

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FRANK CATALANO,

Defendant-Appellant.

UNPUBLISHED

March 10, 2005

No. 252802

Oakland Circuit Court

LC No. 2003-188969-FH

Before: Meter, P.J., and Bandstra and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced to 1 to 15 years in prison. We affirm.

Defendant first argues that there was insufficient evidence to sustain his conviction for second-degree criminal sexual conduct. In reviewing the sufficiency of the evidence, we view the evidence de novo in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). The prosecution is not obligated to disprove every reasonable theory consistent with innocence; instead, it need only convince the jury in the face of whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In this case, the victim testified that she was twelve years old at the time of the incident; defendant, her uncle, was twenty-seven or twenty-eight years old. On the night of the incident, the victim, her mother, younger sister, and defendant were watching a movie in the living room of her house. The victim was sitting on the couch between her sister and defendant. She wrapped a blanket around herself because she was cold, and defendant put his arm around her shoulders. At that point, defendant's "hand came down underneath the blanket over [the victim's] clothing," he touched her right breast, and "it felt like he was squeezing it." The victim testified that defendant tried to touch her breast at least three more times, but she was able to block his hand, which never went underneath her clothing. The victim testified that when she looked at defendant, he was smiling, but did not say anything. Although the victim testified that she did not know if defendant intended to touch her or if it was accidental, she stated that "it didn't feel right," and that she "wante[ed] [her] personal space back because [defendant] invaded it."

Deputy Melissa McClellan initially met with defendant several months after the incident; this interview was videotaped. Deputy Richard Torongeau met with defendant a few days later. Defendant waived his *Miranda*¹ rights, and submitted to a polygraph examination administered by Torongeau; because reference to taking and passing or failing a polygraph test is inadmissible in court², this interview was not recorded. After failing the polygraph examination, defendant admitted to Torongeau that “he did this.” Defendant never denied touching the victim, and confessed “I’m sure I need help because I touched her breast. Yes, I touched her breast. She is not a liar. I don’t want her to testify against me.” After talking with Torongeau, defendant again spoke with McClellan. McClellan testified that defendant confessed that he “copped a feel” of the victim’s breast. Defendant then wrote out a signed confession. At trial, defendant maintained that if he touched the victim, it was unintentional, and that Torongeau and McClellan told him what to write down in his confession, and that he only wrote it out so that he could leave.

To prove second-degree criminal sexual conduct with a person under thirteen years of age, the prosecution must prove beyond a reasonable doubt that the defendant intentionally touched the victim’s breast or the clothing covering that area, that this was done for sexual purposes or could reasonably be construed as having been done for sexual purposes, and that the victim was less than thirteen years old at the time of the alleged act. CJI2d 20.2; CJI2d 20.3. Here, the testimony of the victim, Torongeau, and McClellan, coupled with defendant’s confession, constituted sufficient evidence from which the jury could find beyond a reasonable doubt that defendant touched the clothing covering the victim’s breast, that this was done or could reasonably be construed as having been done for sexual purposes, and that the victim was under thirteen years of age at the time of the incident.

Defendant argues that “a simple ‘he said/she said’ should not satisfy the burden of proof required.” However, “[j]uries, not appellate courts, see and hear witnesses and are in a much better position to decide the weight and credibility to be given to their testimony.” *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992), quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). Further, “the jury is the sole judge of the facts,” and its function is to “listen to testimony, weigh the evidence and decide questions of fact.” *Wolfe, supra* at 514-515, quoting *Palmer, supra* at 375-376. Here, the jury chose to believe the victim’s account of the incident instead of defendant’s version of events. We leave questions of credibility to the trier of fact, and will not resolve them anew on appeal. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). Viewing the evidence in the light most favorable to the prosecution, we conclude that sufficient evidence was presented to support defendant’s conviction of second-degree criminal sexual conduct, and defendant is not entitled to relief on this issue.

Defendant next argues that the prosecutor engaged in misconduct by implying that defendant took a polygraph examination through her questioning of defendant’s expert witness. We review de novo claims of prosecutorial misconduct to determine whether defendant was

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

² *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000).

denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, we review the trial court’s ruling on defendant’s objection to the allegedly improper conduct for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Issues of prosecutorial misconduct are decided on a case-by-case basis, by examining the record and evaluating the remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). “Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial.” *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

Throughout trial, defense counsel attempted to manipulate the rule that reference to a polygraph examination is inadmissible by arguing that because the second interview, i.e., the polygraph examination, was not recorded, defendant’s confession was coerced. Defense counsel urged the jury to view defendant’s confession as suspect because it had not been recorded, and called into question the interview techniques employed by Torongeau and McClellan. Dr. Michael Abramsky, defendant’s expert witness in forensic and clinical psychology, testified that defendant suffers from anxiety and affirmed that defendant would “be the type of person that would be more likely to be able to be pressured into—confessing to something.” Abramsky insinuated that defendant’s confession was false, and implied that it was likely coerced because there was no recorded evidence to the contrary.

On cross-examination, the prosecutor questioned Abramsky concerning whether he knew the reason why the interview had not been recorded. Additionally, the prosecutor challenged Abramsky’s refusal to consider the reports summarizing the interview when making a determination concerning the veracity of defendant’s confession. Defense counsel objected to the prosecutor’s line of questioning, and argued that it was designed to bring into evidence the fact that defendant had failed the polygraph examination. The trial court overruled defense counsel’s objection, noting that it had already ruled that the polygraph evidence was inadmissible and stating that “[s]he hasn’t asked the question. She[] has a right to indicate why [defendant] came to the second interview without asking the question whether or not that affects his judgment.”

Taking the prosecutor’s comments as a whole and evaluating them in light of defense counsel’s arguments and the relationship they bear to the evidence at trial, we find that the questions the prosecutor posed to Abramsky did not constitute misconduct. *Rodriguez, supra* at 30. The trial court correctly noted that the prosecutor had not elicited information concerning the polygraph examination, *Pfaffle, supra* at 288, and the line of questioning at issue did not deprive defendant of a fair and impartial trial. *Ackerman, supra* at 448.³

³ Because we find that the prosecutor’s comments were not improper, we need not consider the prosecutor’s argument that the doctrine of invited response is applicable here to determine whether the prosecutor’s allegedly improper remarks require reversal of defendant’s conviction. *People v Jones*, 468 Mich 345, 352-353; 662 NW2d 376 (2003). However, we note that the questions posed by the prosecutor in this case more accurately fall within the analytical framework of the doctrine of fair response, where “[t]he nature and type of comment allowed is dictated by the defense asserted.” *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995).

(continued...)

Defendant next argues that he was denied the effective assistance of counsel at trial. Because defendant failed to move for a new trial or for a *Ginther*⁴ hearing, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

“Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). “In order to overcome this presumption, defendant must first show that counsel’s performance was deficient as measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms.” *Id.* “Second, defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial such that there is a reasonable probability that but for counsel’s unprofessional errors the trial outcome would have been different.” *Id.* at 663-664. “The defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy,” and “this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel’s competence with the benefit of hindsight.” *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

We note initially that we are not persuaded by the prosecution’s argument that defendant is not entitled to relief because defense counsel was retained. The standards regarding ineffective assistance of counsel apply equally to retained as well as appointed counsel. *People v Hamacher*, 432 Mich 157, 170 n 2; 438 NW2d 43 (1989) (Levin, J., separate opinion), citing *Cuyler v Sullivan*, 446 US 335, 344-345; 100 S Ct 1708; 64 L Ed 2d 333 (1980).

Defendant first argues that his trial counsel was ineffective because the prosecutor made, and the trial court sustained, several objections during the course of voir dire, opening statement, and closing argument. Defendant’s assertion lacks merit. The record reveals that during voir dire, defense counsel was merely attempting to ascertain which potential jurors were most sympathetic to defendant’s case. During opening statement, defense counsel made comments more appropriately reserved for closing argument. The trial court issued a cautionary instruction that the lawyers’ remarks are not evidence and that the jury should decide the case only on the basis of properly admitted evidence. Further, the trial court again instructed the jury on this point before it began deliberating. And it is presumed that jurors follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). During closing argument, defense counsel vehemently tried to persuade the jury that defendant’s confession had been coerced. That defense counsel’s trial strategy to zealously advocate his client’s defense did not work does not render its use ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Defendant has not overcome the strong presumption that counsel’s performance constituted sound trial strategy. *Matuszak, supra* at 58. Further, defendant has not demonstrated

(...continued)

As our Supreme Court stated, “[w]hen a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant’s theory or evidence.” *Id.* “Under the doctrine of fair response, there is no error because a party is entitled to fairly respond to issues raised by the other party.” *Jones, supra* at 352 n 6. As noted above, the prosecutor was entitled to, and did, fairly respond to issues raised by defendant at trial.

⁴ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

a reasonable probability that but for counsel's allegedly objectionable comments, the outcome of the trial would have been different. *Id.* at 57-58.

Defendant next argues that his trial counsel was ineffective for failing to timely file a third amended witness list, resulting in the exclusion of certain witnesses. We note that defendant has given only cursory treatment to this argument in his brief on appeal. And “[a]n appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority.” *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Such cursory treatment constitutes abandonment of the issue. *Matuszak, supra* at 59. Further, we note that defendant mischaracterizes defense counsel's actions: the third amended witness list was technically timely filed fourteen days before trial, as required by the pretrial order. However, at trial, the prosecutor moved to limit defendant to his original witness list. The trial court ruled that because the trial had been twice adjourned on defendant's motion, he was not entitled to benefit from the delay by amending his witness list before each subsequent trial date. The trial court ruled that because defendant was unable to show prejudice, he was limited to his first amended witness list, which had been timely filed before the initial trial date. In any event, the third amended witness list merely included additional relatives of defendant who would have provided cumulative character testimony. Defendant has not demonstrated that defense counsel's performance was deficient—indeed, defense counsel successfully moved for an adjournment to defendant's benefit on two separate occasions, even though a consequence was that the trial court declined to allow defendant to doubly benefit by utilizing the delay to ascertain additional witnesses. *Solomonson, supra* at 663. Additionally, defendant has not demonstrated a reasonable probability that had the additional witness been allowed to testify, the outcome of the trial would have been different. *Matuszak, supra* at 57-58.

Defendant next argues that his trial counsel was ineffective for failing to include the couch where the alleged sexual assault occurred on the exhibit list, precluding its admission into evidence at trial. Again, defendant's cursory treatment of this argument constitutes abandonment of the issue. *Id.* at 59. In any event, a photograph of the couch was admitted into evidence, and defendant has not demonstrated a reasonable probability that, had the jury been able to view the actual couch instead of a photograph of the couch, the outcome of the trial would have been different. *Id.* at 57-58.

Defendant next argues that his trial counsel was ineffective for opening the door to allow the prosecutor to question witnesses concerning an allegedly prior bad act⁵ between the victim and defendant. We disagree. On cross-examination of the victim, defense counsel elicited testimony that defendant had never sexually assaulted her before the incident in the instant case, even when she lived in the same house as defendant. This testimony was presumably intended to preface Dr. Abramsky's testimony that child sexual assault offenses are generally not isolated incidents, but rather are continual acts that escalate over time. By eliciting this testimony, defense counsel bolstered the theory that the victim was simply mistaken about the nature of the incident in this case, and that the touching was accidental.

⁵ MRE 404(b).

The prosecutor then questioned the victim regarding whether there were any other instances where she had been sexually assaulted by defendant—specifically, an incident the victim mentioned before trial where defendant allegedly put his penis near her face. However, at trial, the victim adamantly maintained that nothing improper had occurred, that defendant had just tried to tickle her, that he never touched her, and that she only tried to move away from him because she did not like people tickling or touching her. Additionally, the victim’s mother testified that she could not recall the victim ever telling her that anything inappropriate had occurred involving such an incident. Further, defense counsel elicited testimony from Deputy McClellan that she did not investigate such an incident. Defense counsel argued that he was attempting to establish a pattern of fabrication, wherein the victim would invent an instance of sexual assault that in reality had not occurred.

Defendant has not demonstrated that defense counsel’s performance was deficient—indeed, defense counsel elicited testimony from the victim that defendant had never sexually assaulted her prior to the incident in the instant case, which opened the door to the prosecutor eliciting testimony that supported defendant’s theory of the case, i.e., that the touching was accidental. Further, defendant has not demonstrated a reasonable probability that had the evidence concerning the alleged instance of misconduct not been admitted, the outcome of the trial would have been different. Defendant’s claims of ineffective assistance of counsel are without merit, and defendant is not entitled to relief on this unreserved issue.

Defendant next argues that the trial court erred in scoring ten points for offense variables 4 (OV-4) and 19 (OV-19) when calculating the legislative sentencing guidelines for second-degree criminal sexual conduct. However, because defendant has already served his minimum sentence, this Court is unable to provide a remedy for the alleged error. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). Therefore, the issue is moot and need not be addressed. *Id.*

We affirm.

/s/ Patrick M. Meter
/s/ Richard A. Bandstra
/s/ Stephen L. Borrello