STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MICHAEL DAVID PIPER,

Defendant-Appellee.

UNPUBLISHED
September 17, 1996

No. 171096
LC No. 93-62447-FC

Before: Doctoroff, C.J., and Hood and Bandstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He also pleaded guilty to habitual offender, third offense. He was sentenced to ten to twenty-five years' imprisonment for each conviction, to run concurrently, but consecutive to what remained of his sentence for absconding on bond. Defendant appeals by right. We affirm.

This case involves the criminal sexual assault of a five-year-old girl. Defendant, who is the victim's uncle, and his wife, who is the victim's mother's sister, were staying a few weeks with the victim, her mother, and the victim's younger sister in the mother's apartment. Defendant and his wife slept on the floor in the victim's bedroom and on some nights the victim slept on a mattress next to them. The victim testified that in the early morning, she was sleeping next to defendant and his wife when defendant performed cunnilingus on her and penetrated her rectum with his finger.

The victim's mother testified that later that morning, the victim told her that defendant had put his mouth on her vaginal area and put his finger in her bottom. Upon inspection, the mother discovered redness around the victim's vaginal area. The mother took the victim to the Children's Assessment Center (the Center) where the victim interviewed with Detective Karpowicz and social worker Mary Heikkinen. Karpowicz and Heikkinen testified that the victim told them that defendant had sexually assaulted her. Dr. Cox examined the victim and discovered two areas of redness at the edge of the hymen and a bruise on her anal opening.

Defendant denied the entire incident. His theory was that the true perpetrator was the victim's mother's boyfriend, who often slept over at the apartment and slept over on the night in question.

Defendant first argues that the trial court abused its discretion in allowing two investigating officers (Detective Karpowicz and Officer Nawrocki), a social worker (Heikkinen), and Dr. Cox to testify about statements that the victim made to them. We disagree. The decision to admit evidence is within the trial court's discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995).

Part of the people's case-in-chief dealt with cumulative evidence of the victim's statement of the sexual assault. The six-year-old-victim, who was five at the time of the crime, testified that defendant performed cunnilingus on her and put his finger in her rectum. The victim made the statement to Detective Karpowicz, Officer Nawrocki, Heikkinen, and Dr. Cox. At trial, all four witnesses repeated the statement made to them by the victim.

MRE 801(d)(1)(B) provides that a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive.

Under MRE 801(d)(1)(B), the prosecution can use prior consistent statements by a witness if there is either an express of implied charge of recent fabrication. In this case, the defense made an implied charge of recent fabrication. The defense theory was that the victim's mother's boyfriend was the perpetrator. In the opening statement, the defense said that there would be evidence that the victim talked with the mother's boyfriend. During the cross-examination of the victim's mother, defendant asked her where her boyfriend was at all times of the night of the incident. After the victim's testimony, defendant presented to the jury the victim's statement at the preliminary examination that the mother's boyfriend had talked to her about "this case." Furthermore, the victim testified at trial, was subject to cross-examination, and made the statements to Nawrocki, Karpowicz and Heikkinen before there was a chance for corruption or bias from the mother's boyfriend. *People v Lewis*, 160 Mich App 20, 29; 408 NW2d 94 (1987). We therefore conclude that under 801(d)(1)(B), the prosecution was properly allowed to rebut the implied charge of recent fabrication with the prior consistent statements made to Heikkinen, Karpowicz and Nawroski.

Defendant also argues that the trial court abused its discretion in allowing Dr. Cox to testify about statements that the victim made to him. Although hearsay is generally not admissible, there is an exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. MRE 803 (4); *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992). Under MRE 803(4), the declarant must have the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and the statement must be reasonably necessary to the diagnosis and treatment of the patient. *Id.*

We find that the victim's statements to Dr. Cox meet the ten-factor test for trustworthiness set forth in *Meeboer*, pp 324-325. The first factor is the age and maturity of the declarant. The complainant was five-years-old at the time that she told Dr. Cox of her ordeal. Children over the age of ten are presumed to be reliable. *People v Hyland*, 212 Mich App 701, 705; 538 NW2d 465 (1995). However, lacking any evidence that this five-year-old was immature, we will weigh her age and maturity in her favor. *Id.* The second factor is the manner in which the statements were elicited. Dr. Cox asked the victim how she was hurt in her private parts. In response to these neutral questions, the complainant responded without any problems. We find that the complainant's statements were not elicited in a manner that would undermine its credibility. See *Id.* The third and fourth factors for the trial court to consider are the manner in which the statements are phrased and the use of terminology unexpected in a child of similar years. The complainant's use of the words "down there" and "bottom" were not scientifically complex and do not indicate that her statements were influenced by an adult. *Id.* The fifth factor involves the reason for the examination. If the prosecutor scheduled the medical examination, it might indicate that the examination was not for the purposes of medical treatment. *Id.*, p 706. Here, the complainant's mother testified that she brought the complainant to the Center because she saw redness around her vagina. The sixth and seventh factors involve the timing of the examination in relation to the abuse and to the trial. The complainant was brought to the Center within hours after her mother learned of the incident. The eighth factor is the type of examination. A physical examination in the Center provides no indicia of unworthiness. The ninth factor involves the relation of the declarant to the person identified. The complainant identified defendant, her uncle, who had been temporarily living with her family. The identification of the perpetrator related to psychological treatment for the victim. The tenth factor is the existence of a motive to fabricate. Defendant has not provided any evidence of a motive to fabricate.

In addition to the ten-factor test, the reliability of the hearsay is strengthened when it is supported by other evidence, including the resulting diagnosis and treatment. *Meeboer*, *supra*, pp 325-326. Here, the physical examination's findings--two spots of redness at the edge of the hymen and a bruise on the anal opening--corroborated the complainant's account of what happened. Also, there was evidence that defendant had the opportunity to commit the assault. We therefore conclude that the trial court did not abuse its discretion in allowing Dr. Cox to testify about the statement that the complainant made to him. In any case, the statements were cumulative to the complainant's testimony, and, therefore, harmless. *People v Van Tassel (On Remand)*, 197 Mich App 653, 655; 496 NW2d 388 (1992).

Next, defendant argues that the trial court infringed on his right to confrontation by denying him the opportunity to impeach the victim with her prior inconsistent testimony while she was on the stand. We disagree. Whether a trial court has properly limited cross-examination is reviewed for an abuse of discretion. *People v Minor*, 213 Mich App 682, 684; 541 NW2d 576 (1995).

A primary interest secured by the Confrontation Clause is the right of cross-examination. *Delaware v Van Arsdall*, 475 US 673, 678; 106 S Ct 1431, 1434; 89 L Ed 2d 674 (1986). The Confrontation Clause guarantees an opportunity for an effective cross-examination. It does not, however, guarantee cross-examination that is effective in whatever way, and to whatever extent, the

defense might wish. *Delaware v Fensterer*, 474 US 15, 20; 106 S Ct 292; 88 L Ed 2d 15 (1985). (1982). "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Van Arsdall*, *supra*, p 679.

In this case, on cross-examination of the victim, defense counsel tried to impeach her with her prior inconsistent statements made at the preliminary examination. After several questions, the court ruled that defense counsel would be allowed to read to the jury the pertinent parts of the preliminary examination transcripts after the victim's testimony. After the ruling, the court permitted defense counsel to continue cross-examination. After the victim testified, the court had defense counsel read portions of the transcripts which contradicted the complainant's testimony. We find that defendant was not denied his right to cross-examine the victim.

Defendant next argues that he was denied a fair trial by repeated instances of prosecutorial misconduct. We disagree. Appellate review of improper prosecutorial remarks is generally precluded absent an objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.* This Court examines the pertinent portion of the record and evaluates a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993).

First, defendant argues that the prosecutor improperly opined that complainant was credible and defendant was guilty. However, in this case, the statement of the prosecutor's belief in the honesty of the complainant's testimony and his belief in the guilt of the defendant based on the testimony does not constitute error requiring reversal since, as a whole, the remarks were fair. *People v McElheny*, 221 Mich 50, 56; 190 NW 713 (1922); *People v Rosales*, 160 Mich App 304, 309; 408 NW2d 140 (1987). Moreover, a prompt admonishment to the jury regarding their role as factfinder would have cured any error. *Stanaway*, *supra*.

Second, defendant argues that the prosecutor improperly questioned defendant's wife about her relationship with other men. Because defendant failed to object to this line of questions, and the questioning did not produce any prejudicial effect, defendant's claim must fail.

Third, defendant argues that the prosecutor improperly raised the issue of race. There was testimony that following the assault, the victim "has nightmares, she is scared of anybody--of an Indian." Defendant objected to this line of questioning on grounds of relevancy. The only comment made after this questioning was made by the prosecutor in closing that the victim was having nightmares as a result of the incident. We cannot conclude that the court abused its discretion by allowing evidence of the victim's nightmares to be admitted. Furthermore, this comment did not deprive defendant of his right to a fair and impartial trial. *Allen*, *supra*.

Fourth, defendant argues that the prosecutor appealed to the sympathies and prejudices of the jurors and injected issues broader than guilt. We find that the prosecutor's comments, made during closing argument, were proper statements of the prosecution's theory of the case. The prosecutor urged the jury to convict defendant "based on the evidence you've heard." The prosecution is free to comment on the evidence and all reasonable inferences from the evidence as it relates to its theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1989). Furthermore, defendant failed to challenge the comments made in closing. Again, a prompt admonishment to the jury regarding their role as factfinder would have cured any error. *Stanaway*, *supra*.

Fifth, defendant argues that the prosecutor tried to elicit expert testimony from Heikkinen that she believed that the victim was sexually abused. However, defendant objected to the questions, and the trial court sustained the objections. Therefore, no miscarriage of justice occurred. Defendant also argues that the prosecutor knew that the questions were improper. There is no evidence on the record that the prosecutor knew the impropriety of the questions.

Defendant also argues that the cumulative effect of the improper remarks requires reversal. We do not believe that the cumulative effect of the prosecutor's comments deprived defendant of a fair and impartial trial.

Finally, defendant argues that he was denied a fair trial by the court's questioning of Dr. Cox about the purposes of medical treatment. He claims that the court's questions were intimidating, argumentative, unfair and partial. We disagree. The court's questioning of a witness is subject to a harmless error analysis. *People v Weathersby*, 204 Mich App 98, 110; 514 NW2d 493 (1994).

In this case, the trial court asked Dr. Cox the purpose of his evaluations and examinations of children who come in to the Center. There was nothing inherently improper, prejudicial, or partial in this line of questioning.[1] Furthermore, the questions were relevant to a determination of whether the victim's statements to Dr. Cox were admissible under MRE 803(4), and *Meeboer*, *supra*. We therefore conclude that the court's questioning of Dr. Cox did not prejudice defendant or deprive him of a fair trial.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Harold Hood
/s/ Richard A. Bandstra

[1] Although Dr. Cox's responses were partial, there is no evidence that the court, through its questions, appeared partial to the jury.