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STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 15, 2020
v	No. 349446 Genesee Circuit Court
PERCY LEE OUSLEY, Defendant-Appellant.	LC No. 17-041820-FC

Before: GADOLA, P.J., and RONAYNE KRAUSE and O'BRIEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(2)(b) (penetration of victim less than 13 years old by perpetrator at least 17 years old), second-degree criminal sexual conduct (CSC II), MCL 750.520c(2)(b) (sexual contact with victim less than 13 years old by perpetrator at least 17 years old), and accosting a child for an immoral purpose, MCL 750.145a. We affirm.

I. BACKGROUND

The victim in this case was 10 years old at the time of the alleged sexual abuse. Defendant was a family friend who stayed with the victim's family for a few months. The victim alleged that defendant repeatedly abused her during this period and that the abuse included digital penetration, cunnilingus, and fondling. The victim maintained a notebook where she recorded incidents of the abuse.

Once the abuse was reported to the police, the victim went to the hospital for an examination. At the hospital, Renee Burmeister, a registered nurse and sexual assault nurse examiner, took the victim's history. The victim disclosed to Burmeister several incidents of abuse and complained of vaginal pain. Burmeister conducted a vaginal examination and noted redness on the lips of the labia majora, on the labia minora, and on the posterior fourchette (vaginal opening). She also noted a red mark to the left side of the victim's vaginal opening. Burmeister believed the redness was consistent with the sexual abuse described by the victim.

After defendant was arrested, he was interviewed in the county jail by Rainey Russell, a Children's Protective Services (CPS) worker who was investigating the victim's abuse. Russell told defendant that she had to read him the allegations but he did not have to respond. Defendant informed Russell that he was not supposed to speak to anyone without his attorney present. Nonetheless, after Russell read the allegations, defendant responded.

On appeal, defendant challenges the admissibility of Burmeister's testimony regarding the victim's statements as well as the admissibility of his statements to Russell.

II. ADMISSIBILITY OF VICTIM'S STATEMENTS

Defendant argues that statements the victim made to Burmeister should not have been admitted because they were not reasonably necessary for diagnosis and treatment. We disagree.

Defendant failed to preserve this evidentiary challenge by raising it in the trial court, so our review is for plain error affecting substantial rights. *People v Hawkins*, 245 Mich App 439, 447; 628 NW2d 105 (2001). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

"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). Under MRE 802, hearsay is inadmissible unless otherwise permitted by an exception. One such exception is MRE 803(4), which provides that the following are not excluded by the hearsay rule:

> 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.

In *People v Mahone*, 294 Mich App 208, 214-215; 816 NW2d 436 (2011), this Court explained, "Particularly in cases of sexual assault, in which the injuries might be latent, such as contracting sexually transmitted diseases or psychological in nature, and thus not necessarily physically manifested at all, a victim's complete history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment." *Id.*

Burmeister gave the following testimony about statements made by the victim during Burmeister's examination of her:

> [The victim] stated that [defendant] was touching her inappropriately. That he at one point was licking her vagina and she knew that he was because when she woke up, he was down there. She stated that at night is when he would target her due to him knowing that she slept quite a bit during the—or slept quite hard actually, and a lot due to some past things that happened in her life. She also said that she had seen [defendant's] penis when he had been masturbating on the couch

> and that he would cum inside of a condom which he had kept many in his backpack according to her.
>
> She also stated that [defendant] was telling her that he would hurt himself if she told anyone. He actually ran out of the house and over a fence stating that he was going to jump off a bridge. That's where she got the cut on the palm of her hand was running after him to try to help save him.
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> She also said that the—I asked her if he—when the last time it was that he had touched her and she had said that day. She said that they were sitting on the couch and he had put his hand between her legs and she pushed him away and ran out of the house.

The victim also told Burmeister that defendant had digitally penetrated her and that she was experiencing vaginal pain.

We conclude that the victim's statements to Burmeister clearly fall under the hearsay exception in MRE 803(4). That is, the victim's statements to Burmeister were reasonably necessary for the diagnosis and treatment of the victim's injuries. Burmeister performed a vaginal examination on the basis of the victim's history and discovered that there was redness on the lips of the labia majora, on the labia minora, and on the vaginal opening. Burmeister also noted a red mark to the left side of the victim's vaginal opening. Burmeister concluded that the victim's account of the sexual abuse was consistent with the redness.

Moreover, the victim had a self-interested motivation to tell the truth to Burmeister in order to obtain medical treatment. The victim was 10 years old and thus there was a rebuttable presumption that she understood the need to tell the truth to Burmeister. See *People v Garland*, 286 Mich App 1, 9; 777 NW2d 732 (2009) ("The victim in this case was over the age of ten and thus there was a rebuttable presumption that she understood the need to tell the truth to the nurse.") Defendant has not attempted to rebut this presumption. Because the victim's statements to Burmeister were reasonably necessary for diagnosis and treatment under MRE 803(4), and the victim had a self-interested motivation to be truthful in order to receive proper medical care, the statements were properly admitted at trial. See *Mahone*, 294 Mich App at 214-215.[1]

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[1] Defendant also argues that his trial counsel was ineffective for not objecting to Burmeister's testimony about what the victim told her during the examination. For the reasons explained, any objection by trial counsel to Burmeister's testimony would have been futile, and trial counsel's decision to not object did not amount to ineffective assistance. See *People v Chambers*, 277 Mich App 1, 3-4; 742 NW2d 610 (2007) ("[C]ounsel was not ineffective for failing to raise what would have been a futile objection.").

Defendant also briefly argues that trial counsel was ineffective for not objecting to the admission of Burmeister's report on hearsay grounds. That report was admitted under MRE 902(11), which only allows records of regularly conducted business activity to be admitted if, among other requirements, the records "would be admissible under rule 803(6)." MRE 803(6) is

III. ADMISSIBILITY OF DEFENDANT'S STATEMENTS

Defendant next argues that his statements to CPS worker Russell should have been suppressed because she did not give him *Miranda*[2] warnings before interviewing him and he invoked his right to counsel. We disagree. We review de novo a trial court's ruling on a motion to suppress. *People v Steele*, 292 Mich App 308, 313; 806 NW2d 753 (2011).

Defendant argues that the statements he made to Russell during the interview—which was conducted while he was at the county jail—should have been suppressed because Russell failed to administer *Miranda* warnings beforehand. However, "a person who is not a police officer and is not acting in concert with or at the request of the police is not required to give *Miranda* warnings before eliciting a statement." *People v Anderson*, 209 Mich App 527, 533; 531 NW2d 780 (1995). In *People v Porterfield*, 166 Mich App 562, 566; 420 NW2d 853 (1988), this Court considered whether a defendant's statement to a CPS worker "made in the course of a child-neglect proceeding was inadmissible because he was not informed of his *Miranda* rights . . . at the time he made the statement." This Court determined that "although the caseworker was a state employee, she was not charged with enforcement of criminal laws and she was not acting at the behest of the police; therefore, she need not have advised defendant of his *Miranda* rights." *Id*. at 567.

This case is analogous to *Porterfield*. Like the CPS worker in that case, Russell was not acting in concert with or at the behest of the police. Russell testified that she interviewed defendant as part of her child-abuse investigation, and she told defendant that once she read the allegations to him, he did not need to respond. Because Russell was not acting in concert with or at the behest of the police, she was not required to administer *Miranda* warnings before interviewing defendant.

Defendant argues that this case is distinguishable from *Porterfield* because defendant "clearly invoked his right to have counsel present." Yet defendant does not explain how this changes the fact that Russell, a CPS worker, was not acting in concert with or at the behest of the police when she interviewed defendant.[3] Defendant also points out that Russell, as a CPS worker,

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an exception to the hearsay rule. Defendant does not explain why Burmeister's report would not be admissible under MRE 803(6), and our Supreme Court has held that medical records maintained in the regular course of business are admissible under MRE 803(6). See *Merrow v Bofferding*, 458 Mich 617, 627; 581 NW2d 696 (1998). Thus, any objection by trial counsel to the admission of Burmeister's report would have been futile, and trial counsel's decision to not object did not amount to ineffective assistance. See *Chambers*, 277 Mich App at 3-4.

[2] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[3] To any extent that defendant's statements on appeal can be construed as arguing that Russell's interview was improper because defendant asserted his right to counsel, we conclude that the argument is waived. Defendant does not cite any caselaw or other authority to support such an argument. In fact, defendant does not even explain whether the interview allegedly violated his Fifth Amendment right to counsel or his Sixth Amendment right to counsel. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for

was mandated by law to report child abuse, see MCL 722.623, but again fails to explain how this mandatory-reporting requirement meant that Russell was acting in concert with or at the behest of the police; the police did not instruct Russell to interview defendant, and she interviewed him as part of her child-abuse investigation, which was separate from any police investigation. Thus, *Porterfield* is controlling on the outcome of this issue, and defendant's arguments to the contrary are unpersuasive.

Affirmed.

/s/ Michael F. Gadola
/s/ Amy Ronayne Krause
/s/ Colleen A. O'Brien

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his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Payne*, 285 Mich App 181, 195; 774 NW2d 714 (2009).