

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY ALVA THATCHER,

Defendant-Appellant.

UNPUBLISHED
September 9, 2003

No. 238361
Eaton Circuit Court
LC No. 01-020251-FC

Before: Meter, P.J., and Talbot and Borrello, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of four counts of first-degree criminal sexual conduct (“CSC I”), MCL 750. 520b(1)(a), for the sexual abuse of his nine-year-old stepdaughter. He was sentenced to four concurrent prison terms of thirteen to thirty years each. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred by allowing the complainant’s grandmother to testify about the complainant’s statements to her describing the sexual abuse. “The decision whether evidence is admissible is within the trial court’s discretion and should only be reversed where there is a clear abuse of discretion.” *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). We agree with the trial court that the statements were admissible under MRE 803A.

First, the record does not support defendant’s claim that the complainant’s statements to her grandmother were not admissible under MRE 803A(1) because they were not the “first” corroborative statements. Although the complainant admitted that she tried to disclose the sexual abuse to both her mother and her father before she told her grandmother, she stated that she was unable to do so because defendant was present or she was too afraid. The evidence disclosed that the complainant’s statements to her grandmother were the first corroborative statements describing the sexual abuse.

We also reject defendant’s argument that MRE 803A(2) was not satisfied because the statements were not spontaneous. In *People v Dunham*, 220 Mich App 268, 272; 559 NW2d 360 (1996), this Court held that the victim’s statements to a mediator were spontaneous for purposes of MRE 803A(2) where they were made in response to open-ended questions. In the instant

case, the evidence disclosed that the complainant's grandmother began by asking general questions and narrowed the focus of the questions only after the complainant became more specific about her allegations, after which the grandmother called the police. The complainant's grandmother did not specifically inquire whether defendant sexually abused the complainant or ask detailed, leading questions. We conclude that the complainant's statements were sufficiently spontaneous to be admissible under MRE 803A.

Defendant also argues that the statements were not admissible under MRE 803A(3), because they were not made immediately after the alleged incidents and the delay was inexcusable. We disagree. The complainant testified that she did not reveal the abuse sooner because defendant threatened to spank her "until [she] never sat down" and to kill her with his sword if she revealed the abuse. Under the circumstances, the delay in reporting the abuse was excusable. See, e.g., *Dunham, supra* at 272 (eight or nine month delay in reporting sexual abuse was excusable due to the victim's well-grounded fear of the defendant); *People v Hammons*, 210 Mich App 554, 558; 534 NW2d 183 (1995) (a delay of several days in reporting sexual abuse by the defendant was excusable because of the victim's fear of reprisal by the defendant).

Accordingly, the trial court did not abuse its discretion in allowing the complainant's corroborating statements under MRE 803A.

II

Defendant next argues that the trial court improperly permitted the complainant to testify about uncharged acts of sexual conduct between herself and defendant. We disagree. A trial court has discretion to admit evidence of prior acts of sexual intimacy between a defendant and a victim because the prior acts often have the proper purpose of corroborating evidence of the charged crimes and helping to explain an otherwise incredible charge. MRE 404(b); *People v DerMartzex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973). In the instant case, the prosecutor offered the other acts evidence for the permissible purposes of corroborating the complainant's testimony and to explain her inability to provide specific dates or recall certain details concerning the charged acts of sexual abuse. *People v Sabin (After Remand)*, 463 Mich 43, 69-70; 614 NW2d 888 (2000); *DerMartzex, supra* at 413-414; *People v Dreyer*, 177 Mich App 735, 737-738; 442 NW2d 764 (1989). Additionally, defendant admitted to the police that he may have inadvertently touched the complainant in an improper manner while he slept, and that the contact, if any, was not done purposefully. The other acts evidence was admissible to rebut any claim that the charged sexual conduct occurred by "mistake or accident." MRE 404(b)(1). Finally, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. See *DerMartzex, supra* at 413; *Dreyer, supra* at 738. Accordingly, the trial court did not abuse its discretion in allowing this evidence.

III

Defendant argues that the trial court erroneously admitted both an audiotape recording of his statements to the police, and a videotape recording of additional statements made during a subsequent interview. We disagree.

Defendant argues that the audiotape recording of his statements was not admissible because he was not advised of his *Miranda*¹ rights before giving the statements. Because defendant did not object to this evidence at trial, appellate relief is precluded absent a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Generally, the prosecutor may not use an accused's custodial statements as evidence unless he demonstrates that, before any questioning, the accused was advised of his *Miranda* rights. *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000). However, *Miranda* warnings are not required unless the accused is subject to a custodial interrogation. *People v Hill*, 429 Mich 382, 384; 415 NW2d 193 (1987); *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000). Whether an accused was in custody depends on the totality of the circumstances. The key question is whether the accused could reasonably believe that he was not free to leave. *People v Marsack*, 231 Mich App 364, 374; 586 NW2d 234 (1998); *People v Mendez*, 225 Mich App 381, 382; 571 NW2d 528 (1997).

In the instant case, the officer who interviewed defendant testified that, when he first contacted defendant at his home, he told defendant that he wished to speak with him about some accusations of inappropriate touching and asked defendant if he would come to the police station for an interview. Defendant chose to follow the officer to the police department in his own car. Before the interview, the officer told defendant that he was free to go, that the statement was voluntary, and that, no matter what information defendant provided, he would be free to leave. Defendant agreed to speak with the officer.

Defendant relies on the fact that the questioning occurred at a police station in support of his claim that he was subject to a custodial interrogation requiring *Miranda* warnings. The mere fact that voluntary questioning occurs at a police station, however, does not require the administration of *Miranda* warnings. *Oregon v Mathiason*, 429 US 492, 493-495; 97 S Ct 711; 50 L Ed 2d 714 (1977); *Mendez*, *supra* at 383-384. Further, the officer's subjective hope that defendant would decide to speak freely without an attorney is not relevant to a determination of whether defendant reasonably believed that he either was or was not free to leave. See *Stansbury v California*, 511 US 318, 323, 325; 114 S Ct 1526; 128 L Ed 2d 293 (1994); *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). Defendant has not shown that the totality of the circumstances compels a conclusion that he was in custody such that *Miranda* warnings were required. Thus, he has not shown that the admission of his audiotaped statements amounted to plain error.

Defendant also argues that his later videotaped interview was inadmissible because it violated Michigan's eavesdropping statutes, MCL 750.539a *et seq.* Contrary to what defendant asserts, the officer who participated in the interview was not an "eavesdropper" within the meaning of the statute and, therefore, did not violate MCL 750.539c. MCL 750.539a(2); *People v Lucas*, 188 Mich App 554, 575-576; 470 NW2d 460 (1991); *Sullivan v Gray*, 117 Mich App 476, 481; 324 NW2d 58 (1982). Further, pursuant to MCL 750.539g, the fact that another

¹ *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966)

officer viewed the conversation over a closed-circuit television provides no basis for relief. *People v Collins*, 438 Mich 8, 11 n 1, 24, 34-35; 475 NW2d 684 (1991), citing *United States v Caceres*, 440 US 741; 99 S Ct 1465; 59 L Ed 2d 733 (1979). The court did not err in refusing to suppress this evidence.

IV

Defendant argues that the trial court erred by denying his request for a mistrial where information was disclosed that his videotaped statements were made during a polygraph examination interview. We disagree.

It is a bright-line rule that reference to taking or passing a polygraph examination is error. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). However, a reference to a polygraph examination does not always constitute error requiring reversal. *Id.* at 98. An evidentiary error does not warrant reversal in a criminal case unless, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999).

To determine if reversal is required at a jury trial, the following factors should be considered: (1) whether the defendant objected or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness' credibility; and (5) whether the results of the examination were admitted rather than merely the fact that an examination had been conducted. *Nash, supra* at 98. In this case, however, defendant was tried before the court, not a jury. Unlike a jury, a judge acting as the factfinder possesses an understanding of the law which allows him to ignore evidentiary errors and decide a case based solely on properly admitted evidence. *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001).

Here, it is evident that the references were not intended to bolster witness credibility. Further, the results of a polygraph examination, or even whether an examination was actually conducted, were not disclosed. More importantly, defendant was tried in a bench trial and the trial court properly understood that the references to a polygraph examination were not permissible. The court stated that it would strike the references, and not draw any inference that defendant had taken a polygraph. Under the circumstances, defendant is unable to show that it is more probable than not that the court's verdict would have been different if the references to a polygraph had not been made. *Lukity, supra* at 493-494.

Contrary to what defendant argues, this Court's decision in *People v Smith*, 211 Mich App 233, 234-235; 535 NW2d 248 (1995), does not compel a different result. In *Smith*, this Court held that if a case involves a credibility contest between a polygraph examiner and a defendant-examinee, testimony in a bench trial disclosing the results of a polygraph examination, even indirectly, is error requiring reversal. That is not the situation here. The evidence against defendant consisted of the complainant's testimony and defendant's own uncoerced statements, which included both audiotape and videotape versions, and which corroborated the officer's testimony. Therefore, this issue does not warrant reversal.

V

Defendant lastly argues that trial counsel was ineffective. Because defendant failed to raise this issue in a motion for a new trial or request for an evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Thew*, 201 Mich App 78, 90; 506 NW2d 547 (1993). To establish ineffective assistance of counsel, defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000); and (3) that the resultant proceedings were fundamentally unfair or unreliable, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In addition, defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

Defendant first argues that counsel was ineffective for failing to challenge the introduction of defendant's videotaped and audiotaped statements to the police. Because we have already concluded that defendant has not shown that the statements were erroneously admitted, we similarly reject defendant's claim that counsel was ineffective for failing to object to their admission. Counsel is not required to advocate a meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that counsel was ineffective for failing to elicit evidence that the complainant had falsely accused others of abusing her in the past. As the factual basis for this claim, defendant relies on a vague reference at trial by a defense witness who stated that the complainant "had accused two other people at different times." There is no indication, however, nor does defendant identify any evidence, indicating that the complainant ever alleged that someone other than defendant had abused her sexually. Because decisions as to what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and because defendant has not identified any specific evidence of past allegations of sexual abuse by the complainant, defendant has not shown that counsel was ineffective. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant also challenges trial counsel's decision not to request a *Walker*² hearing to determine whether his statements to the police were made voluntarily. However, the record indicates that counsel did, in fact, explore this issue and ultimately determined that he had no basis upon which to move for a hearing. Defendant has not identified any evidence suggesting that counsel's decision was flawed.

Finally, defendant argues that counsel failed to fully explore inconsistencies between the trial testimony of the examining physician and the physician's previously written report. The report was never admitted at trial and defendant has not submitted a copy on appeal. In the absence of supporting documentation or other record evidence, defendant has failed to show that

² *People v Walker (On Rehearing)*, 374 Mich 331, 338; 132 NW2d 87 (1965).

counsel's cross-examination was incomplete. *Rockey, supra* at 76. Further, considering that the physician admitted that his findings were inconclusive on the issue whether sexual penetration occurred, we are not persuaded that the revelation of some inconsistencies in the physician's opinion testimony through introduction of his report would have changed the outcome of defendant's trial. Defendant is not entitled to relief.

Affirmed.

/s/ Patrick M. Meter
/s/ Michael J. Talbot
/s/ Stephen L. Borrello