

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK RICHARD RUTHERFORD,

Defendant-Appellant.

UNPUBLISHED

June 15, 2010

No. 291694

Genesee Circuit Court

LC No. 08-023429-FH

Before: ZAHRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

A jury convicted defendant of three counts of second-degree criminal sexual conduct (“CSC”), MCL 750.520c(1), and the trial court sentenced him to concurrent prison terms of 52 to 180 months for each conviction. Defendant appeals as of right. We affirm defendant’s convictions, but vacate his sentences and remand for resentencing.

Defendant was charged with four counts of second-degree CSC and one count of fourth-degree CSC, MCL 750.520e, for engaging in sexual contact with three teenage girls during an overnight event for students of a church youth group. The event was held at the house of one of the church members and defendant was present as an adult chaperone. Defendant was convicted of one count of second-degree CSC for engaging in sexual contact with TH, and two counts of second-degree CSC for engaging in sexual contact with SW. He was acquitted of an additional count of second-degree CSC involving SW, and acquitted of the fourth-degree CSC charge involving AM.

I. IN CAMERA REVIEW OF PRIVILEGED RECORDS

Defendant first argues that the trial court erred by denying his motion for an in camera inspection of the complainants’ school records. We disagree. A trial court’s decision whether to conduct an in camera inspection of privileged records is reviewed for an abuse of discretion. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). An abuse of discretion occurs when the trial court’s decision is outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The school records that defendant sought are conditionally privileged under MCL 600.2165. MCR 6.201(C)(2) allows for limited discovery of privileged information under the following circumstances:

If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.

* * *

(b) If the court is satisfied, following an in camera inspection, that the records reveal evidence necessary to the defense, the court shall direct that such evidence as is necessary to the defense be made available to defense counsel.

In this case, defendant relied on “scuttlebutt” that the complainants had been disciplined at school for drug usage and other acts of misconduct, and that one complainant had previously made a report of sexual abuse by a neighborhood child, to justify his request for discovery of the complainants’ confidential school records. The trial court found, and we agree, that defendant failed to demonstrate by specific articulable facts that there was a reasonable probability that the requested records contained material information necessary to his defense.

Defendant’s reliance on “scuttlebutt” concerning the complainants’ school records, unsupported by specific facts, did not satisfy the requirement that a request for discovery of privileged records be grounded in articulable fact. Further, defendant failed to sufficiently explain why discovery of the complaints’ school records was necessary to defend against charges involving conduct at a church youth group gathering. Although defendant asserts that the records were crucial to his theory that the complainants fabricated the allegations to keep them from getting into trouble with their parents for their acts of misbehavior, defendant did not offer any articulable facts indicating that the complainants were engaged in misbehavior when the charged conduct occurred, or explaining why falsely accusing him of sexual misconduct would somehow shield the complainants from the consequences of other, unrelated acts of misbehavior. Defendant acknowledged below that the evidence was sought for credibility purposes. However, a generalized assertion that privileged records may contain evidence useful for impeachment on cross-examination is insufficient to justify an in camera inspection. See *People v Stanaway*, 446 Mich 643, 681; 521 NW2d 557 (1994). Accordingly, the trial court did not abuse its discretion in denying defendant’s request for an in camera inspection.

Defendant alternatively argues that defense counsel was ineffective for failing to supplement his discovery motion to more fully explain and justify the need for an in camera inspection, and for failing to pursue an interlocutory appeal of the trial court’s denial of his motion.

Because defendant did not raise an ineffective assistance of counsel claim in a motion for a new trial or request for an evidentiary hearing in the trial court, our review of that issue is limited to mistakes apparent from the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994); see also *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973). To establish ineffective assistance of counsel, defendant must show that counsel’s performance was deficient under an objective standard of reasonableness, and that he was prejudiced by counsel’s error. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish prejudice, defendant must show that there is a reasonable probability that counsel’s error made a

difference in the outcome. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *Pickens*, 446 Mich at 312, 314.

In light of our determination that the trial court did not abuse its discretion in denying defendant's motion for an in camera hearing, there is no basis for concluding that an interlocutory appeal would have been successful. Thus, defendant was not prejudiced by counsel's failure to pursue an interlocutory appeal. Further, defendant does not indicate what additional evidence counsel should have presented to further justify his request for an in camera hearing in a renewed motion. Without additional evidence, any renewed motion would have been futile. Counsel is not required to make a futile motion. *People v Ish*, 252 Mich App 115, 118-119; 652 NW2d 257 (2002).

II. SEVERANCE OF CHARGES FOR TRIAL

Defendant next argues that the trial court erred in denying his motion to sever the trials of the individual complainants. We disagree.

The interpretation of a court rule is a question of law that is reviewed de novo. *People v Williams*, 483 Mich 226, 231; 769 NW2d 605 (2009). The determination whether joinder of charges is permissible is a mixed question of law and fact. *Id.* The court must first find the relevant facts and then decide whether those facts constitute "related" offenses for which joinder is appropriate. *Id.* Questions of law are reviewed de novo, and the trial court's factual findings are reviewed for clear error. *Id.*

MCR 6.120 states, in pertinent part:

(B) Postcharging Permissive Joinder or Severance. On its own initiative, the motion of a party, or the stipulation of all parties, except as provided in subrule (C), the court may join offenses charged in two or more informations or indictments against a single defendant, or sever offenses charged in a single information or indictment against a single defendant, when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense.

(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on

- (a) the same conduct or transaction, or
- (b) a series of connected acts, or
- (c) a series of acts constituting parts of a single scheme or plan.

(2) Other relevant factors include the timeliness of the motion, the drain on the parties' resources, the potential for confusion or prejudice stemming from either the number of charges or the complexity or nature of the evidence, the potential for harassment, the convenience of witnesses, and the parties' readiness for trial.

(3) If the court acts on its own initiative, it must provide the parties an opportunity to be heard.

(C) Right of Severance; Unrelated Offenses. On the defendant's motion, the court must sever for separate trials offenses that are not related as defined in subrule (B)(1).

Defendant's reliance on *People v Tobey*, 401 Mich 141, 148-154; 257 NW2d 537 (1977), as setting forth the applicable standards for reviewing issues involving joinder and severance, is misplaced. In *Williams*, 483 Mich at 238-239, our Supreme Court observed that the current language of the court rule provides for a broader right of joinder than was recognized in *Tobey*. Accordingly, the Court stated "courts should no longer view *Tobey* as dispositive on issues of joinder and severance." *Id.*

Further, unlike in *Tobey*, the charges in this case did not arise from separate events, several days apart. Although the charges involved three different complainants, they all arose from a series of connected acts at the same overnight church youth group event at which defendant was a chaperone. Thus, joinder was appropriate under MCR 6.120(B)(1)(b). The trial court did not err in denying defendant's motion for severance.

Defendant correctly notes that the trial court has discretion to "sever offenses . . . when appropriate to promote fairness to the parties and a fair determination of the defendant's guilt or innocence of each offense." However, we disagree with defendant's argument that he was unfairly prejudiced by the sheer number of charges, by the complainants' tendency to bolster and corroborate each other, or by the danger of confusion. Indeed, the jury acquitted defendant of the only charge involving AM, and acquitted him of one of the three charges involving SW. Thus, the record does not support defendant's claim that the jury was confused or unduly influenced by the number of charges or the number of complainants. The trial court did not abuse its discretion in declining to sever the charges in the interest of fairness.

III. LAY OPINION TESTIMONY

Defendant next argues that the trial court erroneously allowed Detective Mills to offer her opinion on why the complainants may have revealed more information to her than they did to their parents about defendant's sexual conduct. We disagree. We review the trial court's decision to admit or exclude evidence for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

Detective Mills testified that she had been a police officer for several years and had worked exclusively with domestic violence and criminal sexual conduct cases involving children and adults. She had interviewed several hundred sexual assault victims during her career, 80 percent of which were under the age of 18. She testified that it was not uncommon for children to reveal more information to her than they did to their parents. When asked why that might be, she stated that children are sometimes hesitant to reveal information to their parents because of their emotional connection to them and their inclination to avoid eliciting an emotional response. Conversely, children have no emotional attachment to her because she is a stranger, so they know that she is not going to be upset, shocked, angry, or surprised by anything they say.

Although Detective Mills did not testify as an expert, MRE 701 permits a lay witness to offer “opinions and 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.” Detective Mills’s testimony explaining why children often reveal more information to her than they would to their parents was rationally based on her perceptions gained during many years of experience with child sexual assault victims. Further, because the complainants testified that they had revealed more information to Detective Mills than they did to their own parents, the testimony was helpful to obtain a clear understanding of the evidence. The trial court did not abuse its discretion in allowing the testimony.

IV. PROSECUTORIAL MISCONDUCT

Defendant next argues that misconduct by the prosecutor denied him a fair trial. Claims of prosecutorial misconduct are reviewed on a case-by-case basis, and the challenged remarks are reviewed in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Defendant failed to object to all but one of his claims of misconduct. We review unpreserved claim of prosecutorial misconduct for plain error affecting defendant’s substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).¹

After the jury was sworn, the trial court permitted defendant to make a record of objections to the prosecutor’s conduct during voir dire. Defendant complained that the prosecutor attempted to ingratiate herself with the prospective jurors by asking them how they felt about things, how would they feel if something like this happened to them, and by commiserating with a juror who had been fired. The prosecutor explained that she was simply attempting to get a sense for how jurors thought and felt. The trial court found that the prosecutor’s conduct was not improper. Although defendant again argues on appeal that the prosecutor’s conduct during voir dire was improper, he does not identify any of the allegedly objectionable questions or comments that he contends were improper. Accordingly, we have no basis for evaluating this claim. A defendant may not leave it to this Court to search for a factual basis to sustain his position. *People v T aylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001).

Defendant also argues that the prosecutor improperly vouched for the credibility of the complainants during opening statement and closing argument. We disagree. “A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully.” *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Similarly, a prosecutor may not place the prestige of her office behind the assertion that the defendant is guilty. *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988). However, a prosecutor may argue from the facts that a witness is credible, *Howard*, 226 Mich App at 548, and may argue that the evidence establishes the defendant’s guilt, *Swartz*, 171 Mich App at 370. Further, a prosecutor’s arguments must be considered in light of defense

¹ Abrogated on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

counsel's comments. *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001). “[A]n otherwise improper remark may not rise to error requiring reversal when the prosecutor is responding to the defense counsel’s argument.” *Id.* at 593, quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

In this case, the prosecutor did not improperly vouch for the complainants’ credibility or rely on the prestige of her office to assert that defendant was guilty. Rather, she properly argued from the facts and the evidence why the complainants’ testimony should be believed, and why the evidence established defendant’s guilt. Further, in defense counsel’s closing argument, counsel repeatedly accused the complainants of lying. The prosecutor properly responded in her rebuttal argument by giving reasons, grounded in the evidence, for why the complainants were credible.

We also find no merit to defendant’s argument that the prosecutor improperly referred to the complainants as “victims.” First, the record does not factually support defendant’s claim that the prosecutor “continually” referred to the complainants as “victims” throughout the trial. Second, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to her theory of the case, *Bahoda*, 448 Mich at 282, and the prosecutor need not phrase her arguments in the blandest possible terms, *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). The evidence that defendant committed inappropriate acts of sexual contact against the complainants supported the prosecutor’s characterization of them as victims. Although defendant complains that use of the term “victim” could be perceived as undermining the presumption of innocence, the trial court instructed the jury on the presumption of innocence and the prosecutor’s burden of proving defendant’s guilt beyond a reasonable doubt. The court also instructed the jury that comments and arguments by counsel were not evidence. The court’s instructions were sufficient to protect defendant’s rights.

Also, because Detective Mills’s testimony was not improper (see section III, *supra*), it was not improper for the prosecutor to comment on that testimony to argue that the differences in the information conveyed by the complainants to their parents and to Detective Mills did not affect their credibility. *Bahoda*, 448 Mich at 282.

Defendant also argues that the cumulative effect of the prosecutor’s improper conduct denied him a fair trial. However, because we have rejected each of defendant’s claims of misconduct, relief is not available under a cumulative error theory. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998), overruled on other grounds by *People v Miller*, 482 Mich 540, 561; 759 NW2d 850 (2008). Similarly, because the prosecutor’s conduct was not improper, defense counsel was not ineffective for failing to object. Counsel is not required to make a futile objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

V. SENTENCING

Defendant argues that resentencing is required because the trial court erred in scoring offense variables 9, 10, and 12 of the sentencing guidelines. We conclude that although OV 12 was properly scored, the trial court erred in scoring OV 9 and OV 10 and resentencing is required.

Application of the sentencing guidelines is a question of law to be reviewed de novo on appeal. *People v Libbett*, 251 Mich App 353, 365; 650 NW2d 407 (2002). “A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “Scoring decisions for which there is any evidence in support will be upheld.” *Id.* (citation omitted).

Defendant argues that the trial court erred in scoring ten points for OV 9. A ten-point score for OV 9 is appropriate where “2 to 9 victims who were placed in danger of physical injury or death.” MCL 777.39(1)(c). For purposes of scoring this variable, a court is to count “each person who was placed in danger of physical injury or loss of life or property as a victim.” MCL 777.39(2)(a). The trial court determined that a ten-point score was appropriate because defendant placed two victims, TH and SW, in danger of physical injury.

In *People v McGraw*, 484 Mich 120, 135; 771 NW2d 655 (2009), our Supreme Court held that “[o]ffense variables are properly scored by reference only to the sentencing offense except when the language of a particular offense variable statute specifically provides otherwise.” In this case, the sentencing offense that was scored was count one, involving second-degree CSC against SW. Although the trial court observed that defendant was convicted of a separate count relating to TH, TH was not present when defendant committed the offense against SW, and thus was not a victim of the offense against SW. Therefore, it was improper for the trial court to rely on defendant’s separate conviction involving TH to conclude that there were two victims of the offense involving SW. Accordingly, the trial court erred in scoring ten points for OV 9.

Defendant also challenges the trial court’s 15-point score for OV 10. Fifteen points are appropriate where predatory conduct was involved. MCL 777.40(1)(a). The trial court reasoned that a 15-point score was appropriate because defendant had encountered the complainants on more than one occasion throughout the evening of the event. The court also observed that defendant was the sole adult who was present during the early morning hours when the sexual contact occurred. MCL 777.40(3)(a) defines “predatory conduct” as “preoffense conduct directed at a victim for the primary purpose of victimization.” Thus, for conduct to be scored as predatory conduct, the defendant must have engaged in the conduct before the offense, the conduct must be directed at the victim of the offense, and the conduct must be undertaken for the primary purpose of victimization. *People v Cannon*, 481 Mich 152, 161-162; 749 NW2d 257 (2008).

Although the record supports the trial court’s finding that there were other encounters between defendant and SW before the sexual contact occurred, the trial court did not explain how those encounters involved conduct that was undertaken for the primary purpose of victimization. Further, we do not believe it is proper to rely on conduct that was directed at AM and TH to find that predatory conduct was involved in the offense against SW. Neither AM nor TH were victims of the offense committed against SW, which served as the sentencing offense. The trial court also noted that defendant was the only adult who was present during the early morning hours when the sexual contact occurred. However, defendant’s status does not involve preoffense conduct and, therefore, that factor alone would not support a 15-point score for OV 10. Instead, defendant’s status as an adult chaperone at the group event would seem to be more relevant to whether ten points could be scored for OV 10 on the basis that defendant exploited

SW because of his authority status or because of SW's youth. MCL 777.40(1)(b). Thus, we conclude that the trial court erred in scoring 15 points for OV 10.

Lastly, defendant argues that the trial court erred in scoring 25 points for OV 12, which involves contemporaneous felonious criminal acts. MCL 777.42. First, contrary to what defendant asserts, the record indicates that the trial court only scored ten points for OV 12. Further, the trial court did not rely on criminal acts that were the subject of other convictions to score this variable.

Ten points may be scored for OV 12 if "[t]wo contemporaneous felonious criminal acts involving crimes against a person were committed." MCL 777.42(1)(b). In scoring this variable, it is proper to consider uncharged offenses, *People v Waclawski*, 286 Mich App 634, 686-687; 780 NW2d 321 (2009); *People v Bemmer*, 286 Mich App 26, 32-33; 777 NW2d 464 (2009), or offenses of which a defendant was acquitted, *People v Compagnari*, 233 Mich App 233, 236; 590 NW2d 302 (1998).

In this case, defendant was charged with three counts of second-degree CSC involving SW. He was convicted of two of those counts. At trial, SW testified that defendant touched her inappropriately on three separate occasions on the evening of the sexual assaults. She testified that defendant touched her breast and vaginal areas on the first occasion, that he touched her butt on the second occasion, and that he again touched her butt on the third occasion. She also testified regarding two separate touchings, one in which defendant placed his hand down the back of her pants to the top of her butt, and one in which he placed his hand down the front of her pants to the top of her pubic area before she got up to leave. This evidence supports the trial court's finding that there were at least two contemporaneous felonious criminal acts against SW that did not result in a conviction. Thus, the trial court did not err in scoring ten points for OV 12.

In sum, while the trial court did not err in scoring OV 12, it erred in scoring ten points for OV 9, and in scoring 15 points for OV 10. Because the scoring errors affect the appropriate guidelines range, defendant is entitled to resentencing. *People v Francisco*, 474 Mich 82, 89-92; 711 NW2d 434 (2006).

We affirm defendant's convictions, but vacate his sentences and remand for resentencing. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald