

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 25, 2014

v

DAVID JOHN BASSETT,
Defendant-Appellant.

No. 316664
Kalamazoo Circuit Court
LC No. 2012-001513-FC

Before: BOONSTRA, P.J., and DONOFRIO and GLEICHER, JJ.

PER CURIAM.

Defendant David John Bassett appeals by right his jury trial convictions for one count of first-degree criminal sexual conduct (CSC), MCL 750.520b (sexual penetration of a victim under 13 years of age); two counts of second-degree CSC, MCL 750.520c (sexual contact with a victim under 13 years of age); and one count of torture, MCL 750.85. Because the trial court properly admitted the testimony of the victim’s therapist, we affirm.

The convictions arise out of defendant’s sexual contact with and assaultive abuse of his autistic son.

On appeal, defendant first argues that the trial court erred when it permitted the victim’s therapist, Debra Stewart, to testify about statements that the victim made to her during therapy. We review a trial court’s decision on an evidentiary issue for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A trial court abuses its discretion when it “chooses an outcome that is outside the range of reasonable and principled outcomes.” *People v Waclawski*, 286 Mich App 634, 670; 780 NW2d 321 (2009). However, when the decision involves a preliminary question of law, including whether a rule of evidence precludes admissibility, the question is reviewed de novo. *Lukity*, 460 Mich at 488.

Pursuant to MRE 801(c), “[h]earsay’ is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” In addition, MRE 801(a) provides that “[a] statement is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.” Pursuant to MRE 802, hearsay is generally not admissible, except as specifically provided by the Michigan Rules of Evidence. MRE 803(4) provides that the following statements are an exception to the hearsay rule, regardless of the availability of the declarant:

Statements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

In *People v Meeboer (After Remand)*, 439 Mich 310, 315; 484 NW2d 621 (1992), the Michigan Supreme Court examined the application of MRE 803(4) to hearsay statements made to medical providers by child victims of sexual abuse. The *Meeboer* Court found that a statement to a health care provider that identified the perpetrator of sexual abuse was properly considered to be made for purposes of medical treatment or medical diagnosis, as required by MRE 803(4), because such a statement is necessary to the child victim's "adequate medical diagnosis and treatment." *Id.* at 322. The Court also held more generally that "the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment," and that "sexual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment." *Id.* at 329. In addition, the Court held that an inquiry into the trustworthiness of a child's statements made to a health care provider should "consider the totality of circumstances surrounding the declaration of the out-of-court statement," but identified the following factors relevant to an analysis of the trustworthiness of a child's statement:

(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 (footnotes with citations omitted).]

In the present case, the victim's statements to Stewart during a long therapeutic relationship identified defendant as the perpetrator of the abuse and provided details about the psychological trauma experienced by the child victim. Therefore, the trial court properly found that the victim's statements to Stewart were made for the purpose of medical diagnosis or treatment. *Id.* at 322, 329.

In addition, the trial court properly acknowledged that *Meeboer* required it to examine the totality of the circumstances surrounding the victim's statements to determine whether the victim's statements to Stewart were sufficiently trustworthy to be admissible pursuant to MRE 803(4). The record before the trial court at the time of the hearing established that the therapy started when the victim was 9 years old and continued until he was 14 years old, the therapy was

not initiated by the prosecution, the victim was still suffering psychological or mental issues at the time of the therapy, the therapy began 4½ years before trial, and the victim was very familiar with the person identified as the perpetrator because defendant was the victim's father. These factors all weigh in favor of a finding that the victim's statements to Stewart were trustworthy. *Id.* at 324-325. In contrast, the only factor that weighed against a finding that the victim's statements to Stewart were trustworthy was the type of examination because statements that are made in the course of treatment for psychological disorders may be less reliable than statements made in the course of treatment for a physical disorder. *Id.* Nevertheless, the trial court properly concluded that the totality of the circumstances supported a finding that the victim's statements to Stewart were sufficiently trustworthy to be admissible pursuant to MRE 803(4). As a result, the trial court did not abuse its discretion when it admitted the victim's statements to Stewart pursuant to MRE 803(4).

Second, defendant argues that the trial court erred when it permitted Stewart to testify that the victim suffered from post-traumatic stress disorder (PTSD) consistent with a history of sexual abuse and that the victim exhibited symptoms indicating that he had been abused; defendant argues that this testimony improperly vouched for the truthfulness of the victim's statements.

In both *People v Beckley*, 434 Mich 691, 697; 456 NW2d 391 (1990), and *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), the defendants challenged the admissibility of expert testimony regarding the characteristics and patterns of behavior typically exhibited by sexually abused children. In *Beckley*, the Michigan Supreme Court held that such expert testimony "is only admissible to cast light on the individual behaviors observed in the complainant, therefore the expert must not render an opinion that a particular behavior or a set of behaviors observed in the complainant indicates that sexual assault in fact occurred." *Id.* at 725. In other words, the testimony of an expert witness should be limited "to whether any of the behaviors observed in the victim were consistent with the profile of an incest victim." *Id.* at 730. The *Beckley* Court also held that "[t]he conclusion whether abuse occurred is outside the scope of expertise, and therefore not a proper subject for expert testimony. The jury must make its own determination from the totality of the evidence whether the complainant was sexually abused." *Id.* at 729. In *Peterson*, 450 Mich at 373, the Michigan Supreme Court confirmed that "[a]n expert may testify regarding typical 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 abuse victim or to rebut an attack on the victim's credibility."

Before trial, the trial court below held that Stewart could testify as to behaviors that would appear to a lay person to be inconsistent with someone who had been sexually abused and whether the apparently inconsistent behavior was, in fact, consistent with the behavior of an individual who has been sexually abused. Further, the trial court found that Stewart could not testify as to what may or may not have occurred between defendant and the victim, and that she could only provide the jurors with information that would allow them to determine if they believed the victim or other witnesses. The trial court's rulings with regard to Stewart's proposed testimony accurately reflect the law as articulated in *Beckley* and *Peterson* regarding testimony by expert witnesses about the behaviors of sexually abused children and conclusions by mental health providers regarding whether a particular child's symptoms were consistent with sexual abuse.

Defendant also challenges two specific statements made by Stewart at trial. First, defendant challenges Stewart's testimony that the victim suffered from PTSD. In *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995), the Michigan Supreme Court explained that expert testimony is admissible if it is from a recognized discipline, it serves to give the trier of fact a better understanding of the evidence or assist in determining a fact in issue, and it is "presented by a witness qualified by "knowledge, skill, experience, training, or education." The mental health discipline is a recognized field of specialized knowledge. *Beckley*, 434 Mich at 718. Further, PTSD is a recognized mental disorder. *Id.* at 706 n 15. In addition, in a CSC case with a child victim, the prosecution is entitled to offer evidence to explain why the victim may have displayed unusual behavior. *Peterson*, 450 Mich at 373.

In the present case, Stewart's testimony that the victim suffered from PTSD was derived from the recognized discipline of mental health, and it served to give the trier of fact a better understanding of the evidence (specifically that the victim's behaviors associated with PTSD were distinct from the victim's behaviors associated with autism), as well as a better understanding of a fact at issue (specifically the victim's mental health, which was at issue in the torture charge pursuant to MCL 750.85). Further, defendant did not object to Stewart's qualification as an expert witness in psychotherapy and does not dispute that Stewart was qualified by knowledge, skill, experience, training, or education to give the challenged testimony. Moreover, and more importantly, Stewart's testimony regarding PTSD did not in any way suggest that the PTSD was consistent with a history of sexual abuse. Therefore, the admission of Stewart's testimony that the victim suffered from PTSD did not constitute an abuse of discretion.

In addition, defendant challenges Stewart's testimony that the victim exhibited symptoms of sexual abuse. In *Beckley*, 434 Mich at 731, the Michigan Supreme Court found that testimony that a specific child victim exhibited symptoms that would fit the criteria for someone who has been sexually abused was an inappropriate topic for direct examination. However, because such testimony was elicited by the defendant's trial counsel on cross-examination of the expert witness, the Court found that the defendant could not "complain that the expert's testimony served to vouch for the complainant's credibility," and concluded that admission of this testimony did not require reversal. *Id.* Likewise, in the present case, Stewart's testimony that the victim exhibited symptoms of sexual abuse was elicited by defendant's trial counsel on cross-examination. Because defendant's trial counsel elicited this response from Stewart, defendant cannot now complain that this testimony vouched for the victim's credibility, and admission of this testimony does not constitute error or require reversal. *Id.* In sum, the trial court did not err when it permitted Stewart's testimony regarding PTSD in general and the symptoms exhibited by the victim.

Defendant next argues that even if Stewart's testimony regarding the victim's statements to her was admissible pursuant to MRE 803(4), the trial court should have excluded this evidence pursuant to MRE 403. Because this issue was raised in the trial court and is now being pursued on appeal, it is preserved for this Court's review regardless of the trial court's failure to rule on it. *Peterman v Dep't of Natural Resources*, 446 Mich 177, 183; 521 NW2d 499 (1994); see also *People v Trakhtenberg*, 493 Mich 38, 55 n 11; 826 NW2d 136 (2012).

MRE 403 provides that relevant evidence “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” “[A]ll relevant evidence is prejudicial; it is only unfairly prejudicial evidence that should be excluded.” *People v McGhee*, 268 Mich App 600, 613-614; 709 NW2d 595 (2005). “Unfair prejudice exists when there is a tendency that evidence with little probative value will be given too much weight by the jury.” *Id.* at 614. In *People v Gayheart*, 285 Mich App 202, 228; 776 NW2d 330 (2009), this Court found that evidence that was helpful to explain and corroborate the testimony of other witnesses and that helped establish a fact of consequence to the determination of the action was not unfairly prejudicial pursuant to MRE 403.

In the present case, Stewart’s testimony regarding the victim’s statements served to substantiate that defendant committed the charged offenses. Specifically, the victim’s statements to Stewart identified defendant as the perpetrator of the abuse and established that the victim suffered severe mental pain or suffering, which is a necessary element of the charge of torture. MCL 750.85. In addition, Stewart’s testimony regarding the victim’s statements was corroborated by other competent evidence at trial, including the victim’s testimony. On this record, we do not find that the potential for unfair prejudice substantially outweighed the probative value of these statements. Thus, Stewart’s testimony regarding the statements was admissible, and admission of this testimony was not an abuse of discretion.

Next, defendant argues that because Stewart’s testimony at trial regarding the victim’s statements to her were not admissible, the trial court erred when it denied defendant’s motion for a new trial. However, for all of the reasons stated herein, Stewart’s testimony at trial was admissible. Thus, the trial court did not abuse its discretion when it denied defendant’s motion for a new trial based on the admission of this testimony.

Lastly, defendant argues that Stewart’s testimony related to the victim’s statements deprived him of his right to confront witnesses. However, this issue was never raised at the trial court. More importantly, this constitutional issue was not listed in defendant’s statement of the questions presented on appeal, as required by MCR 7.212(C)(5). Therefore, this argument is not properly presented, and we need not address it. *People v Unger*, 278 Mich App 210, 262; 749 NW2d 272 (2008). In any event, both Stewart and the victim testified at trial, so any claim of not being able to confront either witness is without merit.

Affirmed.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher