STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2011
v	No. 299084 Saginaw Circuit Court
MANUEL SHEARD IV, Defendant-Appellant.	LC No. 09-032941-FC

Before: M. J. KELLY, P.J., and FITZGERALD and WHITBECK, JJ.

PER CURIAM.

Defendant Manuel Sheard IV appeals as of right his jury convictions of four counts of criminal sexual conduct in the first-degree. See MCL 750.520b. The trial court sentenced defendant to serve consecutive prison terms of 25 to 50 years for each conviction. Because we conclude that there were no errors that warrant relief, we affirm.

Defendant's charges arise from evidence that he sexually assaulted his daughter, who was nine at the time of his trial. She testified that the incidents began in August 2007 and continued until June 2009. She gave compelling testimony about the nature and extent of the abuse and stated that the abuse ended only after she told her aunt about it. There was also expert medical testimony that the child had injuries to her genital area including a healed scar on the perineum, which had been sutured in a previous medical visit, as well as a transection of the hymen, which had not completely healed. The physician testified that, although the transected hymen could be the result of a single penetration, it was "more of a sign of potentially repeated penetration." This is because there was "no healing of that area. It left it in two pieces that never joined together."

Defendant's theory of the case was that his daughter's physical injuries were caused by a bicycle accident and that her allegations of abuse were inconsistent and contrived.

After hearing the evidence, the jury found defendant guilty on all four counts.

On appeal, defendant first argues that the prosecutor committed misconduct by introducing improper character evidence, namely that he had had an extramarital affair, and through repeated references to the improper character evidence. Defendant also argues that defense counsel's failure to object to this misconduct amounted to the ineffective assistance of counsel.

At trial, the prosecutor brought up defendant's marital infidelity during his opening statement: "[w]hat you're also going to hear is that the defendant, while married . . . during the course of that marriage relationship Mr. Sheard takes up with a [another woman] and has a child to her." The prosecutor also raised the issue of the extramarital affair during the examination of defendant's sister and his wife. He also discussed defendant's infidelity at some length in his closing remarks.

The rules of evidence provide strict limitations on the use of character evidence or other acts evidence to establish character or propensity. See *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). Nevertheless, there are circumstances when other acts evidence or character evidence—such as proof of marital infidelity—might properly be admitted. *Id.* at 92; see also *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995) (stating that evidence tending to show marital discord was properly admitted to establish motive). However, in this case, it is difficult to see how defendant's marital infidelity might be relevant for something other than an improper character or conduct inference.

Defendant's affair is not relevant to establish motive, opportunity, intent, preparation, or scheme in committing child-rape. It also is not relevant to establish a plan or system for child-rape and is not relevant to show knowledge, identity, and absence of mistake or accident. See MRE 404(b)(1). The evidence of marital infidelity was also plainly inadmissible to show character under MRE 404(a)(1) or MRE 608. Hence, one must conclude that the prosecutor elicited testimony about, and commented on, defendant's marital infidelity for improper purposes. And, indeed, in his closing remarks, the prosecutor repeatedly and plainly invited the jury to use this evidence for an improper character purpose:

> . . . He promised her he would stop. And he wouldn't stop. He takes an oath before he testifies. Swears to tell the truth, the whole truth and nothing but the truth. And then tells you, why, if I had repeatedly put my penis in her mouth, members of the jury, I would tell you that. Do you believe that? Members of the jury, if I repeatedly put my penis in her vagina, I would tell you that. Do you believe that? Members of the jury, if I repeatedly rode her from the back and put my penis in her anus, I would tell you that. Do you believe that?
>
> We know how important his oaths are. He marries . . . and takes an oath to love, honor, cherish, whatever the wedding vows were. And what does he do with his oath to . . . the mother of his two children? Why, he picks up a girlfriend. So while [his wife] is out earning money to support the family, he's home grilling, drinking, with his girlfriend . . . on the front porch. That's how much his oath is worth . . . .

These statements show that the prosecutor argued that people who violate their oaths are liars and, because defendant violated his marital oath, he too must be a liar. That is, the prosecutor emphatically asserted that defendant's marital infidelity was proof that he had a bad character—a propensity to lie—and acted in conformity with that character by committing perjury at trial.

After examining the record as a whole, it is plain that the prosecutor's efforts to elicit testimony about defendant's affair and his comments on the affair were improper. Moreover, given the limited circumstances under which such evidence would be admissible, it was plain error for the trial court to permit the testimony and comments.[1] See *People v Carines*, 460 Mich 750, 763, 769-770; 597 NW2d 130 (1999) (explaining the plain error rule and stating that the trial court committed plain error when it improperly instructed the jury). We also agree that, to the extent that defendant's trial counsel failed to object to that misconduct, the failure to object fell below an objective standard of reasonableness under prevailing professional norms.[2] *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2009) (stating that, in order to establish ineffective assistance of counsel, the defendant must show that his trial lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms). Nevertheless, we cannot agree with defendant's conclusion that he is entitled to a new trial as a result of the prosecutor's misconduct. See *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003) (stating that misconduct will not warrant a new trial unless the misconduct prejudiced the defendant's trial).

In a different case, we would almost certainly have to conclude that the prosecutor's repeated and egregious misuse of this evidence deprived defendant of a fair trial. However, whether a prosecutor's misconduct warrants a new trial will depend on the nature of the misconduct and its relation to the proofs properly adduced at trial. See, e.g., *People v Mezy*, 453 Mich 269, 285-286; 551 NW2d 389 (1996) (plurality opinion) (stating that the prosecutor did engage in misconduct, but concluding that the error was harmless in light of the record evidence). Here, defendant's daughter presented very compelling testimony about repeated sexual abuse. Further, there was medical testimony that the injuries to her vagina were consistent with having been repeatedly penetrated. Expert witnesses also opined that the injuries were not consistent with a bicycle injury, as defendant would have the jury believe. Given the overwhelming weight of the testimony and physical evidence, we conclude that the prosecutor's misconduct—although quite serious and completely unnecessary given the proofs—did not prejudice defendant. And, for that reason, it did not amount to plain error warranting a new trial. See *Carines*, 460 Mich at 763 (stating that the defendant bears the burden of showing that the error affected the outcome of the lower court proceedings). For the same reason, we cannot conclude that, but for defendant's lawyer's failure to object to this misconduct, there was a reasonable probability that the outcome would have been different. See *Uphaus*, 278 Mich App at 185. Accordingly, defendant has not established that he is entitled to a new trial.

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[1] Defendant's trial lawyer did not apparently object to the prosecutor's elicitation or use of this evidence. Therefore, this Court must review the claimed misconduct for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[2] The record shows that defendant's trial lawyer had a sidebar conference with the trial judge during the prosecutor's opening remarks, but the purpose and results of the conference were not preserved on the record.

Next, defendant argues that the trial court abused its discretion when it failed to inquire further into defendant's request for substitute counsel.

An indigent defendant is entitled to counsel, but substitute counsel will only be appointed on a showing of good cause and then only if the substitution would not unreasonably disrupt the judicial process. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Good cause exists when the defendant and counsel develop a genuine disagreement about fundamental trial tactics. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). The trial court should hear the defendant's claim when the defendant is asserting that appointed counsel is inadequate. *Id.* If there is a factual dispute, the trial court should develop a factual record and make findings and a conclusion on the record. *Id.*

On the second day of trial, defendant tried to raise some concerns about his trial lawyer's handling of his case:

> MR. COWDRY: I think Mr. Sheard wanted to say something, Your Honor. I have no idea what.
>
> THE DEFENDANT: I have a couple concerns, your honor.
>
> THE COURT: About what?
>
> THE DEFENDANT: Mr. Best felt it wouldn't be nothing in Dr. Gallester's report—
>
> MR. COWDRY: No, no, no—
>
> THE DEFENDANT: —that would help me.
>
> MR. COWDRY: Just a second.
>
> THE COURT: Talk to your attorney.
>
> THE DEFENDANT: Also, I feel that it would be better if I seek other legal representation if possible.
>
> THE COURT: We are not going to change counsel after we have gotten halfway through this trial.

The trial court made no inquiry into defendant's assertion that it "would be better if I seek other legal representation . . . ." And neither defendant nor his counsel addressed the issue again. On this record, we do not agree that the trial court abused its discretion when it failed to investigate what had prompted defendant's remark. At best, defendant's remark shows that he disagreed with the evidentiary value of a single report; the remark did not establish that he had a disagreement with his lawyer over fundamental trial strategy. See *Bauder*, 269 Mich App at 193. Disagreements regarding trial strategy are generally insufficient to warrant the appointment of new counsel. See *People v Krist*, 93 Mich App 425, 436-437; 287 NW2d 251 (1979). Moreover, defendant has not shown that his trial lawyer's representation was inadequate or how

he might have benefited from substitute counsel. In a letter submitted to this Court under Supreme Court Administrative Order No. 2004-6, standard 4, defendant suggests that there were other witnesses that he would have liked to have called at trial, but he failed to establish that those witnesses would have testified and failed to establish how their testimony might have altered the outcome of his case. Further, defendant has not demonstrated that there was otherwise a breakdown in his relationship with his trial lawyer that prejudiced his trial.

Defendant has not established that the trial court erred with regard to appointment of substitute counsel.

Defendant also argues that the trial court erred when it sustained the prosecutor's objection to a witness' testimony regarding a statement purportedly made by the victim on the ground that the testimony was inadmissible hearsay.

We review a trial court's decision to admit hearsay under one of the hearsay exceptions for an abuse of discretion. *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007). Hearsay is generally inadmissible, unless it falls under one of the exceptions. MRE 802; *Stamper*, 480 Mich at 4. An excited utterance is an exception to the hearsay rule. MRE 803(2). To qualify as an excited utterance, a statement must be a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* There is no exact time limit in which the statement must be made, and the focus should be on the lack of capacity to fabricate. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998). The trial court has wide discretion when deciding if the declarant was still under the stress of the startling event. *Id.* at 552.

Defense counsel attempted to bring in a statement made by the victim through defense witness Kierian Enciso. Defendant alleges that Enciso heard the victim say "you guys lied, you liars" after testifying at the preliminary examination. The statement was purportedly made in response to being told she could not leave with her mother, even though she had been told that if she testified, as requested, she could go with her mother. The prosecutor objected to the admission of the statement as hearsay, and defense counsel responded by asserting that it qualified as an excited utterance. The trial court told defense counsel to lay a foundation for an excited utterance. Defense counsel then tried to establish a foundation. After trying to establish a foundation, the trial court sustained the objection.

The trial court did not abuse its discretion in sustaining the objection. Defense counsel did not lay a sufficient foundation to justify admission of the statement as an excited utterance. Further, even if the trial court had admitted the statement, it would not have aided defendant. Defendant's daughter allegedly made the statement in response to not being allowed to leave with her mother. What prompted her to say those things is also hearsay and inadmissible. Without the context that tended to suggest that she had a motive to fabricate testimony, the statement could not have aided defendant's theory of the case. Therefore, the trial court's decision to sustain the objection could not have prejudiced defendant. See *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Next, defendant argues that prosecution's expert witness, Bonnie Skornia, testified on the psychological effects of sexual abuse, which was outside the scope of her expertise. Defendant asserts that Skornia's opinions on matters outside the scope of her expertise gave prejudicial weight to the prosecutor's case.

Defendant did not object to the qualification of Skornia as an expert witness; thus our review is for plain error. *Carines*, 460 Mich at 763.

This Court reviews the admission of expert testimony for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). A witness may qualify as an expert on the basis of his or her knowledge, skill, experience, training, or education. MRE 702; *People v Yost*, 278 Mich App 341, 393; 749 NW2d 753 (2008). The trial court may admit expert testimony when it believes scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence. MRE 702; *Yost*, 278 Mich App at 393. However, testimony relating to subject matter that is far outside the scope of the witness' expertise is inadmissible. *Yost*, 278 Mich App at 394.

In *People v Peterson*, 450 Mich 349, 352-353; 537 NW2d 857 (195), our Supreme Court stated that, in cases involving child sexual abuse, "an expert may testify . . . 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" and "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." Although her testimony might have been admissible under *Peterson* for a proper purpose, defendant argues that Skornia was only qualified as an expert witness in forensic interviewing. And, because her testimony about delayed disclosure and other effects was outside her scope of her expertise, it was error warranting reversal to permit her to testify as to these additional things.

Before Skornia was admitted as an expert, the prosecutor addressed her qualifications in both delayed disclosure and other psychological effects of child abuse:

> *Q.* All right. Now, is there a psychological component to these kind of offenses?
>
> *A.* Absolutely.
>
> *Q.* Is there something called delayed response, or delayed reporting?
>
> *A.* Yes. We call it delayed disclosure. But yes, there is.
>
> *Q.* Delayed disclosure. All right. Now, have you gone through specific classes, training you and teaching you what delayed disclosure is.
>
> *A.* Yes, I have.

Skornia indicated that there was no special name for that particular type of training, and it was all encompassed in forensic interviewing. Defense counsel then addressed Skornia's qualifications, before the trial court admitted her as an expert:

> *Q.* Okay. What specific training do you have in psychology?
>
> *A.* During the nursing courses or nursing—to get my degree there were many different psychological courses that we took. And then during some of the national classes that we have had—it wasn't actually psychology, but there was stuff that talked about behaviors.
>
> *Q.* How many hours of psychology would you say you have?
>
> *A.* I couldn't give it a number. I don't know.
>
> * * *
>
> *Q.* Okay. You also attended a class, or classes in forensic interviewing?
>
> *A.* Yes, sir.
>
> *Q.* Okay. And where were those classes?
>
> *A.* I have a list here if you would like that. This is a list of all the trainings I have had. The yellow ones show the trainings I have conducted.
>
> * * *
>
> MR. COWDRY: With the CV that Ms. Skornia has provided I would have no objection to her being classified as an expert in the field.
>
> THE COURT: The Court finds Ms. Skornia to be an expert in the field of forensic interviewing, and I will allow her to give expert testimony in that field.

It is clear from this exchange that the parties understood that certain psychological issues that are related to the disclosure of abuse by minors, such the phenomena of delayed disclosure, were included within Skornia's training on forensic interviewing. Defendant's lawyer had the opportunity to explore Skornia's qualifications, and did not object to her qualification as an expert in the area of forensic interviewing, which included the issues defendant now claims Skornia was not qualified to discuss. Because defense counsel agreed to Skornia's qualification as an expert in the field, defendant waived any claim of error in the admission of her testimony on those areas. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Even if defendant had not waived this claim of error, the claim fails under plain error review. Skornia's testimony regarding delayed disclosure and the psychological effects of child abuse were arguably within her expertise, and was necessary to demonstrate to the jury why complainant responded the way she did. *Peterson*, 450 Mich at 352-353.

Finally defendant has submitted a letter under standard 4 in which he essentially gives a statement of his version of events. In this letter, defendant does not make any meaningful argument concerning a claim of error that might warrant relief, has not submitted adequate documentary support or citations to the record in support of his letter, and cited no legal authority for any claim of error. Therefore, we conclude that he has abandoned any claim of error stated in this standard 4 submission. See *People v Harris*, 261 Mich App 44, 50; 680 NW2d 17 (2004).

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ E. Thomas Fitzgerald
/s/ William C. Whitbeck