

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVELL THOMPSON, SR.,

Defendant-Appellant.

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UNPUBLISHED

January 20, 2005

No. 251322

Genesee Circuit Court

LC No. 99-005392

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

The Michigan Supreme Court remanded this case for consideration as on leave granted. *People v Thompson*, 469 Mich 908; 673 NW2d 105 (2003). Defendant appeals from his jury trial convictions for three counts second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victims under thirteen years of age). The lower court sentenced defendant to ten to fifteen years in prison for each conviction. We affirm defendant's convictions but remand for resentencing or rearticulation of substantial and compelling reasons for departure from the sentencing guidelines.

I. Prosecutor misconduct.

Defendant raised several claimed instances of prosecutorial misconduct. A defendant preserves allegations of prosecutorial misconduct by objection below. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Defendant failed to object to all the alleged instances of misconduct excluding his objections to leading questions. All the other claims are not preserved for appellate review. When issues of prosecutorial misconduct are preserved, this Court reviews them de novo to determine if the defendant was denied a fair trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). This Court reviews the unpreserved issues for plain error that affected defendant's substantial rights. Reversal is warranted only if this Court determines that the plain error actually caused an innocent defendant to be convicted or if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

A. Bolstering.

Defendant objects to the prosecution's questioning of various witnesses regarding prior consistent statements made by the victims. Although the prosecution did not move to admit specific statements, it elicited testimony from the witnesses that these statements were consistent

with other statements made by the victims. The admission of prior consistent statements through a third party is appropriate if the prosecution meets the requirements of MRE 801(d)(1)(B). *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000). MRE 801(d) defines statements that are not hearsay. A statement is not hearsay if: 1) the declarant is subject to cross-examination at trial; 2) the statement is consistent with the declarant's testimony at trial; and 3) the statement is offered to rebut an expressed or implied charge of recent fabrication or improper influence. MRE 801(d)(1)(B). This Court has also stated that the prior consistent statement must be made prior to the supposed motive to falsify arose. *Jones, supra* at 707. Although the prosecution did not move for admission of the statements pursuant to MRE 801 and defendant failed to object to the admission of this testimony, application of the prior consistent statement requirements will aid this Court in determining if a plain error occurred.

In this case, all three girls were called to testify and were subject to cross-examination. It is undisputed that their testimony was consistent with the prior statements that are the subject of defendant's current objection. The prosecution elicited the testimony regarding consistency to rebut defendant's allegations of improper influence and fabrication. From the beginning of the case, defendant presented the theory that the girls lied about the incident. During his opening statement, defense counsel made clear that the only thing that happened was that the girls accidentally saw defendant naked. This theory of events clearly implies fabrication on the part of the victims. Defense counsel asked two of the victims' mothers about their propensity to lie and to make up stories. This line of questioning implied that the victims were not credible.

Left to consideration is whether the challenged statements were made prior to the motivation to falsify occurred. Defendant does not point to a motive for the girls' supposed lies. But the record is clear that the statements in question were made prior to police questioning and while the girls were separated. Therefore, this element is satisfied. Admission of the testimony did not amount to a plain error.

Defendant also challenges a separate instance of bolstering. The prosecution specifically asked the testifying police officer if the girls' statements were consistent with each other. Admissions of such evidence would not be permissible under MRE 801(d)(1) and appears to be impermissible. The prosecution offers no justification for admission of this statement. Therefore, it is error by way of improper bolstering. The error is plain because it is clear and obvious. This plain error affects defendant's substantial right to confront witnesses against him. But this Court must still decide if the plain error requires reversal. *Thomas, supra* at 453-454. Error requires reversal only if defendant is actually innocent or if the error affects the fairness, integrity, or public reputation of the judicial proceedings. *Id.*

In this case, substantial evidence exists against defendant. All three victims testified against him in court. Each of the victims told essentially the same story. Therefore, defendant is not actually innocent. Further, this isolated question does not raise questions regarding the fairness, integrity, or public reputation of the proceedings. Defendant was allowed to confront each of these victims and defense counsel thoroughly cross-examined them. Defendant was allowed to amply present his theory of the case. This one minor error does not draw the fairness of the proceedings into question.

#### B. Vouching.

Defendant raises several claims of misconduct under this sub-issue. First, defendant argues that the prosecution impermissibly asked witnesses to comment on other witnesses' credibility. It is generally improper to ask one witness about another's credibility. *People v Messenger*, 221 Mich App 171, 180; 561 NW2d 463 (1997). But a trial court can cure such error with a limiting instruction. *Id.* Reversal based upon an unpreserved claim of prosecutorial misconduct is only warranted where a curative instruction could not have alleviated the prejudicial effect. *Ackerman, supra* at 448-449. Because a curative instruction, if requested, could have alleviated any prejudicial effect, defendant is not entitled to relief. *Id.*; *Messenger, supra* at 180.

Defendant next argues that the prosecution improperly asked witnesses to comment on their own credibility. Defendant points to no authority which states that a witness cannot testify that they are telling the truth. Defendant does point to a case where this Court said it was error to allow a witness to testify that she would not send an innocent man to prison. *People v Malone*, 180 Mich App 347, 361; 447 NW2d 157 (1989). But *Malone, supra*, differs because it centers on a question posed to the witness about defendant's guilt. Here, the prosecution did not ask the witnesses if defendant was guilty, it asked if they told the truth when they made their statements. Such questions are harmless.

Finally, defendant argues that the prosecution vouched for the credibility of its witnesses by commenting on the victims' mothers' instincts and feelings that something was wrong with the victims. A prosecutor cannot vouch for the credibility of his witness by implying that he has some special knowledge of the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). But a prosecutor may comment on his own witness' credibility during closing, especially when there is conflicting evidence and the question of defendant's guilt turns on which witness the jury believes. *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992). The record must be read as a whole and the allegedly impermissible statements judged in the context they were made. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995).

Here, the prosecution did not imply special knowledge of the mothers' truthfulness. Instead the prosecution merely asked the jury to judge the mothers' credibility while taking into consideration their position as mothers. Given that defendant's theory of the case called the witnesses' credibility into question, these comments were fair. *Stacy, supra* at 29-30.

Further, even if the statements were prosecutorial misconduct, the trial court cured the error with proper instruction. This Court has stated that a trial court's instruction to decide the case only on the evidence and that the lawyer's arguments are not evidence can cure any prosecutorial misconduct in closing arguments. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). The trial court gave these instructions and instructed on judging credibility. These careful and proper instructions cured any error stemming from the prosecution's statements. *Id.*

### C. Disparaging defense counsel.

Defendant first claims that the prosecution disparaged defense counsel by stating that the prosecution was interested in the truth. Defendant claims that this implies that the defense counsel was not interested in the truth. When judged in context, this comment does not disparage defense counsel in any way. The statement pointed to by defendant arises out of

defense counsel's attempted impeachment of one of the victims with her preliminary examination testimony. The prosecution was concerned that the victim did not understand the question of whether she remembered being asked certain questions at the examination. Defense counsel argued that the prosecution should not be allowed to voir dire the victim because he was not seeking the truth of the matter just whether she remembered the question. The prosecution stated that it was concerned with the truth, but before it could finish the statement the trial court cut it off and stated that it could deal with any issues it had on redirect. Therefore, taken in context, the comment was not aimed at defense counsel and was not disparaging.

Next, defendant argues that the prosecution disparaged defense counsel by stating: "And—and the reason is, your Honor, in classic style as we have seen before, he [defense counsel] read part of the statement but not all of it, misleading the jury into thinking she didn't say something when it is clearly in the report and I have a right to rehabilitate this witness and that's my response." This statement is again not an attack on defense counsel. The prosecution merely stated that its line of questioning was important to give context to defense counsel's attempt to impeach a witness with earlier preliminary testimony. In context, the challenged statement does not amount to prosecutorial misconduct. *Reed, supra* at 398.

Finally under this sub-issue, defendant contends that the prosecution disparaged defense counsel by referring to his arguments as red herrings. Prosecutors are given wide latitude and need not confine their arguments to the "blandest of all possible terms." *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). This comment was isolated in nature and did not constitute misconduct. Further, such isolated comments do not require reversal, especially when there is significant evidence of defendant's guilt. *People v Launsburry*, 217 Mich App 358, 361-362; 551 NW2d 460 (1996).

#### D. Sympathy for the victims.

Defendant argues that the prosecution committed misconduct by asking the girls how the touching made them feel. Defendant claims that this was an impermissible appeal to the jury's sympathy. Appeals to the sympathy of the jury constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). But the prosecution is not required to use the blandest language possible. It can use "hard language" when it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Emotional language is an important tool in the prosecution's arsenal. *Id.* at 679.

In order to prove second-degree criminal sexual conduct the prosecution had to prove that defendant touched the girls for a sexual purpose. MCL 750.520c. The prosecution accomplished this by having the girls testify about the difference between "good touching" and "bad touching." The girls testified that defendant's contact with them constituted "bad touching" which made them feel bad. This was not an attempt to elicit improper sympathy from the jury but, was instead, a legitimate means of proving an element of the offense. No prosecutorial misconduct occurred.

Defendant next argues that the prosecution attempted to raise juror sympathy by repeatedly having witnesses testify that the girls comforted each other and were upset when talking to their mothers and the police officer. Again, the actions of the prosecution and the questions it asked must be judged in context. *Reed, supra* at 398. Defendant's theory of the case

was that the girls conspired and fabricated the accusations against him. The prosecution brought forth testimony about the girls being upset to combat this theory. The testimony showed that the girls were not laughing or handling the issue nonchalantly. Instead, the girls appeared upset and frightened, as would be expected in the situation. Judged in context, this was a fair tactic by the prosecution.

Defendant also contends that the prosecution committed misconduct by referring to the girls as precious and brave little girls during closing argument. Emotional language is an important tool in the prosecution's arsenal. *Ullah, supra* at 679. The prosecutor's remarks must be judged in context. *Reed, supra* at 398. In this case, the prosecution used somewhat emotional language to combat defendant's accusations that the girls lied. Defendant's case necessarily raised the inference that the girls were liars either duped by their mothers or personally conspiring against defendant. The prosecution attempted to combat this implication by arguing that it took courage for the young girls to testify about the incident. Judged in context, this did not amount to prosecutorial misconduct. Further, the trial court cured any error with proper instruction. *Green, supra* at 693.

#### E. Leading.

Defendant next argues that the prosecutor committed misconduct by repeatedly and continually leading witnesses during direct examination. We note that many of the incidents of leading occurred when the victims testified. A considerable amount of leeway must be given to a prosecutor when questioning child witnesses. *Watson, supra* at 572, 587. Leading questions can be used as necessary on direct examination in order to develop a witness' testimony. MRE 611(c)(1). Further, defendant must demonstrate unfair prejudice or a pattern of eliciting improper testimony to warrant reversal based on leading questions. *Watson, supra* at 588, quoting *People v Hooper*, 50 Mich App 186, 196; 212 NW2d 786 (1973). Defendant fails to argue that any of the testimony obtained through leading questions was inadmissible or improper. Instead, defendant merely objects to the means of obtaining the legitimate testimony. Therefore, defendant has failed to demonstrate that this case warrants reversal. *Id.*

#### F. Ineffective assistance.

Defendant next argues, in the alternative, that his counsel provided ineffective assistance by failing to object to the alleged prosecutorial misconduct. As discussed, *supra*, the prosecutor's conduct was not improper or was cured by the trial court's careful instructions. *Green, supra* at 693; *Lee, supra* at 254. Any objection or motion by defense counsel would have been futile. It is not ineffective assistance of counsel to refuse to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002) quoting *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989). Therefore, defendant is not entitled to a new trial.

#### II. Similar acts evidence.

Defendant next argues that the trial court improperly admitted similar acts evidence pursuant to MRE 404(b). A trial court's evidentiary rulings are reviewed for an abuse of discretion. *People v Manser*, 250 Mich App 21, 31; 645 NW2d 65 (2002). A trial court's decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000).

The prosecution offered the evidence in question under a theory of a common scheme, plan or system in doing an act. In order for such evidence to be relevant and admissible under MRE 404(b), there must be more than general similarity. *Sabin, supra* at 64. There must be sufficient “common features” to indicate a “common design.” *Id.* at 65-66, quoting 2 Wigmore, Evidence (Chandbourn rev), § 304, p 249. The common features must be more than mere commission of the criminal act. *Id.* at 66.

Several similarities exist between the two events. Both involved multiple victims at the same time. And, both involved defendant exploiting his isolation with the victims. In both cases, defendant was in a position of authority over the victims and he exploited that authority. Both cases involved defendant stripping completely nude during the assault. And both case involved defendant forcing the children to each touch his genitals separately. Under the circumstances, the two incidents seem more than generally similar. Defendant’s actions demonstrate a common design. The similarities between the two events go beyond the mere fact that both were sexual assaults. Several unique common features exist between the two of them to demonstrate a common design. *Sabin, supra* at 64-66. Therefore, the trial court did not abuse its discretion in admitting the evidence.

### III. Excited utterance.

Defendant next objects to the trial court’s admission of an excited utterance. A trial court’s evidentiary rulings are reviewed for an abuse of discretion. *Manser, supra* at 31. But any preliminary question of law such as if rule of evidence applies is reviewed de novo. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

MRE 803 states, in part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

This rule allows the admission of evidence because the person is still under the sway of excitement precipitated by an external startling event meaning he will not have the reflective capacity essential for fabrication. Therefore, any utterance will be spontaneous and trustworthy. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The two primary requirements for an excited utterance are: 1) the startling event occurred; and 2) the resulting statement is made while the person is still under the influence of the event. *Id.* at 550. The second requirement is often broken down into two more parts: 1) whether the statement relates to the startling event; and, 2) whether the statement was made before there was time to contrive and misrepresent. *Id.* at 550.

There is no question that a sexual assault qualifies as a startling event. *Smith, supra* at 552. And, defendant does not dispute the fact that the victim’s statement related to the assault.

This leaves the question of whether the eldest victim remained under the influence of the startling event when she made her statement.

The incident took place late in the evening on October 7, 1999. The record reflects that the eldest victim made her statement early the next morning before school time, likely around 8:45 a.m. During the intervening time, defendant was constantly in her presence. We cannot discount defendant's presence as a factor to the delayed reporting of the incident. She made her statement as soon as defendant left her in a safe environment. The time between the event and the statement was not unusually long in comparison with other cases qualified as startling events. (See *Smith* where ten hours passed between the sexual assault and the statement. *Smith, supra* at 552.) Under the circumstances, it appears that the victim remained under the stress of the assault. There is no evidence to suggest that the stress abated.

Defendant also raises the issue that the victim's statement resulted from questioning. The victim's mother testified that the victim initially said that she did not want defendant to drive her to school. The mother admitted that she asked the victim why and what was wrong. The victim did not state anything at that time, but, after defendant left the house, she made her statement. When the statement in question results from questioning, this Court must determine whether the statement was the result of reflective thought. *Smith, supra* at 553. Here, as in *Smith*, the questions were neither suggestive nor persistent. The mother merely asked why the victim did not want defendant to drive her to school. This question was not leading and would not spur reflective thought about an assault. Therefore, the questioning does not undermine the conclusion that the victim's statements resulted from the stress of the assault and not from the questioning. *Id.* at 553-554.

#### IV. Cumulative error.

Defendant claims that cumulative error denied him a fair trial. Cumulative error arguments are reviewed to determine if the combination of alleged errors denied the defendant a fair trial. The cumulative effect of several small errors may warrant reversal even where those individual errors in and of themselves did not warrant reversal. *People v Hill*, 257 Mich App 126, 152; 667 NW2d 78 (2003).

"It is true that the cumulative effect of several errors can constitute sufficient prejudice to warrant reversal where the prejudice of any one error would not." *People v LeBlanc*, 465 Mich 575, 591; 640 NW2d 246 (2002). Cumulative error actually refers to unfair prejudice. *Id.* at 592 n 12. Only the unfair prejudice of actual errors are aggregated to satisfy the standard set forth in *Carines*.<sup>1</sup> *Id.* As discussed, *supra*, the errors alleged by defendant except one that was not prejudicial either did not exist or were cured by the careful instruction of the trial court. This means that defendant was not prejudiced sufficiently to warrant reversal. *Id.* "Because no errors were found with regard to any of the above issues, a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

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<sup>1</sup> *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999).

## V. Sentencing departure.

Defendant next argues that the trial court inappropriately departed from the sentencing guidelines. In reviewing a departure from the guidelines range:

“the existence or nonexistence of a particular factor is a factual determination for the sentencing court to determine, and should therefore be reviewed by an appellate court for clear error. Appellate courts review determination that a particular factor is objective and verifiable as a matter of law. A trial court's determination that the objective and verifiable factors present in a particular case constitute substantial and compelling reasons to depart from the statutory minimum sentence shall be reviewed for abuse of discretion.” *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003) quoting *People v Babcock I*, 244 Mich App 64, 75-76; 624 NW2d 479 (2000).

In terms of sentencing departure review, "an abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *Id.* at 269.

The trial court calculated the guidelines range as forty-three to eighty-six months. The lower court departed from this range and sentenced defendant to ten to fifteen years (120 to 180 months) in prison.

Defendant argues that the first reason for departure, defendant laughing, gesturing and thinking that the case was amusing, is not objective and verifiable. Whether someone is laughing or gestured is objective and verifiable. The trial court stated that it actually physically saw these actions. But the fact that defendant finds the case “terribly amusing” would not be objective and verifiable. This Court has defined "objective and verifiable" to mean that the facts the lower court considered must be actions or occurrences that are external to the minds of the judge, defendant, and others individuals involved in making the decision. And they must be capable of being confirmed. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The determination of whether a person finds something amusing is not external to the mind of the trial judge. It is an internal evaluation not capable of external proof. Therefore, it is not objective and verifiable and cannot be used as a substantial and compelling reason for departure from the sentencing guidelines. *Babcock, supra* at 256-258; *Abramski, supra* at 74.

The trial court's reliance on defendant's finding the case humorous is equivalent to basing a departure on lack of remorse. Essentially, the trial court found that defendant did not take the trial process seriously enough and did not show sufficient respect or remorse for his actions. The Michigan Supreme Court specifically stated that remorse is not objective and verifiable and cannot constitute a substantial and compelling ground for departure from the sentencing guidelines. *People v Daniel*, 462 Mich 1, 11-12; 609 NW2d 557 (2000). Therefore, it was inappropriate for the trial court to base departure on defendant finding the case funny or showing a lack of remorse.

Defendant next argues that his use of crack cocaine at the time of the offense should mitigate his sentence rather than increase it. Defendant cites no authority to support the claim that intoxication must be considered a mitigating factor. This Court will not search for authority

to make a party's argument. *People v Smielewski*, 214 Mich App 55, 64 n 10; 542 NW2d 293 (1995).

The trial court also provided that it was departing because defendant is a danger to children. Defendant argues that this is a mere unsubstantiated fear of recidivism on the part of the sentencing court and argues that it is not objective and verifiable. The labeling of defendant as dangerous is subjective. This determination is not external to the mind of the trial judge. It is an internal evaluation not capable of external proof. Who constitutes a danger will likely vary by who is judging them. Therefore, it is not objective and verifiable and cannot be used as a substantial and compelling reason for departure from the sentencing guidelines. *Babcock, supra* at 256-258; *Abramski, supra* at 74.

Given that two of the reasons given for departure were not proper, and it is unclear whether the trial court would have departed to the same extent using only proper factors, we remand for resentencing or rearticulation of substantial and compelling reasons for departure. MCL 769.34(11); *Babcock, supra* at 266.

Affirmed in part and remanded for resentencing or rearticulation of substantial and compelling reasons for departure. We do not retain jurisdiction.

/s/ Kathleen Jansen  
/s/ Christopher M. Murray  
/s/ Pat M. Donofrio