

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 31, 2014

v

JOSEPH DOUGLAS MCRANNOLDS,

Defendant-Appellant.

No. 315726
Saginaw Circuit Court
LC No. 12-038023-FC

Before: RONAYNE KRAUSE, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count criminal sexual conduct, first degree (CSC I), MCL 750.520b, and one count third-degree child abuse, MCL 750.136b(5)(a). Defendant was sentenced to serve 25 to 38 years for CSC I, and one to two years for third-degree child abuse, to be served concurrently and with credit for 319 days served. We affirm.

I. BACKGROUND

Defendant's convictions arise out of his contact with his girlfriend's six-year-old son. The victim's mother had a form of muscular dystrophy and required assistance to take care of the victim and his younger brother. The maternal grandfather had lived with them for this purpose until the defendant moved in. A therapist, who worked with the family in the later part of 2011, noted the victim's demeanor change from a "pretty wild" child to "like a little soldier" after defendant moved in. The same therapist also observed defendant to be a "very aggressive" person who attempted to minimize the workers involvement with the family. During the time the therapist worked with the family, she made three complaints to the Department of Human Services (DHS) regarding defendant's behavior. In 2012, the victim's elementary principal observed a bruise under the victim's eye. The victim told the principal that the bruise came from being smacked by his "dad" after being bad and later in 2012, told a Families First worker that he did not like defendant because "sometimes he pulls down his pants and tells me and mom to do stuff". The later statement, made after the worker asked the victim how he liked living with defendant resulted in further investigation by law enforcement and defendant being charged.

II. HEARSAY AND INEFFECTIVE ASSISTANCE

Defendant first claims that certain out-of-court statements made by the victim to his principal and a Families First worker were improperly admitted at trial. The statement to the principal concerned a simple assault or child abuse and the statement to the Families First worker concerned a sexual assault.

The principal testified that at some point during the spring of 2012, the victim missed seven days of school. When he returned to school he had a bruise under his eye. The principal testified that when she asked the victim how he had gotten the bruise, he told her that “he was being bad and that his dad had smacked him.” The principal explained that because defendant was living with the victim’s family at the time, she assumed that the victim was referring to defendant. She acknowledged however, that the victim did not identify his “dad” by name.

Defendant argues the victim’s statement to the principal regarding how and from whom he received the bruise was inadmissible hearsay that denied him his constitutional right to a fair trial. Additionally, defendant argues that counsel was ineffective for failing to object to the statement’s admission. Since defendant failed to preserve these issues below, our review is for plain error affecting substantial rights. *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plain error affects a defendant’s substantial rights when it results in outcome-determinative prejudice. *Pipes*, 475 Mich at 279. “[R]eversal is only appropriate when the plain error that affected substantial rights seriously affected the fairness, integrity, or public reputation of the proceedings or when the defendant shows actual innocence.” *Id.* at 283 (internal quotation marks omitted).

We agree that the statement of the victim to the principal in this case was hearsay. “Hearsay is an unsworn, out-of-court statement that is offered to establish the truth of the matter asserted.” [People v Stamper](#), 480 Mich 1, 3; 742 NW2d 607 (2007), citing [MRE 801\(c\)](#). Generally, hearsay is inadmissible unless it falls under one of the exceptions provided for in the Michigan Rules of Evidence. *Id.*; MRE 802. The defendant was also charged with child abuse. Plaintiff obviously offered the statement of the victim through the principal to prove the truth of the matter asserted, that the victim was also physically abused by defendant. The statement was not, as plaintiff argues, excepted from the hearsay rule as a statement of present sense impression under MRE 803(3). According to *Duke v American Olean Title Co*, 155 Mich App 555, 571; 400 NW2d 677 (1986), “only Mr. Duke’s later statement to hospital personnel that he was in pain was admissible under MRE 803(3), and not his explanation of the circumstances of the accident.” The victim’s statement was not of his then existing physical condition, but was rather a statement of memory explaining a past event. “[T]he scope of MRE 803(3) is very narrow and does not allow the admission of any statements explaining” the victim’s state of mind. *Int’l Union, United Auto, Aerospace and Agric Implement Workers of Am v Dorsey*, 273 Mich App 26, 38; 730 NW2d 17 (2006). We also find the statement was not an excited utterance owing to the lack of evidence that it was made while the victim was “under the stress of the excitement caused by the event or condition.” *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003), quoting MRE 803(2). In the same vein, the statement was not a part of the res gestae. *People v Washington*, 84 Mich App 750, 754; 270 NW2d 511 (1978). In sum, there was no exception under the rules of evidence to admit the victim’s statement to the principal.

Despite this evidentiary error, reversal is only required when the error produced outcome-determinative prejudice. The principal's testimony of the victim's statement was cumulative to the victim's own testimony at trial. When "the declarant himself testified at trial, any likelihood of prejudice was greatly diminished because the primary rationale for the exclusion of hearsay is the inability to test the reliability of out-of-court statements." *People v Gursky*, 486 Mich 596, 621; 786 NW2d 579 (2010) (citations and quotation marks omitted). In this case, the principal's hearsay testimony was less important and less prejudicial where the victim testified and was subject to cross-examination. *Id.* In this instance, defendant cannot show plain error affecting his substantial rights.

Defendant's argument that his counsel was ineffective for failing to object to the principal's testimony regarding the victim's statement regarding the bruise likewise fails. Claims of ineffective assistance of counsel often present mixed questions of law and fact, where we review the findings of the trial court for clear error and the issues of constitutional law de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In order to prove ineffective assistance, defendant must "show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." [People v Toma, 462 Mich 281, 302; 613 NW2d 694 \(2000\)](#) (citation omitted). Prejudice is demonstrated by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 302-303. Given the fact that the victim himself testified, and the jury therefore, heard a first-hand accounting of the abuse suffered, it is quite unlikely that defense counsel's objection to the principal's testimony would have resulted in the outcome of the trial being any different. We find defendant was not prejudiced by his counsel's failure to object.

Next, defendant challenges the testimony of a Families First worker assigned to the victim's family that the victim told her that sometimes defendant pulls "down his pants and tells [the victim] and [his] mom to do stuff." Again, defendant argues the testimony should have been excluded as inadmissible hearsay. We disagree. We find the victim's statement to the worker admissible under MRE 803A. Under MRE 803A, certain out-of-court statements made to someone by a child about a sexual act are admissible as a hearsay exception. The rule provides as follows:

A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:

- (1) the declarant was under the age of ten when the statement was made;
- (2) the statement is shown to have been spontaneous and without indication of manufacture;
- (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and

(4) the statement is introduced through the testimony of someone other than the declarant.

If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

This rule applies in criminal and delinquency proceedings only.

The victim's statement, as testified to by the Families First worker, meets the requirements of the exception. The parties stipulated to the victim's date of birth which established he was under the age of 10 when the statement was made. The statement was spontaneous, in that the worker did not "question" the victim about any abuse or mistreatment. Rather, she testified to making "small talk" with the victim about how he liked living with defendant, and the victim responded as detailed above. It is notable that the statement was not made immediately after the incident of abuse. The record, while silent as to whether the victim may not have had the opportunity to tell anyone else about the abuse, contains evidence of the defendant's aggressive and even violent behavior toward the victim which constitutes an equally effective circumstance excusing the delay. See MRE 803A(3).

Defendant also argues the prosecutor failed to make known her intent to use the victim's statements to the worker in advance of trial. After a review of the record, we conclude otherwise. Additionally, in light of defendant's one-sentence cursory treatment of this issue citing no specific court rule or case, we could consider it abandoned. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). Nevertheless, we have reviewed the unpreserved allegation for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

In this case defendant was informed of the prosecution's possible witnesses, including the Families First worker, in April 2012 when he received discovery materials that included witness statements from the Families' First worker and the principal, as well as police reports. In December 2012, the prosecution served defendant with the Felony Information which indicated the names of witnesses the prosecution intended to produce at the trial on February 13, 2013. This list again included the Families First worker. We find no error here and conclude that the notice in this case was sufficient to provide defendant with a "fair opportunity to prepare to meet the statement."

Because the worker's testimony was properly admitted under MRE 803A, counsel cannot be deemed to have rendered ineffective assistance for failing to make a futile objection. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

III. PROSECUTORIAL MISCONDUCT AND INEFFECTIVE ASSISTANCE

Defendant also argues that counsel rendered ineffective assistance by failing to object to a civic duty argument made by the prosecutor during closing argument. Again, we disagree. Where a defendant fails to request a *Ginther* hearing, as was the case here, this Court's review is limited to mistakes apparent on the record. See *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *LeBlanc*, 465 Mich at 579. This Court reviews a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id.*

A defendant's right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This right to counsel encompasses the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To establish a claim of ineffective assistance of counsel a defendant must show (1) that counsel's performance was deficient and (2) that counsel's deficient performance prejudiced the defense. *People v Taylor*, 275 Mich App 177, 186; 737 NW2d 790 (2007). Defendant must also show that the resultant proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). A counsel's performance is deficient if it fell below an objective standard of professional reasonableness. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). The performance prejudiced the defense if it is reasonably probable that, but for counsel's error, the result of the proceeding would have been different. *Id.*

The issue of defense counsel's failure to object to a civic duty argument necessarily involves consideration of whether the prosecutor engaged in misconduct. Indeed, this is what defendant's argument is focused on. This Court reviews an unpreserved claim of prosecutorial misconduct for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Review of unpreserved issues of prosecutorial misconduct is precluded unless a failure to review the issue would result in a miscarriage of justice. *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

During her closing argument, the prosecutor recounted the victim's testimony on cross-examination that defendant used to make him stand in the corner all day, and she told the jury that the victim's younger brother would bring him stuffed animals and a blanket while he was standing there. The prosecutor then made the following statement, to which defendant objects on appeal:

Stuffed animals and a blanket cannot fix what happened to Little Joey. It can't fix it. You are all that's left at this point that can make this right. It will never cure what's happened to him, but it will at least give him the knowledge that he is safe and that he was believed and that his pain, what he went through, was important to somebody.

Defendant asserts that these comments constituted an improper appeal to the jury to convict because it was their "civic duty" to do so.

A prosecutor is charged with the responsibility to seek justice, not merely to win at trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). As such, a prosecutor may not

interject issues broader than defendant's guilt or innocence into the trial proceedings. *Id.* at 63-64. For example, a prosecutor may not urge the jury to convict out of a sense of civic duty. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A civic duty argument is one that "appeal[s] to the fears and prejudices of jury members." *Id.*

During cross-examination, the victim testified that defendant made him stand in the corner "like the whole day" in response to defense counsel's question asking how long his mother made him stand in the corner when he "did something bad." The victim also stated that his "baby brother brought my stuffed animals" to him while he was in the corner. The prosecutor's argument challenged on appeal used this testimony to frame its exhortation that the jury convict based on the evidence of what was done to the victim. In other words, the prosecutor was not urging the jury to convict based on matters external to the trial but based on the matters expressly dealt with during trial. A prosecutor "is not required to state . . . conclusions in the blindest possible terms." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defense counsel was not ineffective for failing to object to the prosecutor's comments. See *Gist*, 188 Mich App at 613.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens