STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CORY DENIAL TRIPLETT,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 252929
Wayne Circuit Court
LC No. 03-009650-01

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

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for engaging in an act of cunnilingus with his nine-year-old daughter. He was acquitted of additional charges of second-degree criminal sexual conduct, MCL 750.520c(1)(a), arising out of other alleged conduct with his daughter. He was sentenced to fifty-one to ninety-six months' imprisonment. He appeals as of right. We affirm.

In the early morning hours of July 5, 2003, the victim telephoned her mother, Natasha Thompson. The victim was staying with her father, defendant, at the home of defendant's mother, Cheryl Easly. The victim complained of stomach pain and wanted Thompson to come and get her. When Thompson told the victim to tell Easly, her grandmother, about her stomachache, the victim began crying and was insistent that Thompson come. Thompson inquired further about what was happening, and the victim indicated that defendant was "bothering" her. She stated that defendant was "feeling on her" and touching her. When Thompson arrived at Easly's house, the victim ran outside. She was crying and was not fully clothed. Thompson took the victim back inside to retrieve her shoes and pants. She then drove the victim directly to the hospital, where a rape kit was completed.

With respect to the act that formed the basis of the charge of first-degree criminal sexual conduct, the victim testified that she and defendant returned from her Aunt Theresa's house after going there to light fireworks on July 4, 2003. When they returned, defendant played a "nasty" movie on his DVD player in the basement, where his king-sized bed was located. The movie depicted girls kissing and men sticking their "private" areas into the "private" areas of women. After the victim observed women putting their tongues into the "private" parts of one another, defendant asked the victim whether she wanted someone to do that to her. The victim answered, "no." Nevertheless, defendant put his head under the bed covers where the victim was located and pulled down her underwear. He "did his tongue like they [the women on the television]

were doing." The victim described that defendant used his lips on her "private" area. Specifically, she indicated that he kissed the part of her body that she wipes after using the bathroom. During the episode, defendant accused the victim of being "horny." She did not understand what the term meant. The victim telephoned her mother after defendant fell asleep.

Teanna Kiya, the girlfriend of one of the victim's uncles, testified that the victim approached her on the night of July 4, 2003, and indicated that she had blood on her underwear. Kiya believed that the victim was having a period. Kiya assisted the victim in cleaning her underwear. She testified that the victim was scared and did not want defendant to know. The victim complained that her "private" part hurt. The victim did not want to leave the bathroom and return downstairs where defendant was located.[1]

Defendant denied that he sexually assaulted the victim and denied that he had pornographic movies in the basement. He offered several possible reasons why the victim accused him, including that she was angry because he would not permit her to have a more mature hairstyle, that she was jealous of his fiancée's daughter, that she was afraid he would not spend a portion of his recently acquired money judgment on her, or that a custody dispute between him and Thompson was the driving force.[2] The jury convicted defendant of the charged act of first-degree criminal sexual conduct.

I

Defendant argues that he was denied a fair trial because the prosecutor introduced into evidence statements about defendant's conduct that were made by the victim to her mother during the early morning telephone call on July 5, 2003. Defendant argues that, because the victim did not call until defendant was asleep, a significant amount of time could have elapsed between the events and her statements. He contends that the statements therefore were not timely under MRE 803A, the rule allowing for the admission of certain out-of-court statements by minors in criminal sexual conduct cases. Defendant further argues that the statements were made only in response to Thompson's repeated questions and, thus, were not spontaneous as required by MRE 803A. We generally review the admission of evidence for an abuse of discretion. *People v Bowman,* 254 Mich App 142, 145; 656 NW2d 835 (2002). However,

[1] Thompson thought that Kiya assisted the victim with her underpants a couple of evenings before the night at issue. Based on what she was told, Thompson believed the victim started her period. The victim, however, never had a period before that time and had never had one since then. Blood was detected on the underwear that the victim was wearing when she arrived at the hospital in the early morning hours of July 5, 2003.

[2] The custody arrangement between Thompson and defendant was informal and did not involve the courts. Thompson had custody, but defendant had liberal visitation with the victim and often took her for lengthy periods of time. There was no custody case pending. Thompson testified that she and defendant had discussed that defendant would take custody of the victim when she became older. Thompson was amenable to this.

unpreserved issues are reviewed for plain error. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999).[3]

MRE 803A provides an exception to the hearsay rule for statements describing sexual acts performed with, or on, the declarant by the defendant. MRE 803A is applicable if (1) the declarant is under the age of ten at the time of the statement, (2) the statement is shown to be spontaneous and without manufacture, (3) the statement is made immediately after the incident or any delay is excusable because of fear, and (4) the statement is introduced through the testimony of someone other than the declarant. MRE 803A further provides that if the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule. In this case, there is no question that the victim was under the age of ten when she made the challenged statements, that the statements were introduced through someone other than the victim, and that the statements, viewed as a whole, constituted the victim's first corroborative statement about the incident. To be admissible under MRE 803A, however, the statements must have been spontaneous and made immediately after the incident or after an excusable delay.

We conclude that the statements met the spontaneity requirement of MRE 803A. Testimony revealed that the victim called Thompson at 2:30 a.m. and said she was sick. The victim sounded odd, so Thompson told the victim to tell her grandmother that her stomach hurt. Thompson trusted the victim's grandmother to take care of the victim. However, at the suggestion that she speak with her grandmother, the victim began crying and begging Thompson to come. Thompson told the victim to stop crying and tell her what was wrong. The victim responded that nothing was wrong and that she just did not feel good. Thompson followed up by asking whether anyone was bothering the victim. Thompson did not intend the question to be a sexual question and was not even thinking about "nothing like that." The victim told Thompson that no one was bothering her. Thompson then told the victim to tell the truth because the telephone call was unusual and it was early in the morning. She wanted to know why the victim was really calling. The victim then stated that someone was bothering her. Thompson asked, "who," and the victim answered that her father, the defendant, was bothering her. When Thompson asked what the victim meant, the victim made the challenged statements that defendant was "feeling on her" and touching her.

Responses to customary, open-ended questions are deemed spontaneous. See *People v Dunham,* 220 Mich App 268, 272; 559 NW2d 360 (1996) (the victim's statements were found to be spontaneous where made in response to "customary, open-ended questions asked of all children of divorcing parents"). In this case, Thompson's questions were open-ended and nonsexual in nature. Thompson never mentioned defendant's name or suggested sexual assault. Her questions were geared solely at finding out why her daughter was calling in the middle of the night. We disagree with defendant's characterization that the statements were the product of

[3] At trial, defendant objected, on hearsay grounds, to Thompson's testimony that the victim said she was sick. The trial court ruled that "the fact that she [the victim] told her mother she was sick is not a hearsay exception [sic]. I'll overrule that." Defendant failed to object to Thompson's testimony about any of the statements that he now challenges. Therefore, defendant failed to preserve this issue.

repeated questioning and were manufactured. The record does not support this assertion. Rather, the record establishes that the victim's statements were sufficiently spontaneous to qualify for admission under MRE 803A.

We additionally conclude that the statements were made within a permissible time frame under MRE 803A(3). In *People v Hammons,* 210 Mich App 554, 558; 534 NW2d 183 (1995), a delay of several days was deemed "excusable" because the nine-year-old victim was scared of reprisal from her father, the defendant. In this case, the evidence revealed that the victim waited until defendant was asleep. She then telephoned her mother from a storage closet. The record does not support that the victim waited any extended period of time before calling her mother.[4] Any delay in reporting was excusable because the young victim simply waited for her attacker to fall asleep before trying to get away. Plain error has not been established with respect to the admission of the challenged statements. *Carines, supra* at 763.

II

Defendant next argues that there was insufficient evidence to support his conviction because the act described by the victim at trial did not establish that he placed his mouth on her genitals. When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman,* 225 Mich App 103, 111; 570 NW2d 146 (1997). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry,* 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and reasonable inferences drawn from that evidence may be sufficient to prove the elements of a crime. *Carines, supra* at 757.

MCL 750.520b(1)(a) provides, in relevant part, that a person is guilty of first-degree criminal sexual conduct if he engages in an act of sexual penetration with a person under thirteen years of age. By definition, "sexual penetration" includes the act of cunnilingus, which is accomplished when a person places his mouth upon the external genital organs of the female. MCL 750.520a(o); *People v Legg,* 197 Mich App 131, 133; 494 NW2d 797 (1992). In *Legg,* the victim testified that the defendant used his mouth to touch the part of her body that she used when going to the bathroom. *Legg, supra* at 133. This Court determined that, based on that testimony, sufficient evidence existed to support the verdict. *Id.* In this case, the victim referred

[4] Defendant argues that a "significant" amount of time passed between the assault and the challenged statements. The record does not support this assertion. It was summer, and it is a matter of common knowledge that it becomes dark later at night during the summer. The victim testified that when she and defendant returned from a party at her Aunt Maxine's house, it was already dark. Defendant went to lie down, and the victim went outside and watched the fireworks. Later, defendant and the victim went to the home of the victim's Aunt Theresa to light fireworks. It was only when they came home from Aunt Theresa's that the act of cunnilingus occurred. The victim telephoned her mother at 2:30 a.m., after defendant fell asleep. She testified that, after the act of cunnilingus, she got out of bed and turned off a light. Defendant put his head under the cover and went to sleep. She then turned off the movie and grabbed defendant's cellular telephone to call her mother.

to her "private" area when testifying. She testified that her underwear covered three parts of her body: her stomach, her bottom, and her "private." She further testified that defendant pulled down her underwear and used his lips to kiss her "private." She described that, in the movie, the girls put their tongues into the private parts of one another. Defendant "did his tongue" to the victim like the girls in the movie were using their tongues on each other; "[h]e kissed it down there." The victim further testified that the part of her body that defendant kissed with his lips was the part of her body that she wipes after going to the bathroom. Viewed in the light most favorable to the prosecution, this evidence was sufficient to support that defendant placed his mouth on the nine-year-old victim's external genital organs.

III

Defendant next argues that his counsel was ineffective for eliciting testimony from Thompson that she suspected defendant of sexually abusing the victim several years earlier, when the victim was three years old. Defendant argues that the challenged evidence was irrelevant and impermissibly invited the jury to reflect on his bad character and propensity to commit sexual offenses. Our review of this ineffective assistance of counsel claim is limited to errors apparent on the record because no evidentiary hearing was held with respect to the issue. *People v Williams,* 223 Mich App 409, 414; 566 NW2d 649 (1997). In order to prevail on a claim that counsel was ineffective, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens,* 446 Mich 298, 302-303; 521 NW2d 797 (1994). He must overcome a strong presumption that the assistance of his counsel was sound trial strategy. *Stanaway, supra* at 687; *People v Tommolino,* 187 Mich App 14, 17; 466 NW2d 315 (1991).

At trial, defense counsel elicited that Thompson took the victim to the hospital on July 5, 2003, because she wanted to protect the victim. He also elicited that Thompson planned to make sure that the victim would never see defendant again. Thereafter, he questioned Thompson about her belief that defendant molested the victim when she was three or four years old. Thompson admitted that she never went to the police at that time and that she allowed the victim to see defendant and stay with him after that time. In closing, defense counsel argued:

> See, Cory Triplett is Cory Triplett to you. See, if he had been Colby [sic] Bryant or the son of someone distinguished in this community, well the police might have done their job. They might have said well listen, this ain't gonna fly. We have a mama that made a false police report on this man before because there's no - - strike that.
>
> Said that the girls [sic] been raped before and she let the girl go back.
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> * * *
>
> I tried to think that [sic] let me make some sense out of this. Okay, if my daughter has been raped by her dad when she's three and a half years old and I

> take her to the hospital but because the hospital says there's no corroboration or anything to suggest that it happened I don't call the police. But now she's nine years old and go to the hospital and there is no corroboration I call the police. Something don't make sense about that.

The record reveals that defense counsel raised the issue of the past, uncorroborated allegations to highlight that Thompson's act of reporting the alleged, uncorroborated assault in 2003 was suspect and not motivated by a need to protect or take care of the victim. He used the evidence to argue that the current allegation against defendant did not make sense. Trial counsel was engaged in a matter of trial strategy. This Court will not second-guess counsel on matters of trial strategy. *People v Knapp,* 244 Mich App 361, 386 n 7; 624 NW2d 227 (2001). While defense counsel's elicitation of the evidence may have been a questionable trial strategy in hindsight, this Court will not assess counsel's competence with the benefit of hindsight. *Id.*; *People v Rice (On Remand),* 235 Mich App 429, 445; 597 NW2d 843 (1999).

Defendant additionally argues that his counsel was ineffective for failing to request a cautionary instruction with respect to the challenged evidence. This issue is not properly before us because it was not raised in the statement of the questions presented. *People v Karl Miller,* 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, defendant has not demonstrated that, but for counsel's failure to request a cautionary instruction, the outcome of trial would have been different. *Stanaway, supra* at 687-688. Therefore, defendant has not established his claim. *Id.*

Finally, we deny defendant's request to remand this case for an evidentiary hearing. The request is untimely, and defendant has not demonstrated that a hearing is necessary. See MCR 7.211(C)(1).

IV

Defendant next argues that his conviction must be reversed because the police department and prosecution failed to preserve evidence and properly investigate the case. Specifically, defendant argues that they failed to seize defendant's bed sheets and test them for the presence of semen, failed to search for the alleged pornographic DVD, and failed to interview his family members and others who were present in the house at the time of the incident. Defendant claims that, if the bed sheets tested negative for the presence of semen or the police failed to locate the DVD, doubt would have been cast on the victim's story. Defendant asserts that the police and prosecution have an obligation to investigate the facts fully and bring forth all relevant evidence. Because defendant did not preserve this issue by raising it before the trial court, our review is limited to plain error affecting defendant's substantial rights. *Carines, supra* at 763.

The authorities do not have a duty to investigate on behalf of a defendant or to seek exculpatory evidence. *People v Burwick,* 450 Mich 281, 289 n 10; 537 NW2d 813 (1995); *People v Sawyer,* 222 Mich App 1, 6; 564 NW2d 62 (1997); *People v Miller (After Remand),* 211 Mich App 30, 43; 535 NW2d 518 (1995). In *Miller,* the defendant argued that his right to due process was violated because the police failed to test his hands for gunpowder. *Miller, supra* at 43. This Court disagreed, observing that the police have no duty to seek and find exculpatory evidence. *Id.* In *Burwick, supra* at 289 n 10, the Court explained:

> Unquestionably, the prosecutor has a duty to adequately prepare the case. The duty owed, however, is imposed by the oath of office and is owed to the client, the public. Likewise, defense counsel owes a duty to the client, imposed by the Sixth Amendment, to provide the defendant with effective assistance of counsel. Neither the prosecution nor the defense has an affirmative duty to search for evidence to aid in the other's case.

In this case, the police had no obligation to talk to defendant's family members and friends or to search for, seize, and test evidence that may have exonerated him. *Id.* We note that defendant had access to his own family and friends. He could have interviewed them and called them as witnesses. Moreover, defendant's argument that the absence of semen could have exonerated him is misguided, considering that defendant was charged with and convicted of an act of cunnilingus. The victim testified that defendant put his mouth on her genitals. There was no evidence that defendant exposed his penis or ejaculated. Thus, the presence or absence of semen on the sheets was irrelevant to the charge, and the police had no reason to seize defendant's sheets. Furthermore, the police department's failure to search for the pornographic DVD to corroborate the victim's story hurt the prosecution's case. The lack of corroborating evidence was helpful to defendant. We conclude that no plain error exists with respect to the alleged investigative deficiencies of the police and the prosecutor.

Defendant's reliance on *People v Jordan,* 23 Mich App 375; 178 NW2d 659 (1970), is misplaced. The basis of the ruling in that case was not that the prosecutor or the police had a duty to conduct testing on a handkerchief, but that testing the handkerchief for the presence of semen was a foundational requirement for the handkerchief's admission into evidence. *Id.* at 385-389. Additionally, defendant's reliance on *Brady v Maryland,* 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), is misplaced. A *Brady* violation is established when the prosecution suppresses evidence that is favorable to a defendant and the evidence was in the prosecution's possession, could not have been obtained by defendant, and may have changed the outcome of the proceedings. *People v Lester,* 232 Mich App 262, 281-282; 591 NW2d 267 (1998). None of those factors are established in this case.

V

Finally, defendant argues that he must be resentenced because offense variable (OV) 10, MCL 777.40, was improperly scored at ten points. Defendant preserved this issue by objecting to the scoring of OV 10 at sentencing. MCL 769.34(10).

> A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. [*People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002) (internal citations and quotation omitted).]

OV 10 relates to the exploitation of a vulnerable victim and is scored at ten points if the offender "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The word "exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). The word "vulnerability" means "the readily apparent susceptibility of a victim to

injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). The existence of one or more of the factors described in subsection 1 of the statute does not automatically equate with victim vulnerability. MCL 777.40(2); see also *People v Harmon,* 248 Mich App 522, 531; 640 NW2d 314 (2001). In *People v Phillips,* 251 Mich App 100, 109; 649 NW2d 407 (2002), this Court affirmed a score of ten points because the defendant was sixty-seven years old, engaged in impermissible sexual conduct with the fourteen-year-old victim, the victim stayed with the defendant, and the defendant was in the process of adopting the victim.

In this case, the trial court assessed ten points because of "the effect of the victim's youth," defendant's authority over her, and the manner in which the acts were conducted. The victim was staying with defendant, her father, at his mother's house. She was in his bed, under the covers, at the time of the charged conduct. Before assaulting the victim, defendant showed her a pornographic movie that depicted women putting their tongues into each other's genitals. Defendant asked the victim if she wanted someone to do this to her. When she told him no, he acted anyway. He accused the victim of being "horny." The victim did not fight defendant and waited until he was asleep to call her mother. This record demonstrates that defendant attempted to manipulate the victim for purposes of sexual gratification and that he took advantage of her youth, their domestic relationship, and his authority over her. We therefore affirm the trial court's scoring decision.

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens