committed misconduct by failing to prevent the victim's mother from signaling to her during her testimony. However, this alleged signaling was not observed by the trial court, defense counsel, or the prosecutor. Rather, the record reflects that defense counsel was informed of the alleged signaling by an unidentified spectator. As such, there is no record evidence that these signals ever occurred. Moreover, after defense counsel objected to the alleged signals, the record bears no indication that any further signaling occurred. Again, we will not search for a factual basis to sustain or reject defendant's position. *Id.* at 260. We find no prosecutorial misconduct in this regard.

Defendant next contends that Danette Lee lacked the proper qualifications to testify as an expert in the area of sexual assault examinations. We disagree. "The determination of whether a witness is qualified to render an expert opinion rests within the discretion of the trial court. Such a determination will not be reversed absent an abuse of discretion." *People v Beckley*, 434 Mich 691, 711; 456 NW2d 391 (1990).

Defendant contends Lee should not have been qualified as an expert because she lacked formal certification as a Sexual Assault Nurse Examiner (SANE) nurse, and because she lacked practical experience conducting sexual assault examinations. "MRE 702 defines an expert in general terms and expertise can be satisfied by a wide array of qualifications. A witness is qualified as an expert by virtue of knowledge, skill, experience, training, or education in a pertinent field." *Id.* at 711. Though Lee lacked formal SANE certification, she had received all the necessary classroom and clinical training to be a SANE examiner, and had performed over

fifteen genital and gynecological examinations on women as part of her training. Lee also had over 23 years nursing experience, mostly in the areas of women's health and obstetrics. Therefore, we conclude that the trial court did not abuse its discretion by qualifying Lee as an expert in the area of sexual assault examination.[1]

Finally, defendant contends the victim's statements to Lee should not have been admitted under Michigan Rule of Evidence 803(4), because the statements were not "made for purposes of medical treatment or medical diagnosis." We do not agree. The decision whether to admit evidence is within the trial court's discretion. Reversal is warranted only where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

> Although hearsay is generally not admissible, there is an exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. Under MRE 803(4), the declarant must have a self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to the diagnosis and treatment of the patient. [*People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996) (citation omitted).]

In *McElhaney*, this Court allowed a nurse practitioner examining a sexually abused child to testify about the child's statements about the sexual assault because "the complainant's statements allowed [the nurse] to structure the examination and questions to the exact type of trauma that the complainant had recently experienced." *Id.* at 282-283.

Here, both Lee and the victim viewed the examination as a means of examining and treating the victim for any trauma or other medical conditions arising from the sexual abuse. The victim's statement to Lee that anal sex with defendant "hurt very badly and that she was screaming and crying during the event and he told her to scream and cry into the pillow," was a statement of past pain and of the inception and general character of the cause thereof, which is specifically admissible under MRE 803(4). Lee also testified that she used the victim's statements to structure her physical examination, focusing on examining any trauma suffered by the victim as a result of oral and anal sex. In light of these factors, we conclude that Lee's testimony about the victim's statements made during the sexual assault examination were admissible under MRE 803(4).

Defendant also argues that Lee's testimony about the victim's statements to her during the examination violated defendant's Sixth Amendment right to confrontation. We disagree. Questions of constitutional law are reviewed de novo. *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999). "[W]hen the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . The Clause does not bar admission of a statement so long as the declarant is present at trial to

[1] Defendant also contends Thomas Kolpacki should not have been qualified as an expert. However, defendant was acquitted of all charges for which Kolpacki's testimony was relevant. Therefore, this issue is moot.

defend or explain it." *Crawford v Washington*, 541 US 36, 59 n 9; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Because the victim testified at trial and was subject to cross-examination, defendant's Sixth Amendment right to confrontation was not violated.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly