

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD ALBERT VANDEBERG,

Defendant-Appellant.

UNPUBLISHED

June 26, 2008

No. 276080

Ottawa Circuit Court

LC No. 06-029985-FH

Before: Jansen, P.J., and Zahra and Gleicher, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of three counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a). Pursuant to MCL 769.11, defendant was sentenced as a third habitual offender to 8 to 30 years in prison for each count. We affirm.

Defendant and the victim's mother had a dating relationship, and they purchased a residence in Holland, Michigan. The 15-year-old victim, who had previously resided with her father, moved into the Holland residence in May 2005. Defendant and the victim developed a close relationship, which had become sexual by the summer of 2005. The liaisons generally occurred on weekdays, after the victim's mother had left for work. In July 2005, the relationship between defendant and the victim's mother deteriorated, and the victim and her mother moved out of the Holland residence. However, they continued to spend time at the Holland residence thereafter. The relationship between the victim's mother and defendant was intermittent during this period. In October 2005, the victim's mother learned that defendant had Hepatitis C. The victim's mother informed the victim, who became upset and eventually disclosed the fact of her sexual relationship with defendant. The victim's mother called the police, and when defendant learned about the allegations, he fled the state.

Defendant first argues that a physician, who examined the victim, improperly opined regarding the victim's credibility and defendant's guilt at trial. Defendant failed to preserve this issue by objecting to the challenged testimony at trial. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Thus, our review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Expert testimony is admissible if "(1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." MRE 702. Our Supreme

Court has expressed the following general principles regarding the testimony of expert witnesses in child sexual abuse cases: “(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty.” *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995).

The physician in question testified that she is a board-certified pediatrician with a special practice in child abuse and neglect, and that she also serves as the medical director and division chief of the child protection team at a children’s hospital in Grand Rapids. The trial court qualified her as an expert in the field of child abuse and neglect. The physician testified that the physical examination of the victim revealed “a complete cleft, which means a healed tear between the 7:00 o’clock and 7:30 position on the hymenal tissue.” The physician explained that the finding indicated trauma to the hymenal tissues, that something had torn the tissue, and that the tissue was “well healed.” According to the physician, the victim claimed to have been sexually active only with defendant, and claimed that she had not sustained any other injury to her genital area. Based on the examination, the physician concluded that “[h]er physical examination rating was clear evidence of blunt force or penetrating trauma which led to a definite evidence of abuse or sexual contact.” We conclude that the physician did not opine that the victim was sexually assaulted by defendant or anyone else or that the victim was truthful. Rather, the physician merely testified concerning the categories of examination findings in child abuse and neglect cases in general, and explained how her specific findings in this case fit within those categories. Viewed in context, we cannot conclude that the physician’s testimony offended the principles regarding expert testimony in child sexual abuse cases as set forth by our Supreme Court. *Id.* We perceive no outcome-determinative plain error in this regard. *Carines, supra* at 763-764.

Defendant also argues that the physician’s testimony constituted an improper opinion on defendant’s guilt and impermissible vouching for the victim’s credibility. Defendant cites *People v Smith*, 425 Mich 98; 387 NW2d 814 (1986), and *People v McGillen #2*, 392 Mich 278; 220 NW2d 689 (1974), in support of this proposition. Defendant’s reliance on these cases is misplaced because they are distinguishable from the instant matter. Indeed, the physician’s testimony in the present case fell squarely within the range of permissible testimony as described by our Supreme Court in *McGillen #2, supra* at 285:

[The physician’s] testimony should, under the facts of this case, be limited to the question of whether or not the complaining witness still had an intact hymen at the time of his examination. This fact is only relevant and material if the [complainant] claims to have had an intact hymen prior to the alleged act.

Defendant next asserts that a police detective expressed an improper opinion that defendant was “grooming” the victim for sexual abuse. We review this unpreserved allegation of error for plain error affecting defendant’s substantial rights. *Carines, supra* at 763-764.

The police officer’s testimony regarding defendant’s “grooming” of the victim appeared to constitute expert opinion testimony. However, the prosecution did not offer the detective as an expert witness. Nevertheless, under MRE 701, a lay witness’s testimony “in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue.” A lay opinion by a police officer is admissible where it is

based on that officer's perception, and it assists the jurors in determining a fact in issue. *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994). Moreover, the disputed testimony was admissible because the police witness was generally qualified to testify as an expert witness, MRE 702, and could have been qualified to do so at trial, *People v Dobek*, 274 Mich App 58, 79; 732 NW2d 546 (2007). We find no plain error with respect to this issue. *Carines, supra* at 763-764.

Defendant also argues that the prosecution engaged in misconduct during the cross-examination of defendant and during its rebuttal argument. We review unpreserved claims of prosecutorial misconduct for plain error. *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005), vacated in part on other grounds 477 Mich 856 (2006).

The role and responsibility of the prosecution is not merely to convict, but to seek justice; therefore, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Generally, the prosecution has great latitude to argue the evidence and all reasonable inferences relating to the prosecution's theory of the case. *Walker, supra* at 542.

Defendant first contends that the prosecution improperly asked him to comment on the victim's credibility during cross-examination. During direct examination, defendant testified that his relationship with the victim was like a father-daughter relationship. During cross-examination, the prosecution delved into defendant's relationship with the victim.

Q. And your relationship with [the victim] was wonderful?

A. We had a nice relationship.

Q. So why would she say this about you?

A. You know you're asking me to tell you why people lie . . . and I can't do that.

Q. But as far as you were concerned your relationship with her was always good?

A. Yes. As far as I was concerned my relationship with [the victim's mother] was always good. I didn't understand why those things happened either.

The prosecution cannot ask a defendant to comment on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). In the instant action, the exchange between the prosecution and defendant during cross-examination is unlike that which our Supreme Court found to be improper but not unfairly prejudicial in *Buckey, supra*. The prosecution in that case asked whether the defendant believed that several witnesses were lying. *Id.* at 17. Here, the prosecution asked "why would she say this about you?" We find that the question was poor in form. However, the prosecutor was simply attempting to explore the degree of tension that existed between defendant and the victim's mother and how that tension might have led to the instant charges against defendant. The prosecutor was not specifically

asking defendant to comment on the victim's veracity. The question was not, therefore, necessarily improper.

Even assuming arguendo that the question was improper, however, defendant merely responded that he could not explain "why people lie." We conclude that there was no prejudice resulting from this improper question. *Id.* at 17. The record reflects that defendant dealt rather well with this question. *Id.* The brief and vague questioning did not rise to the level of outcome-determinative plain error. *Walker, supra* at 542. Moreover, a timely objection by defense counsel could have cured any prejudice, either by precluding such further questioning or by obtaining an appropriate cautionary instruction. *Buckey, supra* at 18.

Defendant also contends that the prosecution compounded the abovementioned improper question by referring to it during rebuttal argument. After reviewing the entire rebuttal, we find that the prosecution was referring to the poems written by the victim, which were properly admitted at trial, when the prosecution argued that "there is absolutely no explanation given for why she would make this up." We conclude that the prosecution was not referring to the inartfully phrased question during cross-examination or improperly shifting the burden of proof to defendant. Rather, the prosecution was arguing that the victim was a credible witness based on the evidence adduced at trial and reasonable inferences derived therefrom. *Walker, supra* at 542.

Defendant next argues that he was denied the effective assistance of counsel when his trial attorney (1) refused to cross-examine the physician, (2) failed to object to the introduction of defendant's parole status at trial, (3) failed to object to the physician's opinion that the victim was credible and defendant was guilty, (4) failed to object to the detective's opinion that defendant was "grooming" the victim, and (5) failed to object to the prosecution's abovementioned cross-examination question and rebuttal argument.

Defendant preserved the first two claims of ineffective assistance of counsel by raising them in his post-conviction motion for a new trial. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). Because defendant did not raise the remaining three claims of error in that motion, they are unpreserved. *Id.* Our review of unpreserved claims of ineffective assistance of counsel is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). "The determination whether a defendant has been deprived the effective assistance of counsel presents a mixed question of fact and constitutional law." *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). To prevail on a claim of ineffective assistance of counsel, a defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Further, a defendant must demonstrate that, but for defense counsel's error, it is reasonably likely that the trial's outcome would have been different. *Id.* at 146. Effective assistance of counsel is presumed; thus, a defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id.*; see also *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Defendant first contends that defense counsel rendered ineffective assistance by refusing to cross-examine the physician. At the hearing on defendant's motion for a new trial, defense counsel testified that he did not cross-examine the physician for the following reasons:

Well, [the physician] is a very compelling witness, and her testimony wasn't that she could testify that [defendant] had committed sexual contact with [the victim]. So my intent or strategy in cross-examining [the physician] was not to give her an opportunity to gild the lily, so to speak, and make her testimony any more damaging for [defendant] than it already was. She hadn't pinned the criminal offense on him apart from [the victim's] testimony.

Decisions about what evidence to present and which witness to call or question are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). The trial court concluded that defense counsel's decision not to cross-examine the physician constituted trial strategy. On appeal, defendant has mischaracterized the physician's testimony. The record establishes that the physician concluded that there was "definite evidence of abuse or sexual contact," and not "definite sexual abuse" as defendant purports. Moreover, defendant's arguments about what defense counsel should have asked the physician during cross-examination amounts to mere second guessing. We will not substitute our judgment for that of defense counsel regarding matters of trial strategy. *Id.* Moreover, a specific trial strategy does not amount to ineffective assistance of counsel merely because it was unsuccessful. *Matuszak, supra* at 61. Defendant has failed to overcome the presumption that defense counsel's decision not to cross-examine the physician was sound trial strategy. *Henry, supra* at 146.

Second, defendant contends that that defense counsel rendered ineffective assistance of counsel by failing to object to the introduction of defendant's parole status at trial. At the hearing on defendant's motion for a new trial, defense counsel testified that he did not recall the prosecution's question regarding defendant leaving the state of Michigan in violation of his parole. Defense counsel indicated that defendant planned to testify that he left the state. The trial court concluded that defense counsel's failure to object to the prosecution's question concerning whether defendant had violated his parole fell below the requisite professional norm. However, the trial court ruled that defense counsel's failure to object was not outcome-determinative.

At trial, a witness testified that defendant had appeared to be leaving town. Additionally, a detective testified that defendant admitted that he had decided to flee after his telephone conversation with the victim's mother regarding the police and the allegations of sexual abuse. During direct examination, defendant testified that he went to Tennessee to visit a cousin. And, during cross-examination, defendant agreed that he went to Tennessee for a vacation. The following colloquy ensued between the prosecution and defendant:

Q. [I]t's your testimony you were going there because you were taking a vacation?

A. Correct.

Q. Even though you weren't allowed to leave?

A. Who said I wasn't allowed to leave?

Q. You weren't allowed to leave the state, were you?

A. Sure, I have the right to travel.

Q. You do have the right to travel?

A. Absolutely.

Q. You didn't have rules?

A. I do have rules, sure.

Q. Didn't you have a parole rule that you weren't allowed to leave the State of Michigan?

A. Without permission, yes.

Q. And did you—you left without the State permission?

A. I did.

* * *

Q. And what was your plan of how long you were going to visit in Tennessee?

A. Until the weekend. I was going to come back that weekend.

Q. And did the phone call saying that you were “* * * my daughter,” have anything to do with when you left?

A. It did. Sure. Yes, absolutely. I knew I was going to get locked up. Like you said, I was on parole for drunk driving and for walking away from work release in the county jail, and you know, I'm not naïve to the system. When somebody makes an accusation like that when you're on parole, they lock you up first and talk to you later. And as a matter of fact . . . I'm still in prison. And as soon as this is cleared up I can go home. This is the only reason why I'm in prison right now as we speak, is because of this accusation that's been made against me.

Defendant opened the door to the prosecutor's line of questioning in this regard when he claimed that he went to Tennessee to visit his cousin. While the initial question about defendant's parole status may have been improper, defendant later volunteered all of the information about his past convictions in response to the prosecution's question concerning whether the victim's mother's telephone call had prompted him to leave the state. Furthermore, defense counsel may well have had strategic reasons for not objecting to the testimony regarding defendant's parole status. Defense counsel may have desired to avoid drawing attention to the challenged comment. *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995). We cannot conclude that the outcome of trial would have been different but for defense counsel's alleged error in failing to object. There was substantial evidence to support the jury's verdict without the improper testimony. The victim's testimony at trial was corroborated by testimony of other witnesses and there was evidence introduced at trial that contradicted defendant's

testimony concerning why he had left the state. Defendant has failed to demonstrate that, but for defense counsel's conduct, there is a reasonable probability that the outcome of the proceedings would have been different. *Matuszak, supra* at 57-58.

Third, defendant contends that defense counsel rendered ineffective assistance by failing to object to the physician's opinion that the victim was credible and that defendant was guilty. This claim of ineffective assistance of counsel lacks merit. However, the physician's testimony was proper because it assisted the jury in its determination that a penetration occurred. *Smith, supra* at 107; *McGillen #2, supra* at 284. Therefore, the physician's expert testimony was admissible. See *Smith, supra* at 115. Defense counsel is not required to raise meritless objections. *Matuszak, supra* at 58.

Fourth, defendant contends that defense counsel rendered ineffective assistance by failing to object to the police detective's opinion that defendant was "grooming" the victim. This claim also lacks merit. Again, the police detective's challenged testimony was admissible, and defense counsel does render ineffective assistance by failing to raise meritless objections. *Id.*

Lastly, defendant contends that that defense counsel rendered ineffective assistance by failing to object to the prosecution's cross-examination question to defendant regarding the victim's credibility and the prosecution's rebuttal argument regarding the same matter. While the prosecution's question may have been improper, there was no prejudice resulting therefrom. *Buckey, supra* at 17. Further, the challenged argument regarding the victim's credibility was based on the evidence adduced at trial and reasonable inferences derived therefrom. Such an argument was proper. *Walker, supra* at 542. We conclude that any prosecutorial misconduct in this regard was not prejudicial to defendant. Thus, defendant cannot establish that counsel's failure to object constituted outcome-determinative plain error.

Defendant next argues on appeal that the trial court improperly denied him credit for time served while he was awaiting trial and sentencing. We cannot agree. According to the presentence investigation report (PSIR), defendant was on parole when he committed the instant offenses, and his commission of those offenses constituted a violation of his parole. A defendant who commits an offense while on parole is not entitled to jail credit against his new sentence; rather, that jail time is credited against the sentence from which the defendant received parole. *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Defendant was not entitled to credit against his CSC III sentences for the time he served in jail pending the instant trial and sentencing. However, he was entitled to have the credit applied against the remaining portion of his sentence for the paroled offense. *Id.*; *People v Stead*, 270 Mich App 550, 552; 716 NW2d 324 (2006).

Finally, defendant argues that he is constitutionally entitled to credit for time served against his new sentences as a matter of due process, equal protection, and principles of double jeopardy. This Court has previously rejected such constitutional arguments. In *People v Stewart*, 203 Mich App 432, 433-434; 513 NW2d 147 (1994), this Court ruled that MCL 791.238 does not unconstitutionally inflict additional punishment on individuals solely because of their status as parole detainees. The *Stewart* Court held that the statute does not violate the federal or state prohibitions against cruel and unusual punishment, or violate defendant's federal or state rights to equal protection and due process. *Id.* Moreover, the plain meaning of MCL 791.238 demonstrates that the Legislature did not intend for defendants who commit criminal

offenses while on parole to receive credit against their new sentences. MCL 791.238(2) provides:

A prisoner violating the provisions of his or her parole and for whose return a warrant has been issued by the deputy director of the bureau of field services is treated as an escaped prisoner and is liable, when arrested, to serve out the unexpired portion of his or her maximum imprisonment. *The time from the date of the declared violation to the date of the prisoner's availability for return to an institution shall not be counted as time served.* The warrant of the deputy director of the bureau of field services is a sufficient warrant authorizing all officers named in the warrant to detain the paroled prisoner in any jail of the state until his or her return to the state penal institution. [Emphasis added.]

On the basis of the plain language used by the Legislature, we must also conclude that the denial of credit to defendant does not offend principles of double jeopardy. See *People v Calloway*, 469 Mich 448, 450-451; 671 NW2d 733 (2003) (observing that “the scope of double jeopardy protection against imposed multiple punishment for the “same offense” is confined to a determination of legislative intent”) (citations omitted).

Defendant was not entitled to credit against his new sentences, but was only entitled to credit against his past sentences from which parole was granted. *Seiders, supra* at 705. Defendant has failed to establish plain error affecting his substantial rights with respect to this issue. *Carines, supra* at 763-764.

Affirmed.

/s/ Kathleen Jansen
/s/ Brian K. Zahra
/s/ Elizabeth L. Gleicher