

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 28, 2012

v

BRANDON JERROLD JOHNSON,

Defendant-Appellant.

No. 304459
Oakland Circuit Court
LC No. 2010-234100-FH

Before: GLEICHER, P.J., and M. J. KELLY and BOONSTRA, JJ.

BOONSTRA, J., (*concurring in part and dissenting in part*).

I concur with the result reached in the majority’s opinion. I write separately to set forth what I believe to be a proper evidentiary analysis in line with the applicable rules of evidence and the published prior authority of this Court. In my view, we need not reach the evidentiary issue since, as the majority notes, “relief is unwarranted.” However, having reached it, we should decide it correctly. The statement whose admission into evidence the majority challenges, was not hearsay, and it in any event was admissible under the hearsay exception for statements offered for purposes of medical treatment.

The following additional facts of record are relevant to this analysis. Immediately following the incident in question, the victim “jumped up” from her bed “in such a shock and panic,” asked defendant “What are you doing?,” and went to her mother’s bedroom. Since her mother was not present, she called her mother on the telephone. Her mother described her as “disturbed,” “kind of crying,” “very shaken, upset,” “her voice was crackly.” The victim later described the experience as having been “traumatic.” At her mother’s direction, the victim woke up her brother, nephew, and sister, and told them what had happened. Her mother returned home “real quick,” within approximately 20-30 minutes, and found the victim “crying,” “very upset,” and “very emotional.” She took the victim to the police station. Police officers later came to their home to conduct an investigation. The mother indicated that, after speaking to the police, she “just tried to console my daughter.” That same day, at the direction of the police, the mother took the victim for an examination by a sexual assault nurse examiner at the START (Safe Therapeutic Assault Response Team) Program of HAVEN.

During the examination, the nurse examiner followed protocol in using a packet of forms (the “HAVEN forms”) that covered appropriate authorizations and disclosures, patient medical data, information provided by the victim about this incident (including verbatim quotes from the

victim), results of the examination, diagrams relating to the examination, physical assessment, evidence collection, discharge summary, and appropriate signatures.

At trial, the nurse examiner who conducted the examination of the victim testified. During her testimony, the prosecutor moved for the admission of the HAVEN forms under the “business record exception” to the hearsay rule. MRE 803(6). Defense trial counsel indicated that she had no objection, and the HAVEN forms were admitted as an exhibit at trial.

Declining to raise objections to evidence is a matter of trial strategy. See *People v Unger*, 278 Mich App 210, 242, 253; 749 NW2d 272 (2008). This Court should not substitute its judgment for that of counsel regarding matters of trial strategy, nor should it assess counsel’s competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Counsel’s strategy does not constitute ineffective assistance simply because it does not work. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). In my view, defendant has not overcome the presumption that his counsel’s lack of objection to the admission of the statement at issue constituted sound trial strategy.

This is especially true because counsel is “not required to raise meritless or futile objections.” *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). At trial, the nurse examiner provided testimony regarding her examination of the victim, including as to each page of the HAVEN forms that were admitted as a trial exhibit. With respect to page 3, the nurse examiner testified that it provided the victim’s description of the incident, and she read that description into the record “word for word,” as follows:

I woke up to the sound of my basketball shorts being snapped back into my back. I heard him murmur like he was talking on his phone. He kept telling me I am grown and how can I still be a virgin and 17 years old. He started to massage my back. I told him to stop. He carries a gun so I was scared. I think I blacked out because I woke up to his hand in my pants and he fingered me in my vagina.

The majority concludes that defendant’s trial counsel “should have objected to the improper admission” of the following portion (only) of the victim’s incident description: “He carries a gun so I was scared.”¹ The majority states, without analysis, that this portion of the

¹ The majority states that this was “the sole reference to a firearm in the record.” This is accurate insofar as the trial record is concerned, but I note that the following testimony was elicited from the victim during the victim’s preliminary examination testimony:

Q And you didn’t see [defendant] with a gun on that particular day, correct?

A Corr – wait, can you rephrase that?

Q Back on September 18th you did not see [defendant] with a gun in his pocket or otherwise on that particular day, correct?

victim's incident description was a "hearsay statement," and further concludes that the statement did not fall within the hearsay exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. MRE 803(4). In my view, neither conclusion is correct.

As the majority notes, the victim's summary of the incident was contained in the nurse examiner's records, which were admitted into evidence under the "business record exception" to the hearsay rule. The admission of those records is unchallenged, and is not at issue on appeal. Nor is the victim's overall summary of the incident challenged. Rather, defendant challenges on appeal trial counsel's failure to object to a *portion* of the nurse examiner's testimony *about* the records, and thus implicitly also challenges the excerpted portion of the victim's statement *to* the nurse examiner, as reflected in the records.

Preliminarily, a proper evidentiary review would require a separate analysis of (a) the nurse examiner's testimony at trial; and (b) the written statement that was contained within the HAVEN forms that were admitted as an exhibit at trial, and about which the nurse examiner testified. The majority conflates the two, focusing only on the written statement contained in the HAVEN forms.

A statement is "hearsay" only if it is "offered in evidence to prove the truth of the matter asserted." MRE 801(c). Here, the nurse examiner's testimony was not offered to prove that defendant "carries a gun," but instead was offered to describe the process for conducting the medical examination of the victim and for gathering the information contained within the HAVEN forms, and to clarify that the statements in the HAVEN forms were those of the victim. The nurse examiner's testimony was not hearsay. MRE 801(c).

The majority correctly notes that where there are multiple layers of hearsay within hearsay, each independent hearsay statement must fall within a hearsay exception to be admissible. *Solomon v Shuell*, 435 Mich 104, 129; 457 NW2d 669 (1990). Thus, even assuming that the HAVEN forms were themselves hearsay (but properly admitted under the business record exception), statements within the HAVEN forms would be inadmissible if they independently were hearsay statements and did not fall within their own hearsay exception.

The majority does not challenge the introduction of the victim's overall summary of the incident. Yet the majority assumes (without any analysis) that the challenged *portion* of the victim's statement to the nurse examiner constituted hearsay. But, like the nurse examiner's testimony, the victim's statement to the nurse examiner (as reflected in the HAVEN forms) was not offered to prove the truth of the fact that defendant "carries a gun," but rather to describe the incident, and its effect upon the victim, in the context of a post-sexual assault nurse examination. The excerpted portion of the victim's statement was not hearsay. MRE 801(c).

The majority also concludes, without any reference to the record, that the statement did not fall within a recognized hearsay exception:

A Correct.

The victim did not make the challenged statement concerning the gun “for the purpose of medical treatment or medical diagnosis.” MRE 803(4). It was not “reasonably necessary [for] diagnosis or treatment.” *Id.* Rather, it was an unnecessary comment having nothing to do with the victim’s injuries and counsel should have objected to its admission.

I disagree. The victim made her statement in the context of an examination by a sexual assault nurse examiner. Certainly, it was made “for the purpose of medical treatment or medical diagnosis.” Far from being an “unnecessary comment having nothing to do with the victim’s injuries,” it was “reasonably necessary [for] diagnosis or treatment.” In my view, this Court is not in any position to determine as a matter of law that the victim’s purpose was other than to fully inform the examining nurse of the totality of the circumstances of the incident and its effect upon the victim, nor is the court in a position to determine as a matter of law that the victim’s statement was not “reasonably necessary” for her medical diagnosis and treatment.

This Court has long recognized that “[s]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment.” *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996).² A complainant’s statements allow medical personnel “to structure the examination and questions to the exact type of trauma that the complainant [has] recently experienced.” *Id.*

The record reflects that the victim suffered a “traumatic” event that may have included “developmental[] and psychological components, all of which require diagnosis and treatment.” *Id.* The nurse examiner’s exploration of the victim’s trauma elicited the challenged statement. The majority improperly discounts any possibility that the victim’s stated knowledge that defendant “carries a gun so I was scared” may have contributed to her trauma arising from this incident (or to any resulting developmental or psychological effects for which medical diagnosis or treatment might be appropriate).

As this Court recently has stated, in a strikingly similar context:

Defendant also argues that statements the victim made to the nurse who conducted a rape examination should not have been admitted. Statements made for the purpose of medical treatment are admissible pursuant to MRE 803(4) if they were reasonably necessary for diagnosis and treatment and if the declarant had a self-interested motivation to be truthful in order to receive proper medical care. This is true irrespective of whether the declarant sustained any immediately apparent physical injury. *People v Garland*, 286 Mich App 1, 8-10; 777 NW2d 732 (2009). *Particularly in cases of sexual assault in which the injuries might be latent, such as contracting sexually transmitted diseases or psychological in nature and thus not necessarily physically manifested at all, a victim’s complete*

² Although *McElhaney* presented the additional consideration of assessing the trustworthiness of a complainant of “tender years,” that consideration was immaterial to the Court’s analysis as applied here.

history and a recitation of the totality of the circumstances of the assault are properly considered to be statements made for medical treatment. Id. at 9-10; People v McElhaney, 215 Mich App 269, 282-283; 545 NW2d 18 (1996). Thus, statements the victim made to the nurse were all properly admissible pursuant to MRE 803(4). [People v Mahone, 265 Mich App 208, 215; ___NW 2d ___ (2011) (emphasis added).]

The majority departs from this precedential case, even while recognizing that “relief is unwarranted.”

I respectfully dissent from the majority’s conclusion that the challenged statement constituted hearsay, and that it did not fall within MRE 803(4). I otherwise concur, and agree with the majority’s ultimate conclusion that “relief is unwarranted.”

/s/ Mark T. Boonstra