

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONZO L. YOUNG,

Defendant-Appellant.

UNPUBLISHED

August 7, 2001

No. 223535

Kalamazoo Circuit Court

LC No. 98-000732-FC

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) [victim under thirteen years of age], and one count of the second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) [victim under thirteen years of age]. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent terms of 40 to 60 years' imprisonment for the CSC I conviction and 9 to 15 years' imprisonment for the CSC II conviction. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in permitting the prosecutor to amend the information to charge that the alleged conduct occurred "on or about June-November 1997." This Court reviews for an abuse of discretion the trial court's determination when and to what extent specificity of the time frame of the charged crime will be required within an information. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986). We conclude that in this case the trial court did not abuse its discretion in permitting the prosecutor to allege in the information that the crimes occurred "on or about June-November, 1997" because (1) the charges involved sexual assaults of a young child, who reasonably might fail to recall specific dates of ongoing assaults, *id.* at 234, (2) the victim could not recall the specific dates during which defendant's repeated assaults of her occurred, (3) the record indicates that the prosecutor expended substantial time and energy attempting to pinpoint specific dates, and (4) defendant suffered no prejudice in preparing his defense because time was neither of the essence nor a material element of the CSC charges against him.¹ *People v Miller*, 165 Mich App 32, 46-47; 418 NW2d 668

¹ Furthermore, as the trial court noted defendant had "some considerable variation in testimony with which to attack testimony . . . at trial."

(1987); *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987). “Where the facts demonstrate that the prosecutor has stated the date and time of the offense to the best of . . . her knowledge after undertaking a reasonably thorough investigation, an information . . . will not be deemed deficient for failure to pin down a specific date.” *Miller, supra* at 47.

Defendant next argues that the trial court improperly allowed an expert witness to testify regarding statements that the victim made to her during a physical examination. We review for an abuse of discretion a trial court’s decision regarding the admissibility of evidence. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

The expert witness who testified regarding the victim’s statements was a pediatrician, qualified as an expert in child sexual abuse, who had examined the victim approximately two months after the incident initially was reported. According to the pediatrician’s testimony, the victim stated to her that “Lonzo” had touched her private parts with his private parts. The pediatrician’s testimony indicated that through further questioning and utilization of a Q-tip for demonstration purposes the victim provided insight into exactly where she felt defendant touch her. The expert witness specifically opined that the victim’s statements were “absolutely necessary” to her medical diagnosis and treatment of the victim. The trial court therefore admitted the statements pursuant to MRE 803(4).

MRE 803(4) provides that certain hearsay statements may be admissible if they are “made for purposes of medical treatment or medical diagnosis in connection with treatment” and are “reasonably necessary to such diagnosis and treatment.” In *People v Meeboer (After Remand)*, 439 Mich 310, 323; 484 NW2d 621 (1992), which involved several minor victims’ statements to physicians describing sexual abuse, the Supreme Court explained that for purposes of applying the MRE 803(4) exception “further analysis of the circumstances surrounding the examination of a child is necessary to determine whether the child understood the need to be truthful to the physician.” The Court required an initial inquiry into the trustworthiness of a child victim’s statements in light of the totality of the circumstances, as well as a subsequent inquiry whether the victim’s statements related to the victim’s medical treatment or diagnosis. *Id.* at 324-325, 328-329. The Court described numerous factors to be considered when determining whether a child victim’s statement is trustworthy:

- (1) the age and maturity of the declarant,
- (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of a statement),
- (3) the manner in which the statements are phrased (childlike terminology may be evidence of genuineness),
- (4) use of terminology unexpected of a child of similar age,
- (5) who initiated the examination (prosecutorial initiation may indicate that the examination was not intended for purposes of medical diagnosis and treatment),
- (6) the timing of the examination in relation to the assault (the child is still suffering pain and distress),
- (7) the timing of the examination in relation to the trial (involving the purpose of the examination),
- (8) the type of examination (statements made in the course of treatment for psychological disorders may not be as reliable),
- (9) the relation of the declarant to the person identified (evidence that the child did not mistake the identity), and
- (10) the existence of or lack of motive to fabricate. [*Id.* at 324-325.]

The Court further indicated that corroborating evidence, such as physical evidence of the assault and evidence that the victim identified an assailant who had the opportunity to commit the assault, can support the trustworthiness of the child declarant's statements regarding a sexual assault. *Id.* at 326.

We agree with defendant that the approximately two-month time gap between the victim's initial reporting of the abuse and the expert's examination of the victim, as well as the victim's stated preference for living with her grandmother, tend to support an inference that the victim's statements may have been coached. With respect to the other indicia of trustworthiness described in *Meeboer*, however, we note the following: (1) the victim was eight years-old at the time of the expert's examination, (2) no indication exists that the expert's questions of the victim placed words in the victim's mouth; (3) the victim phrased her statements in a childlike manner, referring to defendant's "private parts," (4) apparently neither the prosecutor nor police initiated the expert's examination of the victim, but the victim's grandmother did so on recommendation of the Family Independence Agency, (5) the expert's examination occurred after defendant's identification as a suspect, but approximately five months before defendant's preliminary examination and more than 1½ years before defendant's trial began, (6) the statements occurred during the course of a medical examination by the expert, a pediatrician, (7) the victim's statements identified an assailant—her mother's long-time boyfriend—whom the victim was unlikely to misidentify and who had ample opportunity to commit the assaults, thereby reducing the risk of misidentification. Moreover, unlike the facts in *People v Craft*² cited by defendant, see *Meeboer*, *supra* at 336-338, the victim consistently implicated defendant as the assailant when initially reporting the abuse to her grandmother and an emergency room physician, during the physical examination by the expert witness, and throughout her trial testimony.

In addition to qualifying as trustworthy, the statements must be reasonably necessary to the victim's medical diagnosis and treatment. *Meeboer*, *supra* at 328-330. The expert testified that the victim's statements were "absolutely necessary" to her ability to diagnose and treat the victim. The expert explained that the victim's statements regarding defendant's abuse allowed her to determine the extent of defendant's penetrations into the victim, and also assuaged the expert's concerns of the victim's "coaching" or "fabrication." The expert's own gauge of the victim's veracity certainly would be relevant and necessary to her diagnosis and medical treatment of the victim. The victim's statements permitted the expert "to structure the examination and questions to the exact type of trauma that the [victim] had recently experienced." *People v McElhaney*, 215 Mich App 269, 282-283; 545 NW2d 18 (1996) (noting that sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment).

Although some existing facts tend to diminish the trustworthiness of the victim's statements to the expert, in light of the substantial other facts tending to strengthen the trustworthiness of the victim's statements, *McElhaney*, *supra* at 280-282, which were reasonably necessary to the expert's medical treatment and diagnosis of the victim, we cannot conclude that

² *Craft* was a companion case to *Meeboer*, *supra*.

the trial court clearly abused its discretion in admitting the expert's testimony regarding the victim's statements pursuant to MCR 803(4). *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Even assuming that the trial court erroneously admitted the expert's testimony regarding the victim's statements, this error was harmless because the expert's testimony was cumulative to the victim's own trial testimony describing defendant's assaults. *McElhaney*, *supra* at 283.

Defendant lastly asserts that the trial court read an inappropriate jury instruction, CJI2d 20.29.³ Because defendant failed to raise a timely objection to this instruction, he must demonstrate plain error that was outcome determinative or error that falls under the category of cases where prejudice is presumed or reversal is automatic. *People v Mette*, 243 Mich App 318, 324; 621 NW2d 713 (2000). As defendant notes, this case hinged on the victim's credibility. The jury clearly chose to credit the victim's testimony, a determination that we will not second guess.⁴ Because we fail to comprehend how the unnecessarily given curative instruction could have altered the outcome of defendant's trial,⁵ we need not further consider this issue.⁶

Affirmed.

/s/ Jeffrey G. Collins
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

³ The trial court instructed the jury that it "heard testimony from an expert about the behavior of sexually abused children," and that it should consider that evidence only for the limited purpose of determining whether the victim's behavior was consistent with the behavior of other sexually abused children. Defendant correctly notes that no expert testimony described the typical behavior of sexually abused children.

⁴ See *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) (noting in the context of a motion for new trial "that, absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its view of the credibility 'for the constitutionally guaranteed jury determination thereof'").

⁵ In support of his argument, defendant presents bare speculation that the instruction might somehow have induced the jury to imagine and then rely on a nonexistent expert opinion favorable to the prosecutor. We find this unlikely, especially in light of the trial court's instructions that the jury should determine the facts from the evidence presented during trial.

⁶ To the extent that defendant suggests that defense counsel was ineffective for either improperly requesting the instruction or failing to properly object to it, this assertion fails given our conclusion that the providing of the instruction was not outcome determinative. *People v Nimeth*, 236 Mich App 616, 624-625; 601 NW2d 393 (1999).