

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LEE DARBY,

Defendant-Appellant.

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UNPUBLISHED

October 4, 2007

No. 270420

Oakland Circuit Court

LC No. 2005-206038-FC

Before: Schuette, P.J., and Hoekstra and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under 13), and sentenced to seven years and one month to 20 years' imprisonment. He appeals as of right. We affirm.

**I. FACTS**

Defendant's conviction arises out of the sexual assault of his fiancée's daughter, the complainant, who was six years old at the time of trial. She testified that defendant engaged in digital penetration with her when she lived with defendant and her mother, who was at work during the incident. Her mother had noticed a change in her disposition from outgoing and cheerful to frightened and weepy. She disclosed defendant's conduct to her mother one night while her mother was giving her a bath. She stated that the defendant digitally penetrated her at least three times, but she was unsure if the defendant's conduct occurred all on the same day or at different times. She was upset that her mother was going to marry the defendant. Defendant denied ever having touched the complainant in an inappropriate manner.

**II. EFFECTIVE ASSISTANCE OF COUNSEL**

Defendant argues that he is entitled to a new trial because he was denied the effective assistance of counsel. We disagree.

**A. Standard of Review**

Defendant failed to raise this issue in a motion for a new trial or evidentiary hearing in the trial court, and this Court denied his motion to remand to move for an evidentiary hearing; therefore, our review is limited to errors apparent on the record. *People v Ginther*, 390 Mich

436, 443; 212 NW2d 922 (1973); see also *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

## B. Analysis

“Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *Matuszak, supra* at 48, quoting *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Moorer*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). With respect to the prejudice requirement, “a defendant must demonstrate ‘a reasonable probability that, but for counsel’s . . . errors, the result of the proceeding would have been different . . . .’” *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000), quoting *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997). A defendant must also overcome the strong presumption that counsel’s actions constituted sound trial strategy. *Toma, supra* at 302.

Defendant first argues that he was denied the effective assistance of counsel when defense counsel permitted portions of police reports to be admitted into evidence. We disagree.

At trial, the prosecutor admitted portions of police reports that included written summaries of interviews of the complainant by her mother, Deputy Jan Berg, and Care House forensic interviewer Amy Allen. Defendant contends that defense counsel was ineffective for failing to object to the admission of these summaries. The record shows, however, that counsel’s failure to object constituted sound trial strategy. Defendant’s theory of defense was that the complainant’s allegations were the result of improper interviewing techniques. At trial, defendant called Dr. Katherine Okla as an expert witness to offer her opinion regarding the questioning of the complainant by her mother, Deputy Berg, and Allen, as described in the police reports. Dr. Okla testified that Deputy Berg’s questioning of the complainant did not comport with the proper forensic interview process. Dr. Okla opined that Deputy Berg should not have interviewed the complainant in her grandmother’s presence and that it was of significance that Deputy Berg was not a trained forensic interviewer. Dr. Okla further opined that the complainant’s mother’s line of questioning was suggestive and that Allen’s interview was “unavoidably affected” by the prior interviews by Deputy Berg and the complainant’s mother. Defense counsel relied on the police reports in eliciting Dr. Okla’s testimony. MRE 703 requires that “facts or data . . . upon which an expert bases an opinion or inference shall be in evidence.” Therefore, although a police report that is adversarial to a defendant is generally not admissible, *People v McDaniel*, 469 Mich 409, 412-413; 670 NW2d 659 (2003), defense counsel’s decision not to object to the admission of the police reports in the instant case constituted sound trial strategy. *Toma, supra* at 302.

Defendant also argues that defense counsel was ineffective for failing to object to Allen’s testimony regarding the complaint’s truthfulness. In child sexual abuse cases, an expert may not testify that sexual abuse occurred and may not vouch for the veracity of the victim. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). Here, defendant challenges Allen’s testimony that the complainant’s development is “pretty high” and argues that Allen suggested that the complainant was “not taintable” and that the incident in fact occurred.

Contrary to defendant's argument, Allen did not vouch for the complainant's credibility. Rather, her testimony constituted proper rebuttal evidence because it responded to defendant's theory of defense and in particular to Dr. Okla's testimony that the interviews of the complainant were improper. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). Allen testified that the complainant's mother's questioning was proper and was not designed to elicit a particular response. Regarding defendant's theory that multiple interviews may taint a child, Allen testified that if the child's information remains the same during multiple interviews, this can suggest that the child is recalling an event or that the child is not taintable. Allen further opined that because the complainant corrected erroneous information and indicated that she did not know or did not remember certain information, she was not tainted. Such testimony directly responded to testimony elicited from Dr. Okla supporting defendant's theory that the complainant's allegations were untrue and resulted from suggestive interview techniques. Therefore, because the rebuttal testimony was proper, defense counsel was not ineffective for failing to object to its admission. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003) (explaining that "counsel does not render ineffective assistance by failing to raise futile objections.").

Defendant further argues that counsel was ineffective for failing to object when evidence of his incarceration was admitted. We disagree. During her testimony, Allen recalled that the complainant had told her that defendant is "at OCJ, and that means Oakland County Jail." Defendant has failed to demonstrate a reasonable probability that the result of the proceeding would have been different had defense counsel objected to this remark. *Toma, supra* at 302-303. Moreover, the comment was fleeting, and defense counsel may not have wanted to draw attention to the fact of defendant's incarceration. Therefore, defendant has not overcome the strong presumption that counsel's actions constituted sound trial strategy. *Toma, supra* at 302.

### III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor's comments during closing argument denied him his rights to due process and a fair trial. We disagree.

#### A. Standard of Review

Generally, we review claims of prosecutorial misconduct de novo to determine whether a defendant was denied a fair and impartial trial. *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005). However, because defendant failed to preserve this issue for appellate review by objecting to the prosecutor's alleged misconduct, our review is limited to plain error affecting his substantial rights. *Id.* at 451. "When reviewing a claim of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate a prosecutor's remarks in context." *Id.*

#### B. Analysis

Defendant contends that the prosecutor erroneously indicated in her closing argument that Dr. Okla testified that there was a 95 percent guarantee that the complainant's allegations were true. Defendant relies on the following paragraph in support of his argument:

When Dr. Okla was very long and drawn out. [sic] And, and I know that was torturous for a lot of us to sit there and that testimony, [sic] so I'm only going to talk a little bit about her testimony.

Dr. Okla discussed range of error, how do we know there's no range o[f] error when you're interviewing on what a child is saying. Said [sic] if there's a small range of error, we can have a 95 percent – 95 percent surety or guarantee that what this child says is accurate. So that's why I went through that with her.

Defendant mischaracterizes the prosecutor's argument as referring specifically to the complainant in the instant case. Rather, when the prosecutor's remarks are read in context, it appears that the references to "a child" and "this child" refer not to the complainant, but to a hypothetical child alleging sexual abuse. Thus, the record does not support defendant's argument. As such, defense counsel was not ineffective for failing to object to the prosecutor's remarks. *Ackerman, supra* at 455.

Defendant further argues that the prosecutor's assertion that the complainant "hasn't had sex education" and "doesn't know about sexual body parts" was not based on the evidence. "A prosecutor may not make a statement of fact to the jury that is unsupported by evidence, but she is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Ackerman, supra* at 450. Defendant again mischaracterizes the prosecutor's argument, which, in context, was as follows:

She said he put those two fingers in my coocha, he did it three times, and it hurt. She – this is a child who hasn't had sex education. This is a child who doesn't know about sexual body parts. She said it hurt. She said she told him to stop. She said she was threatened. Those are details surrounding that event. Not one person, and you're going to get these exhibits of the three people that talked to [the complainant] during this, not one person that has talked to [the complainant] has ever used those words until [the complainant] used those words, and you're going to see that. And there's no other explanation for why [the complainant] would say what she said and did what she did, except for that it happened.

The prosecutor's argument was consistent with the testimony of the complainant's mother, who maintained that although she had not discussed "the birds and the bees" with her daughter, the complainant had used the term "coocha" to mean "vagina" for years. The complainant's mother further testified that she did not ask the complainant whether defendant touched her "coocha," and that the complainant used the word to describe where defendant touched her on her own accord. The prosecutor's argument was further consistent with Allen's testimony that a six-year-old child having had no sex education would not be capable of fabricating allegations similar to those in the instant case. Allen opined that the allegations are beyond the scope of what a six-year-old child would be able to "come up with." Therefore, the prosecutor's argument was supported by the evidence or reasonable inferences therefrom, and defense counsel was not ineffective for failing to object to the remarks. *Ackerman, supra* at 450, 455.

Defendant further contends that the prosecutor committed misconduct by arguing that the police reports admitted into evidence were truthful despite that they were not offered for their truth. Contrary to defendant's argument, the prosecutor did not assert that the police reports were truthful. Rather, she relied on the police reports to show that nobody who interviewed the complainant used the term "coocha" before the complainant herself used that term. She also argued that the reports showed that the complainant's story was consistent throughout the three interviews. Accordingly, defendant's argument lacks merit, and counsel was not deficient for failing to object to the prosecutor's argument. *Ackerman, supra* at 455.

#### IV. RESENTENCING

Finally, defendant contends that he is entitled to resentencing because his sentence was increased based on facts that were neither admitted nor proven beyond a reasonable doubt contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Specifically, defendant argues that the trial court should not have assessed points for offense variables (OVs) 4, 10, and 11 based on facts that he did not admit and which had not been proven beyond a reasonable doubt.

##### A. Standard of Review

This Court reviews whether defendant is entitled to resentencing de novo because defendant's claim concerns whether Michigan's sentencing scheme is constitutional. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

##### B. Analysis

Our Supreme Court recently addressed this issue in *Drohan, supra*. *Id.* at 164. There, the defendant was convicted of third- and fourth-degree criminal sexual conduct and similarly challenged the trial court's scoring of points under OVs 4 and 10 as violative of *Blakely*. *Id.* at 143, 145. Our Supreme Court rejected the defendant's argument and held that judicial fact-finding to determine only the minimum sentence of an indeterminate sentence does not violate *Blakely*, which pertains only to sentences imposed beyond the statutory maximum. *Id.* at 159-164.

The instant case is on all fours with *Drohan* and requires an identical result. The trial court's scoring of the sentencing variables did not violate *Blakely* because the trial court's assessment of points under OVs 4, 10, and 11 affected only the minimum term of defendant's indeterminate sentence. Although defendant also argues that our Supreme Court wrongly decided *People v McCuller*, 475 Mich 176; 715 NW2d 798 (2006), vacated and remanded \_\_\_ US \_\_\_; 127 S Ct 1247; 167 L Ed 2d 62 (2007), his argument is inapposite. The United States Supreme Court recently vacated our Supreme Court's decision in *McCuller* and remanded the case to our Supreme Court for further consideration. *McCuller v Michigan*, \_\_\_ US \_\_\_; 127 S Ct 1247; 167 L Ed 2d 62 (2007). That case, however, involved a defendant who was entitled to an intermediate sanction, as opposed to a prison sentence, absent the trial court's scoring of certain offense variables. *People v McCuller, supra* at 179 n 2. Therefore, because this case

presents no such situation, the proper resolution of *McCuller* is irrelevant to the instant case.

Affirmed.

/s/ Bill Schuette  
/s/ Joel P. Hoekstra  
/s/ Patrick M. Meter