

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS JAMES TILSON,

Defendant-Appellant.

UNPUBLISHED

July 1, 2010

No. 291307

Kent Circuit Court

LC No. 08-003732-FC

Before: SAWYER, P.J., and BANDSTRA and WHITBECK, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b) (relation to victim). Defendant was sentenced as an habitual offender second offense, MCL 769.10, to 15 to 30 years' imprisonment for each count. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

At trial, Dr. Eugene M. Shatz offered expert testimony and stated that, after treating the minor victim, "it was my medical opinion that this child had been abused." Defense counsel immediately and generally objected, but then indicated the question was not necessarily inappropriate and did not challenge the testimony as being improper expert testimony. The trial court and prosecutor agreed to proceed with direct examination without referring to the ultimate issue in the case. Defendant did not ask the trial court to strike Dr. Shatz's statement from the record and he did not ask for a limiting instruction. On appeal, defendant argues that Dr. Shatz's improper opinion testimony denied him his right to a fair trial where the trial court failed to strike the testimony from the record and failed to provide a limiting instruction. Defendant failed to preserve the issue for review by objecting on the same grounds at trial that are asserted on appeal. See *People v Grant*, 445 Mich 535, 545, 553; 520 NW2d 123 (1994). We review unpreserved claims, including claims that defendant was denied a fair trial, for plain error affecting substantial rights. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006), citing *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must show that a plain error occurred, and that the plain error affected his substantial rights in that it affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763-764.

In CSC cases, an expert

(1) . . . may testify in the prosecution’s case in chief 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, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim’s credibility. [*People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended on other grounds 450 Mich 1212 (1995).]

However, “(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.” *Id.* When an expert offers improper opinion testimony that a sexual assault in fact occurred, “generally effective cross-examination will prevent the jury from drawing such a conclusion; however, a limiting instruction may also be necessary and should be given on request.” *People v Beckley*, 434 Mich 691, 725; 456 NW2d 391 (1990).

In this case, Dr. Shatz’s testimony opining that the victim was sexually abused was clearly improper and constituted plain error. *Peterson*, 450 Mich at 352. However, this improper testimony did not deny defendant a fair trial, because it did not amount to plain error affecting his substantial rights. *Carines*, 460 Mich at 764; *Conley*, 270 Mich App at 305. Dr. Shatz’s improper opinion testimony was brief and accounted for only a small portion of his overall testimony concerning the medical treatment he provided to the victim. The trial court thereafter had the prosecutor avoid the ultimate issue in the case, and later sustained an objection when Dr. Shatz appeared ready to improperly state his conclusion on the ultimate issue a second time.

Moreover, there was a significant amount of other evidence introduced by the prosecution that would allow a rational juror to find defendant guilty of both counts of CSC I beyond a reasonable doubt. Two medical doctors offered testimony that the victim, for purposes of medical treatment, stated that defendant performed fellatio on him and then had him engage in anal sex. While both the victim’s mother and the victim testified that they could not remember any of the details associated with the sexual assaults, their testimonies were thoroughly impeached by prior statements they each made to police and medical witnesses. And, evidence showed that defendant attempted to interfere with both witnesses’ testimony by trying to convince them to lie about the sexual assaults. See *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981) (evidence concerning a defendant’s attempts to influence witnesses against him can be relevant to show consciousness of guilt). In addition, the victim admitted during his testimony that defendant engaged in sexual activity with him, although he stated that he did not remember any of the details of the assaults, and his victim impact statement was admitted as substantive evidence as a past recollection recorded wherein the victim asserted that defendant should be punished and should receive mental help for his actions. Additionally, Detective Edward Kolakowski testified that defendant attempted to hide from police when they appeared at his residence. See *People v Biegajski*, 122 Mich App 215, 220; 332 NW2d 413 (1982) (“Evidence of an attempt to avoid arrest and flight in a criminal case is relevant, material, admissible and can lead to an inference of guilt”). Most importantly, defendant confessed to police that he committed the charged offenses.

Although the trial court did not offer a limiting instruction, defense counsel did not request an instruction, and an instruction is not required to cure improper prejudice. See *Beckley*, 434 Mich at 725. While the trial court did not sua sponte strike Dr. Shatz's testimony from the record, the court ensured no additional improper statements were made. Considering the significant amount of other evidence in this case, including defendant's admission that he committed the offenses, the trial court's handling of the matter did not amount to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

We affirm.

/s/ David H. Sawyer
/s/ Richard A. Bandstra
/s/ William C. Whitbeck