

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT NORMAN VERBRUGGEN,

Defendant-Appellant.

UNPUBLISHED

October 11, 2002

No. 231970

Macomb Circuit Court

LC No. 00-002217-FC

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f), and one count second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(f). He was sentenced to concurrent prison terms of 210 to 540 months for each CSC I conviction and 86 to 180 months for the CSC II conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied a fair and impartial trial because of prosecutorial misconduct. We disagree.

Because defendant failed to timely object to the alleged improper conduct below, this Court reviews this claim for a plain, i.e., clear or obvious, error that likely affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Also, reversal is warranted only if the plain, unpreserved error resulted in the conviction of an actually innocent defendant or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Carines*, *supra* at 763.

Defendant argues that, during closing and rebuttal arguments, the prosecutor improperly vouched for the victim's credibility, characterized the defense as "lies," and referred to some defense witnesses as "liars." Viewed as a whole and in context, the challenged conduct does not rise to the level of error requiring reversal. A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about the defendant's guilt. See *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). In making the challenged remarks here, the prosecutor was

arguing that, based on the evidence, the claims made by defendant and the defense witnesses were inconsistent and contradictory, while the victim's testimony was consistent with the reasonable inferences from the evidence. This was not improper. A prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Also, a prosecutor may use "hard language" when it is supported by evidence and is not required to phrase arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Further, the challenged remarks were responsive to the evidence produced at trial (including defendant's own testimony) and to defense counsel's arguments, and the remarks were reasonable inferences based on the evidence. See *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977), *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW 2d 354 (1996), and *Fisher*, *supra* at 156. During trial, defendant, as well as two defense witnesses, admitted that they had lied to the police during the investigation. In addition, defendant and his wife testified that the victim was lying and that the victim was angry with defendant and his wife for various reasons.

To the extent that any of the challenged remarks could be viewed as improper, the trial court cured any prejudice by instructing the jury that it should only consider the evidence, that the lawyers' statements and arguments were not evidence, and that it was the jury's duty to determine the credibility of the witnesses. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001). Accordingly, defendant has failed to demonstrate an outcome-determinative plain error, *Carines*, *supra* at 763, and this issue does not warrant reversal.

II

Defendant claims that his conviction must be reversed because the prosecutor improperly proffered "other acts" evidence without complying with the requirements of MRE 404(b). Because defendant failed to object to the admission of this evidence below, this Court reviews this claim for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

At trial, the victim testified that, while defendant was digitally penetrating her vagina, he said, "Why don't you shave. If you did shave, you'd look like a ten-year-old and I've f**ked ten-year-olds before." This testimony involves defendant's alleged *statement*, as opposed to an *act*. "[A] prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act." *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), citing *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988). Accordingly, defendant has failed to demonstrate plain error, and reversal is unwarranted.¹ *Carines*, *supra* at 763.

III

¹ Apart from relying on MRE 404(b), defendant has not argued that the evidence was inadmissible on any other basis. We nevertheless note that defendant's statement was admissible under MRE 801(d)(2), as an admission of a party opponent. See *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996).

Defendant's final claim is that defense counsel was ineffective because he failed to object, pursuant to MRE 404(b), to the admission of the "other acts" evidence concerning his alleged sexual acts with ten-year-olds. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review of this issue is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *Id.* A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

As discussed previously, the statement attributed to defendant did not constitute "other acts" evidence, *Rushlow, supra* at 176, and, therefore, defense counsel had no basis on which to make a MRE 404(b) objection. Counsel was not required to make a meritless objection. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Further, defendant's statement was admissible as an admission of a party opponent. MRE 801(d)(2); *Kowalak, supra* at 556-557. Finally, in light of the other evidence introduced at trial and the jury's rejection of defendant's alibi defense, it is unlikely that, but for trial counsel's alleged inaction, the outcome would have been different. *Effinger, supra* at 69. Accordingly, defendant has failed to establish that defense counsel rendered ineffective assistance.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter