

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIE JENE HANDLEY, JR.,

Defendant-Appellant.

UNPUBLISHED

August 19, 2003

No. 234541

Genesee Circuit Court

LC No. 00-006522-FC

Before: Meter, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). The trial court sentenced him to two concurrent terms of seven to fifteen years' imprisonment. We affirm.

Count I of the felony complaint charged defendant with digital-vaginal penetration, and Count II charged him with penile-vaginal penetration. The complaining witness testified at trial that, when she was nine years old, defendant vaginally penetrated her on two separate occasions – once with his finger and once with his penis. Sometime after the two incidents, the complaining witness told her mother that she had noticed the presence of a “brown substance” between her legs. The child’s doctor sent a sample of the substance to Laboratory Corporation of America (Lab Corp.), which reported that she had contracted gonorrhea. Defendant also tested positive for gonorrhea.

Defendant first argues that the prosecutor presented insufficient evidence to sustain his convictions. We disagree. “When reviewing a claim regarding the sufficiency of the evidence, this Court examines the evidence in a light most favorable to the prosecution to determine if a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt.” *People v Joseph*, 237 Mich App 18, 20; 601 NW2d 882 (1999). Under MCL 750.520b(1)(a), “[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person” who “is under 13 years of age.” “Sexual penetration” is defined to mean “sexual intercourse, . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body” MCL 750.520a(o).

There is no dispute that the complaining witness was under thirteen years old at the time of the offenses. The child testified that defendant digitally penetrated her vagina and penetrated

her with his penis at a point between her legs. Viewed in the light most favorable to the prosecution, see *Joseph, supra* at 20, this evidence alone is sufficient to establish the essential elements of the two counts of CSC I. Moreover, while the child's testimony need not have been corroborated, see MCL 750.520h, there was considerable evidence supporting her testimony, including defendant's own custodial statement in which he admitted sexual activity with the victim, as well as the evidence that both the child and defendant had tested positive for gonorrhea.¹ Based on all the evidence and the reasonable inferences that arise from it, *People v Hardiman*, 466 Mich 417, 428-429; 646 NW2d 158 (2002), a rational jury could find that the essential elements of the offense were proved beyond a reasonable doubt. *Joseph, supra* at 20.²

Next, defendant argues that the trial court erred by allowing the complaining witness' doctor to testify about the results of the Lab Corp. test. Specifically, defendant argues that the court erroneously ruled that the testimony was admissible under MRE 803(6), the business records exception to the hearsay rule. We disagree. "The decision whether evidence is admissible is within the trial court's discretion and should only be reversed where there is a clear abuse of discretion." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

As defined by MRE 803(6), business records constitute an exception to the hearsay rule. *Lopez v General Motors Corp*, 224 Mich App 618, 626; 569 NW2d 861 (1997). A business record may be admitted if it meets the foundational requirements of MRE 803(6). The following may be admitted at trial:

A . . . report . . . of . . . conditions . . . or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the . . . report, . . . all as shown by the testimony of the custodian or other qualified witness, . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. . . . [MRE 803(6).]

We conclude that these requirements were met in this case. Given the nature of the relationship between the complaining witness' doctor and Lab Corp., the doctor was an "other qualified witness" who could testify with regard to the requisite foundational requirements. According to the doctor, he contracted with Lab Corp. "to provide laboratory services" for his practice. In essence, Lab Corp. served as a de facto extension of the doctor's practice, analogous to a hospital lab or diagnostic unit. Additionally, the doctor's testimony clearly establishes that

¹ As noted *infra*, the statement and the evidence concerning gonorrhea were properly admitted at trial.

² Defendant's reliance on *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998), is misplaced. Citing *Lemmon*, defendant argues that, because the complaining witness' testimony allegedly was "patently incredible" and "inherently implausible" and had allegedly been "seriously impeached," the prosecution failed to present sufficient evidence to support the convictions. First, we disagree with defendant's characterizations of the complaining witness' testimony. Further, the information set forth in *Lemmon* regarding the evaluation of witness credibility is meant to guide trial courts in considering motions for new trials, not appellate courts in considering the sufficiency of the evidence. See *id.* at 627.

the Lab Corp. report was made at or near the time the specimen was tested and that it was a diagnostic tool made for the purposes of treating the complaining witness. There is also no indication that the results contained in the report were not based on established objective criteria or that the report was prepared by a person lacking knowledge of the specimen and the testing procedures employed by Lab Corp.

Accordingly, the trial court did not abuse its discretion in allowing the doctor to testify about the test results. See, e.g., *Ormond v State*, 599 So2d 951, 958-959 (Miss, 1992); see also *In re Estate of Searchill*, 9 Mich App 614, 619-621; 157 NW2d 788 (1968). Further, given the nature of the business records exception and the inherent trustworthiness of the evidence admitted, defendant's confrontation clause challenge is without merit. *People v Safiedine*, 152 Mich App 208, 218-219; 394 NW2d 22 (1986).

Next, defendant contends that the prosecutor engaged in misconduct when presenting the testimony of the police officer who questioned defendant following his arrest. We disagree. Although defendant unsuccessfully moved to suppress his custodial statement before trial, he failed to object to the prosecutor's handling of the officer's trial testimony. Accordingly, this issue is unpreserved and will be reviewed as a clear or obvious error that affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The officer testified that defendant acknowledged that he had touched the complaining witness' vagina with his hand and that he had penetrated her vagina with the tip of his penis. The officer testified that the admissions were made after defendant waived his *Miranda*³ rights. Defendant maintains that because the officer was reading into the record portions of the report he prepared about defendant's interrogation, the prosecutor was required to have the officer read into the record the entire report.

However, it is clear from the trial transcript that, contrary to defendant's characterization, the officer was not reading excerpts of his report into the record. Rather, the officer was using the report to refresh his memory as he testified. Defendant was "entitled to have the writing or object produced at the trial," MRE 612(a), but the rules of evidence do not provide that a writing used to refresh a testifying witness' memory must be read in its entirety or admitted into evidence. The record shows that defendant had the opportunity to inspect the report and cross-examine the officer with regard to it, as well as the opportunity "to introduce in evidence, for their bearing on credibility . . . , those portions which relate to the testimony of the witness." MRE 612(c). Accordingly, defendant has failed to establish the existence of a clear or obvious error. *Carines, supra* at 763. Moreover, we have no basis from which to conclude that the jury's verdict would have differed had the police officer read the entire statement in question. *Id.*

Next, defendant argues that his attorney committed misconduct requiring reversal by failing to examine defendant about the circumstances surrounding his custodial statement. Because defendant failed to move for an evidentiary hearing below and because his request for a remand was denied by this Court, our review of this issue is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish a claim of

³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance likely affected the outcome of the proceedings. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

After reviewing the record, we conclude that defendant has failed to establish that counsel's performance fell below an objective standard of reasonableness. Indeed, if counsel had elicited, in conformity with defendant's argument on appeal, that defendant did not answer any questions during the interview, that he "was not told that he had the right not to say anything," and that "he disagreed with what [the] officer . . . told him," among other things, then the prosecutor may have vigorously cross-examined defendant or may have recalled the officer and thereby reinforced the impact of the custodial statement in the minds of the jury. Further, the record establishes that counsel did vigorously challenge the reliability of the statement during cross-examination of the interrogating officer. We cannot conclude that additional examination of defendant with regard to the statement would have affected the outcome of the trial. *Id.*

Next, defendant argues that the trial court erred by failing to sua sponte give a limiting instruction to the jury concerning testimony about an uncharged act of sexual penetration. However, because defendant affirmatively approved the jury instructions as given, any potential error has been extinguished. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000); *People v Tate*, 244 Mich App 553, 558-559; 624 NW2d 524 (2001).

In any event, we find no basis for relief under the plain error doctrine from *Carines*, *supra* at 763. Given the amount of evidence amassed against defendant, we cannot conclude that the limiting instruction in question would have affected the outcome of the trial. *Id.* Because the absence of the instruction did not affect the outcome of the trial, we reject defendant's related argument that his counsel rendered ineffective assistance by failing to request the instruction. See, generally, *Stanaway*, *supra* at 687-688.

Lastly, defendant argues that his *Miranda* rights were violated and that the admission of his custodial statement amounted to error requiring reversal. Again, we disagree. We will not disturb the trial court's factual findings with respect to this issue unless they are clearly erroneous. *People v Snider*, 239 Mich App 393, 417; 608 NW2d 502 (2000); *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997).

Defendant contends that because his testimony regarding whether he was read and waived his *Miranda* rights conflicted with the interrogating officer's testimony, the prosecution was required to present written proof that he did understand and waive those rights before his custodial statement could be addressed at trial. We find no authoritative support for such a sweeping rule of exclusion. While a trial court should "indulge every reasonable presumption against waiver" of fundamental constitutional rights, see, e.g., *Aetna Ins Co v Kennedy*, 301 US 389, 393; 57 S Ct 809; 81 L Ed 1177 (1937), the court's discretion is not proscribed in the manner suggested by defendant. Instead, the totality of the circumstances is considered. *Snider*, *supra* at 417-418.

Initially, we note that there is no hint in the record of any police coercion. Further, the record establishes that, at the time he was questioned by the police officer, defendant was an eighteen-year-old high school graduate. Defendant may have taken special education classes in

high school, but there is no indication that his mental abilities were impaired to such an extent that he could not understand his *Miranda* rights. Indeed, defendant admitted that he was told, and understood, that anything he might say to the police could be used against him in a court of law. Defendant also indicated that, had he been told of his right to remain silent, his right to have an attorney, and that he could waive the right to have an attorney present during questioning, he would have understood what these protections meant. To the extent that the court's decision is predicated on a weighing of witness credibility, we defer to the trial court's superior position to make such a judgment. See *People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992). Under these circumstances, the trial court did not clearly err in finding that defendant had been informed of his *Miranda* rights and that the statements made to the interrogating officer were voluntary and knowingly and intelligently made.

Affirmed.

/s/ Patrick M. Meter
/s/ Kathleen Jansen
/s/ Michael J. Talbot