STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2008
v	No. 278566 Calhoun Circuit Court
MARK EUGENE MOTTINGER, Defendant-Appellant.	LC No. 2006-004487-FC

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

PER CURIAM.

After a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(*i*), and sentenced to three concurrent terms of 135 to 360 months' imprisonment. He appeals as of right. We affirm.

First, defendant argues that his counsel was ineffective for failing to object at trial to the rampant abuse of Child Sexual Abuse Accommodation Syndrome (CSAAS) evidence presented by the prosecution. We disagree.[1]

To establish ineffective assistance of counsel, a defendant must show "that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To establish that his trial counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Id.* To establish prejudice, defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different . . . ." *Id.* at 302-303, quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Further, counsel is not ineffective for failing to make a futile objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002).

[1] Because no evidentiary hearing was held, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

In *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), and *People v Peterson*, 450 Mich 349; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995), our Supreme Court provided the framework for the proper scope of an expert's testimony regarding CSAAS issues. The basic rules announced in *Beckley* and reaffirmed in *Peterson* include the following: "(1) an expert may not testify that sexual abuse occurred, (2) an expert may not vouch for the veracity of the victim, and (3) an expert may not testify regarding whether the defendant is guilty." *Peterson*, *supra* at 352. However, the *Peterson* Court also clarified its decision in *Beckley* and held,

> (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. [*Id.* at 352-353.]

During his opening statement, defense counsel referred to the victim's version of events as inconsistent, preposterous, and unrealistic. In doing so, defense counsel attacked the victim's credibility, specifically with regard to the victim's claim that some of the incidents of sexual abuse occurred while she and defendant were in close proximity to other people. Defense counsel also attacked the victim's credibility by highlighting her clinginess toward defendant and her sexual inappropriateness, behaviors that appeared to constitute accommodating the alleged abuser. Consequently, the door was opened for Dr. Henry to generally explain that accommodating the abuser is behavior exhibited by children who are victims of sexual abuse. Additionally, Dr. Henry testified in general about secrecy, helplessness, entrapment, disclosure, and retraction,[2] but this testimony explained why a victim might exhibit a lack of responsiveness and related directly to his testimony regarding behavior that accommodates the abuser. Therefore, the admission of testimony regarding these behaviors was not erroneous, and defense counsel did not err when it failed to challenge its admission. *Milstead*, *supra* at 401.

Nevertheless, some additional testimony that Dr. Henry provided at trial was improper. After Dr. Henry explained why a sexually abused child might exhibit clingy behavior, the prosecutor asked him whether he reviewed the victim's counseling records and whether, in his opinion, the information contained in those records indicated that the victim exhibited behavior that was consistent with that of a sexually abused child. The prosecutor's question did not directly relate to the victim's specific behaviors of clinginess toward defendant, sexual inappropriateness, or willingness to participate in sexual acts with defendant while other people were in close proximity, and the prosecutor did not limit Dr. Henry's opinion regarding the victim's records to a discussion of clingy behavior. In answering the prosecutor's question, Dr. Henry essentially vouched for the victim's credibility by indicating that the victim's counseling records supported her allegations of abuse. The testimony was not limited to

[2] Common characteristics observed in children who are victims of sexual abuse include (1) secrecy, (2) helplessness, (3) entrapment and accommodation, (4) delayed, conflicting, and unconvincing disclosure, and (5) retraction. *Peterson*, *supra* at 372 n 11.

background information, and Dr. Henry became an advocate, not just an advisor. See *Beckley*, *supra* at 731-732. The scope of Dr. Henry's testimony exceeded the rules announced in *Beckley*, *supra*, and *Peterson*, *supra*, and resulted in error. Further, Dr. Henry's statements concerning an "Iceberg of Life" diagram assembled by the victim were not tailored to address the victim's clinginess toward defendant, her sexual inappropriateness, her willingness to participate in sexual acts with defendant while other people were in close proximity, or any other behavior that needed to be explained to the jury, so admission of this testimony was also erroneous. Consequently, counsel's performance in allowing the testimony without objection fell below an objective standard of reasonableness.

However, counsel's errors were harmless. The errors are most similar to those discussed in *Peterson*, *supra* at 375-379. The *Peterson* Court found error because the experts in that case were allowed to vouch for the veracity of the victim and made numerous references to consistencies between the victim's behavior and behavior that is typical of victims of sexual abuse, even though defense counsel never asserted that the victim's behavior was inconsistent with that of a sexual abuse victim. *Id*. at 376-377. The *Peterson* Court ultimately held that the errors were harmless and did not result in a miscarriage of justice. *Id*. at 378-379. The Court noted that parts of the testimony of the prosecution's expert witnesses led to questions concerning the experts' accuracy, and that the prosecutor recognized during closing arguments that the case was a classic example of a credibility contest. *Id*. at 377-378. Accordingly, the jury's attention was not focused on the experts' testimony, but rather on the testimony of the victim and the defendant and which of the two the jury should believe. *Id*. In reaching a conclusion, the *Peterson* Court remarked that the trial court "properly instructed the jury throughout the trial with respect to questionable testimony and properly charged the jury concerning its use of the expert testimony during deliberations." *Id*. Because the errors did not particularly favor either side, they were harmless and did not result in a miscarriage of justice. *Id*. at 379.

Similarly, in this case, Dr. Henry generally stated that the information contained in the victim's records indicated a pattern of behavior that was consistent with that of a sexually abused child. Further, his references to the "Iceberg of Life" diagram conveyed that the victim's thoughts and ideas were consistent with those of a child who was sexually abused, even though defense counsel never offered a contrary assertion. But, these errors are harmless. First, during opening statements, defense counsel indicated that the jury would hear from an expert "who will state everything [the victim] did is explainable. Everything [the victim] did makes sense because it's consistent with behaviors of child sexual assault victims. Very convenient, but not proof of the facts. That's an expert's opinion . . . ." Defense counsel also elicited testimony from Dr. Henry revealing that he could not state whether the victim was sexually abused, negating the suggestion that Dr. Henry believed she was abused. Further, during Dr. Henry's questioning, defense counsel set forth the idea that an advocate, not someone with an objective viewpoint, drafted the counseling records. This testimony served to question the credibility of the counseling records. Defense counsel also questioned Dr. Henry regarding whether a child who had reported falsely in the past would be capable of providing false information during a counseling session in order to support her lie. In so doing, he challenged the victim's credibility.

Defense counsel also elicited from Dr. Henry an admission that some of the feelings that the victim indicated in the "Iceberg of Life" diagram were the same feelings that a child might feel if her parents abandoned her.[3] Thus, instead of challenging improper portions of the testimony, defense counsel chose to attack Dr. Henry's ideas concerning the credibility of the counseling records and the "Iceberg of Life" diagram, casting doubt on his testimony as a whole. Defense counsel also questioned the extent of the "proof" that was actually provided by these documents and argued that Dr. Henry's opinion was not proof. The nature of defense counsel's questioning is a matter of trial strategy, which we will not second-guess with the benefit of hindsight.[4] *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

In addition, the prosecutor acknowledged during closing arguments that the case was a credibility contest. Neither the prosecutor nor defense counsel focused the jury's attention on Dr. Henry's testimony. Rather, both parties' counsel highlighted the testimony of the victim and defendant and emphasized that the resolution of the case centered on which person the jury believed. Although both parties' counsel referred to Dr. Henry's testimony during closing arguments, they did not emphasize this testimony. Further, the trial court properly instructed the jury with regard to the use of expert testimony, which typically cures such errors. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) ("Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements and jurors are presumed to follow their instructions."). Under these circumstances, Dr. Henry's improper testimony did not particularly favor either side.

Therefore, we find no reasonable probability that the results of defendant's trial would have been different had defense counsel challenged the admission of the improper testimony. *Toma*, *supra* at 302-303. The testimony of other witnesses corroborated the victim's testimony and raised questions regarding the credibility of defendant and his wife, and the impact of Dr. Henry's testimony was minimal at best. Defense counsel was not ineffective.

Defendant also asserts that his counsel was ineffective for failing to obtain a proper limiting instruction before trial regarding the expert's testimony. The trial court granted defense counsel's motion in limine and limited Dr. Henry's testimony by precluding him from testifying that sexual abuse occurred, vouching for the veracity of the victim, or testifying regarding whether defendant is guilty. These three limitations are the basic rules announced in *Beckley* and reaffirmed in *Peterson* and, therefore, were not improper. Further, based on the discussion on the record before trial between the judge and the attorneys, there was already an understanding that Dr. Henry's testimony would be limited to merely address the lack of responsiveness of victims of sexual abuse. In addition, defense counsel elicited testimony from Dr. Henry indicating that Dr. Henry did not know whether the victim was sexually abused. As the *Beckley* Court noted, effective cross-examination by defense counsel can prevent the jury from drawing

[3] The victim's father was not involved in her life, and the victim's mother had remarried and had emotional problems.

[4] In particular, we note that it may have been far less effective to discredit general testimony about behaviors of child abuse victims without having testimony about the specific victim to question.

the conclusion that an expert believes that based on a particular behavior observed by complainant, a sexual assault in fact occurred. *Beckley*, *supra* at 725. Accordingly, defense counsel was not ineffective for failing to obtain a more inclusive limiting instruction.

Defendant also argues on appeal that his counsel was ineffective because he stipulated to the admission of the victim's counseling records, which were irrelevant and contained highly prejudicial information and hearsay. In particular, defendant argues that the counseling records contained the therapist's observations of the victim, hearsay from the victim, and information relating to the course of treatment. Defendant also argues that the "Iceberg of Life" diagram was improperly admitted. Again, we disagree.

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). The records introduced here contain two levels of hearsay: (1) the record itself (because the reports are used to prove that the statements were made), and (2) the victim's statements contained within the records and the therapist's observations of the victim and information relating to the course of treatment (hearsay within hearsay). To be admissible, each level of hearsay must fall within an exception to the hearsay rule. MRE 805; *Cooley v Ford Motor Co*, 175 Mich App 199, 203; 437 NW2d 638 (1988). We hold that the counseling records and the "Iceberg of Life" diagram are admissible under MRE 803(6) as records of regularly conducted activity. See e.g., *Merrow v Bofferding*, 458 Mich 617, 626-627; 581 NW2d 696 (1998); *Jackson v Depco Equip Co*, 115 Mich App 570, 579-580; 321 NW2d 736 (1982).

In looking at the second level of hearsay, MRE 803(4), the medical record exception, applies. In *People v Meeboer* (*After Remand*), 439 Mich 310, 322; 484 NW2d 621 (1992), the Court stated:

> In order to be admitted under MRE 803(4), a statement must be made for purposes of medical treatment or diagnosis in connection with treatment, and must describe medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury. Traditionally, further supporting rationale for MRE 803(4) is the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient.

The *Meeboer* Court also addressed the need to sufficiently establish the trustworthiness of a child's statement in order to support the application of the medical treatment exception. *Id.* The *Meeboer* Court stated:

> Factors related to trustworthiness guarantees surrounding the actual making of the statement include: (1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement), (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness), (4) use of terminology unexpected of a child of similar age, (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment), (6) the timing of the

> examination in relation to the assault (the child is still suffering pain and distress), (7) the timing of the examination in relation to the trial (involving the purpose of the examination), (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable), (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and (10) the existence of or lack of motive to fabricate.
>
> Although some courts hold that corroborative evidence relating to the trust of the out-of-court statement should not be considered in determining whether to admit the statement, we believe the better reasoned view is that the reliability of the hearsay is strengthened when it is supported by other evidence. Corroborating physical evidence of the assault, evidence that the person identified as the assailant had the opportunity to commit the assault, and resulting diagnosis and treatment can support the trustworthiness of the child's statements regarding a sexual assault and aid in the determination whether the statement was made for the purpose of receiving medical care. [*Id*. at 324-326 (footnotes omitted).]

Psychological trauma experienced by a victim of sexual abuse and the resulting counseling is recognized as an area that requires diagnosis and treatment. *Id*. at 229. The statements made by the victim in the counseling records and the "Iceberg of Life" diagram appear to be made for the purpose of diagnosis and treatment. Although the therapy sessions began after the victim disclosed the abuse to the police and the victim knew that a case was being prepared against defendant, the timing of the therapy sessions and the fact that they were therapy sessions, which are not as reliable as medical treatment sessions, do not result in the statements being deemed any less trustworthy under the relevant considerations. The victim made many statements consistent with those of an individual seeking treatment and dealing with her feelings. The statements do not appear to focus on defendant's conduct in an accusatory way. In addition, although defendant asserts that the victim had a motive to fabricate, we do not find this argument persuasive based on the nature of the statements, which, again, do not focus on defendant's conduct. The statements reflect a desire to express thoughts and feelings in order to receive proper treatment, and they are not objectionable on hearsay grounds.

With regard to the therapist's observations of the victim and information relating to the course of treatment set forth in the counseling records, however, we reach a different conclusion. Conclusions and observations of a therapist are arguably not admissible in evidence under MRE 803(4). Regardless, we find that defense counsel's allowance of the therapist's observations and course of treatment did not fall below an objective standard of reasonableness. The stipulation to the admission of the counseling records was made in lieu of the victim's counselor testifying at trial. Defense counsel may have concluded that the therapist's trial testimony concerning her observations of the victim and her opinion regarding the best course of treatment for the victim would have carried more weight with the jury and provided more substantive evidence than merely admitting the records containing hearsay statements. Defense counsel's "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy," *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001), and we will not substitute our judgment for that of counsel regarding matters of trial strategy or assess counsel's competence with the benefit of hindsight, *Matuszak, supra* at 58. Therefore, defendant has not overcome the strong presumption that his counsel's

actions constituted sound trial strategy, nor has defendant otherwise met his heavy burden of proving that his counsel was ineffective.

Defendant also asserts that the failure to call an additional witness to support his theory that the victim had a motive to lie deprived him of a substantial defense, because challenges to the victim's credibility might have made a difference in the outcome of his trial. Such a witness was at the courthouse and waiting in the hall to testify, but defense counsel forgot to call her as a witness. A decision regarding whether to call a witness is generally presumed to be a matter of trial strategy, and the failure to call witnesses constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A defense is substantial if it might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996).

The record reveals that defense counsel addressed the theory that the victim had a motive to lie in his opening statement, his closing argument, and during his cross-examination of the victim. Because the theory that the victim was motivated to lie was raised before the trial court, defendant was not deprived of this defense. See *Dixon*, *supra* (a defendant is not deprived of a defense if the theory was raised during the cross-examination of the victim and closing arguments). Consequently, defendant was not denied the effective assistance of counsel when counsel failed to call this witness. Defendant has not shown both that his counsel's representation fell below an objective standard of reasonableness under prevailing professional norms *and* that, but for his counsel's error, the results of the proceeding would have been different.

Next, defendant argues that the prosecutor unfairly used CSAAS evidence as proof of defendant's guilt. We disagree.[5] Defendant has not provided any examples of allegedly improper comments made by the prosecutor. The trial court, however, granted defendant's motion to limit Dr. Henry's testimony. Although Dr. Henry provided some improper testimony, he also testified that he could not state whether the victim was sexually abused, nor did he testify that defendant was guilty. Further, when commenting on the evidence, the prosecutor was allowed to discuss the reasonable inferences that could be drawn from the expert's testimony and compare the expert testimony presented to the facts of the case. Our review of the record reveals that the prosecutor's comments were based on the evidence, reasonable inferences, and common sense. Moreover, the trial court properly instructed the jurors that they "may only consider the evidence that has been properly admitted in this case" and that the "lawyers' statements and arguments are not evidence." The trial court further instructed that "you should only accept things that the lawyers say that are supported by the evidence or by your own common sense and general knowledge." Additionally, "[y]ou should use your own common sense and general knowledge in weighing and judging the evidence" and "you should rely on your own common sense and everyday experience." The trial court also properly instructed the jurors with regard to

[5] Because defense counsel failed to challenge the prosecutor's argument, we review defendant's claim for plain error affecting his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

the use of expert testimony during deliberations. These instructions were sufficient to dispel any prejudice that might have resulted from the prosecutor's remarks. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995) (the trial court's instruction that attorneys' arguments are not evidence eliminated any prejudice). Again, curative instructions are presumed to resolve most errors, and jurors are presumed to follow their instructions. *Unger*, *supra* at 235. There was no plain error requiring reversal.

Finally, defendant argues that his lack of criminal history was a pertinent character trait under MRE 404(a)(1), and he should have been permitted to inform the jury of this. We disagree.[6] In *People v Phillips*, 170 Mich App 675, 680-681; 428 NW2d 739 (1988), this Court addressed a similar situation and held that no rule of evidence would permit testimony regarding a defendant's lack of a criminal record. Similarly, in this case, we find that no rule of evidence permits testimony concerning defendant's lack of a criminal record. *Id*. This is neither evidence establishing reputation nor evidence of a specific instance of conduct under MRE 405. *Id*. at 680. In addition, pursuant to MRE 608(b), character evidence introduced by way of specific instances of conduct, or the lack thereof, cannot be proved through extrinsic evidence. *Id*. at 681. Further, evidence of specific instances of conduct, or lack thereof, would not be permitted under MRE 405(b) because character is not an essential element of the charge or defense. *Id*. Based on the foregoing, the trial court did not err in prohibiting defendant from introducing evidence that he had no prior criminal history.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

[6] We review a trial court's decision to admit or exclude evidence for an abuse of discretion and questions of law de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).