

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
July 22, 2010

v

JOHN EMIL DANZ,

Defendant-Appellant.

No. 292167
Saginaw Circuit Court
LC No. 08-030205-FC

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b) (actor related to victim), and five counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b) (force or coercion used). Defendant was sentenced to serve concurrent prison terms of 225 months to 40 years on each CSC I conviction, and 95 months to 15 years on each CSC III conviction. We affirm. This case has been decided without oral argument pursuant to MCR 7.214(E).

The victim, defendant's stepdaughter, testified that defendant sexually abused her from the time she was eight or nine years old until she was 18 years old, and that the nature of the sexual acts progressed over time to oral sex and vaginal intercourse.

Defendant first argues that the evidence adduced at trial was insufficient to support his convictions. We review de novo challenges to the sufficiency of evidence in criminal trials. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). We must determine whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *Id.*

Defendant essentially makes two sufficiency arguments on appeal. First, he claims that the evidence was insufficient because the victim was an untruthful person who made inconsistent statements under oath to the police, including giving different versions of when the abuse started. It is axiomatic that “[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses. As the trier of fact, the jury is the final judge of credibility.” *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998) (citation and quotation marks omitted). Moreover, the alleged inconsistencies are not material. “Time is not of the essence, nor is it a material element, in criminal sexual conduct cases involving a child victim.” *People v Dobek*,

274 Mich App 58, 83; 732 NW2d 546 (2007). Regarding the five counts of CSC I, the jury was properly instructed that the prosecutor had to prove that the victim was less than 16 years old at the time of the encounters with defendant. See MCL 750.520b(1)(b). Whether the abuse started before or after protective services was called when she was around nine years old has nothing to do with establishing whether she was under 16 at the time of the charged events. Nor does it have anything to do with determining whether force or coercion was used with respect to the five counts of CSC III. See MCL 750.520d(1)(b).

Second, defendant argues that, with respect to the counts alleging CSC III, the prosecutor failed to prove that defendant used force or coercion when allegedly engaging in sexual acts with the victim. The victim testified that she complied with defendant because she believed his threat that she and her brother would be put in separate foster homes and would never see each other or their mother again. At trial, an expert in the field of criminal sexual assault testified that children who are abused at a young age can become “emotionally and mentally . . . stuck at that age” and remain subject to a threat that may no longer seem plausible based on present circumstances. Viewed in the light most favorable to the prosecution, a rational trier of fact could have found that defendant’s threats against the victim regarding her family amounted to coercion, and that it was reasonable for a minor to believe that defendant was capable of carrying out his threat to separate her from her family, and to continue to believe it even as she matured.

Next, defendant raises a multifaceted argument that he was denied the effective assistance of trial counsel. The determination whether counsel was ineffective is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Factual findings are reviewed for clear error and matters of law are reviewed de novo. *Id.* To prevail, defendant must show that counsel made errors and that those errors were so serious that the result of the trial was unreliable. *Id.* at 578. “When no *Ginther*¹ hearing has been conducted, . . . review of the defendant’s claim of ineffective assistance of counsel is limited to mistakes that are apparent on the record.” *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Both the United States and Michigan Constitutions guarantee a defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. This right to counsel includes the right to effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Michigan has adopted the standard for evaluating the effectiveness of counsel set out by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994). Under *Strickland*, “the defendant must show that counsel’s representation fell below an objective standard of reasonableness.” *Strickland*, 466 US at 688. Second, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. The defendant must also show that counsel’s

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). To the extent defendant’s Standard 4 supplemental brief constitutes a proper request to remand for a *Ginther* hearing, we deny it as unnecessary.

decisions did not constitute sound trial strategy. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001). The defendant bears the heavy burden of showing that counsel was not effective, as effectiveness of counsel is presumed. *Id.* at 714.

On the first day of trial, defense counsel indicated that he had just filed an amended witness list that included two new potential rebuttal witnesses—Craig Danz, defendant’s brother, and Sandra Danz, Craig’s wife. The prosecutor objected, and defendant provided an offer of proof through the testimony of the two potential witnesses. Craig testified in part that the victim’s mother twice told him that the victim said that “none of this would have even happened if she [the victim’s mother] would have gone back to Michigan with” the victim. The prosecutor objected to the admission of this testimony on the ground that it was “hearsay upon hearsay.” Defense counsel responded that the testimony was to be provided as rebuttal to impeach the victim’s mother, if necessary. The court ruled it was hearsay and thus not admissible at that time. However, the court indicated that “[i]f it gets down to some point of impeachment we will have to take this up outside the presence of the jury.”

The issue of whether the victim’s mother made the alleged statement to Craig only came up during cross-examination of the former. It is well established “that a denial cannot be elicited on cross-examination simply to facilitate the admission of new evidence.” *People v Figgures*, 451 Mich 390, 401; 547 NW2d 673 (1996). Defendant argues that the victim’s mother completely denied making the statement to Craig. In fact, the victim’s mother merely denied that the victim had made the statement to her. Instead, the victim’s mother testified that she had expressed to Craig her own fear that had she gone back to Michigan, the victim would not have made the charges. Defendant asserts that Craig’s testimony “is of the utmost importance because it goes to the reason and mind set of the accuser.” In other words, defendant is seeking to admit Craig’s testimony as substantive evidence to establish the victim’s motive for having made allegations of sexual abuse against him. Defendant has not addressed under what exception to the hearsay rule the cited testimony could be admitted as substantive evidence. Defendant cannot leave it to this Court to search for authority in support of his position. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any event, we find none. It is conceivable that Craig’s testimony could have been used to impeach the victim’s mother’s credibility in making an allegedly prior inconsistent statement, see MRE 613(b), and the court would have instructed the jury not to consider the testimony as substantive evidence. See *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1981). But defendant’s purported use for the evidence would not have been permitted. See *id.* Defense counsel cannot be faulted for failing to attempt to admit the evidence for the reasons stated by defendant, given that any such request would have been futile. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Similarly, there is nothing in the record to support defendant’s contention that a friend of the victim would have provided the testimony claimed, and defendant provides nothing on appeal beyond his bare assertion. “Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position.” *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Likewise, other than defendant’s self-serving contentions on appeal, there is nothing of record or offered on appeal to support his assertion that the victim’s mother would have contradicted the victim’s account of being alone with police when questioned about an unspecified incident with an unidentified boy, or that the victim’s great uncle had made a statement to police that contradicted another witness’s alleged report to the police.

Defendant also contends that counsel failed to impeach the victim's testimony about the number of sexual assaults that occurred on average over the course of a month. Defendant contends that the victim testified the sexual assault occurred "never more than three times" in a month," whereas "other testimony" indicated that she told her mother it occurred four to five times a month. However, defendant does not cite to any testimony that indicates the victim told her mother the assaults occurred four or five times each month.² Defendant has not established that defense counsel was ineffective on this issue.

Defendant further contends that the victim's testimony that she did not tell her grandmother and aunt about the abuse when asked is implausible. Given that defendant does not indicate what counsel could have done about this testimony, this allegation is nothing more than an assertion that the victim is not credible. Additionally, the victim's testimony was that she was both unsure if she would be believed if she revealed the abuse, and was still fearful of defendant's threat to separate her and her brother. The fact that the victim was being given an opportunity to reveal the abuse as opposed to bringing up the subject herself does not rob this fear of its potency, particularly in light of her misgivings about being believed if she did speak up.

Additionally, defendant's assertion that he was denied his right to testify by counsel flies in the face of the record. Defendant repeatedly told both his counsel and the prosecutor on the record that he had freely decided not to testify.

We do agree that counsel should have asked the court to admonish the prosecutor when he stated, "I'm sorry. That is so disgusting I can't think of my next question." Defendant is correct that this is an inflammatory and improper comment. *Dobek*, 274 Mich App at 63-64 (noting that "[a] defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the defendant's guilt or innocence"). However, defendant has not demonstrated that the outcome of the trial would have been different had his counsel objected to this isolated statement. See *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001).

² Defendant also fails to note that the cited testimony of the victim actually refers to the rate of vaginal intercourse, leaving other types of sexual assault uncounted.

Defendant also argues that the cumulative effect of the errors he alleges require reversal. “The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted.” *Dobek*, 274 Mich App at 106. Reversal on the basis of cumulative error is unwarranted because we found only one instance of error in defendant’s failure to object to an improper comment by the prosecutor, which does not merit reversal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kathleen Jansen
/s/ Jane M. Beckering