

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DORIEL DWAYNE BRIGGS,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 261842

Oakland Circuit Court

LC No. 2004-197985-FH

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of one count of third-degree criminal sexual conduct (CSC III) MCL 750.520d (multiple variables), and one count of attempted CSC III, MCL 750.92. Defendant was acquitted of a third charge of attempted CSC III. Defendant was sentenced as a third-offense habitual offender, MCL 769.12, to serve concurrent prison terms of 5 to 30 years on the first count, and 2 to 10 years on the second count. Defendant appeals as of right and we affirm.

Defendant argues three issues on appeal. First, defendant contends that the trial court should have suppressed his written statements to police because their admission violated his right against involuntary self-incrimination. We disagree. Defendant gave his first statement to police while he was in custody, but not yet under arrest. Defendant was stopped by officers responding to a dispatch about a sexual assault because he fit the description of the suspect. While in the backseat of a patrol car, defendant yelled to the officers, “do you want to hear my side of the story?” The officers told defendant they were still investigating the charges, but they would give him paper and pen to write on if he would like to make a statement. Defendant then voluntarily wrote a statement describing sexual contact with the victim, but characterizing it as consensual.

Defendant contends that his first statement was not made voluntarily because the actions of the police officers encouraged him to write it. This Court has held that a defendant is entitled to the protections of *Miranda*¹ only when he is subject to interrogation while in police custody. *People v Kowalski*, 230 Mich App 464; 584 NW2d 613 (1998). Interrogation can include

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

“express” questioning as well as its “functional equivalent,” which refers to words or actions by the police that the officers should know are likely to produce an incriminating response. *Rhode Island v Innis*, 446 Mich 291, 300-301; 100 S Ct 1682; 64 L Ed 2d 297 (1980).

Although the court did find during a *Walker*² hearing that defendant was in custody at the time of his statement, defendant was not asked any questions by the officers (other than his name) before he wrote his statement. Defendant argues that even if the officers refrained from directly questioning him, their actions amounted to the “functional equivalent” of an interrogation by tacitly encouraging defendant to make an incriminating statement. Defendant argues that by telling him he was a suspect in an alleged sexual assault, telling him he could make a statement, giving him paper and a pen to write his statement, and discussing the case, the police were trying to extract an incriminating response. Defendant also contends that, because no *Miranda* warnings were given, defendant did not knowingly and intelligently consent to waive them.

This argument fails for several reasons, including the fact that *Miranda* did not yet apply to defendant when he made the statement because, although he was in custody, he was not subjected to interrogation. In addition, the actions of the police seem in no way designed to provoke an incriminating statement from defendant. Simply letting defendant know he was a suspect and what he was suspected of is not reasonably likely to elicit an incriminating response. Rather, such circumstances can reasonably be characterized as “those normally attendant to arrest and custody.” *Innis, supra* at 301. Because defendant instigated the process that led to his statement, including an express request to the officers to listen to his version of events, he cannot now claim that he was induced or tricked into writing the statement or that it was drafted in violation of his *Miranda* rights.

As for defendant’s challenge to the written statement made at the police station and after he was given his *Miranda* warnings, his argument is based solely on the conclusion that the first statement should have been suppressed. Because the first statement was properly admitted, there is no exacerbating error that would render the second statement inadmissible.

Second, defendant claims that his counsel was constitutionally ineffective for failing to raise objections to alleged instances of prosecutorial misconduct and for failing to follow certain trial strategies. We disagree. In order to establish ineffective assistance of counsel, “a defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations and emphasis omitted). “[E]ffective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *Id.*

Defendant asserts that the prosecutor impermissibly bolstered and vouched for the credibility of the victim during her testimony and during the prosecutor’s opening statement and

² *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

closing argument. Issues of prosecutorial misconduct are considered on a “case-by-case basis by examining the record and evaluating the remarks in context, and in light of defendant’s arguments.” *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor’s remarks depends on all the facts of a case. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003).

Defense counsel chose to attack the victim’s credibility as part of his trial strategy. Counsel suggested that the victim’s written statement of her allegations against defendant was influenced by the police officers on the scene, based on her admission that she did not understand the meaning of certain terms used in her statement until the officers explained them. After this attack on her credibility, the prosecutor properly rehabilitated the victim’s credibility. The prosecutor asked the victim a series of questions regarding her responsibility as a witness, but did not improperly insert her own viewpoint into the exchange.

The prosecutor’s comments during closing argument also do not amount to vouching for the victim. A prosecutor is not permitted to vouch for the credibility of a witness by suggesting that she has special knowledge of the witness’s truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Nothing in any of the cited comments amounts to an assertion, either express or implied, that the prosecutor had special knowledge of the victim’s truthfulness. Indeed, the prosecutor specifically told the jurors that it was their job to assess credibility.

As none of the challenged actions by the prosecutor were improper, there was no reason for defense counsel to object. “Defendant is not required to make a . . . futile objection.” *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392, lv den 469 Mich 972 (2003).

Defendant also claims that defense counsel was deficient in failing to make an opening statement or call witnesses. This Court has held that waiver of opening statement is a “subjective judgment[] on the part of trial counsel which can rarely, if ever, be the basis of a successful claim of ineffective assistance of counsel.” *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983).

Further, defendant does not offer any support for the proposition that counsel was deficient in failing to call witnesses. In *People v Johnson*, 451 Mich 115; 545 NW2d 637 (1996), our Supreme Court concluded that the defendant’s counsel had not offered effective assistance when he failed to call six witnesses who claimed to have seen the shooting in issue occur and could state that the defendant had not fired a single shot. *Id.* at 118-120. Counsel for the defendant in *Johnson* did not offer an explanation for failing to call the witnesses, and conceded that he had spoken to them about their stories prior to the start of trial. *Id.* at 120. Thus, the Court concluded that counsel’s failure to call the witnesses fell below an objective standard of reasonableness. *Id.* The instant case presents no such scenario. Defendant does not suggest on appeal that there were witnesses at the hotel who could vouch for his version of the events. If there were no witnesses with relevant testimony for defense counsel to present, he was not deficient in failing to do so.

Defendant's third and final assertion of error is that the trial court deprived him of his Sixth Amendment³ rights by improperly using its influence to persuade him not to testify. We disagree. On the first day of trial, defendant stated that he would not testify in his behalf. The trial judge questioned defendant about this decision:

THE COURT: Mr. Briggs, do you understand that you have the right to testify if you want to testify?

THE DEFENDANT: Yes.

THE COURT: Do you understand that you have the right to remain silent, if you choose to remain silent, and your silence cannot be used against you?

THE DEFENDANT: Yes.

THE COURT: Is it your – do you desire to testify or not to testify?

THE DEFENDANT: No. Not.

THE COURT: You don't want to testify?

THE DEFENDANT: I don't feel I have to. No.

THE COURT: Thank you. I'm satisfied.

The following day, however, defendant stated that he wanted to testify and requested that the court reopen proofs. Defendant stated that he wanted to testify to have the "opportunity to go ahead and set straight the record" about the statements he made to the police, specifically that the officer had expressly asked him questions. The trial judge advised defendant that the issue of the admissibility of the statement was already preserved in the record for appeal. The trial judge also advised defendant that he "ought to listen" to his father and his attorney, and added "I can't make the choice." The judge advised defendant that his prior record for crimes of theft and dishonesty could be introduced against him if he testified. Finally, the judge said: "Use your head. Talk to your father? . . . Come to a decision." Defendant then decided not to testify and stated he would "leave the situation as it is." Defendant contends that the court's efforts to get defendant to reevaluate his decision to testify was akin to its rendering an opinion on the sagacity

³ US Const, Am VI.

of that decision. We find that here that in the first instance the trial judge properly questioned defendant as to his voluntary waiver of the right to testify, and in the second instance, the trial judge was in good faith attempting to inform defendant that the issue about which he wished to testify had already been addressed on the record, and attempting to inform defendant of the possible issues that might arise if he did testify.

In *People v Hunter*, 46 Mich App 158; 207 NW2d 417 (1973), this Court addressed the issue of judicial interference in a defendant's decision to take the stand. In *Hunter*, the defendant decided to testify after a conference with his attorney, about which the court later questioned defense counsel. *Id.* at 159-160. This Court held that although it is error for a court to interfere or inquire into a defendant's decision to testify, the relevant inquiry on review is whether a defendant was coerced into waiving his Fifth Amendment⁴ right against self-incrimination by taking the stand. *Id.* at 160. The Court found that upon review of the entire record, it was clear that the defendant was not coerced into testifying because, (1) the defendant neither moved for a mistrial nor objected to the court's line of inquiry, and (2) the colloquy between the defendant, his counsel, and the court took place outside the presence of the jury, and the court made it clear that the defendant was not obligated to testify and advised him that his prior offenses could be brought in if he took the stand. *Id.*

Similarly, defendant in the instant case did not object to the court's questions and comments on the second day of trial, advising him to listen to his counsel and his father when they told him he should not testify. That defendant then chose to follow the advice of counsel and his father after the court's questioning does not amount to reversible error due to judicial interference.

Affirmed.

/s/ Jessica R. Cooper
/s/ Joel P. Hoekstra
/s/ Michael R. Smolenski

⁴ US Const, Am V.