STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 12, 2009
v	No. 282020 Oakland Circuit Court
EDELMIRO FIGUEROA, JR., Defendant-Appellant.	LC No. 2007-216230-FC

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of first-degree criminal sexual conduct. MCL 750.520b(1)(a). The trial court sentenced him as a second habitual offender, MCL 769.13, to 25 to 50 years' imprisonment. Because we conclude that there were no errors warranting relief, we affirm.

Defendant argues that the trial court violated his right to cross-examine the witnesses against him when it permitted a nurse to testify about the statements that his three-year-old daughter, the complainant in this case, made at the hospital after she was allegedly sexually assaulted. Defendant contends that, because a police officer directed the complainant's mother to take her to the hospital and the nurse examined the complainant for the primary purpose of investigating the alleged assault, these statements were testimonial and should have been barred. Defendant further contends that this error deprived him of a fair trial. Because the admissibility of the nurse's testimony was never challenged before the trial court, we review this unpreserved constitutional issue for plain error that affected defendant's substantial rights. *People v Carines,* 460 Mich 750, 761, 764-767; 597 NW2d 130 (1999).

Testimonial hearsay is inadmissible against a defendant unless the declarant is unavailable and there was a prior opportunity for cross-examination of the declarant. *Crawford v Washington,* 541 US 36, 58; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Shepherd,* 472 Mich 343, 347; 697 NW2d 144 (2005). In this case, it is clear that defendant's daughter was unavailable for cross-examination and that defendant had not had a prior opportunity to cross-examine her. However, it is not clear or obvious that her statements to the nurse were testimonial in nature. See *Carines*, 460 Mich at 763 (noting that for plain error to exist the error must be clear or obvious). Statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later prosecution." *Davis v*

Washington, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). This Court has previously held that a child's statements to a non-governmental employee about possible abuse were not testimonial. *People v Geno*, 261 Mich App 624, 630-631; 683 NW2d 687 (2004). In addition, courts from other jurisdictions have determined that statements to a medical professional are not testimonial in the absence of evidence that, under the circumstances, an objective witness would reasonably have believed that the statement would be available for use at a later trial. See *State v Stahl*, 111 Ohio St 3d 186, 183-196; 855 NE2d 834 (2006) (listing and analyzing authorities and adopting the "objective witness" test for determining whether statements were testimonial).

In the present case, a police officer took the child and her mother to the hospital so that it could be determined what had occurred and so that necessary medical care could be provided. The child's statements were made in response to routine questions, which were intended to determine what had occurred before examining the child. The nurse asked the child what had happened, and the child's 11-year-old half-brother said that "papi" had touched her. The nurse then asked the child whether papi touched her, and the child responded yes. When the nurse asked where, the child's hand went down over her vaginal area. The nurse confirmed on cross-examination that she wrote in her notes that the patient stated that she was touched by papi with his hand and that it hurt. The nurse talked to the child shortly after the alleged criminal sexual conduct had occurred, and no suspects had been apprehended at that time. Thus, although there are circumstances in this case from which one might conclude that the statements were testimonial, there are also circumstances that support the conclusion that the statements were not directed at establishing facts for later criminal prosecution. See *People v Walker (On Remand)*, 273 Mich App 56, 61-65; 728 NW2d 902 (2006). Consequently, any error was not plain—that is, not clear or obvious. *Carines*, 460 Mich at 763.

Furthermore, even if the statements were testimonial, any error in their admission did not affect defendant's substantial rights and, for that reason, defendant would not be entitled to relief. *Carines*, 460 Mich at 763 (noting that, in order to warrant relief, the error must have prejudiced defendant, i.e., the defendant must show that error affected the outcome of the lower court proceeding). The child's statements were corroborative and cumulative. The child's half-brother testified that he saw defendant in bed under the covers with his half-sister, that her pants and panties were not on, that defendant was not wearing any clothes, that defendant was putting his private part in his half-sister's private part, and that his half-sister was crying. This was powerful evidence of defendant's guilt.

Nevertheless, defendant argues that the jury might have found him guilty of criminal sexual conduct, second degree, rather than first degree without the nurse's testimony regarding the child's statements. We do not agree. All that the child told the nurse was that defendant touched her and it hurt. This statement does not particularly suggest the element of penetration. Indeed, this testimony is far more supportive of criminal sexual conduct in the second degree than it is of criminal sexual conduct in the first degree. Hence, defendant failed to show that this cumulative evidence prejudiced him. Finally, even if this testimony had affected the outcome of the trial, it would still not warrant relief unless the error resulted in the conviction of an actually innocent person or undermined the integrity of the judicial system. *Carines*, 460 Mich at 763. And, under the facts of this case, we would decline to exercise our discretion to grant the

requested relief. *Id.* The trial court's admission of the child's statements to the nurse did not constitute plain error affecting defendant's substantial rights.

Defendant also argues that defense counsel was ineffective for failing to object to the testimony provided by the nurse. This Court's review of defendant's unpreserved claim of ineffective assistance of counsel is limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was so deficient that it fell below an objective standard of professional reasonableness and, that it is reasonably probable that, but for his counsel's ineffective assistance, the result of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The 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). In reviewing a claim of ineffective assistance of counsel, "[t]his Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Defendant has not overcome the presumption that his trial counsel's decision was a matter of trial strategy. *Solmonson*, 261 Mich App at 663. Given that the complainant's statements tended to support the lesser offense of second-degree criminal sexual conduct, defendant's trial counsel could reasonably have determined that it was in defendant's interest to permit the testimony. Moreover, as already noted, the result of the proceedings would not have been different without this testimony. Therefore, even if defendant's trial counsel could be said to have been ineffective for failing to object to this testimony, that failure would not warrant relief. *Rodgers*, 248 Mich App at 714.

There were no errors warranting relief.

Affirmed.

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly