

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP EDWARD COLEMAN,

Defendant-Appellant.

UNPUBLISHED

September 14, 2006

No. 260309

Muskegon Circuit Court

LC No. 03-048830-FC

Before: Sawyer, P.J., and Fitzgerald and O’Connell, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a),¹ and the trial court sentenced him to a prison term of 56 months to 20 years. He appeals as of right. We affirm.

The victim is a friend of defendant’s stepdaughter, Elissa. According to the victim, one night in December 2001 defendant granted permission for her to spend the night with Elissa, but remarked to her on the telephone that, “whatever goes on between me and you will stay between me and you, right?” That night, she and Elissa fell asleep on the living room couch while watching television. The victim was subsequently awakened by defendant and ended up in his bedroom. While she was lying on defendant’s bed, defendant removed her pants and underwear and attempted to insert his penis in her vagina. The victim felt disgusted and scared. She did not call out for help because she was frightened and was not “really thinking” clearly. After a few minutes, defendant stopped and walked to his dresser. The victim jumped off the bed, dressed herself, and ran to the bathroom.

The victim testified that she ultimately returned to the living room couch. Shortly thereafter, defendant’s wife, Carletta, and another of defendant’s stepdaughters, Danyell, arrived at the home. The following morning, the victim was upset, scared, and crying. Carletta inquired as to the reason for the victim’s demeanor. The victim told Carletta that defendant had tried to have sexual intercourse with her the previous night. Some time later, Elissa asked the victim to

¹ The victim was under 13 years of age.

come over to her home and the victim declined, explaining what transpired with defendant and indicating that she did not wish to be present when defendant was at home.

Other witnesses corroborated portions of the victim's testimony. Elissa testified that the victim was crying one morning after sleeping at her home. The victim would not explain why she was crying, but she spoke privately to Carletta. Elissa remembered sleeping on the couch the previous night. Elissa also testified that she and the victim were coming home from school together sometime after December 2001 when the victim told her that defendant tried to touch her inappropriately, but then said that defendant did not touch her. Another of defendant's stepdaughters, Brianna, acknowledged that the victim was crying the morning after the incident and spoke to Carletta privately. Carletta acknowledged speaking to the victim the morning after the assault. Carletta also indicated that the victim continued to visit Elissa but would stay only until 6:00 p.m. and no longer stayed overnight.

The victim was separately interviewed by Shawn Baker from the Michigan State Police and by Melissa Peterson, an expert in the behavior of, and interviewing and counseling of, abused children. Child Protective Services investigator Sue Johnson was present when Baker interviewed the victim. Baker, Peterson, and Johnson are trained in the forensic protocol for interviewing children, which requires observation of the child's demeanor and evaluation of the child's statements to look for "red flags" that the child may be fabricating allegations or may have been coached, brainwashed, or influenced in making her allegations. In both of her interviews, the victim provided a narrative description of events.² No "red flags" were observed at either interview.

Johnson testified that it is typical for a child not to tell her parents about abuse and to have continued contact with the offender. It is also typical for children not to cry out while being assaulted. Peterson testified that she did not find any indication that the victim lied or fabricated the allegations of abuse.

During an interview with Michigan State Police Detective Gary Miles defendant denied more than thirty times that he had any sexual contact with the victim, repeatedly indicating that the victim was "just a kid." Defendant also explained that his daughter, Brianna, was "wide awake right there" during the time the incident allegedly occurred. Defendant acknowledged that Carletta spoke to him about the incident the next morning and that she was very angry and upset.

Several witnesses testified for the defense. George Hubbard was defendant's coworker at the Muskegon Heights Police Department in September 2002 when defendant informed him about the allegations that the victim was making. Hubbard then spoke to the victim and her mother, and the victim confirmed the allegations. Defendant made no attempt to interfere with a referral to the State Police for investigation.

² The victim actually told Baker, when providing a narrative of events, that defendant raped her.

Defendant's stepdaughter Danyell testified that, on the night in question, she and Carletta went to the store between 11:00 and 11:30 p.m. to purchase a furnace filter after the furnace stopped working. When they left, Elissa and the victim were asleep on the couch, and Brianna was watching television in a bedroom. Danyell and Carletta were gone for approximately 15 to 20 minutes. When they returned, the victim was in the bedroom with Brianna, asleep in the bed. Defendant was in the basement, attempting to repair the furnace. Brianna testified that Danyell told her that the incident allegedly occurred on the night the furnace was not working. Brianna remembered that night. When she and defendant arrived home, Elissa and the victim were already asleep on the couch. Brianna watched television in the living room, while defendant went to the basement to repair the furnace. When Carletta and Danyell went to the store, Brianna went into the front bedroom to watch television. The victim was asleep in that same bedroom. Defendant never came upstairs, and neither Brianna nor the victim left the bedroom during the time that Carletta and Danyell were away. Later, when Brianna asked the victim about the incident during a telephone conversation, the victim hung up. During a subsequent conversation, the victim said that defendant tried to touch her, that he tried to rape her, that he did rape her and then, later, that it did not happen.

I

Defendant argues that the court committed plain error necessitating reversal when it allowed the testimony of Peterson and Baker that, during their respective interviews of the victim, they observed no "red flags" indicating that the victim was fabricating the allegations or that she was influenced or coached in making the allegations.³ Because defendant failed to object to this testimony at trial, this issue is unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). We review unpreserved claims of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

It is well settled that an expert witness may not vouch for the veracity of a victim. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995); *People v Beckley*, 434 Mich 691, 727, 734; 456 NW2d 391 (1990). In *Peterson*, *supra* at 352, citing *Beckley*, *supra*, the Court confirmed that an expert may not testify that the sexual abuse occurred, may not vouch for the victim's veracity, and may not testify that a defendant is guilty. An expert may testify, however, regarding typical and relevant symptoms of child sexual abuse for the purpose of explaining behavior that may be construed by the jury as being inconsistent with that of an actual abuse victim. *Id.* An expert may also testify regarding consistencies between the victim and other victims to rebut an attack on the victim's credibility. *Id.* at 352-353. The purpose of expert testimony "is to provide the jury with background information that it could not

³ In making his argument, defendant notes that the victim's mother also testified that she did not see any indication that the victim was lying about the instant events. She tried to see if there were "red flags" that the victim was not telling the truth, but she was not sure all of the time. Defendant asserts that this constituted improper opinion evidence, pursuant to MRE 701, but he concedes that this testimony was not "nearly as damaging" as that of Baker and Peterson because the victim's mother disavowed being an expert and did not testify to the substance of the statements the victim made to her.

otherwise bring to its evaluation of the child's credibility." *Id.* at 365, citing *Beckley, supra* at 728 (Brickley, J.).

Defendant asserts that the effect of Peterson's and Baker's testimony that they observed no "red flags" indicating that the victim was fabricating the allegations or was influenced in making them constituted improper vouching by an expert witness. Initially, we note that Baker was not offered, nor qualified by the trial court, as an expert. Rather, Baker testified as a lay witness regarding her investigation of the allegations against defendant. Defendant provides this Court with no authority for subjecting Baker's testimony to the criteria set forth in *Peterson* and *Beckley*. Therefore, defendant's assertion that Baker's testimony constitutes impermissible expert testimony is abandoned. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Even if that testimony was considered as expert testimony for purposes of this issue, defendant's argument lacks merit.

The testimony of Baker and Peterson regarding "red flags" was proper. The testimony revealed that, during forensic interviews, there are certain signs or flags common to alleged victims that signify that fabrication may be occurring or that the child was coached by or influenced by another in making the allegations. Neither Baker nor Peterson observed evidence of these signs or flags during their interview with the victim. The purpose of the challenged testimony was clearly to provide the jury with background information that it could not otherwise bring to its evaluation of the victim's credibility. *Peterson, supra* at 365. Moreover, neither Baker nor Peterson testified that the victim was credible, that defendant was guilty, or that sexual abuse occurred. *Id.* at 352.

Defendant relies on this Court's decision in *People v Matlock*, 153 Mich App 171; 395 NW2d 274 (1986). In *Matlock*, this Court reversed defendant's conviction because the alleged victim's rape counselor testified that studies indicated that ninety-five percent of sexually abused children tell the truth about the abuse and further, that she had treated over one hundred patients (including the alleged victim) in a four-year period and had never encountered a child that lied to her about sexual abuse. This Court determined that such testimony "directly vouched for the [alleged victim's] credibility" that the acts of sexual abuse took place. *Id.* at 178. The testimony placed an "impermissible stamp of scientific legitimacy to the truth of [the alleged victim's] story," and its admission required reversal. *Id.* at 179.

Unlike the expert in *Matlock*, however, neither Peterson nor Baker vouched for the victim's credibility. Rather, they testified as to their own direct observations of the victim during the course of their respective interviews of her. The jury could find the entirety of both Peterson's and Baker's testimony to be credible, while at the same time concluding that no sexual assault took place. The jury was free to conclude that, while Peterson and Baker did not observe any "red flags" indicating that the victim was fabricating the allegations against the defendant, she did indeed fabricate those allegations.

On the record before us, we conclude that the trial court did not commit plain error in allowing witnesses to testify that they observed no behavior during their respective interviews of the victim that suggested that she fabricated her allegations of sexual assault. Consequently, there was no plain error requiring reversal. *Carines, supra*.

II

Defendant next argues that he was deprived of the effective assistance of trial counsel because his counsel failed to object to the testimony of Peterson and Baker as discussed above. To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms; that, but for his counsel's errors there is a reasonable probability that the results of his trial would have been different; and that the proceedings were fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To establish that his counsel's performance was deficient, "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances." *Toma, supra* at 302. Given our conclusion that that the testimony of Peterson and Baker was permissible, we reject defendant's claim that his trial counsel was ineffective for failing to object to that testimony. Counsel is not ineffective for failing to advocate a meritless position or to make a futile objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005); *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell