STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PAUL BRIAN VILLENEUVE,

Defendant-Appellant.

UNPUBLISHED
November 12, 1996

No. 183498
LC No. 94-004679

Before: Michael J. Kelly, P.J., and Hood and H.D. Soet,* JJ.

PER CURIAM.

Defendant appeals by right his conviction following a jury trial of first-degree criminal sexual conduct ("CSC 1"), MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and his conviction following a bench trial of being a second habitual felony offender, MCL 769.10; MSA 28.1082. Defendant was sentenced to eleven to twenty-five years imprisonment for the habitual offender conviction. We affirm.

Defendant first argues that the trial court erred in admitting the prior consistent statements of the complainant. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Hurt*, 211 Mich App 345, 350; 536 NW2d 277 (1995). Prior consistent statements of a witness are generally not admissible as substantive evidence. There are, however, three exceptions to this rule. One, where the statement is used to rebut a charge of influence, two, when there is a question as to whether the witness made a prior inconsistent statement and three, where a witness has been impeached with allegations of recent fabrication. *People v Strickland*, 162 Mich App 623, 627; 413 NW2d 457 (1987). Furthermore, prior consistent statements can be used to rehabilitate a witness impeached by a prior inconsistent statement. *People v Miller*, 165 Mich App 32, 49, 418 NW2d 668 (1988); *People v Smith*, 158 Mich App 220, 227; 405 NW2d 156 (1987). The trial court properly admitted the officer's testimony. Defense counsel opened the door to such testimony by asking the complainant's mother if the complainant had recently told her that her boyfriend had assaulted the complainant rather than defendant. The complainant's two statements to the police were used to rehabilitate him and thus were properly admitted. *Miller*, *supra*, 165 Mich App 49. Even if the trial court erred in admitting the officer's testimony, reversible error may not be predicated on an evidentiary ruling unless a substantial

right was affected. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993). Because the complainant himself testified that he had been assaulted by defendant, the error in admitting the officer's testimony was harmless. *Id.*; *Miller, supra*, 165 Mich App 50.

Next, defendant contends that the trial court failed to swear or affirm that the six year old complaintant would testify truthfully. Absent an abuse of discretion, this Court will not reverse the trial court's decision to permit a child witness to testify. *People v Coddington*, 188 Mich App 584, 597; 470 NW2d 478 (1991). Whenever a child under the age of ten is produced as a witness, the court shall examine the child publicly or privately and ascertain to its own satisfaction whether the child has sufficient intelligence and sense of obligation to tell the truth so as to be safely admitted to testify. In such cases, the testimony may be given on a promise to tell the truth instead of an oath or statutory affirmation. MCL 600.2163; MSA 27A.2163. Prior to the complainant testifying, the court stated: "The witness is not given an oath in such cases, but gives testimony upon a -- by other means, all of which has already been done, so we are going to begin with the questioning." There was no error in failing to again inquire into his competency to testify in front of the jury, because the judge had already made a determination at the preliminary examination and a pretrial evidentiary hearing that the complainant was competent. MCL 600.2163; MSA 27A.2163; *People v Hargrove*, 57 Mich App 378, 381 n 1; 225 NW2d 772 (1975). With regard to defendant's claim that the court did not ask if the complainant understood that he had to tell the truth, even if the court did not do so, the prosecutor, prior to asking any substantive questions, asked the complainant if he understood that he had to tell the truth, to which the complainant replied that he did. MCL 600.2163; MSA 27A.2163.

Defendant also argues that the trial court should have ordered a competency hearing for defendant. The determination of whether a defendant is competent to testify is within the trial court's discretion. *People v Garfield*, 166 Mich App 66, 73; 420 NW2d 124 (1988). Here, there was no request for a competency hearing nor the required showing of necessity which would require the trial court to order such a hearing. MCR 6.125; *Garfield, supra* at 73; *People v Spry*, 74 Mich App 584, 589-592; 254 NW2d 782 (1977); *People v Fisk*, 62 Mich App 638, 641; 233 NW2d 684 (1975). Counsel's mere mention at a pretrial hearing and at sentencing that defendant was having problems with his memory did not amount to either a request for a hearing nor evidence that defendant was incompetent. *Garfield, supra* at 73. In fact, after a brief examination by the court during the pretrial hearing, the court preliminarily determined that defendant was competent. Thus, the trial court's failure to sua sponte order such a hearing did not lead to reversible error. *Spry, supra* at 589-592.

Next, defendant argues that he received in effective assistance of counsel because his attorney failed to request a competency hearing, misstated evidence in his opening statement and improperly questioned a police officer. To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that, under an objective standard of reasonableness, counsel was not functioning as an attorney as guaranteed by the Sixth Amendment to the United States Constitution. Moreover, the defendant must overcome the presumption that the challenged action could be considered sound trial strategy. As well, the defendant must show that any deficiency was prejudicial to his case. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995); *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). Counsel's failure to request a

competency hearing did not lead to reversible error. There is nothing in the record, other than some passing references to his possible memory loss, to show that defendant was less than reasonably competent. Counsel reserved his right to request a competency hearing and declined to ask for one. Because counsel refrained from requesting such a hearing, there was probably no basis for seeking one. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991); *People v Parker,* 133 Mich App 358, 363; 349 NW2d 514 (1984). Although counsel erroneously stated that the complainant had said that defendant may have molested his sister prior to touching him, the trial court cured any error during its instructions to the jury that the arguments, statements and questions of counsel are not evidence and not to be considered when rendering their verdict. *LaVearn, supra,* at 213. Lastly, counsel's questioning of Officer Skiba, which resulted in the bolstering of the complainant's testimony, was not ineffective assistance of counsel. Counsel, during his cross-examination of Officer Skiba was attempting to impeach the complainant and place before the jury evidence that someone else may have een the perpetrator That this strategy arguably led to the admission of damaging evidence, does not render its use ineffective assistance of counsel. *People v Murph,* 185 Mich App 476, 479; 463 NW2d 156 (1990). See also *People v Johnson,* 174 Mich App 108, 112-113; 435 NW2d 465 (1988); *People v Krist,* 93 Mich App 425, 438; 287 NW2d 251 (1979).

Defendant further argues that the cumulative effect of these errors denied him his right to a fair trial. Although individual errors by themselves may not lead to reversible error, the cumulative effect of these errors may be so prejudicial as to deny a defendant his right to a fair trial. *People v Morris*, 139 Mich App 550, 563; 362 NW2d 830 (1984); *People v Skowronski*, 61 Mich App 71, 81; 232 NW2d 306 (1975). However, because defendant has failed to establish the existence of any prejudicial error, this issue is without merit.

Defendant also argues that his sentence was not proportionate with the crime committed. We disagree.

When reviewing a sentence for proportionality, provided permissible factors are considered, this Court's review is limited to whether the sentencing court abused its discretion. *People v Coles*, 417 Mich 523, 530; 339 Mich 440 (1983), overruled in part on other grounds, *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentencing court abuses its discretion when it violates the principle of proportionality. A sentence must be proportionate to the seriousness of the offense and the conduct of the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). Appellate review of an habitual offender sentence is limited to whether the sentence violates the principle of proportionality without reference to the guidelines. *People v Gatewood*, 450 Mich 1021; ___ NW2d ___ (1996), after remand *People v Gatewood,* ___ Mich App ___; ___ NW2d ___ (No. 193626, rel'd 05/14/96), Slip op 1. Here, in light of the fact that defendant had been convicted of CSC 1 for assaulting his six year old nephew, that in 1988, defendant pleaded no contest to a charge of CSC 2 involving an eight-year old girl, that these two CSC convictions provided the basis for defendant's habitual offender conviction, that defendant had been convicted of various misdemeanors, including larceny under $100, retail fraud and possession of marijuana and had dropped out of school in grade ten and never held a steady job, the sentence of eleven to twenty-five years was proportionate. *Milbourn, supra* at 635-636, 654.

Finally, defendant argues that his sentence was so disparate that it amounted to cruel and unusual punishment. Sentences which are proportionate do not constitute cruel and unusual punishment. *People v Bullock*, 440 Mich 15, 40-41; 485 NW2d 866 (1992); *Williams, supra* at 543. Therefore, defendant's eleven to twenty-five year sentence did not constitute cruel and unusual punishment. *Id.*

Affirmed.

/s/ Michael J. Kelly
/s/ Harold Hood
/s/ H. David Soet