

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HANK OLIVER BAILEY,

Defendant-Appellant,

UNPUBLISHED

May 5, 2011

No. 293730

Ionia Circuit Court

LC No. 08-14203-FH

Before: SAWYER, P.J., and WHITBECK and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of four counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under age 13). Defendant was sentenced to serve 60 to 180 months in prison for all four counts. We affirm defendant's convictions and sentences, but remand for entry of a corrected judgment of sentence.

Defendant was convicted of sexually assaulting two minor females, who are the grandchildren of his then girlfriend (now wife). Defendant claims on appeal that he was denied a fair trial because of allegedly improper vouching made by the prosecutor during her closing argument. After reviewing defendant's unpreserved claim of prosecutorial misconduct, we find no plain error. *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006).

A prosecutor generally may not "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). In none of the cited instances did the prosecutor imply such knowledge. The first instance constitutes a legitimate assertion that the prosecutor had met the burden of proof, and three other instances are arguments by the prosecutor that, based on the facts, several prosecution witnesses were credible and worthy of belief. *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008). A prosecutor may "comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The last instance is merely a proper assertion "that the evidence establishes defendant's guilt." *People v Swartz*, 171 Mich App 364, 370; 429 NW2d 905 (1988).

Defendant also argues that the trial court abused its discretion and denied his right to present a defense by denying his request to visually demonstrate the position of defendant, his wife, and the victims while riding in a truck in which both victims testified they were sexual touched. However, the proposed demonstration did not fairly illustrate the circumstances. Defense counsel intended to measure out the length of the truck seat on a courtroom bench and sit between defendant and his wife in the measured space. While exact similarity of conditions is not required, *Lopez v GMC*, 224 Mich App 618, 627-628; 569 NW2d 861 (1997), defense counsel did not argue that his body size was comparable to the eight and nine-year-old victims, and a difference in size between defense counsel and the victims is a significant matter that could impact the fairness of the comparison. Therefore, the trial court did not abuse its discretion by denying this request for a demonstration. *People v Bulmer*, 256 Mich App 33, 34; 662 NW2d 117 (2003). Further, defendant was not denied the right to present a defense as he had ample opportunity to present his own version of events occurring in the truck and to directly challenge the credibility of the victims. See *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Next, defendant argues that the trial court should have denied the prosecutor's request to admit evidence of defendant's alleged prior acts under MRE 403 and MCL 768.27a. MCL 768.27a provides an exception to MRE 404(b)'s exclusion of propensity evidence with respect to certain offenses, including CSC II, by recognizing its potential relevance in those circumstances. As with all relevant evidence, however, it "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403; see *People v Pattison*, 276 Mich App 613, 621; 741 NW2d 558 (2007). Defendant observes, and the record demonstrates, that there were some differences between the other acts described and the acts for which he was on trial. However, there were many similarities including the ages of the victims (under 13) and the fact that defendant touched them by placing his hand on their bottoms and chests. All of the incidents, charged and uncharged, involved repeated touchings over the course of a day (sometimes in the presence of defendant's wife) during the same week. Because the other acts were admissible under MCL 768.27a and were not unduly prejudicial, we conclude that the trial court did not abuse its discretion by admitting this evidence.

Defendant also argues that his convictions are not supported by sufficient credible evidence. MCL 750.520c(1)(a) provides as follows:

(1) A person is guilty of criminal sexual conduct in the second degree if the person engages in sexual contact with another person and if any of the following circumstances exists:

(a) That other person is under 13 years of age.

"Sexual contact" is defined to include

the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being

for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

(i) Revenge.

(ii) To inflict humiliation.

(iii) Out of anger. [MCL 750.520a(q).]

Defendant asserts that the prosecutor did not submit evidence to prove that the touching was done for a sexual purpose. In *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997), this Court stated that “[t]he statute’s language is clear and its inclusion of a reasonable person standard provides a structure to guide the jury’s determination of the purpose of the contact.” In the instant case, the victims testified that defendant intentionally and repeatedly touched their buttocks and breasts. There was no evidence that such touching was done for a legitimate purpose. Therefore, it was not unreasonable for the jury to conclude that defendant had touched the victims for a sexual purpose. In addition, defendant’s argument concerning the credibility of the victims’ testimony is not persuasive, as this Court defers to the credibility determinations of the trier of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).¹

Defendant also asserts that he was denied a fair trial due to the ineffective assistance of counsel. Defendant bears a heavy burden to show that his attorney’s conduct fell below an objective standard of reasonableness, which prejudiced defendant as a result. *People v McGraw*, 484 Mich 120, 142; 771 NW2d 655 (2009), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To establish prejudice, defendant must show that but for his attorney’s error, the result of the proceeding would have been different. *Id.* Defendant must overcome a strong presumption that his attorney’s performance constituted sound trial strategy. *Id.*

First, defendant argues that his attorney was ineffective for failing to object to the alleged instances of prosecutorial misconduct. As we concluded earlier in this opinion, defendant failed to establish any plain error with respect to the prosecutor’s conduct. A defense attorney cannot be faulted for failing to raise a futile objection. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Second, defendant argues that his attorney failed to object to the prosecutor’s examination of two witnesses regarding the reluctance to testify of the wife of the defendant during the preliminary examination for a separate case against defendant. Even if it was improper, as defendant claims, for his attorney to fail to object to the prosecutor’s references to a preliminary examination that was not at issue in this case, defendant fails to establish prejudice

¹ Defendant’s unpreserved great weight argument is premised entirely on the discussion advanced in support of his insufficient evidence claim, which we have concluded is without merit.

given the weight of the evidence supporting his convictions—particularly the testimony of the victims.

Third, citing several instances of apparently inconsistent testimony, defendant argues that his attorney failed to conduct a proper cross-examination of the victims. Defendant’s attorney challenged the victims’ credibility by pointing to specific inconsistencies in their testimony. That his attorney did not challenge other possible inconsistencies in the victims’ testimony does not mean that his assistance was constitutionally deficient. Indeed, it is a reasonable trial strategy to draw the jury’s attention to some of the inconsistencies in the victims’ testimony, but to refrain from an extended confrontation, which could be perceived as bullying the child victims.

Fourth, defendant claims that his attorney erred by failing to have certain school documents authenticated or entered as evidence. Defendant does not explain how the documents would have been useful to his defense, but the prosecutor suggests that the documents might have shed some light on whether one of the victims skipped school during the week she visited defendant’s residence, or whether she came to the house after school. However, both parties agreed that the girl had been at the house at the same time as the other victim and whether the girl was truant was of little value to the pertinent issues of the case.

Fifth, defendant argues that his attorney failed to present a viable closing argument. Defendant complains that trial counsel erred in referencing and describing (at length) various murder cases and historical events—including the Susan Smith and Scott Peterson cases, the Salem Witch Trials, the internment of Japanese Americans during World War II, and the McCarthy hearings—in order to illustrate three fundamental principles: that a defendant is presumed innocent until proven guilty, that the prosecution has the burden of proof, and that guilt must be shown beyond a reasonable doubt. Choosing to reference historical circumstances that would resonate with members of the jury in order to emphasize the responsibilities they have is not an unreasonable trial strategy. Further, defendant’s attorney then examined the evidence within the context of the three principles he illustrated. Thus, counsel’s closing argument does not establish defendant’s claim of ineffective assistance.

Sixth, defendant argues that his attorney failed to “present a known defense” by failing to file a motion to quash the second felony habitual offender supplement from the second amended information. Both parties agree that the supplemental information incorrectly stated that defendant had been convicted of a prior felony. However, defendant’s sentences were not enhanced based on the habitual offender statutes. Therefore, defendant was not prejudiced and is not entitled to relief on this basis.

On appeal, defendant raises the unpreserved argument that offense variable (OV) 9 should have been scored at zero points instead of 10 points because there was just one victim. Pursuant to the statute, a score of 10 points for OV 9 is appropriate where “[t]here were 2 to 9 victims who were placed in danger of physical injury or death, or 4 to 19 victims who were placed in danger of property loss.” MCL 777.39(c). When scoring OV 9, only people placed in danger of injury or loss of life when the sentencing offense was committed should be considered. See *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009). Although defendant’s argument is premised upon the fact that he only touched one victim at a time, he cannot reasonably argue

that the assaults did not coincide during several points of the victim's visits to their grandmother's house in 2008. First, he reportedly "tried to touch [both victims] on [thei]r bottoms" when playing games with them and another male grandchild on their grandmother's bed. Sometime later, defendant repeatedly touched the victims, who sat between him and their grandmother, while riding in their grandmother's truck to get a pizza. After returning from this errand, the victims testified that defendant again touched them while playing games with them. Thus, defendant fails to show plain error affecting any substantial right. *Pipes*, 475 Mich at 279.

Defendant also argues that OV 10 should have been scored at zero points instead of 15 points. MCL 777.40(1)(c) provides the following scoring guidelines for OV 10:

(a) Predatory conduct was involved..... 15 points

(b) The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status..... 10 points

* * *

(d) The offender did not exploit a victim's vulnerability..... 0 points

The prosecutor argues that a score of 15 points was appropriate because predatory conduct was involved. MCL 777.40(1)(a). "Predatory conduct" is defined as a "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). The prosecutor fails to identify, and the record does not demonstrate, such preoffense conduct to warrant a score of 15 points.

However, the record does support a score of 10 points for OV 10. "'Exploit' means to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). Given the ages of the victims and defendant's position of authority in the household of their grandmother, a score of 10 points would have been appropriate. Nonetheless, subtracting 5 points from defendant's total OV score would not affect his minimum sentencing range, which would remain at 43 to 86 months. MCL 777.64. Thus, any error by the trial court in assessing defendant 15 points instead of 10 points for OV 10 was harmless. *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003).

Finally, we agree with defendant and the prosecutor that an inaccurate reference to defendant being a second-offense habitual offender should be removed from the judgment of sentence, and we remand for that purpose, as well as to correct the scoring error in OV 10. Defendant's convictions and sentences are affirmed. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ William C. Whitbeck
/s/ Kurtis T. Wilder