

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS RAY JACKSON,

Defendant-Appellant.

UNPUBLISHED

April 29, 2010

No. 283092

Allegan Circuit Court

LC No. 07-015249-FC

Before: BECKERING, P.J., and WILDER and DAVIS, JJ.

PER CURIAM.

Following a jury trial, defendant appeals of right his convictions of two counts of first-degree criminal sexual conduct, with a person under 13 years of age, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, also with a person under 13 years of age, MCL 750.520c(1)(a). We affirm.

I

Defendant and his former spouse, RL, had two children. Their daughter, the complainant, was born in 1995, and her brother, DL, was born in 1996. Defendant and RL were divorced in 1997. Defendant had physical custody of the children, with parenting time for RL. In 2004, RL initiated an investigation of defendant based on the complainant's disclosures that defendant was sexually abusing her. Although the children were removed from defendant's custody, an investigation found no evidence of abuse; thus, the case was closed, and the children were returned to defendant. In 2007, RL learned that defendant's sister's ex-husband, Joe Buck Brown, a convicted sex offender, was living in the trailer where defendant lived. RL contacted Michigan Children's Protective Services (CPS). Eric Rayl, a CPS worker, interviewed the complainant. Although Rayl was there to ask the complainant about Brown, the complainant volunteered to Rayl that defendant sexually abused her.

The police arranged for a medical examination of the complainant. Dr. Nancy Simms conducted the examination. Before Dr. Simms's examination, her assistant, Tracy Cyrus, forensically interviewed the complainant. The complainant told Cyrus that her father's penis rubbed her private area, and that it hurt. While Cyrus interviewed the complainant, Dr. Simms interviewed RL. After the interviews, Dr. Simms physically examined the complainant. As Dr. Simms was doing a cotton swab of the complainant's intra-labial area, the complainant spontaneously told Dr. Simms that that was the area that "her daddy's pee-pee touched her

body.” Dr. Simms did not find physical evidence of trauma, and therefore concluded that defendant used his penis to touch the inside of the complainant’s labia, but did not enter the complainant’s vagina. During the trial, Dr. Simms was called as an expert by the prosecution to offer testimony about her examination of the complainant and the complainant’s statements. In the course of her testimony, Dr. Simms also was asked for, and offered, her opinion and diagnosis that the complainant was a victim of “probable pediatric sexual abuse.”

The complainant testified during the trial that while she lived with defendant, defendant would come to bed, take off her pajama bottoms, unzip his pants, and touch her “peeing” area with his penis while she was sleeping. According to the complainant, defendant touched her with his penis, in either the bedroom where they slept, or in the bathroom, almost every night. Occasionally, he also rubbed the outside and inside of her private area with his hand. When he touched her, sometimes he would ejaculate. Defendant told her that the name of the ejaculated substance was “cum.” When defendant ejaculated on her, it would come out on her stomach, and she would get a cloth rag and wash it off. On other occasions, he would either finish in the bathroom, or go to the bathroom to get toilet paper and finish in the bedroom.

The complainant further testified that, after the defendant was done having sex with her, they would go to sleep, or occasionally, defendant would use the computer in the bedroom, after she and her brother went to sleep. The complainant testified that defendant’s actions felt wrong, and sometimes hurt. Finally, the complainant testified that defendant had told her not to tell anyone, because he would go to jail. She could not remember exactly when the abuse occurred, but did recall that the abuse began when she was five or six years old, and continued until she was 12.

II

Defendant first argues that Dr. Simms’s diagnosis that probable pediatric sexual abuse occurred was inadmissible because it constituted improper vouching for the complainant. We agree, but find that the erroneous admission of the testimony does not require reversal.

Pursuant to MRE 702, expert testimony is permitted:

If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In cases involving alleged child sexual abuse: (1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of the alleged victim, and (3) an expert may not testify whether the defendant is guilty. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). An expert’s testimony that his “findings” are consistent with the alleged victim’s history as related by the complainant is impermissible when based solely on what the alleged victim told him unless the expert has been qualified as an assessor of credibility. *People v Smith*, 425 Mich 98, 109; 387 NW2d 814 (1986).

In the absence of any physical evidence of abuse, Dr. Simms's diagnosis that probable pediatric sexual abuse occurred constituted improper vouching of the complainant's credibility because her opinion was based solely on her assessment of the credibility of the complainant and the complainant's mother. Dr. Simms was qualified as a medical doctor, not as an assessor of credibility. Medical expertise is not helpful to the jury on the question of the complainant's veracity. See *People v Beckley*, 434 Mich 691, 727-729; 456 NW2d 391 (1990) (opinion by Brickley, J.) (plurality opinion); see also *People v McGillen # 2*, 392 Mich 278, 285; 220 NW2d 689 (1974). A layman is just as qualified to assess the credibility of an alleged sex abuse victim as a medical doctor. Because this case was a credibility contest between the complainant and defendant, as there were no other witnesses or physical evidence attesting to the alleged abuse, Dr. Simms's diagnosis that the alleged sexual abuse probably occurred "placed an impermissible stamp of scientific legitimacy to the truth of [the complainant's] story" *People v Matlock*, 153 Mich App 171, 179; 395 NW2d 274 (1986).

Despite the erroneous admission of the diagnosis, however, we conclude that the error does not require reversal. One purpose of requiring a party to object to proffered testimony is to give the trial court an opportunity to prevent or correct any error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376, 381-382 (2003). Because defendant did not object to this testimony below, we review defendant's claim of error under the standard for unpreserved, nonconstitutional error set out in *People v Grant*, 445 Mich 535, 551, 520 NW2d 123 (1994), and *People v Carines*, 460 Mich 750; 597 NW2d 130 (1999). To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant first bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights, i.e., the error affected the outcome of the lower court proceedings. *Grant*, 445 Mich at 548-549; *Carines*, 460 Mich at 763. Reversal is warranted only if the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines*, 460 Mich at 763.

The erroneous admission of Dr. Simms's diagnosis did not affect the outcome of the lower court proceedings. As we previously noted, the complainant gave specific and detailed testimony about defendant's actions in sexually assaulting her. Because the victim's testimony in a criminal sexual conduct case need not be corroborated, MCL 750.520h, there was more than sufficient evidence to support the jury verdict absent Dr. Simms's diagnosis.

III

Defendant also argues that Dr. Simms improperly based her opinion on inadmissible hearsay. We disagree.

We review evidentiary rulings for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). However, a party opposing the admission of evidence must object at trial. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Therefore, this issue is unpreserved and subject to the plain error analysis because defendant failed to object at trial to any of the hearsay contained in Dr. Simms's testimony. *Carines*, 460 Mich at 763.

MRE 703 provides:

The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

We have interpreted this rule to mean that when an expert bases his or her opinion on hearsay, so long as the hearsay is admissible and is actually admitted into evidence, even if only through the testimony of the expert, the expert may base his or her opinion on that evidence. *People v Yost*, 278 Mich App 341, 365; 749 NW2d 753 (2008).

Dr. Simms based her opinion on the complainant's statements during Cyrus's forensic interview, the complainant's spontaneous statements to Dr. Simms during the examination, and the complainant's past medical history as provided by the complainant's mother. The statements and information were admitted into evidence through the testimony of Dr. Simms. For the reasons stated below, we conclude that the statements upon which Dr. Simms based her opinion were admissible as substantive evidence because they fell within the medical treatment exception to hearsay. See MRE 803(4); *Yost*, 274 Mich App at 365.

“‘Hearsay’ is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Hearsay is generally not admissible as substantive evidence, unless it is offered under one of the exceptions to the hearsay rule contained in the Rules of Evidence. MRE 802.

“Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment” are admissible as an exception to the hearsay rule. MRE 803(4); *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). The rationale supporting the admission of statements under this exception is the existence of (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care. *Meeboer*, 439 Mich at 322. Identification of one's abuser is reasonably necessary to the diagnosis and treatment of the patient. *Id.* If the child is over ten years old, there is a rebuttable presumption that the minor understands the need to tell the truth to medical personnel. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662; 496 NW2d 388 (1992); see also *People v Crump*, 216 Mich App 210, 212; 549 NW2d 36 (1996).

Both the complainant's statements to Cyrus, and her statements to Dr. Simms, that her father sexually abused her, were reasonably necessary to diagnose and treat her. If no genital contact between the complainant and her father occurred, then there would be no need to test the complainant for sexually transmitted diseases, or to look for physical evidence of trauma, caused by sexual abuse that might need treatment. Further, the identity of her abuser was medically relevant because identification of the abuser is necessary to separate the child from the abuser and protect the child from further abuse. *Van Tassel*, 197 Mich App at 661 (“[t]reatment and

removal from an abusive environment is medically beneficial to the complainant of a sexual abuse crime”); *Meeboer*, 439 Mich at 328-330.

At the time that the complainant made the statements to Cyrus and to Dr. Simms, she was 12 years old. Thus, she was presumed to understand the need to tell the truth to medical personnel, to ensure her proper diagnosis and treatment. *Van Tassel*, 197 Mich App at 662. Although defendant argues that the statements were untrustworthy, because the complainant’s mother was simply coaching her in order to obtain custody, and the complainant had a motive to lie because she preferred living with her mother, the credibility and motivations of the complainant and her mother were thoroughly explored on cross-examination by defense counsel, and questions of the credibility and motivations of witnesses are within the province of the jury. See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). Accordingly, the trial court’s admission of the hearsay statements by the complainant, to Cyrus and Dr. Simms, was not plain error.

Cyrus relayed statements by the complainant to Dr. Simms, which constitutes a second level of hearsay, but this relay of information also falls within the medical treatment exception to hearsay. MRE 805. The medical treatment hearsay exception, MRE 803(4), is not limited to statements made by the patient, so long as those statements are reliable. *Yost*, 278 Mich App at 362 n 2. The purpose of Cyrus’s statements to Dr. Simms was to direct the doctor’s examination of the complainant and to insure that the complainant received proper medical diagnosis and treatment. Nothing on the record indicates that Cyrus was biased in favor of the complainant, or had a motive to fabricate. Thus, the trial court’s admission of Cyrus’s statements to Dr. Simms was not plain error. MRE 803(4).

The trial court’s admission of Dr. Simms’s testimony concerning statements that the complainant’s mother made to Dr. Simms was also not plain error under MRE 803(4). A parent has a vested interest in telling the truth to the doctor in order to obtain proper medical treatment for her child. The mother described the complainant’s medical history to Dr. Simms to obtain medical treatment for the complainant. While there was evidence that the complainant’s mother wanted the children to live with her, and that she refused to return the children to their father once several years earlier, questions of the credibility or motivation of a witness are for the jury. *Lemmon*, 456 Mich at 642

IV

Defendant also argues that Dr. Simms’s testimony, which included Cyrus’s out-of-court statements, violated the confrontation clause.¹ We disagree.

¹ We note that Dr. Simms’s testimony contained additional hearsay, including the complainant’s statements to Cyrus and the complainant’s statements to Dr. Simms. However, the complainant testified in person at trial and was thoroughly cross-examined by defendant. Therefore, Dr. Simms’s testimony concerning the statements made by the complainant to Cyrus did not violate the confrontation clause. *Crawford*, 541 US at 59 n 9 (“when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior
(continued...)”)

The Confrontation Clause of the Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” US Const, Am VI; *Crawford v Washington*, 541 US 36, 42; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Taylor*, 482 Mich 368, 375; 7591 NW2d 361 (2008). Thus, “[t]estimonial statements of [a] witness[] absent from trial have been admitted only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine [the declarant].” *Crawford*, 541 US at 59. A testimonial statement is a statement “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” *Id.* at 52. Testimonial hearsay statements are inadmissible regardless of whether such statements would be otherwise admissible under the rules of evidence. *Id.* at 50-51. If the hearsay statement at issue is *nontestimonial*, the confrontation clause does not restrict state law from determining admissibility. *Id.* at 68.

In *Davis v State of Washington*, 547 US 813, 814; 126 S Ct 2266; 165 L Ed 2d 224 (2006), the United States Supreme Court, applying *Crawford*, held that statements made during police questioning of a victim are testimonial when the primary purpose of the out-of-court statements was “to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 814. Because the victim’s responses in *Davis* to a 911 operator’s questions were made in order to “enable police assistance to meet an ongoing emergency,” the responses were not testimonial, and their admission was not, therefore, a violation of the confrontation clause. *Id.* at 827-828.

In *Melendez-Diaz v Massachusetts*, ___ US ___, ___; 129 S Ct 2527, 2532; 174 L Ed 2d 314 (2009), the court applied *Crawford* and the confrontation clause to conclude that “certificates of analysis,” on which nontestifying laboratory analysts stated under oath that the substances seized by the police and tested by the analysts were cocaine, were testimonial statements, “made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.” Reiterating, however, that the primary protection of the confrontation clause is to guarantee that a defendant may confront witnesses who “bear testimony” against him, the Supreme Court noted that “[a] witness’s testimony against a defendant is thus inadmissible *unless the witness appears at trial or*, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.” *Melendez-Diaz*, 129 S Ct at 2531 (emphasis added); see also *Crawford*, 541 US at 53-54.

The confrontation clause is only implicated with respect to Cyrus’s statements to Dr. Simms if the statements were testimonial and would lead an objective witness to reasonably believe that they would be available for use at a later trial. *Crawford*, 541 US at 52. Recently, in *People v Spangler*, 285 Mich App 136; 774 NW2d 702 (2009), this Court considered whether a complainant’s statements to a Sexual Assault Nurse Examiner (SANE) during a medical forensic examination were testimonial hearsay for confrontation clause purposes. Prior to trial, the defendant moved to exclude from evidence any statements the complainant made to the SANE. Considering only the content of the Michigan Medical Forensic Examination Record, the trial

(...continued)
testimonial statements.”).

court held that the complainant's statements were testimonial, and excluded the SANE'S proposed testimony. On appeal, this Court held that a

reviewing court must consider the *totality of the circumstances* of the victim's statements and decide whether the circumstances objectively indicated that the statements would be available for use in a later prosecution or that the primary purpose of the SANE's questioning was to establish past events potentially relevant to a later prosecution rather than to meet an ongoing emergency. [*Id.* at 154.]

Because this Court concluded in *Spangler* that the trial court "made no attempt to gain any information regarding the process of the examination, what prompted the complainant's statements, or how the forensic form was filled out," this Court reversed the trial court's order excluding the SANE's proposed testimony and remanded to the trial court for a fuller examination of the facts surrounding the complainant's alleged statements. *Id.* at 156-157. This Court also offered the following non-exhaustive list of factors courts have considered when evaluating whether statements to a SANE or a similar examiner are testimonial:

- 1) the *reason* for the victim's presentation to the SANE, e.g., to be checked for injuries, to be checked for signs of abuse;
- 2) the length of time between the abuse and the presentation;
- 3) what, if any, preliminary questions were asked of the victim or the victim's representative, or what preliminary conversations took place, before the official interview or examination;
- 4) *where the interview or examination took place*, e.g., a hospital emergency room, another location in the hospital, an off-site location;
- 5) the manner in which the interview or examination was conducted;
- 6) whether the SANE conducted a medical examination and, if so, the extent of the examination, and *whether the SANE provided or recommended any medical treatment*;
- 7) whether the SANE took photographs or collected any other evidence;
- 8) whether the victim's statements were offered spontaneously, or in response to particular questions, and at what point during the interview or examination the statements were made;
- 9) whether the SANE completed a forensic form during or after the interview or examination;
- 10) whether the victim or the victim's representative signed release or authorization forms, or was privy to any portion of the forensic form, before or during the interview or examination;
- 11) whether individuals other than the victim and the SANE were involved in the interview or examination and, if so, the level of their involvement;
- 12) *if and when law enforcement became involved in the case, how they became involved, and the level of their involvement*; and
- 13) *how SANEs are utilized by the particular hospital or facility where the interview or examination took place*. [*Id.* at 155 (emphasis added).]

The question whether the complainant's statements to the SANE were testimonial in *Spangler* is distinguishable from the question in this case whether the statements made by a doctor's assistant to the doctor were testimonial. However, some of the guiding factors identified in *Spangler* are also instructive here.

Dr. Simms testified that Cyrus conducted a forensic interview prior to the examination to minimize the number of times the complainant was asked about the abuse, thereby limiting the

power of suggestion. Defendant failed to elicit testimony indicating any other purpose for Cyrus's forensic interviewing, such as furthering the objectives of law enforcement.² Dr. Simms further testified that the primary purpose of the examination was medical. She explained that the examination is intended: (1) "to discover whether or not there might have been any kind of injury to the child"; (2) "to assess for the risk of infection"; and (3) "to reassure the child about any concerns that they have about their body or any issues or questions that they have." In light of these facts, it follows that the primary purpose of Cyrus's statements to Dr. Simms, following the interview and before the examination, was to assist Dr. Simms to develop a plan for the medical examination, to diagnose the complainant, and to treat the complainant. Although Detective Lisa Bancuk arranged the medical examination for the complainant, the complainant's mother and a CPS worker were the only people present at the time of the examination examination. Based on the totality of the circumstances, we conclude that Cyrus's statements to Dr. Simms were made for the primary purpose of diagnosing and treating the complainant, not to establish or prove that defendant committed a crime. Accordingly, Dr. Simms's testimony, which included Cyrus's out-of-court statements, did not violate the confrontation clause.

In reaching our conclusion, we disagree with defendant that Cyrus's statements were testimonial because they were made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 US at 51-52. Although Dr. Simms has testified in court as an expert witness on numerous occasions, this does not necessarily mean that Cyrus's statements were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial in the sense intended by *Crawford*. The focus of the confrontation clause is on "witnesses against the accused," or those who "bear testimony." *Id.* at 51. The court defined "testimony" in *Crawford* as "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* Cyrus was not making a solemn declaration or affirmation for the purpose of establishing or proving some fact, but rather was assisting the doctor in developing a diagnosis and treatment plan for a child who had allegedly been sexually assaulted.

For all of the foregoing reasons, defendant's confrontation clause claim fails.

V

Defendant next asserts that prosecutorial misconduct resulted in a deprivation of his liberty without due process of law. We disagree.

To preserve a claim of prosecutorial misconduct, a defendant must "timely and specifically" object "except when an objection could not have cured the error, or a failure to review the matter would result in a miscarriage of justice." *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008), quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d

² To the extent that defendant chose not to elicit testimony concerning the purposes for the interview and medical examination, we again hold that defendant is not permitted to voluntarily harbor error as an appellate parachute. *Fetterley*, 229 Mich App at 520.

501 (2003). Defendant failed to object, so we review his claims of prosecutorial misconduct for plain error. *Carines*, 460 Mich at 763-764.

Claims of prosecutorial misconduct are reviewed on a case-by-case basis, evaluating each allegedly improper remark in context. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). First, defendant argues that the prosecutor improperly forced defendant to label his children liars. The prosecutor cross-examined defendant about whether Brown was living with defendant and the children:

Q. So [DL] tells his mom that Joe Buck Brown is living in his house and that's a lie.

A. That is a lie.

Q. [DL] flat out lied about that.

A. Where he got that he was living there I have no clue.

Later, the prosecutor questioned defendant about the living and sleeping arrangements in his home:

A. Everybody was cramped. In fact my brother and his son slept in that bedroom together a lot of the time as well.

Q. [DL] and [the complainant] don't talk about that.

A. Exactly.

Q. Why wouldn't they if that's what was going on? Why would [DL] lie about that?

A. A lot of times they don't know what goes on.

A prosecutor commits misconduct when the prosecutor asks a defendant on cross-examination to comment on the credibility of the prosecution's witnesses, because the defendant's opinion is not probative of the witnesses' credibility, and credibility determinations are for the trier of fact. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985); *People v Loyer*, 169 Mich App 105; 425 NW2d 714 (1988). Here, the prosecution plainly erred by asking defendant to label the prosecution's witnesses "liars" in order to discredit him.

Nevertheless, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Throughout the trial, defense counsel presented the argument that the complainant and DL were lying because their mother influenced them in order to gain custody and they preferred to live in their mother's larger home, with improved living and sleeping arrangements. Further, defense counsel questioned Thomas Cottrell, one of the prosecution's expert witnesses, regarding whether children ever make false allegations.

Thus, any error in the questioning does not require reversal, because it was responsive to defense counsel's theory that the children were lying. *Id.*

Next, defendant argues that the prosecution shifted the burden of proof by stating the following to the jury in closing argument:

What the defense will say is that there is reasonable doubt. That the elements of the crime haven't been proven to you beyond a reasonable doubt. Well, let[']s look at that. Has the defense created reasonable doubt.

* * *

The defendant may say that the child's delayed disclosure is reasonable doubt. Well, is it? . . . But one thing you have to keep in mind is that kids don't run to the nearest police officer when their dads start to sexually abuse them. They don't report, sometimes they don't report for decades. That doesn't create reasonable doubt.

* * *

The defendant may say well reasonable doubt was created by the defendant's statement himself. The defendant never admitted he sexually abused his daughter. . . . Defendant's very equivocal, very back and forth statements to the police officer don't create reasonable doubt.

* * *

The defendant may say well reasonable doubt was created because there wasn't any physical trauma. You heard Dr. Simms. Dr. Simms was very clear. I wouldn't expect to see physical trauma in a case like this. . . . That doesn't create reasonable doubt.

The "prosecutor may not imply in closing argument that [a] defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Here, the prosecution impermissibly implied that defendant had the burden of proving reasonable doubt. However, the error does not require reversal, because it did not affect defendant's substantial rights. The trial court properly instructed the jurors that defendant was not required to prove anything and that the prosecution had the burden of proof, and jurors are presumed to follow instructions. *Unger*, 278 Mich App at 234-235 (stating that curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow instructions). In addition, prior to the trial court's instructions, defense counsel reminded the jury in his closing argument that the prosecution, and not defendant, has the burden of proof, and the prosecution acknowledged the proper burden of proof in its rebuttal argument. As such, the prosecution's initial burden-shifting during closing argument does not require reversal.

Finally, defendant argues that the prosecution committed misconduct by improperly bolstering the complainant's credibility, and by arguing facts not in evidence. During closing argument, the prosecution argued that the complainant should be believed:

[The complainant] has been consistent over time. She has continued to talk about, and tell, not because she wants to but because she keeps getting asked about sexual abuse by her dad, that he's been sexually abusing her since she was very little, that he touches her when they're in bed together, that they sleep in the bed together with her brother, that her brother doesn't hear it or see it, he's sleeping, sometimes he's there, sometimes he's not. That he touches her with his penis in her vaginal area by going in part of the way. That he tells her that the white sticky stuff that comes out on her stomach is called cum. That she has to wipe that up with a wash cloth. Sometimes her father gets rid of the rest of the white sticky stuff by himself, that he touches her with his hand, and that he tells her don't tell.

While the prosecutor "may argue from the facts that a witness should be believed," the prosecutor "may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness." *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005) (citations omitted). In addition, a prosecutor may not make a factual statement to the jury that is not supported by the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003).

The complainant testified at trial to almost all of the facts mentioned above by the prosecution. Regardless, the evidence presented at trial did not support, or allow a reasonable inference that, she disclosed *all* of those facts to multiple people, consistently over time. By arguing facts not in evidence, the prosecution implied that it had special knowledge that the jury did not have to determine the complainant's truthfulness. *McGhee*, 268 Mich App at 630. This impermissibly placed the prestige and extra-record knowledge of the prosecution behind the complainant's testimony. *People v Matuszak*, 263 Mich App 42, 54-55; 687 NW2d 342 (2004).

Nevertheless, we conclude that the prosecution's improper bolstering did not result in convincing "one juror to change his or her vote from one to acquit to one to convict," *People v Burrell*, 127 Mich App 721, 728; 339 NW2d 239 (1983), because the jury is presumed to have followed the trial court's instructions that the lawyers' arguments are not evidence, and that the jury should base its decision only on the evidence and the law. *Unger*, 278 Mich App at 234-235. Thus, the plain error did not affect defendant's substantial rights. *Carines*, 460 Mich at 763.

VI

Defendant also argues that he was deprived of his constitutional right to effective assistance of counsel. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo. *Id.* But where, as here, there was no evidentiary

hearing on the matter below, our review is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Generally, to establish ineffective assistance of counsel, a defendant must show that (1) defense counsel erred insofar as his performance fell below an objective standard of reasonableness, under professional norms, and (2) that it is reasonably probable that, but for counsel's error, the result would have been different, and the result that did occur was fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007), citing *Strickland v. Washington*, 466 U.S. 668, 687; 104 S Ct 2052; 80 L.Ed.2d 674 (1984). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). The presumption that counsel was effective necessarily requires a strong presumption that his counsel's decision-making was strategic. *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004).

Defendant claims that his defense counsel was ineffective because he failed to object to the admission of Dr. Simms's testimony about her diagnosis. Even if the failure to object to an expert's opinion that is based solely on the credibility of the complainant falls below an objective standard of reasonableness, defendant cannot show that it is reasonably probable that, but for counsel's error, he would not have been convicted, or his conviction was fundamentally unfair or unreliable. As we have previously noted, the complainant's testimony alone provided a sufficient basis for the jury verdict. Thus, defense counsel was not ineffective for failing to object to the admission of Dr. Simms's testimony into evidence. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003) (defense counsel is not required to make a meritless motion, nor a futile objection).

Defendant also claims that his defense counsel was ineffective because he failed to object to the instances of prosecutorial misconduct. Defense counsel's theory was that defendant's children were lying. Therefore, defense counsel may have chosen not to object to the prosecutor's cross-examination of defendant regarding whether his son was a liar to avoid undermining the defense theory. We will not second-guess this strategic decision with the benefit of hindsight and we conclude that defense counsel was not ineffective for failing to object to the prosecution's cross-examination. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004).

Next, defense counsel's failure to object to the prosecution's closing argument that appeared to shift the burden of proof to defendant also constituted trial strategy. Rather than objecting, counsel strategically used the faulty argument to tell the jury that the prosecution had misinformed the jury about the law, and to emphasize that, on the contrary, the prosecutor had the burden of proof. By aligning himself and defendant with the trial court (which properly instructed the jury on the law), defense counsel cast doubt on the prosecution's truthfulness to the jury. The prosecutor then had to explain herself during rebuttal. Again, we decline to second-guess this strategy on appeal. *Grant*, 470 Mich at 45.

Last, defense counsel failed to object to the prosecution's bolstering of the victim, which improperly suggested that the victim's allegations had been consistent over time. Because the trial court instructed the jury only to base its decision on the evidence, and told the jury that the lawyer's arguments are not evidence, any error was harmless. *Unger*, 278 Mich App at 234-235

(jurors are presumed to follow instructions). Thus, we conclude that defense counsel was not ineffective for failing to object to the prosecution's closing argument. *Frazier*, 478 Mich at 243.

VII

In sum, Dr. Simms improperly vouched for the credibility of the complainant, but the error did not affect defendant's substantial rights. The trial court did not plainly err in admitting Dr. Simms's testimony even though it contained hearsay. Furthermore, Dr. Simms's testimony, which contained Cyrus's out-of-court statements, did not violate defendant's confrontation rights. Although the prosecution committed several acts of misconduct, the errors did not affect defendant's substantial rights. Finally, defendant was not denied the effective assistance of counsel because defense counsel failed to object to Dr. Simms's testimony or to the prosecution's misconduct.

Affirmed.

/s/ Jane M. Beckering

/s/ Kurtis T. Wilder