

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAWRENCE CHARLES BAKER, JR.,

Defendant-Appellant.

UNPUBLISHED

November 27, 2007

No. 267241

Kalkaska Circuit Court

LC No. 05-002579-FH

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (victim at least 13 and under 16 years of age). The trial court sentenced him as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 15 to 22 and 1/2 years. We affirm.

Defendant argues that his trial attorney rendered ineffective assistance of counsel when he failed to object to Sergeant Abe Devol's statement that he generally first interviews those individuals he believes "to be the most honest" rather than interviewing individuals randomly. This statement was made after the prosecutor asked Devol why he was unable to interview all the potential defense witnesses in this case. Defendant argues that this isolated comment amounted to an improper attack on the credibility of the defense witnesses as a whole.

Defendant did not raise the issue of ineffective assistance of counsel below in a proper request for an evidentiary hearing or in a motion for a new trial. Accordingly, our review is limited to errors apparent on the record. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).¹ A defendant seeking a new trial based on ineffective assistance of counsel bears a heavy burden to overcome the presumption that counsel provided effective assistance. See *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). The defendant "must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must also establish a reasonable probability that, but for counsel's error or errors, the

¹ We note that defendant filed a motion for a remand in this Court, but this Court denied the motion.

result of the proceedings would have been different. *Id.* He must also demonstrate that the result of the proceedings was fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

A lay witness is not permitted to comment or give an opinion on the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). An examination of Sergeant Devol’s testimony, however, reveals that Devol was not commenting on the credibility of the witnesses. Rather, he was describing his own personal process for determining the order in which to interview potential witnesses. While the comment was made in response to a question about follow-up interviews of defense witnesses, Devol did not indicate that he employs this process only when questioning defense witnesses. Moreover, he did not indicate whom among the potential defense witnesses he considered “to be the most honest.” Defendant’s ineffective assistance claim is without merit. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (failure to make a futile objection does not constitute ineffective assistance of counsel).

Defendant also argues that Devol’s comment requires reversal under the plain error doctrine. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We disagree. No “clear or obvious” error occurred. *Id.* at 763.

Defendant next argues that the prosecutor committed misconduct requiring reversal during closing arguments. Defendant contends that certain of the prosecutor’s comments improperly disparaged defense counsel and improperly suggested that defense counsel was trying to mislead the jury, thereby shifting the jury’s focus away from deciding the case based on the evidence. This claim is unpreserved because the allegation of misconduct was not made below. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Accordingly, our review is under the plain error doctrine. *Id.*; *Carines, supra*, 460 Mich at 763-764.

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411, (2001). A defendant’s right to a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). The propriety of a prosecutor’s remarks depends on all the facts of the case, and the remarks should be read as a whole and evaluated based on defense arguments and their relationship to the evidence at trial. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Generally, a prosecutor cannot personally attack defense counsel and should not suggest to the jurors that defense counsel is trying to mislead them. *Watson, supra*, 245 Mich App at 592; *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). Here, however, the prosecutor’s challenged comments merely amounted to the prosecutor’s arguing the general weakness of the defense, which is acceptable. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). In his opening and closing arguments, defense counsel compared the trial to an hourglass. He argued that the jury’s function is akin to the middle portion of the hourglass, i.e., sifting through the testimony presented above and determining which to believe and thereby pass onto the bottom of the hourglass. In keeping with this argument, defense counsel focused on

inconsistencies in the testimony presented. The prosecutor properly responded to this argument, and no prosecutorial misconduct occurred. See, e.g., *Watson, supra*, 245 Mich App at 592-593. Moreover, contrary to defendant's contention, defense counsel did not render ineffective assistance of counsel in failing to object to the prosecutor's comments. Counsel cannot be faulted for failing to raise a meritless objection. *Thomas, supra*, 260 Mich App at 457.

Defendant next argues that his trial attorney rendered ineffective assistance of counsel in failing to challenge a juror, Jane Martin, for cause and in failing to question her adequately. He also implies that the trial court's actions with regard to Martin constituted plain error requiring reversal.

"A criminal defendant has a constitutional right to be tried by a fair and impartial jury." *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998). A defendant is denied his constitutional right if he can establish that he was "actually prejudiced" by a juror or when a juror who is removable for cause is allowed to serve on the jury. *Id.* at 7-9. A trial court must remove a juror when the prospective juror is removable for cause under one of the enumerated categories found in MCR 2.511(D). *People v Badour*, 167 Mich App 186, 188-189; 421 NW2d 624 (1988), rev'd on other grounds 434 Mich 691 (1990). MCR 2.511(D)(2) and (4) provide that a juror is challengeable for cause if he or she "is biased for or against a party or attorney" or "has opinions or conscientious scruples that would improperly influence the person's verdict"

Defendant's appellate argument is based on Martin's acknowledgement that she knew prospective prosecution witness Steve Scott and her subsequent statement that she "believe[d] he'd tell the truth." However, Scott, who defendant claims is a probation officer, did not testify at trial. Martin's belief that a witness who did not testify would tell the truth does not amount to a denial of the right to an impartial jury because there is no evidence of improper partiality concerning any of the testimony or evidence actually adduced at trial. Defendant contends that Martin's seeming bias in favor of Scott indicates that she may have been biased in favor of other law enforcement personnel, including Devol, who testified in depth and was an important witness for the prosecution. This argument is without merit because the inference at its heart is simply too attenuated and amounts to a mere possibility of impartiality that is not supported by the record. Indeed, it appears from context that Martin believed that Scott would testify truthfully because of her acquaintance with him through her daughter.

Defendant also contends that the trial court improperly continued to question Martin concerning whether she would be able to sit as an impartial juror. Defendant argues that the trial court continued to question her until she essentially capitulated and gave the court the answer it sought. The record evidences that Martin was initially equivocal about sitting as a juror because she was uncomfortable about having to hear testimony concerning the sexual assault of a minor. Naturally, a potential juror might be reluctant to serve when the nature of the impending testimony is likely to be disturbing. However, Martin eventually unequivocally stated that she would be able to keep an open mind, and defense counsel later followed up on the trial court's questioning and asked whether she could be impartial; she replied that she could. There is nothing to indicate that juror Martin capitulated to pressure applied by the court.

Defendant has not established plain error with regard to the treatment of Martin. Nor has he established ineffective assistance of counsel. We note that a trial attorney's decision relating

to the selection of jurors is generally a matter of trial strategy. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). While counsel could have raised a challenge for cause, there is no indication that the court would have accepted it based on the follow-up questions asked of Martin. It was arguably a matter of trial strategy not to raise such an objection and possibly antagonize a juror that had a reasonable chance of being placed on the jury. Moreover, a juror's assurance to remain impartial, and the trial court's acceptance of that assurance, is sufficient proof that the juror's presence on the jury was not outcome-determinative. *Id.* at 259-260.

Defendant next raises additional issues of alleged prosecutorial misconduct. Once again, the issues are unpreserved, and our review is under the plain error doctrine. *Carines, supra*, 460 Mich at 763-764.

Defendant argues that the prosecutor improperly argued facts not in evidence when he argued that when witness Brittney Foles asked the complainant what happened between her and defendant, the complainant told Brittney that it was "none of her business." Defendant asserts that the complainant only told Brittney that "nothing happened." When the prosecutor's remarks are read in context, however, it is clear that the prosecutor did not commit misconduct. The prosecutor stated as follows: "[The complainant], *in her way of saying it's none of your business*, said nothing happened, it's none of your business" (emphasis added). In other words, the prosecutor was characterizing the denial that something had happened as an implied statement that the incident was none of anyone's business. This implication was in keeping with the complainant's testimony that she generally told those who asked about the assaults that it was none of their business or simply "said nothing so that [people] would leave [her] alone." A prosecutor is given "wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).

Defendant next argues that the prosecutor erred in arguing that the complainant's mother told the complainant to tell people that nothing happened or that it was none of their business. Defendant contends that such testimony was never elicited at trial and that a prosecutor may not argue facts that are not in evidence. See *Watson, supra*, 245 Mich App at 588.

It is true that such testimony was not directly elicited at trial. The prosecutor had attempted to elicit an answer during trial from the complainant regarding what her mother had told her to say, but defense counsel's hearsay objection was sustained. However, following that objection, the prosecutor asked the complainant what she told people after she had talked to her mother, and the complainant replied, without objection, that she either told them that it was none of their business or simply said nothing to them. Accordingly, it can be reasonably inferred that her mother told the complainant to tell people that nothing happened or that it was none of their business, and therefore the prosecutor's challenged remarks were not improper; a prosecutor can argue inferences based on the evidence. *Id.* Further, the inferred statements did not amount to hearsay because they were not offered for the truth of the matter asserted but were rather offered for their effects on the listener, i.e., how the complainant reacted to questions after she was directed by her mother. *People v Fisher*, 449 Mich 441, 449-450; 537 NW2d 577 (1995). The argument that the prosecutor improperly argued facts not in evidence is without merit.

Defendant next argues that the prosecutor improperly opined about how 13-year-old children think when he summarized how the complainant acted following the assaults. However,

the prosecutor's statement was not provided as an expert opinion on the behavior of teenagers, but was rather a proper lay comment based on a commonsense understanding of how individuals of the complainant's age generally act following an assault. No error is apparent.

Defendant next broadly argues that the prosecutor improperly questioned defense witnesses concerning their motivation to be involved in the case. Contrary to defendant's claim, the prosecutor's questions were proper because "[o]ppportunity and motive to fabricate testimony are permissible areas of inquiry of any witness." *People v Buckey*, 424 Mich 1, 15; 378 NW2d 432 (1985).

Defendant next argues that the prosecutor improperly argued that a defense witness had accused Devol of witness intimidation. While there seemed to be some indication at trial that this witness had previously accused Devol in this regard, such testimony was not directly elicited at trial. While the statement by the prosecutor was arguably improper, a contemporaneous curative instruction could have eliminated any prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Additionally, the isolated comment did not amount to a miscarriage of justice. As a result, reversal is unwarranted. *Id.* Nor is reversal warranted based on the prosecutor's brief statement that the witness had "eavesdrop[ed]."

Defendant next argues that the prosecutor improperly asked a witness whether he was "there" when defendant sexually assaulted the complainant; defendant claims that the line of questioning was posed for its inflammatory effect on the jury and that it had no probative value because the prosecutor knew that the witness was not present in the rooms where the alleged assaults occurred. Defendant's argument is without merit. The witness had indicated that he was at the complainant's home during the day when the sexual assaults occurred. Accordingly, the line of questioning was relevant to determine the witness's potential knowledge of whether the assaults had occurred. Moreover, the manner of the prosecutor's questioning was a valid form of cross-examination and did not, as argued by defendant, improperly inject the prosecutor's personal opinion into the trial.

Defendant next argues that the prosecutor improperly argued that there was no evidence to show that the assaults did not occur and that the jury therefore had "to take [the complainant] at her word." While clearly the jury was not required to believe the complainant, the trial court properly instructed the jury that the attorney's arguments were not to be considered as evidence and properly instructed the jury that it was free to believe any part of anyone's testimony. These instructions were sufficient to cure any prejudice resulting from the prosecutor's brief comment. See *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Jurors are presumed to follow the instructions of the trial court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Additionally, any prejudicial effect stemming from the prosecutor's argument could have been cured by a contemporaneous curative instruction, and we do not believe that the brief comment resulted in a miscarriage of justice. *Stanaway, supra*, 446 Mich at 687.

Defendant additionally argues that the cumulative effect of the claimed prosecutorial misconduct denied him a fair trial. However, this argument fails because, as discussed above, none of the prosecutor's comments or arguments denied defendant a fair trial. See *People v Bahoda*, 448 Mich 261, 293 n 64; 531 NW2d 659 (1995).

Defendant next argues that his trial attorney rendered ineffective assistance of counsel in failing to object when witnesses for the prosecution testified regarding the contents of a letter allegedly written by defendant. He also implies that the trial court's actions with regard to the letter constituted plain error requiring reversal.

This issue involves the construction of various evidentiary rules. An evidentiary rule is reviewed under the same principles involving the interpretation of a court rule or statute, and review is de novo. *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). "The primary goal of statutory interpretation is to ascertain and give effect to the Legislature's intent[, and t]he Legislature is presumed to have intended the meaning it plainly expressed." *Linsell v Applied Handling, Inc*, 266 Mich App 1, 15; 697 NW2d 913 (2005). If statutory language is clear and unambiguous, then a court is required to apply the statute as written. *Id.*

Preliminarily, defendant argues that defense counsel should have objected to the testimony involving the letter because of the failure to authenticate whether it actually was a letter from defendant. Under MRE 901(a), for a document to be admissible, it must be authenticated by the introduction of sufficient evidence to support a finding that the document is what the proponent claims it to be. *Haberkorn v Chrysler Corp*, 210 Mich App 354, 366; 533 NW2d 373 (1995). "Under MRE 901(b)(1), a foundation can be laid for admissibility by testimony of a witness with knowledge who can also identify and authenticate the evidence." *Granger v Fruehauf Corp*, 147 Mich App 190, 203; 383 NW2d 162 (1985), rev'd on other grounds 429 Mich 1 (1987). Here, the letter was properly authenticated based on witness Justin Griffor's testimony that he received the letter from defendant, read it, then gave it to the complainant in accordance with defendant's instructions. Furthermore, the complainant and Griffor testified similarly concerning its contents. Because there was not a legitimate authentication concern, defense counsel was not ineffective for failing to object. See *Thomas, supra*, 260 Mich App at 457.

Defendant next argues that, by operation of MRE 602, defense counsel was ineffective because the complainant, witness Kassie Konsella, and Griffor should have been prohibited from testifying about the contents. Defendant asserts that only he should have been allowed to testify concerning the letter's contents. MRE 602 prohibits a witness from testifying about a matter concerning which he or she has no personal knowledge. However, contrary to defendant's argument, those individuals who testified concerning the letter's contents had personal knowledge of its contents because they claimed to have read it. Simply because those individuals did not write the letter did not preclude them from testifying about its contents. Moreover, to the extent that certain small portions of Konsella's testimony regarding the letter constituted hearsay, the statements were cumulative to other testimony admitted at trial and did not unfairly prejudice defendant.

Defendant argues that his trial counsel should have attempted to prohibit the complainant, Konsella, and Griffor from testifying regarding the contents of the letter based on the operation of several additional evidentiary rules. MRE 1002 requires an original writing to prove the contents of a writing unless otherwise provided in the rules of evidence or by statute. As an exception to MRE 1002, MRE 1004 allows other evidence to be admitted to prove the contents of a writing if certain circumstances apply and provides, in part, as follows:

The original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if—

(1) **Originals Lost or Destroyed.** All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith

Defendant argues that the above subrule plainly prohibited testimony concerning the letter because it was intentionally destroyed in bad faith. As defined by a legal dictionary, “bad faith” means “[d]ishonesty of belief or purpose[.]” Black’s Law Dictionary (8th ed). In the insurance context in regard to a failure to negotiate a settlement in bad faith, our Supreme Court has noted that bad faith is a state of mind that requires an “arbitrary, reckless, indifferent, or intentional disregard of the interests of the person owed a duty.” *Commercial Union Ins Co v Liberty Mut Ins Co*, 426 Mich 127, 136; 393 NW2d 161 (1986).

Contrary to defendant’s argument, the letter here was not plainly destroyed in bad faith because defendant allegedly wrote in the letter that it should be destroyed after it was read. Assuming the letter was destroyed pursuant to defendant’s direction, it was plainly not bad faith for either the complainant or Konsella, two adolescent girls, to comply with defendant’s request to conceal evidence of his guilt. The letter was arguably destroyed in good faith. See, e.g., *People v Thompson*, 111 Mich App 324, 332; 314 NW2d 606 (1981) (concluding that testimony from the complainant concerning the contents of threatening letters allegedly written by the defendant was properly admitted under MRE 1004 because there was no showing that the complainant destroyed the letters in bad faith). Accordingly, it was objectively reasonable for counsel not to challenge the testimony concerning the letter’s contents, given the likelihood that the trial court would have deemed such testimony admissible. See *Thomas, supra*, 260 Mich App at 457.

Defendant next argues that when MRE 1004(1) is read in context with MRE 1003 (regarding duplicates) and MRE 1007, it is plain that MRE 1004(1) did not allow the testimony at issue in the instant case to prove the contents of the letter. MRE 1007 provides as follows: “Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party’s written admission, without accounting for the nonproduction of the original.” MRE 1007 is a more specific rule that applies when the party opponent has testified regarding the contents of a writing. That rule did not apply here. Nor did MRE 1003 apply, because a duplicate was not presented. However, simply because testimony under MRE 1007 is unavailable and simply because a duplicate is unavailable does not limit a party from relying on MRE 1004 to admit testimony concerning the contents of a writing if that writing was not lost or destroyed in bad faith. Defendant’s argument about MRE 1004 is without merit.

Moreover, by application of MRE 1008, the issue concerning the existence of the alleged writing was a question for the trier of fact to determine. That rule provides as follows:

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule

104. *However, when an issue is raised (a) whether the asserted writing ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.* [MRE 1008 (emphasis added).]

Defense counsel inferred through his questioning that the letter never existed. By operation of MRE 1004 and 1008, testimony was admissible to prove the contents of the letter because it was not destroyed in bad faith, and the issue of whether the writing ever existed was a question for the jury.

Defendant additionally argues that his trial counsel should have objected based on MRE 403 because the testimony concerning the letter was unfairly prejudicial. MRE 403 provides that relevant evidence may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice. Given the high probative value of the evidence, it was admissible under MRE 403; defendant was not unfairly prejudiced by the testimony in question.

Defendant's ineffective assistance claim is without merit. See *Thomas, supra*, 260 Mich App at 457. Moreover, to the extent defendant is arguing that the trial court's actions surrounding the letter constituted plain error, we reject that argument. No clear or obvious error is apparent. *Carines, supra*, 460 Mich at 763.

Defendant lastly argues that a juror denied that she knew defendant or any of his immediate family members, when she had in fact previously been associated with defendant's father and defendant's uncle. Defendant argues that his trial attorney was ineffective for failing to bring those allegations to trial court's attention after defendant's father informed him of them shortly before closing arguments. Defendant's argument is without merit because there is nothing in the record to substantiate the allegations. We do not consider allegations unsupported by the record. *Hawkins v Murphy*, 222 Mich App 664, 670; 565 NW2d 674 (1997).

Affirmed.

/s/ Michael J. Talbot

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter