STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WAYNE GREER,

Defendant-Appellant.

UNPUBLISHED
July 15, 1997

No. 187475
Allegan Circuit Court
LC No. 94-009599

Before: Bandstra, P.J., and Hoekstra and J.M. Batzer*, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), second-degree CSC, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2). Subsequently, defendant pleaded guilty to being a second habitual offender, MCL 769.10; MSA 28.1082, and was sentenced to concurrent terms of imprisonment of twenty-five to fifty years for the first-degree CSC conviction, ten to 22-1/2 years for the second-degree CSC conviction, and fifteen to 22-1/2 years for the child abuse conviction.

Defendant first argues that the trial court abused its discretion in qualifying Marie Gale as an expert. We disagree. The trial court properly determined that Gale was qualified as an expert based on her training, background, and experience. MRE 702; *People v Haywood*, 209 Mich App 217, 224-225; 530 NW2d 497 (1995). In this case, Gale testified that she had been employed by Child and Family Services as a clinical social worker for over two years and that she had provided therapy to over one hundred children, many of whom had been sexually or physically abused. She testified that she was trained to recognize the symptoms or characteristics of sexual abuse in children's conduct and that she had a master's degree in social work. Gale had also participated in continuing education seminars involving both physical and sexual abuse of children. Gale was previously employed by two other agencies where she provided therapy to children and had previously testified in several courts regarding physical and sexual abuse therapy.

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* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Defendant also argues that Gale's expert testimony improperly vouched for and buttressed the victim's credibility. We agree. Although defendant failed to preserve this issue by objecting at trial, we will consider the issue because, under the facts of this case, the error could have been decisive of the outcome. *People v Grant,* 445 Mich 535, 553; 520 NW2d 123 (1994). Recently, in *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995), our Supreme Court revisited its decision in *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), to "determine the proper scope of expert testimony in childhood sexual abuse cases." The Court held that an expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of "explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim or to rebut an attack on the victim's credibility." *Peterson, supra* at 373.

In the present case, Gale testified that the behavior of the victim, which included inappropriate sexual behavior such as rubbing up against her pelvis, indiscriminate affection with strangers and family members, inappropriate sexualized activity, toileting problems, and teeth grinding, was consistent with having been sexually abused. This was error. The testimony was not given to rebut an attack on the victim's credibility nor was there any evidence presented regarding the victim's behavior that might be construed by the jury as being inconsistent with that of an abuse victim, such as "delay in reporting, recantation, accommodating the abuser or secrecy." *Id.* at 373, n 12. Defense counsel did not attack the victim's credibility on cross-examination nor did he give an opening statement which could have possibly been construed as an attack on the victim's credibility. Furthermore, the victim testified that she told her biological mother "[l]ots of times" about the abuse. Although the victim did not say when she told her biological mother about the abuse and thus it could be argued that the victim delayed reporting the abuse, Gale's testimony would still have to have been limited to the behavior in question, i.e., the delayed reporting. *Id.* at 374, n 13. There was no justifiable basis for Gale's testimony regarding all the other behavior traits.

Nor can we conclude that Gale's testimony was harmless error as was the case in *Peterson, supra* at 377-379. Unlike *Peterson*, the present case did not have any medical testimony that corroborated sexual abuse. In fact, the victim's biological mother testified that she took the victim to see a doctor for regular checkups and there was never a need for medical treatment regarding any vaginal or rectal bleeding. The only evidence that the victim had been sexually abused came from the victim herself who was six years old at the time of trial and who was testifying to sexual abuse that occurred when she was about three or four years old. Unlike the victim's testimony in *Peterson, supra* at 377, n 15, the present victim's testimony was inconsistent at times and was prone to suggestibility. It cannot be said that the improper expert testimony that the victim's behavior was consistent with having been sexually abused did not affect the jury's verdict.[1]

Next, defendant argues that the trial court abused its discretion in allowing the prosecutor to introduce similar acts evidence through the testimony of the victim's sister. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion. *People v McAlister,* 203 Mich App 495, 505; 513 NW2d 431 (1994). In this case, the trial court recognized the evidentiary safeguards regarding MRE 404(b) as enunciated in *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205

(1994), and properly admitted the testimony in question. Because defendant's plea of not guilty put all the elements of the charged offenses at issue, *VanderVliet, supra* at 78, the testimony was relevant to show defendant's intent, absence of mistake, or a system or plan of how the acts were conducted. We also note that the sister's testimony that she saw defendant make the victim "eat poop" was properly admitted because the sister was a witness to some of the abuse that occurred between defendant and the victim. This particular testimony does not constitute similar acts evidence.

