

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD H. THOMSON,

Defendant-Appellant.

UNPUBLISHED

June 14, 2002

No. 230235

Oakland Circuit Court

LC No. 00-171857-FC

Before: Bandstra, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his convictions by a jury of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court sentenced him to concurrent terms of fifteen to thirty years' imprisonment for the first-degree CSC conviction and five to fifteen years' imprisonment for each of the second-degree CSC convictions. We affirm.

Defendant first argues that the trial court erred by denying his motion to suppress his statements to the police. An appellate court will defer to the trial court's factual findings on a motion to suppress unless the findings are clearly erroneous. *People v Herndon*, 246 Mich App 371, 395; 633 NW2d 376 (2001). A finding is clearly erroneous when, after reviewing the entire record, this Court is left with a definite and firm conviction that a mistake occurred. *People v Coomer*, 245 Mich App 206, 219; 627 NW2d 612 (2001). To the extent the trial court's ruling involves an interpretation of law or the application of a constitutional standard to undisputed facts, we review the decision de novo. *People v Attebury*, 463 Mich 662, 668; 624 NW2d 912 (2001).

Defendant maintains that his statements should be suppressed because the police asked him questions after he had allegedly invoked his right to remain silent and to consult an attorney. Under *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966), before conducting a custodial interrogation, the police must advise a suspect that he has the right to remain silent, that anything he says may be used against him, and that he has the right to an attorney during questioning. See *People v Dennis*, 464 Mich 567, 572-573; 628 NW2d 502 (2001).

However, the *Miranda* protections apply only to *custodial* interrogations. As this Court recently explained in *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999):

It is well settled that *Miranda* warnings need be given only in situations involving a custodial interrogation. *People v Anderson*, 209 Mich App 527, 532; 531 NW2d 780 (1995). The term "custodial interrogation" means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *People v Hill*, 429 Mich 382, 387; 415 NW2d 193 (1987), quoting *Miranda*, *supra* at 444. To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances, with the key question being whether the accused reasonably could have believed that he was not free to leave. *People v Roark*, 214 Mich App 421, 423; 543 NW2d 23 (1995). The determination of custody depends on the objective circumstances of the interrogation rather than the subjective views harbored by either the interrogating officers or the person being questioned. *Stansbury v California*, 511 US 318, 323; 114 S Ct 1526; 128 L Ed 2d 293 (1994).

Custody can mean that an individual "has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest." *People v Kulpinski*, 243 Mich App 8, 25; 620 NW2d 537 (2000), quoting *People v Peerenboom*, 224 Mich App 195, 197-198; 568 NW2d 153 (1997).

The facts adduced at the evidentiary hearing clearly established that defendant was not in custody when he was interviewed by the police. He voluntarily appeared for the police interview and was told that he did not have to say anything, was not in custody, and was free to leave. Therefore, defendant did not have the benefit of his rights available under the Fifth Amendment and *Miranda*. For this reason, defendant's reliance on *Edwards v Arizona*, 451 US 477; 101 S Ct 1880; 68 L Ed 2d 378 (1981), *People v Paintman*, 412 Mich 518; 315 NW2d 418 (1982), and *People v Catey*, 135 Mich App 714; NW2d (1984), is misplaced. Furthermore, because adversarial proceedings had not yet been initiated, defendant's Sixth Amendment right to counsel had not attached. *People v Anderson (After Remand)*, 446 Mich 392, 402; 521 NW2d 538 (1994). Accordingly, the trial court did not err in denying defendant's motion to suppress.

Next, defendant argues that his trial attorney rendered ineffective assistance of counsel. Because defendant did not raise this issue in a motion for a new trial or evidentiary hearing, our review is limited to mistakes apparent from the record. *People v Wilson*, 196 Mich App 604, 612; 493 NW2d 471 (1992).

In order for this Court to reverse due to ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). To establish prejudice, defendant must show that there was a reasonable probability that, but for his counsel's error, the result of the proceeding would have been different. See *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). The

burden is on defendant to produce factual support for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant alleges that counsel acted improperly by calling Mary Kay Neuman as a witness and allowing her to offer her opinion about the victim's credibility. Defendant contends that Neuman's testimony served to bolster the victim's credibility and therefore damaged defendant's case. However, decisions regarding which witnesses to call are a matter of trial strategy. See generally *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). It is apparent from the record that Neuman's testimony was necessary for the defense to pursue its theory that Neuman, as well as others who questioned the victim about the allegations against defendant, may have improperly influenced the victim's statements. Neuman's testimony established a foundation for the defense's expert's testimony in this area. In light of the defense theory, defendant has not overcome the presumption of sound trial strategy. *Tommolino, supra* at 17.

Defendant further alleges that his attorney acted improperly by failing to object to arguments and testimony regarding defendant's purported assertion of the right to remain silent and the right to counsel. However, this testimony was relevant to the defense theory that the officers placed undue pressure on defendant to make a statement. Accordingly, defendant has once again failed to overcome the presumption of sound trial strategy. *Id.*

Next, defendant argues that the prosecutor committed misconduct during her closing argument. Because there was no objection to the challenged remarks at trial, we review this issue for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To obtain relief, defendant must show a clear or obvious error that likely affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Claims of prosecutorial misconduct are decided case by case. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court reviews the prosecutor's remarks in context to decide if the comments deprived the defendant of a fair and impartial trial. *Id.* "A prosecutor's comments must be considered in light of the defense arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Otherwise improper remarks may not result in error requiring reversal if the remarks are made in response to defense counsel's arguments. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Viewed in context, the prosecutor's remarks do not constitute plain error requiring reversal.¹ The challenged comments regarding the victim's credibility and regarding defendant's status as a pedophile were confined to the evidence and reasonable inferences that could be drawn from the evidence and were principally addressed to the defense theories and evidence. We note that a prosecutor is entitled to argue that a witness is not worthy of belief, *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982), and we reiterate that a prosecutor's

¹ Nor, contrary to defendant's brief argument in a footnote of his appellate brief, did defense counsel render ineffective assistance by failing to object to the comments.

comments must be considered in light of the defense arguments raised. *Messenger, supra* at 181. The comments regarding the police officer's actions, although approaching the level of impropriety, were offered in rebuttal to defense counsel's implication in closing that the officer acted improperly. Moreover, in light of the evidence presented at trial, we cannot conclude that the comments likely affected the outcome of the trial. Accordingly, we discern no basis for appellate relief. *Id; Kennebrew, supra* at 608; *Carines, supra* at 763. We additionally note that contrary to defendant's argument, the prosecutor, by commenting on the credibility of the defense theory and testimony, did not improperly shift the burden of proof to defendant or shatter the presumption of innocence. See *People v Fields*, 450 Mich 94, 108-111, 115; 538 NW2d 356 (1995).

Affirmed.

/s/ Richard A. Bandstra
/s/ Michael R. Smolenski
/s/ Patrick M. Meter