

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 22, 2014

v

KENNETH LEE MURINE,
Defendant-Appellant.

No. 310962
Jackson Circuit Court
LC No. 10-005670-FC

Before: METER, P.J., and SERVITTO and RIORDAN, JJ.

PER CURIAM.

Defendant Kenneth Lee Murine appeals as of right from his convictions of first-degree criminal sexual conduct (CSC) involving a victim under the age of 13, MCL 750.520b(2)(B), and second-degree CSC involving a person under the age of 13, MCL 750.520c(1)(a). The trial court departed from the recommended minimum sentence under the legislative guidelines and the mandatory minimum sentence imposed by law. It sentenced defendant to 30 to 50 years' imprisonment for his first-degree CSC conviction and to 10 to 15 years' imprisonment for his second-degree CSC conviction. We affirm defendant's convictions. However, because the trial court failed to articulate substantial and compelling reasons for the sentencing departure, we vacate defendant's first-degree CSC sentence and remand for resentencing regarding that offense.

Defendant first contends that he is entitled to resentencing because the 30-year minimum sentence for his first-degree CSC conviction constituted an upward departure for which the trial court failed to articulate substantial and compelling reasons.¹ We agree. Defendant's recommended minimum sentence range under the legislative guidelines was 135 to 225 months. Absent substantial and compelling reasons for a departure, a sentencing court is required to impose a minimum sentence within the appropriate guidelines range. MCL 769.34(3); *People v Babcock*, 469 Mich 247, 255-256; 666 NW2d 231 (2003). However, MCL 769.34(2)(a) states: "If a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section. . . ."

¹ Defendant does not challenge his sentence for his second-degree CSC conviction.

Defendant was subject to a 25-year mandatory minimum sentence under MCL 750.520b(2)(b).² Under MCL 769.34(2)(a), the required imposition of this mandatory sentence would not constitute a departure and would not require justification by substantial and compelling reasons. Rather than impose the 25-year mandatory minimum, however, the trial court imposed a sentence of 30 to 50 years' imprisonment, exceeding both the guidelines range and the mandatory statutory minimum. When a court imposes a sentence greater than the mandatory minimum, which also exceeds the recommended guidelines range, the court must justify this departure with substantial and compelling reasons. *People v Wilcox*, 486 Mich 60, 72-73; 781 NW2d 784 (2010). In sentencing defendant, the trial court did not acknowledge that it was imposing a departure sentence or attempt to justify the departure with substantial and compelling reasons as required by MCL 769.34(3). Consequently, defendant is entitled to resentencing for his first-degree CSC conviction. *Id.* at 73. We note that the prosecution agrees with this relief.

Next, defendant challenges the sufficiency of the evidence supporting his convictions. We review claims involving the sufficiency of the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). We view the evidence "in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999) (internal citations and quotation marks omitted).

Both of defendant's CSC convictions were premised on the victim's having been under 13 years of age and, in the case of defendant's first-degree CSC conviction, defendant's having been at least 17 years of age. MCL 750.520b(2)(b); MCL 750.520c(1)(a). Defendant does not contest his age or that of the victim; he instead denies sexually assaulting the victim. Regarding defendant's first-degree CSC conviction, the prosecution was required to show "sexual penetration," which is defined as follows: "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required." MCL 750.520a(r). The victim plainly testified to numerous acts constituting "sexual penetration." For example, she described defendant performing the act of cunnilingus on her and indicated that defendant rubbed his private parts "inside" her private parts, causing her pain. Regarding defendant's second-degree CSC conviction, the prosecution needed to prove "sexual contact," which "includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification [or] done for a sexual purpose" MCL 750.520a(q). "Intimate parts" include the primary genital area, groin, and buttock. MCL 750.520a(f). Once again, the victim's testimony, including testimony that defendant touched her private parts and rubbed himself on her "both back and front," provided sufficient evidence from which to

² The statute states: "For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years."

conclude that “sexual contact” occurred between defendant and the victim. On its own, the victim’s testimony was sufficient to support defendant’s CSC convictions. *People v Brantley*, 296 Mich App 546, 551; 823 NW2d 290 (2012). Moreover, although the testimony of a victim in a CSC case need not be corroborated, see MCL 750.520h, the victim’s testimony was buttressed by DNA evidence. DNA testing showed the presence of defendant’s semen on the victim’s blankets.

Nevertheless, on appeal, defendant continues to challenge the credibility of the victim’s testimony, maintaining that her testimony resulted from coaching and a defective forensic-interview protocol. He insists that his theory of events is supported by that of an expert, Dr. Katherine Okla, who testified that the forensic interview conducted in this case was problematic. He further notes that the medical experts offered by the prosecution conflicted regarding their opinions concerning the physical evidence supporting abuse. These challenges by defendant involve credibility determinations that this Court will not disturb on appeal. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). If there were conflicts in the testimony, those conflicts were for the jury, and the jury was “free to believe or disbelieve, in whole or in part, any of the evidence presented.” *People v Perry*, 460 Mich 55, 63; 594 NW2d 477 (1999). Ultimately, based on the victim’s testimony and corroborating evidence, the prosecution clearly presented the jury with sufficient evidence to find defendant guilty beyond a reasonable doubt.

Next, defendant raises three claims of prosecutorial misconduct. First, he argues that the prosecution impermissibly shifted the burden of proof during his rebuttal closing argument by commenting on defendant’s failure to call Amy Goodenaugh as a corroborating witness. Defendant preserved this argument with an objection at trial, *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008), and thus we review his claim de novo to see if he was denied a fair and impartial trial, *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). We consider claims involving prosecutorial misconduct on case-by-case basis, examining the entire record and evaluating a prosecutor’s remarks in context. *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). We consider the prosecutor’s comments “as a whole” in light of “defense arguments and the relationship they bear to the evidence admitted at trial.” *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). Typically, prosecutors are afforded great latitude regarding their arguments and conduct at trial; they may argue the evidence and all reasonable inferences arising from the evidence. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008).

Regarding defendant’s first claim of prosecutorial misconduct, a prosecutor may not attempt to shift the burden of proof to the defendant. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, in this case, what defendant mistakes for an attempt to shift the burden of proof was, in fact, permissible comment on defendant’s failure to call a corroborating witness. It is well settled that, when a defendant advances a theory or a defense, the prosecution may comment on the defendant’s failure to produce corroborating witnesses without shifting the burden of proof to the defendant. *People v Fields*, 450 Mich 94, 112, 115; 538 NW2d 356 (1995); *People v Jackson*, 108 Mich App 346, 351-352; 310 NW2d 238 (1981). Defense counsel mentioned Goodenaugh several times during trial, asking several witnesses about her protracted stay in the home where the criminal conduct took place. During closing,

defense counsel presented Goodenaugh's stay as significant, arguing that the victim's failure to recall the stay supported defendant's theory that her testimony resulted from coaching. Given defendant's emphasis on the significance of Goodenaugh's stay in the house, the prosecution permissibly commented on defendant's failure to call her as a witness to corroborate his theory and, in doing so, did not shift the burden of proof. *Fields*, 450 Mich at 112. Moreover, the trial court properly instructed the jury regarding the burden of proof and specified that the lawyers' arguments were not evidence. Thus, even if there had been an error, it was cured by the court's instructions. *Abraham*, 256 Mich App at 279.

In a supplemental brief, defendant raises two additional claims of prosecutorial misconduct. First, defendant maintains that the prosecution committed misconduct by questioning the credibility of Dr. Okla in light of the payment she received for her services and the fact that she rarely testifies on behalf of the prosecution. Defendant failed to object during trial. If a defendant fails to preserve a claim of prosecutorial misconduct, this Court reviews the claim for plain, outcome-determinative error. *Callon*, 256 Mich App at 329. We will not find error requiring reversal where a curative instruction could have alleviated any prejudicial effect. *Id.* at 329-330.

First, we note that defendant fails to cite to the record or to identify any specific remarks or questions by the prosecution. *Abraham*, 256 Mich App at 277. Nevertheless, the record shows that the prosecution cross-examined Okla about her receipt of payment for appearing on defendant's behalf and about her tendency to testify for defendants rather than the prosecution. These questions were permissible cross-examination because they related to Okla's credibility and potential bias. MRE 611(c); see also *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001) (recognizing the relevancy of interest or bias of a witness). Moreover, defense counsel raised these matters on direct examination, opening the door for further questions by the prosecution during cross-examination. See *People v Lukity*, 460 Mich 484, 498; 596 NW2d 607 (1999); *People v Gibson*, 71 Mich App 543, 547; 248 NW2d 613 (1976). Consequently, during cross-examination, the prosecution did not commit any type of misconduct by questioning Okla about her financial motives and tendency to testify for the defense.

During closing, the prosecution commented on Okla's receipt of payment and repeated appearances on behalf of defendants. For example, the prosecutor stated that "[t]he doctor was hired to come in here and testify that there was something wrong with [the forensic interview]." We see no error in these general arguments because we have previously acknowledged that "the prosecution is free to argue from the evidence presented that an expert witness had a financial motive to testify at trial." *Unger*, 278 Mich App at 239. However, while prosecutors may comment on an expert's financial motives to testify, they may not make arguments designed to "impugn the integrity of the defendant's experts" or suggest that "the expert has intentionally misled the jury . . ." *Id.* at 240; see also *People v Leighty*, 161 Mich App 565, 576; 411 NW2d 778 (1987) (finding impropriety bordering on misconduct where the prosecutor attacked an expert's professionalism). Here, the prosecution may have crossed a line and impugned Okla's integrity as a professional in arguing that Okla would have offered an opinion favorable to the defense "no matter what" the evidence showed and in arguing that prosecutors did not use her as a witness "because [p]rosecutors don't like to put people on the stand who have built a lucrative career out of criticizing the testimony of children." While these remarks were arguably

improper, reversal is not required because any prejudicial effect could have been alleviated by a timely objection and curative instruction, *Unger*, 278 Mich App at 241, and, by instructing the jury that the lawyers' arguments were not evidence, the trial court alleviated any potential prejudice. *Id.* at 240-241; *Abraham*, 256 Mich App at 279. We find no basis for reversal under the plain-error doctrine.

Defendant's next prosecutorial-misconduct argument relates to an alleged violation of a sequestration order. Defendant preserved this argument at trial, moving for a mistrial or jury instruction based on the prosecutor's conduct. Thus, we review defendant's claim of prosecutorial misconduct de novo to see if defendant was denied a fair and impartial trial. *Mann*, 288 Mich App at 119. A trial court's decision regarding a motion for a mistrial is reviewed for an abuse of discretion. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010). An abuse of discretion occurs if the trial court chooses an outcome outside the range of principled outcomes. *Id.* "A defendant who complains on appeal that a witness violated the lower court's sequestration order must demonstrate that prejudice has resulted." *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985).

MRE 615 governs the exclusions of witnesses, providing that a court "may order witnesses excluded *so that they cannot hear the testimony of other witnesses . . .*"³ As evident from the plain language of MRE 615, the purpose of excluding a witness is to prevent him or her from hearing the testimony of other witnesses. More fully, we have explained that the "purposes of sequestering a witness are to prevent him from coloring his testimony to conform with the testimony of another and to aid in detecting testimony that is less than candid." *People v Meconi*, 277 Mich App 651, 653; 746 NW2d 881 (2008) (internal citations and quotation marks omitted). Here, defendant claims the prosecution violated the sequestration order by speaking with the victim outside of the courtroom and showing her the blankets, which were to be offered into evidence. The prosecutor acknowledged that he spoke to the victim before she testified and showed her the blankets, explaining that he did it to show the eight-year-old victim a familiar item in order to calm her "physical symptoms of terror." The prosecutor stated that he did not tell the victim that the items were exhibits or that anyone had testified about them.

On these facts, the trial court did not abuse its discretion in denying defendant's motion for a mistrial because no violation of the sequestration order occurred. As the trial court explained it, in keeping with MRE 615, the sequestration order existed "to prevent any witnesses from being informed of what was being conducted in the trial so that they had knowledge of what has already been testified to by other witnesses." Because the victim was not present for any testimony and was not made privy to any testimony, the sequestration order was not violated. See, generally, *People v Davis*, 133 Mich App 707, 714; 350 NW2d 796 (1984), and *People v Stanley*, 71 Mich App 56, 62; 246 NW2d 418 (1976).

³ Although Const 1963, art 1, § 24 provides victims with a constitutional right to be present during trial, MCL 780.761 authorizes victim sequestration. Because this case may be resolved on other grounds, we decline to reach the constitutional question of whether a victim may be sequestered. See *People v Meconi*, 277 Mich App 651, 653; 746 NW2d 881 (2008).

Even assuming a violation of the sequestration order, defendant was not prejudiced by the incident. The prosecutor's conversation did not impart any information to the victim. Further, although the trial court denied a curative jury instruction, defendant cross-examined the victim about the incident and used the incident during closing to argue that the prosecution had to remind the victim about what to say in her testimony. Cross-examination is one of the accepted remedies for a sequestration violation and the jury was capable of evaluating the victim's credibility in light of the incident. *Meconi*, 277 Mich App at 654-655. The prosecution's conduct did not deny defendant a fair trial and he is not entitled to relief.

Lastly, defendant argues that he was denied the effective assistance of counsel when his trial counsel failed to call Goodenaugh as a witness. Defendant failed to move the trial court for a new trial or to request an evidentiary hearing regarding this claim. As such, his claim is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, a defendant bears the burden of demonstrating (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011) (internal citation and quotation marks omitted). The defendant must also show that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Effective assistance of counsel is presumed, and "[t]his 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 Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

The record shows that Goodenaugh appeared on the defense witness list and that she was not ultimately called for trial. However, the record is devoid of any indication regarding why she was not called or what testimony she would have offered if called.⁴ On the existing record, defendant cannot overcome the presumption that, in deciding not to call Goodenaugh, counsel acted as a matter of strategy. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003) ("[c]ounsel's decision whether to call a witness is presumed to be a strategic one for which this Court will not substitute its judgment"). Further, absent a record of how Goodenaugh would have testified, defendant cannot establish that he was denied a "substantial defense." *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004) ("failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense"). Ultimately, having failed to establish a supporting record for his argument, defendant cannot prevail on his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

⁴ Even the unsubstantiated allegations in defendant's supplemental brief do not explain in any detail how Goodenaugh's testimony would have benefited the defense. In fact, defendant's unsubstantiated recounting of events indicates that his attorney met with Goodenaugh on two occasions before trial, which, if anything, suggests that counsel made an informed, strategic decision not to call Goodenaugh to the stand.

We affirm defendant's convictions; however, we vacate his sentence for first-degree CSC and remand for resentencing with regard to that offense. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Michael J. Riordan