STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DWAYNE MICHAEL ROSE,

Defendant-Appellant.

UNPUBLISHED
February 18, 2021

No. 351282
Hillsdale Circuit Court
LC No. 18-424367-FC

Before: BECKERING, P.J., and SAWYER and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction of second-degree criminal sexual conduct (person under 13) (CSC-II), MCL 750.520c(1)(a). The trial court sentenced defendant to serve 24 to 180 months' imprisonment. Defendant argues that the trial court erred by admitting evidence of Snapchat messages and excluding defendant's proposed rebuttal character witness. Defendant also argues that the admission of testimony from a sexual assault nurse examiner (SANE) included inadmissible hearsay and violated his constitutional right to confrontation. Defendant further argues that testimony from a law enforcement officer regarding a polygraph test and the prosecutor's statement regarding potential penalties denied him a fair trial. We affirm.

This appeal arises from defendant's sexual assault of his 12-year-old stepdaughter. At trial, the victim testified that defendant came into her bedroom while she was sleeping, lifted her shirt, licked her nipple, and pulled her shirt back down. She testified that defendant then placed his hand inside her underwear and digitally penetrated her. Trial testimony indicated that the charged incident was preceded by numerous other incidents involving defendant's inappropriate touching of the victim and her twin sister. The day after the assault took place, the victim was examined by a SANE, who testified that the victim identified defendant as the perpetrator of the assault.

The victim's sister testified that, on the eve of trial, she received messages from defendant via the Internet service "Snapchat," instructing her and the victim to lie during their testimonies in order to protect defendant. Defendant denied sending these messages, and he now argues that testimony regarding them should not have been admitted. At an evidentiary hearing, defendant

offered a character witness to rebut the assertions made in the messages. The trial court excluded this witness from testifying.

At trial, two statements were made that defendant contends deprived him of a fair trial. First, the prosecutor mentioned that the offense of CSC-I carried a possible life sentence. No objection was made to this statement. Second, the law enforcement officer who responded to the complaint mentioned during direct examination that he offered defendant a polygraph examination. Defense counsel immediately objected, and the trial court sustained the objection. No further mention was made of the polygraph during the trial. Defense counsel declined a curative instruction.

Defendant was convicted and sentenced as stated earlier, and he now appeals.

I. SNAPCHAT MESSAGES

Defendant claims that the victim's sister's testimony regarding the Snapchat messages lacked foundation and was unfairly prejudicial. We disagree.

This Court reviews a trial court's evidentiary decisions for abuse of discretion. *People v Danto*, 294 Mich App 596, 599; 822 NW2d 600 (2011). "A trial court abuses its discretion when its decision falls outside the range of principled outcomes." *Id*. "[D]ecisions regarding the admission of evidence frequently involve preliminary questions of law, e.g. whether a rule of evidence or statute precludes admissibility of the evidence. This Court reviews questions of law de novo." *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The reasons stated by defendant for his claim that the evidence lacked proper foundation are 1) the trial court ruled that the witness's testimony regarding the Snapchat messages was admissible without a request; 2) a "Snapchat log" was not admitted into evidence; and 3) doubt as to witness's basis for concluding that the messages were sent by defendant.

The admission of this evidence is governed by MRE 701, which provides:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

A "jury is *free* to credit or discredit any testimony." *Kelly v Builders Square, Inc*, 465 Mich 29, 39; 632 NW2d 912 (2001).

During the evidentiary hearing, the witness testified regarding the Snapchat messages. Neither the messages themselves, nor any log of the messages were admitted into evidence; the only mention of the messages in the presence of the jury was the witness's testimony. The witness stated several reasons that she was able to attribute the messages to defendant. First, the messages came from an account that had been used by defendant to send her messages in the past, including a message that included a picture of defendant. She was aware of the false name that defendant used in connection with his Snapchat account; she testified that her mother told her that it was defendant's account. She stated that she had a log of the conversation on her phone. The witness

quoted defendant as stating, "I'm sorry, I'm under arrest; if you get me out of jail." She knew that the messages were not being sent from her mother's phone because she was receiving Snapchat messages from two different Snapchat accounts at the same time, and her mother did not have a second phone. All this testimony indicates that the witness was aware that she received the messages and that they were sent by defendant. On the basis of this information, the trial court determined that the witness's testimony regarding the Snapchat messages was admissible. Because her testimony is rationally based on her perception, it is admissible under MRE 701. The trial court did not abuse its discretion in making this determination. Defendant has not shown how the admission of this testimony was inconsistent with substantial justice. See MCR 2.613(A).

Defendant asserts that the witness's testimony regarding the Snapchat messages is inadmissible because original copies of the messages themselves are still available, and therefore, admission of the witness's testimony violated the best-evidence rule. We disagree.

The best-evidence rule is MRE 1002, which provides, "To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by statute." The word "original" is defined in this context by MRE 1001(3):

> An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data inaccurately, is an "original."

Finally, MRE 1004(1) provides exceptions when the original writing is not required: "The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if . . . [a]ll originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith[.]"

The best-evidence rule does not apply to the testimony regarding the Snapchat messages because defendant has not established that the original was actually available. The witness testified that she "unfriended" defendant and that this action deleted the messages from her phone. As the prosecutor stated, "[T]he text messages disappear."

Defendant did not provide any argument, testimony, or evidence to contradict the prosecution's assertion that the Snapchat messages were unavailable. The Snapchat log was never admitted into evidence. There is no further discussion of it in the record, and the trial court did not ask for a copy of it. Because all the available testimony established that the original messages were unavailable, the exception under MRE 1004 applied.

Even if we were to conclude that there was error, it did not affect defendant's substantial rights because other evidence admitted was sufficient to support defendant's conviction of CSC-II. The victim testified that she was sexually assaulted by defendant. "The testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g [criminal sexual conduct statutes]." MCL 750.520h. Even though it was not required, the victim's testimony was corroborated by DNA evidence and by the testimony of the victim's sister. Defendant was found

guilty of CSC-II on the basis of this evidence. In conclusion, defendant did not show that admission of the testimony related to the Snapchat messages constituted error affecting his substantial rights.[1]

II. SEXUAL ASSAULT NURSE EXAMINER'S TESTIMONY

Defendant argues that testimony from a sexual assault nurse examiner (SANE), which included the statement that the victim told her that defendant was the person who committed the sexual assault, was inadmissible hearsay and violated the Confrontation Clause. We disagree.

"Unpreserved claims of evidentiary error are reviewed for plain error affecting the defendant's substantial rights." *People v Benton*, 294 Mich App 191, 202; 817 NW2d 599 (2011).

Hearsay is a statement, other than the one made by a declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. MRE 801(c). Hearsay statements are inadmissible, unless an exception applies. MRE 802. MRE 803(4) provides an exception to the hearsay rule, even though the declarant is available as a witness:

> 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.

"Exceptions to the hearsay rule are justified by the belief that the hearsay statements are both necessary and inherently trustworthy." *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992). In *Meeboer*, our Supreme Court held that the identification of an assailant in a sexual assault examination met the requirements for admission under this exception. *Id*. at 331.

> 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) are 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 trustworthiness of a child's statement can be sufficiently established to support the application of the medical treatment

[1] To the extent that defendant suggests that defense counsel was ineffective in failing to challenge the admissibility of the testimony regarding the Snapchat messages, we deem this issue abandoned for failure to identify it as an issue in his questions presented, see MCR 7.212(C)(5); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000), and for failure to actually develop the argument, see *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004); *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

exception. Furthermore, we find that the identification of the assailant is necessary to adequate medical diagnosis and treatment. [*Id*. at 322.]

The SANE's examination of the victim occurred the day after the sexual assault. The examination involved looking for injuries and taking swabs for DNA evidence. The general purpose of the exam was medical diagnosis and treatment. This testimony is admissible under MRE 803(4) because a statement made for medical treatment is deemed reliable, and the identification of the assailant is necessary information for the SANE to provide medical treatment. *Id*. at 328.

Defendant argues that this Court should reconsider the admission of statements identifying assailants under *Meeboer* because SANE examinations are used to gather evidence and *Meeboer* creates a way to circumvent the hearsay rules. However, "this Court is bound by Michigan Supreme Court precedent, even if such precedent has become obsolete." *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

Defendant also argues that admission of this statement violates his Sixth Amendment right to confrontation. We disagree.

The Confrontation Clause states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" US Const, Am VI; see also Const 1963, art 1, § 20. In this case, the victim testified at trial and was available for cross-examination. Therefore, defendant's rights under the Confrontation Clause are not at issue. See *Crawford v Washington*, 541 US 36, 59; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

III. EXCLUSION OF DEFENDANT'S PROPOSED CHARACTER WITNESS

Defendant sought to have a character witness admitted to rebut assertions of defendant's dishonesty raised by the testimony regarding the Snapchat messages. Defendant claims that this witness was essential to his case, and the trial court abused its discretion by excluding his testimony. Defendant also argues that the exclusion of this testimony violated his constitutional right to a fair trial under the Fourteenth Amendment Due Process Clause, and he is entitled to a new trial. We disagree.

"Admission of rebuttal evidence is within the sound discretion of the trial judge and will not be disturbed absent a clear abuse of discretion." *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996). "The test for error regarding rebuttal evidence is whether it is justified by the evidence it is offered to rebut." *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991). A trial judge has discretionary authority to prevent the trial from "turning into a trial of secondary issues." *Figgures*, 451 Mich at 398.

Generally, the determination of whether a party's due-process rights under the Fourteenth Amendment were violated is a constitutional question which this Court reviews de novo. *People v Wilder*, 485 Mich 35, 40; 780 NW2d 265 (2010). However, unpreserved claims of constitutional error are reviewed under the plain error rule. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

"Under the Due Process Clause of the Fourteenth Amendment criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense." *People v Aspy*, 292 Mich App 36, 48-49; 808 NW2d 569 (2011) (quotation marks and citation omitted). MRE 404(a)(1) "allows a criminal defendant an absolute right to introduce evidence of his character to prove that he could not have committed the crime." *People v Whitfield*, 425 Mich 116, 130; 388 NW2d 206 (1986).

The trial court's stated reason for excluding this witness is that defendant was attempting to introduce a character witness that had not been disclosed as such to the prosecution.

The trial court did not abuse its discretion by excluding this evidence. The evidence related to a secondary issue in the trial—whether defendant instructed the victim or her sister to lie—rather than directly addressing whether defendant had committed a sexual assault. Defendant did not clearly indicate what the testimony would include, or how it would relate to the evidence it was being introduced to rebut. From the discussion with defense counsel, the trial court could have reasonably concluded that the admission of defendant's proposed character witness was not justified on the basis of the evidence it was offered to rebut. See *Leo*, 188 Mich App at 422. Because the admission of the evidence was within the discretion of the trial judge, and because no clear abuse of discretion is indicated, the trial court did not err in excluding this testimony.

Moreover, defendant is also unable to show that the outcome of the case was prejudiced by the omission of this testimony. There is no indication in the record that the proposed witness had direct knowledge of the sexual assault. Therefore, the witness could not have offered any information to refute the fact that it took place. The witness was being offered to testify about defendant's character trait of honesty, in order to rebut testimony that he told the victim and her sister to lie in the Snapchat messages. But the case does not rest on those messages. The victim testified that defendant sexually assaulted her. "The testimony of a victim need not be corroborated" in criminal sexual conduct prosecutions. MCL 750.520h. Even though it was not required, the victim's testimony was corroborated by DNA evidence and by the testimony of the victim's sister. Defendant was found guilty of CSC-II on the basis of this evidence. Because defendant does not show how this witness could have addressed any elements or defenses related to the charge for which defendant was convicted, exclusion of this evidence did not prejudice defendant and does not constitute plain error affecting defendant's substantial rights. Exclusion of the proposed witness testimony did not prevent defendant from presenting a complete defense, and therefore, did not violate his rights under the Fourteenth Amendment Due Process Clause.

IV. MENTION OF POLYGRAPH EXAMINATION

A witness mentioned in the presence of the jury that defendant had been asked if he would consent to a polygraph test. Defense counsel objected, and the objection was sustained. Defendant contends that the statement was deliberate error and prejudiced defendant in front of the jury, and that a new trial should be granted on the basis of this plain error. However, defendant waived this issue when his trial counsel declined the trial court's offer to give the jury a limiting instruction. "One who waives his rights under a rule may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error." *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (quotation marks and citation omitted). Because this issue was

waived, no relief can be granted by this Court. We further note that defendant did not move for a mistrial so the issue was not preserved for review. *People v Nash*, 244 Mich App 93, 96; 625 NW2d 87 (2000).

V. PROSECUTORIAL MISCONDUCT

The prosecutor mentioned in her opening statement that one of the charges against defendant could result in a life sentence. Although defendant was found not guilty of that charge (CSC-I), defendant contends that the mention of the penalty may have influenced the jury and undermined the fairness of the trial. Defendant further contends that the prosecutor's statement was deliberate, and his conviction should be reversed. We disagree.

"In order to preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). In this case, defendant did not contemporaneously object to the prosecutor's comment included in her opening statement regarding potential penalties. Unpreserved claims of prosecutorial misconduct are reviewed for plain error that affected defendant's substantial rights. *People v Gibbs*, 299 Mich App 473, 482; 830 NW2d 821 (2013).

When making an opening statement, "[i]t is improper for the prosecutor to inject issues broader than guilt or innocence." *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976). "The rule in Michigan has always been that neither the court nor counsel should address themselves to the question of the disposition of a defendant after the verdict." *People v Goad*, 421 Mich 20, 25; 364 NW2d 584 (1984). The danger in providing information regarding a possible sentence to the jury is that, "jurors might disregard their oath to render a true verdict according to the evidence if concerned with extraneous consideration." *Id.* at 27.

> The general rule is that the jury should not normally be informed of possible punishment if a defendant is convicted. The fear is that such information may cause the jury to compromise its integrity and render a verdict based on factors other than the evidence. Defendant [is] entitled to a fair trial and to a verdict by the jury upon the evidence without consideration of the punishment to be administered. [*People v Mumford*, 183 Mich App 149, 151; 455 NW2d 51 (1990) (quotation marks and citations omitted; alteration in original).]

The comment in the prosecutor's opening statement referred to the possibility of a life sentence for defendant's CSC-I charge. The trial court did not immediately interrupt the proceedings when this statement was made, nor did defense counsel object or request a curative instruction. The trial court addressed the statement by discussing it with the attorneys and by instructing the jury that potential penalties should not influence their decision.

On appeal, defendant asserts that the prosecutor's statement was made deliberately "to exploit the statutory elements of the respective ages of the offender and victim and did so by focusing on how those elements affected the penalty." Defendant further states that the impact on the jury is that it "may have compelled some of them to seek a compromise."

This argument assumes that the jurors found this remark so persuasive that it caused them to ignore their jury instructions. The jury was instructed that, in order to support a conviction on

any charge, it would have to unanimously find beyond a reasonable doubt that all elements of the charged crime were satisfied. The jury was further instructed that its decision should not be based on any consideration of potential penalty. Defendant speculates that the mention of a penalty in the opening statement would have caused the jury to compromise, and may have impacted the jury's view of the credibility of the witnesses. However, this is mere speculation and there is no way of knowing what impact, if any, this statement had on the jury.

Defendant was acquitted of the CSC-I charge. Because of this acquittal, defendant was no longer faced with the possibility of a life sentence. Therefore, it is at least possible that the remark worked in defendant's favor—causing the jury to hesitate to convict someone when the consequences are lifetime imprisonment, on the basis of the evidence presented to them at trial. The maximum penalty for the CSC-II charge for which defendant was convicted is imprisonment of not more than 15 years. See MCL 750.520c(2)(a). Defendant does not explain how this error would have prejudiced defendant's case with the CSC-II charge because the mentioned penalty did not apply to that charge. "[W]e consider issues of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context, and *in light of defendant's arguments*." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004) (emphasis added). Defendant has not shown how this error affected his substantial rights. Therefore, he is not entitled to a reversal of his conviction.

Affirmed.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Douglas B. Shapiro