Defendant argues that insufficient evidence existed to convict him of first-degree CSC and first-degree child abuse. We disagree. A review of the record in this case indicates that the prosecution presented sufficient evidence on each element of the crimes charged, particularly when the evidence is viewed in a light most favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). A person is guilty of first-degree CSC if he or she engages in sexual penetration with another person and if that other person is under thirteen years of age. *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). There is no dispute that the victim in this case is under the age of thirteen. As to the penetration element of first-degree CSC, "any . . . intrusion, however, slight," is sufficient. *Id.* The victim testified that defendant put his "wiener" and a Care Bear foot into her "front [private] part" and that defendant put his "wiener" in her "butt." The victim testified that defendant's "wiener" looked like a hot dog and was the color of his skin. This testimony was sufficient to establish penetration of the victim's anus. Although defendant asserts that anal penetration could not have occurred because the victim testified that it did not hurt when defendant penetrated her "butt," the question was one of fact for the jury to decide. *Wolfe, supra* at 514-515. The jury's function is to decide the weight and credibility to be given to a witness' testimony. *Id.*

As to the disputed serious mental harm element of first-degree child abuse, we conclude that sufficient evidence was admitted to establish the element. "Serious mental harm" is defined as "an injury to a child's mental condition or welfare that is not necessarily permanent but results in visibly demonstrable manifestations of a substantial disorder of thought or mood which significantly impairs judgment, behavior, capacity to recognize reality, or ability to cope with the ordinary demands of life." MCL 750.136b(f); MSA 28.331(2)(f). Evidence that the victim urinated in inappropriate places and engaged in inappropriate sexual behavior as well as her teeth grinding, restlessness, aggressiveness, and unusually high tolerance for pain shows that she suffered from serious mental harm in that her judgment and behavior were significantly impaired. Simply because the victim was able to testify does not indicate that she did not suffer a serious mental injury as defendant alleges.

Defendant asserts that the prosecutor's closing argument was improper because she vouched for the truthfulness of the victim's testimony, denigrated defendant, and shifted the burden of proof to defendant. Because defendant failed to object to the prosecution's remarks, our review is foreclosed unless the prejudicial effect of the remarks was so great that it could not have been cured by an appropriate instruction or where failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). We have reviewed defendant's arguments and conclude that any prejudice could have been cured by an appropriate instruction had defendant requested one. *Stanaway, supra.*

Defendant also argues that he was denied his right to effective assistance of counsel in that his counsel failed to present a defense, to properly cross-examine prosecution witnesses, and to prepare for trial. Our review of this issue is limited to the record because defendant did not request a *Ginther*[2] hearing. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the trial would have been different. *Stanaway*, *supra* at 687-688.

Defense counsel's failure to object to the expert testimony that the victim's behavior was consistent with having been sexually abused prejudiced defendant because that testimony was improper as stated above and, but for counsel's error, there was a reasonable probability that the result of the trial would have been different. Defense counsel's performance in this regard fell below an objective standard of reasonableness because his failure to object demonstrates an unfamiliarity with *Beckley*, *supra*, which, at the time of trial, was the leading case regarding which expert testimony is proper in a prosecution for child sexual abuse.

As to defendant's other ineffective assistance claims, we conclude that defense counsel's actions either did not prejudice defendant or were a matter of trial strategy with which we will not interfere. *Stanaway, supra*; *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). There is no evidence on the record that defense counsel was unprepared for trial or that defense counsel did not properly cross-examine witnesses. We further note that, although defendant in his appellate brief, states that defense counsel erroneously opted not to have defendant testify on his own behalf at trial, the record reveals that defendant stated that he also did not want to testify.

Defendant asserts that the trial court erred in failing to give the jury cautionary instructions on the limitations of its use of the "similar acts" evidence in child CSC cases, CJI2d 20.28, and on its use of expert testimony given at trial, CJI2d 20.29. We disagree. Defendant waived review of this issue by failing to object to the trial court's instructions. In any event, our review of the instructions given by the trial court fairly presented the issues to be tried and adequately protected defendant's rights. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). We also note that a comparison between CJI2d 20.28 and the actual instruction given by the trial court reflects that the two instructions are virtually identical and that there are no differences of any consequence between them. Furthermore, defense counsel's failure to request CJI2d 20.28 and 20.29 did not constitute ineffective assistance of counsel as argued by defendant.

Because we are reversing and remanding for a new trial, we need not address defendant's sentencing arguments.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra

[1] Although we recognize that, at the time of trial, the court did not have the benefit of *Peterson*, the trial court did have available the case of *Beckley*, *supra*, which had held that "evidence of behavioral patterns of sexually abused children is admissible 'for the narrow purpose of rebutting an inference that a complainant's postincident behavior was inconsistent with that of an actual victim of sexual abuse, incest or rape.'" *Beckley*, *supra* at 710.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).