

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

VICTOR JONES,

Defendant-Appellant.

UNPUBLISHED

February 21, 2008

No. 273051

Wayne Circuit Court

LC No. 06-005380-01

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

PER CURIAM.

Defendant was convicted by a jury of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (involving a child under the age of 13), and was sentenced to four concurrent prison terms of 144 months to 25 years. He appeals as of right, and we affirm.

Defendant first argues that he was denied the effective assistance of counsel by his attorney's failure to object to the testimony of an emergency room physician who examined the six-year-old complainant and testified regarding the disclosures the child made to her. In order to establish ineffective assistance of counsel, defendant must show that counsel's performance fell below objective standards of reasonableness, and that there is a reasonable probability that, but for counsel's error, the result of the proceeding might have been different. *Strickland v Washington*, 466 US 668, 687, 690, 694; 104 S Ct 2052; 80 L Ed2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Because defendant did not move for a new trial or an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Defense counsel did not act below an objective standard of reasonableness by failing to object to Dr. Cruz's testimony concerning the child victim's disclosures. The statements fell within the hearsay exception found in MRE 803(4), which allows for the admission of statements made for purposes of medical treatment or medical diagnosis in connection with treatment. In *People v Meeboer*, 439 Mich 310, 322-323; 484 NW2d 621 (1992), the Supreme Court noted that, while an adult's understanding of the need to speak the truth to a physician "may seem obvious," further inquiry concerning the trustworthiness of a young child's statement is necessary. The Court enumerated ten factors to assist in evaluating the trustworthiness of a child's statement to a doctor. *Meeboer, supra* at 324-325. Contrary to defendant's argument, we conclude that application of the *Meeboer* factors supports admission of the testimony.

While the child was immature, there was no indication that the statements to Dr. Cruz were obtained by leading questions. The child's use of the term "booty" to describe her rectal area is suggestive of genuineness, and she did not use terminology that would be unusual for a child of her age. The examination was not initiated by the prosecution or during any legal proceedings. Instead, the child's mother brought the child to the emergency room the day after the child made a disclosure to her. It is unclear how long after the last assault the examination took place. However, a fissure was still present and thus, we can assume the examination was as much for medical purposes as for the collection of evidence. There is virtually no likelihood that the child would mistake the identity of defendant. Finally, no motive to fabricate appears in the record. Considering the totality of the circumstances as the Court in *Meeboer* instructed, *id.* at 324, we are persuaded that the statements bear sufficient indicia of trustworthiness for admission under MRE 803(4). Further, the statements were reasonably necessary for medical diagnosis and treatment. Because the child's disclosures to Dr. Cruz were admissible under MRE 803(4), defense counsel did not render ineffective assistance by failing to object to Dr. Cruz's testimony concerning those statements.

Defendant next asserts that he was denied a fair trial because Dr. Cruz, an expert qualified in the area of pediatric medicine, improperly vouched for the credibility of the child complainant. Because defendant did not object to the testimony, this issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is appropriate only when the plain error resulted in the conviction of a defendant who is actually innocent, or when the error seriously affected the fairness, integrity, or public reputation of the proceedings. *Id.* An expert may not give an opinion regarding whether sexual abuse occurred, may not vouch for the veracity of the complainant, and may not testify regarding whether the defendant is guilty. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended 450 Mich 1212; 548 NW2d 625 (1995); *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Our review of the record indicates that Dr. Cruz did not vouch for the veracity of the complainant or opine that the abuse actually occurred. She testified that she felt the injury observed was consistent with the reported mechanism of injury. When the prosecutor asked Dr. Cruz to elaborate on what was meant by the mechanism of injury, the doctor referred to "what had occurred to [the child]" and "what her father had done to her." The trial court intervened, and the witness then indicated that her physical findings were consistent with what the child had reported had happened to her. While the testimony might have veered close to improper vouching, it is not plainly so, and it does not constitute plain error. *Carines*, *supra* at 763-764.

Finally, defendant claims that he was denied a fair trial by the trial court's limitation on voir dire of the jury. The scope of voir dire is left to the discretion of the trial court. MCR 6.412(C)(1); *People v Taylor*, 195 Mich App 57, 59; 489 NW2d 99 (1992). "The court may conduct the examination of prospective jurors or permit the lawyers to do so. . . ." MCR 6.412(C)(2). However, jurors should be adequately questioned so that challenges for cause and peremptory challenges can be intelligently exercised. *People v Jendrzewski*, 455 Mich 495, 509; 566 NW2d 530 (1997). The trial court may not restrict the scope of voir dire in a manner that prevents the development of a factual basis for the use of peremptory challenges. *Taylor*, *supra* at 59. Generally, however, a party must exhaust his peremptory challenges in order to preserve for appeal a question regarding jury selection. *Id.* at 59-60. Although defendant did not exhaust his peremptory challenges, we treat his objections as preserved because they were

clearly stated in the trial court, and defendant indicated satisfaction with the jury only with the exception of his noted objections. *Jendrzewski, supra* at 514 n 19.

Counsel for defendant requested that the trial court ask each juror out of the presence of the others whether he or she had been the victim of sexual abuse. The trial court instead questioned the jurors as a group regarding whether they or their family or friends had been the “victim of a crime, including a sexual assault.” Those who responded positively were questioned regarding their relationship to the person who had been the victim of the crime, how long ago the crime occurred, and whether they could be impartial. Two jurors who answered affirmatively to the crime victim inquiry indicated that they could not be impartial, and both were excused for cause by the court. Of all the prospective jurors, three others indicated that they or a family member/friend had been the victim of an unspecified crime. These three prospective jurors were excused by defendant’s peremptory challenges.

It does appear that defendant was forced to use peremptory challenges without full development of the factual basis for doing so, as he was not allowed to learn the nature of the crimes to which these three jurors or their friends or family had been victim. *Jendrzewski, supra* at 509; *Taylor, supra* at 59. Nevertheless, where none of the jurors who were ultimately seated had been the victims of *any* crime, *and* where defendant did not exhaust his peremptory challenges, it is difficult to see how the trial court’s restriction on voir dire could have denied defendant his right to a fair and impartial jury. See *People v Dehaven*, 321 Mich 327, 334; 32 NW2d 468 (1948); *People v Daoust*, 228 Mich App 1, 7-9; 577 NW2d 179 (1998). Thus, while defendant’s claim may be technically preserved for appeal, *Jendrzewski, supra* at 514 n 19, it is without factual merit in the circumstances presented.

Finally, the trial court did not abuse its discretion by refusing to question the jury regarding whether they believed that there were circumstances in which a young child might not tell the truth. The trial court commented that this was argument to the jury and would not be permitted. As we have already noted, the court may itself conduct examination of the jurors. MCR 6.412(C)(2). The court adequately covered the subject matter that defendant sought to address when it determined that the prospective jurors understood that they were to determine credibility.

Affirmed.

/s/ Helene N. White
/s/ Joel P. Hoekstra
/s/ Bill Schuette