

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL JOSEPH HOLM,

Defendant-Appellant.

UNPUBLISHED

May 6, 2008

No. 279406

Clinton Circuit Court

LC No. 06-008049-FC

Before: White, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(a) and (1)(b)(i). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant, defendant's 13-year-old daughter, alleged that defendant began engaging in sexual activity with her when she was in the fifth grade. This activity took many forms, including intercourse. Defendant denied engaging in any sexual activity with complainant.

Doctor Stephen Guertin interviewed complainant and conducted a physical exam. At trial, Dr. Guertin was qualified as an expert in pediatrics, specializing in child sex abuse. Dr. Guertin testified that the physical exam revealed that complainant's hymen had a split in it and that the opening of the hymen was markedly larger than would be expected for someone not having sexual intercourse. Dr. Guertin also testified that complainant's vagina was longer and deeper than would normally be expected of someone who had not had intercourse. Dr. Guertin testified that these findings did not prove a claim of abuse, but did support such a claim. Towards the end of his direct testimony, Dr. Guertin was asked:

Q: Doctor, did you draw some type of conclusion in this case?

A: Yes. The child gave a very clear history of being sexually abused in a variety of ways, and she certainly had physical evidence that would corroborate some of what she said, and so my conclusion was that she had been molested.

No objection was made to this testimony.

Defendant first contends the trial committed plain error by allowing plaintiff's expert to testify that he had reached the conclusion that complainant had been molested. We disagree.

To preserve an evidentiary issue for review, the party opposing the evidence must object at trial and specify the same ground for objection that it asserts on appeal. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Here, there was no objection at trial to the challenged evidence. Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). No verdict should be reversed or a new trial granted in any criminal case on the ground of improper admission of evidence, unless it affirmatively appears that the error has resulted in a miscarriage of justice. MCL 769.26; *People v Young*, 472 Mich 130, 141; 693 NW2d 801 (2005).

To prevail on a claim of plain error, a defendant must show that: (1) an error occurred; (2) the error was clear or obvious, and (3) the plain error affected substantial rights. *Carines*, *supra* at 763. A reviewing court should only reverse when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 774.

Our Supreme Court has established general principles regarding the testimony of expert witnesses in child sexual abuse cases: "(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). However, an expert in a child sexual abuse case is permitted to testify regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim. *Id.* at 352-353. The rationale for setting these guidelines was to establish limitations on expert testimony while maintaining a fair and equitable solution to credibility contests that frequently arise in these types of cases. *Id.* at 352.

While the majority of Dr. Guertin's testimony comports with the *Peterson* guidelines, his comment that complainant was molested does appear to be outside the permissible scope of such testimony. Even though he did not identify the perpetrator of the molestation, he still concluded that complainant had been molested. Nevertheless, we conclude that this error does not require reversal.

The rationale of the *Peterson* Court in setting limitations on expert testimony was to prevent situations where juries might see the expert as the only "impartial" witness in cases that amount to a swearing match between a defendant and his accuser, and thereby lend undue weight to the expert's testimony. *Peterson*, 450 Mich at 374. In this case, Dr. Guertin's testimony would not have served as a "tie breaker" between complainant and defendant, since the prosecution also presented the testimony of complainant's mother, who observed defendant in the complainant's room at four in the morning while complainant was naked, and who confronted defendant, causing him ultimately to admit to the sexual activity with complainant. Therefore, it cannot be said that Dr. Guertin's conclusion was outcome determinative. *People v Osantowski*, 274 Mich App 593, 607; 736 NW2d 289 (2007).

In addition, any prejudice resulting from Dr. Guertin's statement could have been cured by a timely objection and curative instruction. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001).

While defendant might be said to have established that an error occurred and that said error was clear and obvious, we conclude that the error cannot be said to have affected defendant's substantial rights, since the challenged testimony does not appear to have been outcome determinative. Therefore, a claim of plain error cannot succeed. Defendant is not entitled to relief on this issue. MCL 729.26.

Defendant next contends he was deprived of his right to effective assistance of counsel. We disagree.

In order to preserve a claim a claim of ineffective assistance of counsel, a defendant must make a motion for a new trial or request an evidentiary hearing in the trial court. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant did not request a new trial or an evidentiary hearing; thus, the issue is unpreserved, and our review is limited to mistakes apparent on the record. *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In order to prevail on a claim of ineffective assistance of counsel, defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different; and (3) the resultant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant must overcome a strong presumption that counsel's actions were the product of sound trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant contends that he was denied effective assistance of counsel based solely on counsel's failure to object to Dr. Guertin's testimony that complainant had been molested, and that this failure to object could not have been part of a sound trial strategy. However, we conclude that because Dr. Guertin's testimony was not outcome determinative, as outlined above, defendant cannot show that the alleged error resulted in actual prejudice. *Rodgers, supra*. Absent such a showing, defendant's claim cannot succeed.

Affirmed.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenksi