

STATE OF MICHIGAN
COURT OF APPEALS

IN RE MICHAEL EUGENE THOMAS, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

MICHAEL EUGENE THOMAS,

Respondent-Appellant.

UNPUBLISHED

March 22, 2007

No. 264549

Macomb Circuit Court

Family Division

LC No. 04-570681-DL

Before: O’Connell, P.J., and Murray and Davis, JJ.

PER CURIAM.

The minor respondent appeals as of right from an order of disposition entered following a delinquency proceeding in which a jury determined that he committed first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age). On March 28, 2005, the trial court entered an order of disposition placing respondent under the supervision of the Family Independence Agency for an indefinite term of probation. He was also required to register as a sex offender for a period of 25 years. We reverse and remand for a new trial.

Respondent was twelve years old at the time of the offense, and the victim was five years old. They were neighbors and lived four houses away from each other; the victim is also the younger sister of one of respondent’s friends. The victim had been playing at respondent’s house, where the two were alone for approximately 15 minutes. When the victim returned to her mother’s house, the victim apparently reported that respondent had touched her inappropriately and scratched her vagina with his fingernail. The mother, Scarlett Lucas, telephoned the police, who interviewed and arrested respondent. At the request of the police, Lucas took the victim to a medical clinic for a forensic medical examination later that evening. The examination found a half-centimeter abrasion to the victim’s hymen. DNA evidence was taken from the victim and from respondent’s fingernails; the DNA analysis from the victim’s examination was not placed in evidence, and the DNA evidence from respondent’s fingernails did not recover any match to the victim. Respondent testified that the victim entered his house against his permission and was inside for approximately five minutes, when she ran to his bedroom, jumped on his bed, and asked to play video games. He claimed she threw a tantrum when he told her she could not play

the game and that he picked her up and carried her out of the house. Respondent denied that he touched the girl's vagina unintentionally or otherwise during this incident.

Respondent first argues that the trial court erred by admitting hearsay statements introduced through the testimony of the victim's mother, which were beyond the scope of the hearsay exception in MRE 803A for a child's statement about a criminal sexual act. Because respondent's objection is unreserved, the alleged error will require reversal only if he establishes plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999)

MRE 803A is a codification of the common law "tender years exception" to the hearsay evidence rule. *People v Dunham*, 220 Mich App 268, 271; 559 NW2d 360 (1996). This exception

makes a statement describing an incident that included a sexual act performed with or on a declarant under ten years of age by the defendant or an accomplice admissible to the extent it corroborates testimony given by the declarant during the same proceeding if the statement is spontaneous, made immediately after the incident or with excusable delay such as that caused by fear or other equally effective circumstance. [*In re Snyder*, 223 Mich App 85, 91; 566 NW2d 18 (1997).]

The victim was five years old at the time, and her statement was spontaneously made to her mother as soon as her mother returned home. The victim's responses to her mother's open-ended requests to clarify what the child meant by her statement that respondent hurt her with his fingernails are also considered spontaneous under the rule. *Dunham, supra* at 272. The rule required that defendant be given advance notice of the statement, but a defendant is not prejudiced by the prosecutor's failure to inform him about the plan to introduce MRE 803A testimony where he should have anticipated the potential testimony. *Id.* at 272-273. Here, respondent was aware that the victim made the statement to her mother and that her mother was listed as a prosecution witness, so we do not believe respondent was prejudiced.

Nonetheless, we find that the trial court erred in admitting Lucas's testimony under MRE 803A to the extent that it exceeded the scope of her daughter's own testimony. MRE 803A only permits corroborative statements. The child testified that respondent touched her vagina with his finger and claimed that his fingernail scratched her in that area. However, Lucas's testimony included hearsay statements from the child alleging that respondent pulled down his own pants and told the victim to lick his "butt."¹ The trial court stopped her from testifying about these statements the first time she attempted to do so, reminding the prosecutor of the requirements of MRE 803A and giving a cautionary instruction to the jury. However, Lucas repeated these same allegations twice more during her testimony, and the second time the prosecutor clearly and

¹ The victim's mother used this term to refer to both genitals and anus, and she instructed her children to do the same. Therefore, it is frequently unclear during her testimony what body part she is actually referring to.

deliberately elicited testimony regarding the child's hearsay statements. Defense counsel made an untimely objection only after the prosecutor asked three questions that clearly called for non-corroborative hearsay, *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003), and did not request a curative instruction or to strike Lucas' response.

Because respondent's objection is unpreserved, we review for plain error affecting respondent's substantial rights. *Carines, supra* at 763-764. Under this standard, respondent must show that the error affected the outcome of the proceedings and either resulted in the conviction of an actually innocent person or seriously affected the integrity, fairness, or public reputation of the proceedings. *Id.*, 763. We believe respondent has done so. The plain language of MRE 803A clearly establishes that hearsay is "admissible to the extent that it corroborates testimony given by the declarant during the same proceeding," as the prosecutor had already been informed by the trial court, but Lucas's testimony went well beyond corroboration by adding significant new allegations to those included in her daughter's testimony. Eliciting such clearly inadmissible evidence after being told that it was inadmissible constitutes clear error. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

In *Jones*, our Supreme Court determined that the defendant had nevertheless not shown that the plain error affected the outcome of his trial. *Jones, supra* at 360. In contrast, the evidence of respondent's guilt here is far from overwhelming. This case is essentially a credibility contest between children. According to the prosecution's witnesses, respondent was alone with the girl for no more than fifteen minutes. The child's sister apparently checked on the girl moments before she left respondent's house. The child's testimony raises a strong possibility that the girl did not believe her own allegations to be true. Troublingly, her testimony also gives us serious concerns that she was not competent to testify because she did not know the difference between truth and untruth.

The trial court tested the girl's competency to testify by asking her the following question:

Q. Could you tell me something that isn't true right now just to play a game?
What would be something that isn't true?

A. Michael sticking his finger in me.

Q. I can't hear you.

A. Michael sticking his finger in me?

Q. Michael sticking your – his finger in you?

A. Yeah.

Q. What – tell me what that statement means? Is that true or not true?

A. Not true.

Q. Okay. Do you know what true and not true means?

A. I don't know.

Q. You don't know?

A. Yeah.

Furthermore, the child was unable to narrate or provide context for her allegation. Essentially, the girl's testimony consisted of the words "He stuck me with his finger . . . in here" and the act of pointing to her vagina.

As to the fact of penetration, we note that the evidence that the child had a small abrasion on her hymen does not conclude the question whether respondent penetrated her vagina as alleged. The testifying medical expert, who did not examine the child herself, admitted that she could not testify as to what caused the abrasion or whether it was consistent with the child's allegations. In addition, Lucas testified that she examined her daughter's vagina in somewhat of a panicked state when the girl first made her allegations and that the child demonstrated with her own finger what respondent allegedly did to her while her mother was conducting this exam.

We are unable to say whether or not an actually innocent person was convicted. However, when the factors are viewed together, we believe that the fairness, integrity, or public reputation of the proceedings below were seriously affected independent of respondent's actual innocence. The prosecutor deliberately and repeatedly elicited testimony that had already been established as inadmissible, and we are disturbed by the possibility that the prosecutor did so to bolster a case that was based on testimony that was not only weak, but provided by a witness who may not have been competent to give it at all. We conclude that respondent has met his burden of showing that the plain error indeed affected his substantial rights. *Carines, supra* at 763.

Additionally, the trial court improperly allowed hearsay testimony to be given by a nurse from the clinic where the child was examined, without first establishing the trustworthiness of the child's statements to the treating nurse. The nurse who performed the actual exam was unavailable to testify, so the supervising nurse in the office quoted from statements contained in the clinical record. The nurse who testified explained that she was responsible for maintaining these records, and that the specific record she relied on had been compiled and kept in the regular course of business. Therefore, the trial court apparently properly found that the document itself was admissible under MRE 803(6).² However, each statement within such a record must independently be admissible as nonhearsay or be admissible under a hearsay exception. MRE 805; *Merrow v Bofferding*, 458 Mich 617, 627; 581 NW2d 696 (1998); *Solomon v Schuell*, 435 Mich 104, 128-129; 457 NW2d 669 (1990). Respondent contends that the trial court erred in admitting the statements under MRE 803(4) because the prosecutor failed to lay the proper foundation by establishing that the statements were reasonably necessary for diagnosis and treatment. *Merrow, supra* at 629. We agree.

² MRE 803(6) was not explicitly referred to in the record. We presume the trial court admitted the victim's clinical record under the "records of regularly conducted activity" exception to the hearsay evidence rule, because that would have been a proper decision.

The traditional rationale underlying the MRE 803(4) exception is that statements made for medical treatment are inherently trustworthy because the declarant has a self-interested motivation to speak the truth in order to receive an accurate diagnosis and proper treatment. *Merrow, supra* at 629. This rationale requires more careful analysis when applied to a child under the age of ten, who may not have an adult understanding of the need to tell the truth to medical professionals. *People v Meeboer (After Remand)*, 439 Mich 310, 326; 484 NW2d 621 (1992). The *Meeboer* Court ruled that the proper analysis was whether the child's statement was reliable under the totality of the circumstances. *Id.* at 323-324. The child's understanding to tell the truth to the medical provider must be evaluated through consideration of a non-exhaustive list of ten factors:

(1) the age and maturity of the declarant, (2) the manner in which the statements are elicited (leading questions may undermine the trustworthiness of the 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 the purpose 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 (footnotes omitted).]

A trial court may also consider corroborating physical evidence of an assault in determining whether to admit the child's out-of-court statement. *Id.* at 325-326.

Here, the declarant was two weeks past her fifth birthday, and the evidence showed that she may have had an immature sense of the concept of truth. The testifying witness was unable to say how the interview was conducted or how the declarant responded to any questions. These factors therefore weigh against admission. However, it appears from the witness' paraphrasing of the child's statements that they contained childish vocabulary and immature forms of expression, which weigh in favor of admission. The child's mother testified that the police instructed her to take her daughter to the clinic for the express purpose of collecting DNA evidence, which would be used to prosecute respondent. Although hearsay statements are more trustworthy when made before any investigation against a particular defendant is initiated, they may still be reliable if the primary purpose of the examination was to diagnose, treat, or protect the general welfare of the victim. *Meeboer, supra* at 331, 333, 337. This factor appears to favor neither admission nor exclusion. The examination was conducted within hours of the alleged assault, it was medical rather than psychological, and there is no evidence that the child was uncertain of the identity of her alleged attacker; these factors weigh in favor of admission.

However, the tenth factor, the existence or lack of motive to fabricate, should be weighed against the prosecution because there was some evidence of a motive to fabricate the allegations. *Meeboer, supra* at 325. Respondent testified that the girl was angry because he would not allow her to play with his video game. He explained that she had a tantrum and needed to be

physically removed from the house. Respondent and his mother testified that the girl had entered their home on previous occasions and that she was told to leave and not to enter again. Respondent's mother alleged that she and Lucas had a disagreement regarding the child and that as a result there was "bad blood" between the families. Although the trial court excluded evidence related to these inter-family hostilities and defense counsel made no offer of proof, the testimony suggests the possibility of a motive to fabricate, which this Court must consider as part of whether the child's statement was reliable under the totality of the circumstances. *Meeboer, supra* at 323-324.

We conclude that the victim's clinical medical record was properly admitted under MRE 803(6). However, the totality of the circumstances persuade us that the child's statements contained in that record constitute hearsay within hearsay, MRE 805, and insufficient evidence was presented to support admission of those statements under MRE 803(4). The record does not support the finding that her statements were made with the requisite understanding of the need to speak the truth to her medical examiners.³ Furthermore, the nurse's testimony was not merely repetitive of competent testimony already given by the victim herself, which could have constituted harmless error. *People v McElhaney*, 215 Mich App 269, 283; 454 NW2d 19 (1996); *People v Van Tassel (On Remand)*, 197 Mich App 653, 655; 496 NW2d 388 (1992). Rather, the testimony was cumulative of the hearsay testimony of the girl's mother, which was also erroneously admitted. Given the weakness of the prosecutor's case without these improperly admitted hearsay statements, we conclude that respondent has carried his burden of establishing that it was more probable than not that the alleged error affected the outcome of the trial. In light of this conclusion, we need not address respondent's remaining issue.

Reversed and remanded. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Alton T. Davis

I concur in result only.

/s/ Peter D. O'Connell

³ Although identification of the assailant in a sexual abuse case "is necessary to adequate medical diagnosis and treatment" *Meeboer, supra* at 322, some of the testimony regarding what respondent said to the child, and the allegation that he exposed himself to her may not have been. Those other statements therefore would not have been admissible under MRE 803(4) in any event. Given our other conclusions, we decline to address this issue.