

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DELVRENE LAMOUNT WALLACE,

Defendant-Appellant.

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UNPUBLISHED

July 12, 2007

No. 269202

Wayne Circuit Court

LC No. 05-010684-01

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and sentenced to 12 to 30 years' imprisonment. He appeals as of right. We affirm.

I

Defendant was convicted of sexually assaulting the seven-year-old victim in April 2005. The victim testified that she was visiting at the home of her godmother when defendant, who was also present in the home, sexually assaulted her. On the morning of this incident, the victim was lying on her stomach watching television while others in the house were still sleeping. Defendant unzipped his pants, laid on top of her, lifted her dress, removed her underwear, and anally penetrated the victim. The victim did not initially report the incident, but later told her mother.

At trial, defendant denied ever inappropriately touching the victim. He testified that when he saw the victim on the morning of the alleged incident, she was upset because she had wet the bed. Defendant teased the victim, retrieved a washcloth, and told another person in the home to put the victim in the bathtub.

II

Defendant first argues that he was denied his right to due process because the prosecutor failed to timely provide discovery, contrary to the rule set forth in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and the trial court failed to impose any remedy for the noncompliance. We disagree. Because defendant failed to request any action by the trial court,

we review this claim for plain error affecting substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004).

During the prosecutor's redirect examination of the victim's mother, she asked if the victim's statement that defendant had messed with her was consistent with the statement she had made to the police. The prosecutor asked the witness to look at a piece of paper, apparently containing the victim's statement to the police. Defense counsel objected, and a bench conference was held. Outside the presence of the jury, the parties discussed several matters. With regard to the statement, defense counsel described its contents as a statement taken by a police officer, but it contained most of the information previously known to the defense. Defense counsel did not request any action by the trial court with regard to the statement.

A criminal defendant has a due process right of access to information possessed by the prosecution. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998), citing *Brady, supra*. In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. *Lester, supra* at 281-282.

Defendant has not established a *Brady* violation. Initially, we note that defendant has failed to proffer the statement for our review. Further, the record shows that the prosecution provided the statement to defendant at trial, and defense counsel had an opportunity to review it. Defense counsel acknowledged that the statement essentially contained information the defense already possessed. Furthermore, the statement was apparently consistent with the victim's and her mother's trial testimony. Thus, this evidence was not favorable to defendant. Moreover, although defendant speculates that earlier receipt of the information may have affected the outcome of his case, he makes no specific claims regarding the *actual* effect. In sum, defendant has failed to show a plain error affecting his substantial rights. *Kimble, supra*.

We reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to request a remedy for the alleged discovery violation. 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 the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

As previously indicated, defendant has not established a *Brady* violation. Because there was no reasonable basis to request a discovery remedy, defendant cannot establish a claim of ineffective assistance of counsel. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to make a futile objection).

### III

Defendant also argues that he is entitled to a new trial because the victim's Kids Talk interview videotape was destroyed in bad faith. Because defendant failed to raise this issue in the trial court, we review this claim for plain error affecting substantial rights. *Kimble, supra*.

A Sex Crimes Unit police officer testified that, because of her young age, the victim underwent a forensic interview by non-police personnel at Kids Talk, and the interview was videotaped. The officer explained that this process allows law enforcement to improve on the likelihood that a child is being truthful and reduces the possibility of implanted answers. After the interview, the prosecution determines whether there is enough information to go forward. The officer explained that after observing the victim's interview, she returned to her office to prepare an investigator's report using the videotape. However, when she attempted to play the videotape, there was no sound. The prosecutor's office made a second videotape, but it too had no sound.

"Defendant bears the burden of showing that the evidence was exculpatory or that the police acted in bad faith." *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Here, there is no indication that the prosecution or the police "destroyed" the videotape sound, and there is no basis for concluding that the police or the prosecution acted in bad faith. Without more information, the failure to detect a malfunction that affected the sound constituted mere negligence, at most. Moreover, defendant has not demonstrated that the evidence was exculpatory. Rather, his assertion that the video recording could have exonerated him is entirely speculative. Consequently, defendant has failed to show a plain error affecting his substantial rights.

We also reject defendant's cursory argument that he was denied the effective assistance of counsel because defense counsel failed to move to suppress any testimony "flowing from" Kids Talk. Decisions about what evidence to present are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Here, defense counsel used the Kids Talk interview and process during his cross-examination of the officer to challenge the effectiveness of the procedures in evaluating a child accuser's credibility. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Consequently, defendant cannot establish a claim of ineffective assistance of counsel.

#### IV

Defendant further argues that he is entitled to a new trial because the prosecutor impermissibly vouched for the victim when she remarked, "She told the truth." We disagree.

Because defendant failed to object to the prosecutor's remarks, we review this claim for plain error affecting substantial rights. *Kimble, supra*. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, viewed in context, the challenged remark did not suggest that the prosecutor had special knowledge that the victim was credible. Through a partial and selective recitation of the record, defendant has mischaracterized the prosecutor's argument. In *rebuttal* argument, the prosecutor stated the challenged remark in the following context:

The inconsistencies points out wearing underwear [sic]. That was, that was I think one of this [sic] things, one of the things [defense counsel] said. Well, you know, when it happened did you have on underwear? No, he took it off. Were you wearing it before? Yeah. We [sic] you ask two different questions the answers are going to be different. When he put his penis in her anus or anal opening she didn't have underwear on. *She told the truth*. Before he took her underwear down she was wearing underwear. *She told the truth*. And this was a mantras seven words, this was a child [sic] underwent direct examination and underwent rigorous cross-examination. And this was not a child who was going to agree with every adult. In fact, she kept telling me, you know, wasn't it around your birthday? I don't know. She could have, you know, been more forceful. Hey, you don't know when it was. She doesn't know. She wasn't just there to be agreeable. She was there to tell what she knows happened. [Emphasis added.]

The prosecutor's comments must be considered in light of defense counsel's comments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). The prosecutor's argument was focused on refuting defense counsel's assertions during closing argument that the victim's testimony was inconsistent and not credible. In making the challenged remark, the prosecutor discussed the consistency of the victim's testimony and her demeanor, and argued that there were reasons to conclude that the victim was credible. A prosecutor is free to argue from the facts that a witness is credible. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Additionally, in its final instructions, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility, and that the lawyers' comments are not evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Consequently, this claim does not warrant reversal.

We reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to object to the prosecutor's remark. Because the trial court's instructions adequately protected defendant's rights, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's failure to object, the result of the proceeding would have been different. *Effinger, supra*.

## V

Defendant also argues that he was denied his right to a fair trial when the trial court failed to declare a mistrial after the jury twice indicated that it was deadlocked. We decline to review this issue. Given defense counsel's affirmative approval of the trial court's handling of the matter, defendant cannot now complain of an error. To hold otherwise would allow defendant to harbor error as an appellate parachute. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d

144 (2000). Consequently, any objection in this regard was waived, and there is no error to review. *Id.*

Defendant argues, in the alternative, that he was denied the effective assistance of counsel because defense counsel failed to move for a mistrial when the jury indicated that it was deadlocked. We disagree.

On March 1, 2006, at 9:09 a.m., after the trial court completed giving its final instructions, the jury began deliberations. At 12:06 p.m., the jury sent a note requesting the definition of first-degree CSC. The court reread the standard jury instruction and the jury resumed deliberations for 20 minutes before being excused for lunch at 12:30 p.m. The jury resumed deliberations at 1:30 p.m. At 1:53 p.m., the court reconvened and indicated that before the lunch break the jury had sent a note indicating that it was “unable to come to a unanimous decision.” Without objection, the court read the “deadlocked jury” instruction, CJI2d 3.12, and ordered the jury to continue deliberating. At 3:25 p.m., the jury sent a note indicating that it could not “come to a unanimous agreement.” After discussion with counsel, the court placed the following on the record:

I have spoken with the attorneys briefly off record, and I am going to bring the jury back out momentarily and instruct them that they can go home for the day if they so choose collectively or they can spend another half an hour or so to continue to deliberate, and go home at the end of that time if they wishes [sic] as well. It’s up to them. But I’m not prepared to throw in the towel just yet. They have been out since about 9:30 this morning, taking into account lunch. They haven’t been out to the point where I don’t think that further deliberation might be fruitful one way or the other.

At 3:27, the trial court instructed the jury. The jury was excused at 3:40 p.m., and resumed deliberations on March 2, 2006, at 9:00 a.m. The jury sent a note requesting the victim’s testimony. At 11:33 a.m., the testimony was played for the jury, and the jury was excused for lunch at 12:46 p.m. At 1:45 p.m., the jury returned its verdict. The jurors were individually polled and each agreed with the verdict.

Defendant has failed to demonstrate that, had defense counsel moved for a mistrial, it would have been successful. See *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003) (a mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to receive a fair trial). “Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered.” *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989). When a jury indicates that it is unable to agree unanimously on a verdict, a court may require the jury to continue deliberations so long as the court’s actions do not threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals, or cause “a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement.” See *People v Hardin*, 421 Mich 296, 312; 365 NW2d 101 (1984). A trial judge’s decision whether to declare a mistrial because a jury is deadlocked is accorded great deference by a reviewing court. See *People v Lett*, 466 Mich 206, 213; 644 NW2d 743 (2002).

It was not unreasonable for the trial court to conclude that it was premature to declare a mistrial, and its supplemental instructions advising the jury to continue deliberating were not coercive. Considering that the jury had not deliberated for very long before indicating that it was deadlocked, the trial court reasonably surmised that the jury might be able to reach a verdict after hearing relevant instructions and discussing the case in the context of those instructions. Further, the instructions were not coercive and adequately protected defendant's rights. The instructions given properly reflected the applicable law, including that the jury's verdict must be unanimous, and that the individual jurors should vote their conscience and not give up their honest opinions for the sake of reaching a unanimous verdict. See *People v Burden*, 395 Mich 462, 468-469; 236 NW2d 505 (1975). The trial court did not give any instruction or act in a manner that implied that the jury had to deliberate for any specific length of time, or return a verdict in a certain amount of time.<sup>1</sup> Rather, the "overall impact of the instruction[s] given in this case was not to coerce the jury, but to stress the need to engage in full-fledged deliberations while maintaining the integrity of the judicial system." *Hardin, supra* at 315.

Under these circumstances, had defense counsel moved for a mistrial, the trial court would have properly exercised its discretion in denying it. *Lett, supra*. Consequently, defendant cannot demonstrate that, but for defense counsel's inaction, the result of the proceeding would have been different. *Effinger, supra*.

Affirmed.

/s/ Richard A. Bandstra

/s/ Brian K. Zahra

/s/ Karen M. Fort Hood

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<sup>1</sup> See *People v Vettese*, 195 Mich App 235, 245; 489 NW2d 514 (1992) (instruction that jury would be excused for the evening and would return the next morning not coercive because it did not imply that the jury had to return a verdict by a certain time).