

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL BECERRA,

Defendant-Appellant.

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UNPUBLISHED  
February 14, 2008

No. 273462  
Ottawa Circuit Court  
LC No. 06-029858-FC

Before: Markey, P.J., and Meter and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b); and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b). Defendant was sentenced to concurrent terms of 96 to 434 months' imprisonment for CSC I, and 60 to 180 months' imprisonment for CSC II. We affirm.

Defendant first argues that the victim's testimony was insufficient to support the convictions because the victim lacked credibility, and because the prosecutor failed to produce physical evidence corroborating her testimony. Defendant alternatively argues that the verdicts were against the great weight of the evidence because defendant and the victim's sister contradicted the victim's testimony at trial. We review challenges to the sufficiency of the evidence de novo and in a light most favorable to the prosecution to determine whether the trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). Circumstantial evidence and the reasonable inferences that arise therefrom can constitute sufficient proof of the elements of a crime beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Additionally, we review for an abuse of discretion the trial court's decision to deny a motion for a new trial on the basis that the verdict was against the great weight of the evidence. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A defendant must show that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 639, 642; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

The victim's testimony, if believed, was sufficient evidence from which a rational trier of fact could find that defendant committed the elements of both CSC I and CSC II. *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994); MCL 750.520h. The age of the victim in

this case was undisputed. At the time of the alleged incidents, she was a person between the ages of 13 and 16 years. The fact that the victim was a member of defendant's household was also undisputed. Further, the victim identified defendant as the perpetrator of the encounters that were the basis for the convictions. She testified about one encounter with defendant where, after viewing a "pornographic" movie, defendant forcibly removed her pants and shirt, and forced her to engage in penile/vaginal intercourse with him. The victim testified about a second incident where the skin of defendant's hands came into contact with her breasts and vagina while defendant "tickled" her, both over and under her clothing. In addition to her testimony at trial, the victim also described the assaults in a statement she gave to an administrator at her school. While defendant argues that the victim was not a credible witness, due to several alleged inconsistencies between her version of her encounters with defendant and her sister's version of events, questions of credibility and intent should be left to the jury to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).<sup>1</sup>

We also reject defendant's argument that the victim was successfully impeached with evidence that her testimony at trial differed from her previous descriptions of the incidents. That there was conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. *McCray, supra* at 637; *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003). Unless the contradictory testimony was "so far impeached that it 'was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Musser, supra* at 219. We conclude that defendant has not shown that the trial court abused its discretion by denying his motion for a new trial, for the victim's trial testimony was not deprived of all probative value such that it could not be believed, and it did not defy physical reality or contradict indisputable facts. *Musser, supra*.

Defendant next argues that the trial court improperly instructed the jury with respect to the unanimity requirement. Generally, we review de novo claims of instructional error. *People v Heikkinen*, 250 Mich App 322, 327; 646 NW2d 190 (2002). However, defendant failed to preserve this issue, and waived appellate review, by affirmatively expressing satisfaction with the trial court's jury instructions. *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987). Waiver is defined as "the 'intentional relinquishment or abandonment of a known right.'" *Carines, supra* at 762-763. The trial court asked each party whether they had any objections or corrections to the proposed instructions, to which defendant's trial counsel stated, "[n]o, your Honor." If a party invites instructional error, by expressing satisfaction with a trial court's instructions, it constitutes a waiver that extinguishes any error regarding the instructions. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). If appellate review was not foreclosed by waiver, review is for plain error. *Carines, supra* at 763. To avoid forfeiture under the plain error rule, three requirements must be met: (1) an error

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<sup>1</sup> Defendant additionally argues that the prosecutor failed to provide physical evidence showing that the victim was assaulted, but physical evidence is unnecessary because a jury can base its conviction solely upon the victim's testimony. *Smith, supra* at 69; MCL 750.520h.

must have occurred; (2) the error must be plain; and (3) the error must have affected the defendant's substantial rights, which generally requires the defendant to show that the error affected the outcome of lower court proceedings. *Id.*

The trial court instructed the jury that:

In count I, the defendant is charged with [CSC I]. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant engaged in a sexual act, that involved entry into [the victim's] genital opening, by the defendant's penis or finger. Any entry, no matter how slight, is enough. It does not matter whether the sexual act was completed, or whether semen was ejaculated.

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Your verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agree on that verdict.

Assuming defendant has not waived this issue, defendant cannot show plain error. Criminal defendants are entitled to unanimous jury verdicts, MCR 6.410(B); *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994), so a trial court is required to properly instruct the jury on the unanimity requirement, *Id.* at 511. But, a trial court is not required to give a specific unanimity instruction merely because a single charge may be based on more than one underlying course of conduct. *Cooks, supra* at 512. Where a prosecutor presents evidence of multiple acts to establish a single charged offense, a general unanimity instruction is sufficient unless: (1) the alternative acts committed by the defendant are materially distinct, which means that the either acts themselves are conceptually distinct, or either party offered materially distinct proof regarding one of the alternatives, or (2) there is reason to believe the jurors may have been confused or may have disagreed about the factual bases of the defendant's guilt. *Id.* at 524. Here, the prosecutor presented evidence of two distinct acts (the "tickling" incident which involved contact, and the incident involving the "pornographic" movie, which involved penile/vaginal penetration). Defendant was charged with two distinct criminal counts, and during closing argument the prosecutor conceptually linked each incident to the charged crime. Defendant has not demonstrated that a more specific unanimity instruction was warranted or would have affected the outcome. *Carines, supra*.

Next, defendant poses several arguments regarding Dr. Palusci's testimony. First, defendant argues that the trial court abused its discretion by allowing Dr. Palusci to testify that the victim was referred to him by Child Protective Services. An error in the admission or the exclusion of evidence is not a ground for reversal unless the error appears inconsistent with substantial justice. MCR 2.613(A); MCL 769.26. The defendant claiming error must show that it is more probable than not that the alleged error affected the outcome of the trial in light of the weight of the properly admitted evidence. *People v Whittaker*, 465 Mich 422, 426-427; 635 NW2d 687 (2001). Reversal is not required based on the challenged testimony of Dr. Palusci, as the fact that the victim received services through Child Protective Services was admitted through other witnesses' testimony, including the testimony of the victim. Defendant does not challenge

the admission of that testimony. Thus, he has not shown that the admission of this fact resulted in prejudice.

Second, defendant argues that the trial court abused its discretion in admitting evidence of the victim's statements to Dr. Palusci. We review the admissibility of an expert witness's testimony for an abuse of discretion. *People v Smith*, 425 Mich 98, 106; 387 NW2d 814 (1986). An abuse of discretion exists when a trial court's decision is not within the range of principled outcomes. *People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005). Although hearsay is generally inadmissible, MRE 803(4) provides an exception for statements made for purposes of medical treatment or medical diagnosis in connection with treatment. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). For admission under MRE 803(4), the declarant must be motivated to speak the truth to the treating physician in order to receive proper medical care, and her statement must be reasonably necessary for the medical care provider to diagnose and treat the patient. *Id.* Where the declarant is a child, "further analysis of the circumstances surrounding the examination of [the] child is necessary to determine whether the child understood the need to be truthful to the physician." *People v Meeboer (After Remand)*, 439 Mich 310, 323; 484 NW2d 621 (1992).

A totality of the circumstances test is used for establishing the trustworthiness of a young declarant's statement. *Id.* at 324. The factors that are taken into account are; (1) the age and maturity of the declarant, (2) whether the medical care provider used leading questions to elicit the information, (3) the manner in which the statements are phrased, (4) whether the declarant used age inappropriate terminology, (5) whether the prosecutor initiated the exam, (6) the timing of the examination in relation to the assault, (7) the timing of the examination in relation to the trial, (8) the type of examination, (9) the relation of the declarant to the person identified, and (10) the existence of or lack of motive to fabricate. *Id.* at 324-325.

The trial court did not abuse its discretion in admitting evidence of the victim's medical history, which she provided to Dr. Palusci. The victim was 13 years of age when the statements were made, indicating a sufficient level of maturity for her to understand the necessity of honesty. Defendant did not provide evidence showing that Dr. Palusci used leading questions to elicit the information, or that the victim used age inappropriate terminology to describe her condition. Further, Dr. Palusci testified that he approached the examination as "a pediatrician," and that one of the purposes of his examination was to diagnose any diseases and recommend a course of treatment. Defendant also does not show that the admission of this evidence was prejudicial. The fact that the victim made prior consistent statements was already introduced, without objection, through the testimony of the victim and the victim's middle school principal. Reversal is not required. *Mateo, supra* at 212.

Third, defendant argues that the trial court abused its discretion in admitting the substantive conclusions of Dr. Palusci, because his testimony was not the product of scientific, technical or specialized knowledge, and because Dr. Palusci impermissibly bolstered the victim's credibility. Defendant did not object to the substantive conclusions of Dr. Palusci at trial, and he stipulated that Dr. Palusci was an "expert in child abuse cases." Therefore, review is for plain error. *People v Jones*, 468 Mich 345, 355-356; 662 NW2d 376 (2003).

The trial court is required, under MRE 702, to ensure that all expert testimony admitted at trial is reliable. *People v Dobek*, 274 Mich App 58, 94; 732 NW2d 546 (2007). MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

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); *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). An expert may testify, however, in the prosecution’s case in chief regarding typical and relevant symptoms of child sexual abuse to explain a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and 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. *Peterson*, *supra* at 352-353.

There was no plain error in the admission of the challenged testimony. At trial, Dr. Palusci testified that he scored the victim as “a five” on a scale pertaining to physical evidence of sexual abuse, indicating that there was “definitive evidence of a sexual contact.” Dr. Palusci also opined that, in his overall assessment of the likelihood that the victim suffered child sexual abuse, he scored the victim as “a four” on a scale of one to four, indicating that there were “high level physical findings, and a clear age appropriate disclosure of an action consistent with those findings.” We conclude that Dr. Palusci’s opinion, though based partially on the manner in which the victim reported her allegations, was admissible as testimony regarding the consistency between the victim’s behavior and the behavior of other victims of child sexual abuse.<sup>2</sup>

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<sup>2</sup> We reject defendant’s argument that the admission of Dr. Palusci’s testimony was error because the danger of unfair prejudice from the testimony substantially outweighed its probative value. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Layher*, 464 Mich 756, 769; 631 NW2d 281 (2001). Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003). Here, defendant’s primary defense was to attack the credibility of the victim, and to insinuate that her allegations against defendant were recent fabrications. Therefore, evidence tending to support the victim’s credibility, such as Dr. Palusci’s opinion regarding the victim’s injuries, was highly relevant and not unfairly prejudicial.

Next, defendant argues that the trial court abused its discretion by admitting evidence that defendant assaulted the victim on other occasions, previous to those for which the charges were brought. MRE 404(b) governs the admission of prior bad acts, crimes, or wrongs. To be admissible under MRE 404(b), the evidence must be (1) offered for a proper purpose, (2) relevant, and (3) the probative value of the evidence must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). In general, MRE 404(b) is a rule of inclusion, and a defendant's prior bad acts are only excluded if admitted for the improper purpose of proving a defendant's bad character and propensity to act in conformity therewith. *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

The trial court properly admitted the victim's testimony that defendant assaulted her on other occasions, because the evidence indicating a common plan or scheme was relevant, and otherwise not unfairly prejudicial. The victim testified that, during the previous incidents and in the incident for which defendant was charged with first-degree criminal sexual conduct, defendant held her hands above her head, and attempted to force the victim to engage in penile/vaginal intercourse. This evidence was sufficient to support the inference that the defendant executed a common plan in committing the charged offenses. *Hine, supra* at 251. The evidence was relevant to an essential element of the crime, and it was not marginally probative evidence that would be given undue or preemptive weight by the jury. Its admission was not an abuse of discretion.

The trial court also did not err by excluding testimony regarding the victim's sexual history. MCL 750.520(j) requires a defendant to give notice, within ten days of arraignment, that he wishes to use evidence of the victim's sexual history under an exception to the rape shield statute. When a defendant fails to comply with the 10-day requirement provided for by the statute, the trial court must exercise its discretion, on a case-by-case basis, to determine whether the evidence should be admitted or excluded. *People v McLaughlin*, 258 Mich App 635, 654; 672 NW2d 860 (2003). Here, the evidence did not fit with the exceptions to the rape shield statute. The evidence would not have showed the source or origin of semen, pregnancy or disease. MCL 750.520j(1)(b). Moreover, the evidence defendant wished to offer was speculative and did not lead to a reasonable inference that the victim engaged in a sexual relationship with another man. Further, the preclusion of the evidence did not implicate defendant's Sixth Amendment confrontation rights, because it did not pertain to past consensual sexual incidents between defendant and the victim, and it did not demonstrate a possible source of bias on behalf of the victim. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). Furthermore, we have previously determined that "[p]rotracted delay in raising the evidence, especially by waiting until the start of trial, suggests wilful misconduct to create a tactical advantage, and weighs in favor of exclusion." *McLaughlin, supra* at 654-655. The trial court properly excluded the evidence.

Next, defendant argues that the trial court improperly denied his *Batson*<sup>3</sup> challenge. We review for clear error a trial court's determination whether a race-neutral explanation for juror

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<sup>3</sup> *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

exclusion was pretext. *People v Knight*, 473 Mich 324, 344-345; 701 NW2d 715 (2005). A prosecutor may not use a peremptory challenge to strike a juror on the basis of race. *People v Bell*, 473 Mich 275, 282; 702 NW2d 128 (2005). On the record presented to us, defendant has not shown that the trial court clearly erred in determining that the prosecutor provided a race-neutral reason for the peremptory strike against the juror. The prosecutor's explanation, that the contested juror was likely to be distracted because she was planning a vacation, was facially race-neutral and therefore valid. *Knight, supra* at 337. Further, defendant has not shown that the prosecutor's proffered reason was pretext, as the prosecutor excluded the only two jurors who asserted that they were going to travel around the time of the trial.

Defendant also challenges several scoring decisions with respect to the judicial sentencing guidelines. *People v Reynolds*, 240 Mich App 250, 253-254; 611 NW2d 316 (2000). The misscoring of sentencing variables under the judicial sentencing guidelines do not necessarily provide a legal claim that would justify remand. *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 600 (1997). We will uphold scoring decisions under the judicial sentencing guidelines if evidence exists in the record to support the score. *People v Hernandez*, 443 Mich 1, 16; 503 NW2d 629 (1993) abrogated on other grounds by *People v Mitchell*, 454 Mich 145; 560 NW2d 600 (1997).

Under the judicial sentencing guidelines, 15 points is scored for OV 7 where a defendant exploited the victim's youth or abused the offender's authority status. *People v Nantelle*, 215 Mich App 77, 84; 544 NW2d 667 (1996). Here, the victim was 13 years of age at the time of the offenses, and defendant was in a position of authority over her because he was her stepfather. Those factors are sufficient to support the trial court's decision to score 15 points to OV 7. *Id.* at 84-85.

We likewise reject defendant's challenge to the trial court's scoring OV 13 at five points. Under the judicial sentencing guidelines, five points is scored for OV 13 where a victim suffers a serious psychological injury requiring professional treatment. *People v Elliott*, 215 Mich App 259, 262; 544 NW2d 748 (1996). Here, the prosecutor presented evidence that, in 2002, the victim was treated by a psychiatrist, after mistakenly believing that she observed defendant on a public street. This evidence of record supports the trial court's scoring decision. *Hernandez, supra* at 16.

The trial court's decision to score OV 25 at five points was also correct. Under the judicial sentencing guidelines, five points is scored for OV 25 where a defendant commits two contemporaneous criminal acts. *People v Raby*, 218 Mich App 78, 81; 554 NW2d 25 (1996) (Smolenski, J.), superceded by statute, *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A contemporaneous criminal act is one that occurs within six months of the sentencing offense if it is identical to or similar in nature and will not result in a separate criminal conviction. *Id.* Here, contrary to defendant's argument on appeal, the trial court did not base its scoring of OV 25 on the conduct related to his CSC II conviction. Rather, the trial court determined that the victim's testimony established that defendant committed at least two separate, uncharged sexual assaults against her in the six months before December 1997. At trial, the victim testified about separate incidents where defendant touched her inappropriately or attempted to force her to engage in sexual intercourse. Therefore, there was evidence in the record supporting the trial court's scoring decision, a decision that we will uphold. *Hernandez, supra* at 16.

We now turn to defendant's argument that his due process right to a fair trial was denied by substantial prosecutorial misconduct. Because the alleged errors were not preserved by a contemporaneous objection and a request for a curative instruction, appellate review is for plain error. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). No error requiring reversal will be found where a curative instruction could have prevented any prejudicial effect. *Watson, supra* at 586.

Defendant first argues that the prosecutor impermissibly misstated to the jury the law regarding reasonable doubt. A prosecutor's uncorrected misstatement of the law may deprive defendant of his right to a fair trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). However, if the jury is correctly instructed on the law, an erroneous legal statement made by the prosecutor can potentially be cured. *Id.* Regardless whether the prosecutor misstated the law, the trial court correctly instructed the jury regarding the definition of a reasonable doubt, and instructed the jury that the lawyer's statements were not evidence. Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998); *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). Thus, any prejudicial effect from the alleged misstatement was rectified by the trial court's specific instruction to the jury.

Defendant also asserts that the prosecutor impermissibly appealed to the jurors' sympathy by introducing certain evidence, and made an improper civic duty argument during his closing argument. An appeal to the jury to sympathize with the victim may constitute an improper argument. *Watson, supra* at 591. However, here, the prosecutor had legitimate reasons to produce the challenged evidence at trial. The evidence that defendant claims evoked sympathy related both to flight from Michigan and the victim's credibility, specifically why she would have traveled to and stayed with defendant in Mexico after the sexual assaults. And, defendant has failed to show that any of the challenged evidence more likely than not affected the outcome of his trial. The trial court's instructions that the jury should not be influenced by sympathy or prejudice, that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Finally, we find that the prosecutor's argument regarding the difficulty the victim had when testifying was not an improper civic duty argument. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

In his supplemental "Standard Four" brief on appeal, defendant argues that his conviction must be reversed because the complaint was defective in that it did not disclose a factual basis, and because the complainant did not attest to the assertions under oath. Because defendant failed to preserve this issue with a timely objection, review is for plain error. *Carines, supra* at 763. The complaint was not required to contain anything more than the substance of the accusations against defendant and the name and statutory citation to the charged offenses. MCL 764.1a. Here, the complaint contained the substance of the allegations against defendant, the names of the possible witnesses against him, and the statutory citations that corresponded to the crimes for which defendant was charged. Further, the amended complaint was signed by Sergeant James Beyer, and notarized by a "Judge/Magistrate Clerk." There was no error.

Finally, defendant claims that his trial counsel was ineffective for failing to object, but he does not cite the specific portions of the trial at which his trial counsel should have objected, nor does he discuss whether trial counsel was pursuing a legitimate trial strategy. A party may not

simply announce a position and leave it for this Court to discover and rationalize the basis for his claim. *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Affirmed.

/s/ Jane E. Markey

/s/ Patrick M. Meter

/s/ Christopher M. Murray