

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT WYATT WILBURN,

Defendant-Appellant.

UNPUBLISHED

November 19, 2009

No. 286019

Livingston Circuit Court

LC No. 07-016545-FC

Before: Borrello, P.J., and Whitbeck and K. F. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13 years of age), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age). We affirm.

I. Basic Facts and Procedural History

The underlying facts of this case involve defendant's sexual abuse of his neighbor's daughter. After being informed of the assault, the victim's mother immediately took the victim to the hospital where the victim was examined by Patricia Crane, a certified nurse specializing in sexual assault examinations. Crane at first spoke to the victim and the victim's mother, and then Crane discussed what happened with the victim alone.

At trial, the prosecution called Crane to testify regarding what the victim related regarding the assault. Defendant objected, on the basis that the victim's statements were not made for the purpose of medical treatment or diagnosis because there was no injury. The trial court overruled the objection and permitted Crane to testify.

At the close of the testimony, the trial court provided the jury instructions regarding the elements of the crimes charged. Defendant objected to the court's decision to provide the jury with CJI2d 20.25, a standard instruction, which states, "To prove this charge, it is not necessary that there be evidence other than the testimony of [the victim], if that testimony proves guilt beyond a reasonable doubt." Defendant requested that the trial court add to this instruction, the phrase, "In light of all the evidence." The trial court denied this request. This appeal followed.

II. MRE 803(4)

Defendant first argues that the trial court abused its discretion by permitting Crane to testify regarding the statements the victim made to her during her examination because the statements were not related to diagnosis or medical treatment. Specifically, defendant contends that the victim's statements were made to report the incident and, further, in consideration of the totality of the circumstances, the statements should not have been admitted because the victim was not trustworthy under *People v Meeboer (After Remand)*, 439 Mich 310; 484 NW2d 621 (1992). We disagree. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Johnson*, 474 Mich 96, 99; 712 NW2d 703 (2006). Further, because defendant's argument related to the trustworthiness of the victim is being raised for the first time on appeal, he must show plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

A. Medical Treatment

Under MRE 803(4) hearsay testimony related to medical treatment or medical diagnosis is not excluded, even though the declarant is available. MRE 803(4) specifically permits the following:

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.

The reason for this exception to the hearsay rule is (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care. *Meeboer, supra* at 322.

Here, the victim's statements were reasonably necessary for her treatment or diagnosis. The victim felt pain during the assault, which she reported to her mother, who immediately took the victim to the hospital. The victim told Crane what happened during the sexual assault and Crane used that information to make medical decisions, specifically deciding to inspect the victim's pelvic area for injury. After this examination, Crane concluded that no physical medical treatment was necessary and she called a social worker. Obviously, and as Crane acknowledged in her testimony, the victim's history was important because it told Crane how to proceed with, and how to structure, the examination, as well as what treatment would be necessary. Only if this information is provided can a nurse proceed with the necessary medical treatment, if any. This is especially true in instances, like this case, where there is no readily apparent visible injury.

Defendant suggests that the victim's statements went beyond reporting what was necessary for treatment and diagnosis. Defendant, however, does not identify any specific statements in support of this allegation. This Court will not search the record for the factual basis in support of a party's position. Accordingly, we consider this argument abandoned. *Begin v Michigan Bell Tel Co*, ___ Mich App ___ ; ___ NW2d ___ (2009).

We also reject defendant's suggestion that the victim's mother took the victim to the hospital to report the crime and not to seek treatment or diagnosis. There is no support for this assertion on the record. And, further, the fact that the victim's mother immediately took the victim to the hospital, and not to the police, strongly suggests that she was seeking medical treatment or diagnosis. Thus, we conclude that the trial court did not abuse its discretion by admitting the hearsay statements because they were "made for the purpose of medical treatment or diagnosis in connection with treatment" MRE 803(4).

B. Trustworthiness of the Victim

In addition, defendant contends that the hearsay statements should have been excluded because the victim was not trustworthy, due to her age. We disagree. Where the victim is of "tender years, . . . the understanding to tell the truth may not be as apparent as it is with adults [and] . . . investigation into the circumstances surrounding the making of the hearsay statements is required in order to establish whether the child understood the need to be truthful to the physician." *Meeboer, supra* at 326. Under this totality of the circumstances test, this Court examines ten factors to assess the trustworthiness of the declarant's statements, including:

- (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.]

However, where the victim is over the age of ten, she is not of tender years, and the above factors have no application. *People v Van Tassel (On Remand)*, 197 Mich App 653, 662; 496 NW2d 388 (1992). Rather, "a rebuttable presumption arises that [the minor] . . . understands the need to tell the truth to medical personnel." *Id.*

Here, the victim was nearly 11 years of age when the sexual abuse occurred. Thus, there is a presumption that she understood the need to tell Crane the truth during the medical examination. However, defendant's attempts to overcome this presumption on appeal fail. As defendant concedes, the victim appears mature for her age. The victim did not use highly technical phrases in describing the incident or the anatomy involved; in her conversation with Crane she used the term "private parts." The examination was not performed at the request of the prosecution. Rather, the victim was taken to the hospital on the same day as the assault immediately after she told her mother defendant had sexually abused her and she had been hurt by the assault. There, she submitted to a medical examination and could have still been suffering from distress due to the incident. Trial did not occur until nearly one year later. The record does not support that the victim mistakenly identified defendant. And, although there is some

evidence tending to show a motive to fabricate, the issue was disputed. Thus, the totality of the circumstances tends to weigh in the victim's favor and defendant has failed to overcome the presumption of trustworthiness.¹ Accordingly, defendant has failed to demonstrate that the trial court committed any error and relief is not necessary on this basis.

III. Jury Instructions

Defendant also contends that the trial court erred in refusing to add certain language to standard jury instruction CJI2d 20.25. We cannot agree. Claims of instructional error are reviewed de novo. *People v Hall*, 249 Mich App 262, 269; 643 NW2d 253 (2002). The trial court's determination that a particular instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

The trial court did not error by providing the jury with the standard instruction, CJI2d 20.25, which states, "To prove this charge, it is not necessary that there be evidence other than the testimony of [the victim], if that testimony proves guilt beyond a reasonable doubt." This language accurately comports with the law as set forth in MCL 750.520h, which states, "The testimony of a victim need not be corroborated in prosecutions under section 520b to 520g." Because defendant was facing charges under section 520b, the trial court appropriately exercised its discretion to provide the standard instruction CJI2d 20.25 and it was under no obligation to provide the additional language that defendant requested.

Further, there is no merit to defendant's concern that the jury, if instructed with CJI2d 20.25, would fail to consider all of the evidence and only consider the victim's testimony. Our review of the record reveals that the trial court repeatedly instructed the jury that it should consider all of the evidence, including all of the witnesses' testimony and exhibits admitted at trial. Juries are presumed to follow the instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and there is no indication on the record before us indicating that the jury in the present matter did otherwise. The trial court did not err when it instructed the jury.

¹ Both defendant and the prosecution note that there is no evidence on the record regarding the second and third factors (the manner in which the statements are elicited and the manner in which the statements are phrased). This lack of record evidence is likely the result of defendant's failure to object to the admission of hearsay testimony on the basis that the victim was untrustworthy under the *Meeboer* factors. Defense counsel's failure to raise the issue below suggests that he believed that trustworthiness was not an issue and, otherwise acquiesced to the admission of the hearsay so long as it was otherwise properly admitted under MRE 803(4). A party may not claim error on appeal if he acquiesced to it below. *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002). Nonetheless, we have reviewed the issue here because many of the facts necessary to resolution of the issue are apparent on the record. *People v Davis*, 250 Mich App 357, 364; 649 NW2d 94 (2002).

Affirmed.

/s/ Stephen L. Borrello
/s/ William C. Whitbeck
/s/ Kirsten Frank Kelly