

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER DARNELL MOORE,

Defendant-Appellant.

UNPUBLISHED

October 18, 2005

No. 256302

Wayne Circuit Court

LC No. 04-002106-01

Before: Owens, PJ, and Fitzgerald and Schuette, JJ

PER CURIAM.

Defendant was convicted of seven counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), seven counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a), two counts of disseminating sexually explicit matter to minors, MCL 722.675, and third-degree home invasion, MCL 750.110a(4). He was sentenced to concurrent terms of 168 months to 50 years in prison on each of his seven first-degree criminal sexual conduct convictions, ten to fifteen years in prison on each of his seven second-degree criminal sexual conduct convictions, one to two years in prison on each of his two disseminating sexually explicit matter to minors convictions, and three to five years in prison for his third-degree home invasion conviction. He appeals as of right. We affirm.

Defendant first argues that he was denied due process of law and a fair trial through misconduct of the prosecutor. We disagree.

Defendant properly preserved his claims that he was denied a fair trial when the prosecutor asked the victims leading questions. However, defendant failed to preserve any of his other prosecutorial misconduct claims. Preserved claims of prosecutorial misconduct are evaluated on a case-by-case basis to determine whether the defendant was denied a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597 NW2d 843 (1999). Unpreserved claims of prosecutorial misconduct are reviewed for plain error that affected the defendant's substantial rights. Reversal is merited only if plain error caused the conviction of an innocent defendant or “seriously affected the fairness, integrity, or public reputation of judicial proceedings” regardless of the defendant's innocence. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004), quoting *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). Moreover, this Court reviews a trial court’s decision to allow leading questions for an abuse of discretion. *In re Susser Estate*, 254 Mich App 232, 239; 657 NW2d 147 (2002); *People v Fields*, 49 Mich App 652, 658; 212 NW2d 612 (1973); MCL 768.24.

A prosecutor may be given a considerable amount of leeway when questioning a child witness. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001); MRE 611(c)(1). To merit reversal, the defendant must demonstrate prejudice or a pattern of eliciting inadmissible testimony. *Id.* In the instant case, we find that the prosecutor's leading questions never suggested an answer but, rather, were used to get the witnesses back on track and to recollect previous statements the witnesses had made. Given the young ages of the witnesses, the events that had happened to them, and their expressed fear in testifying, we conclude that the trial court did not abuse its discretion when it allowed the prosecutor to ask leading questions to elicit proper testimony. *Watson, supra*, p 587.

In regard to defendant's unpreserved argument that the prosecutor committed misconduct when he stated that the family court placed the children with their natural father, we conclude that this argument fails. A prosecutor is prohibited from arguing facts not in evidence or mischaracterizing the evidence presented, but he may argue reasonable inferences from the evidence. *Watson, supra*, p 588. In this instance, the prosecutor was not arguing facts not in evidence. The victims and the mother of two of the victims all testified that the two victims now live with their natural father. Thus, the prosecutor merely argued reasonable inferences from the evidence. *Watson, supra*, p 588. In regard to defendant's unpreserved argument that the prosecutor committed misconduct during his closing argument when he made it sound like defendant penetrated one of the victims' vagina, we conclude that this argument fails. Testimony suggested that defendant penetrated her vagina and, thus, it was not improper for the prosecutor to imply that defendant did so.

In regard to defendant's unpreserved argument that the prosecutor committed misconduct when he stated, "somebody just said they really don't like going by their dad's all the time," we conclude that this argument fails. The record does not support the prosecutor's statement and, in fact, the record establishes that the one victim liked living with his dad and the other victim wanted her mom and dad to get back together. However, given the abundance of testimony that supported defendant's convictions, and the fact that the trial judge instructed the jury that the prosecutor's comments were not to be considered as evidence, we conclude that the comment did not deny defendant his right to a fair and impartial trial, let alone did it amount to plain error that affected his substantial rights.

In regard to defendant's remaining prosecutorial misconduct arguments on appeal, we conclude that they need not be addressed. A defendant may not merely announce a position and expect this Court to discern and rationalize the grounds for his claims, nor may he give an issue cursory treatment with little citation of supporting authority. *Watson, supra*, p 587. Defendant's failure to cite any supporting legal authority constitutes an abandonment of his remaining prosecutorial misconduct claims. *Id.*

Defendant next argues that he was denied his constitutional right to the effective assistance of counsel when defense counsel failed to challenge the various alleged instances of prosecutorial misconduct. We disagree.

Defendant failed to properly preserve this issue for appeal. When a defendant fails to preserve a claim of ineffective assistance of counsel by moving for a new trial or an evidentiary hearing, this Court's review is limited to the facts contained in the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002); *People v Wilson*, 242 Mich App 350, 352; 619

NW2d 413 (2000). This Court reviews the trial court's findings of fact for clear error and constitutional questions de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, and (2) that it is reasonably probable that the result of the proceedings would have been different had it not been for counsel's error. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must prevail over the strong presumption that his counsel's actions were sound trial strategy under the circumstances. *Id.*, p 302. Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel is not ineffective by failing to raise futile objections. *Ackerman, supra*, p 455. As discussed, the alleged instances of prosecutorial misconduct did not amount to misconduct. Therefore, any objections to the alleged instances of prosecutorial misconduct would have been futile. Thus, defendant was not denied his right to the effective assistance of counsel when defense counsel failed to object. *Ackerman, supra*, p 455.

Defendant next argues that the trial court erred when it admitted the mother's testimony relating what her son told her about defendant abusing him and his sister. We disagree.

This Court reviews a trial court's decision to admit evidence under a hearsay exception for an abuse of discretion. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004). An abuse of discretion occurs when an unprejudiced person would not find that the ruling was justified. *Id.*, p 632. When the decision involves a close evidentiary question, it does not amount to an abuse of discretion. *Id.*

Hearsay is defined as a statement, other than one made by a declarant while testifying at a trial or hearing, which is offered as proof of the truth of the matter asserted. MRE 801(c). Hearsay generally may not be admitted as substantive evidence unless it is offered under one of the exceptions to the hearsay rule. *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). MRE 803A, which codified the Michigan common-law tender years hearsay exception, provides that a statement describing a sexual act performed with or on the declarant by the defendant may be admitted to corroborate the declarant's testimony at the same proceeding if: (1) the declarant was less than ten years of age when the statement was made; (2) the statement was spontaneous and without indication of fabrication; (3) either the statement was made immediately after the incident or the delay was excusable as the result of fear or other equally effective circumstances; and (4) the statement is introduced through the testimony of somebody other than the declarant. *People v Dunham*, 220 Mich App 268, 271-272; 559 NW2d 360 (1996); MRE 803A. An eight or nine-month delay between an incident of sexual abuse and a child reporting the incident, which is based on a child's well-grounded fear of a defendant, is an excusable delay for purposes of MRE 803A. *Id.*, p 272.

Here, the victim's out-of-court statement described sexual acts performed on him by defendant and corroborated the testimony he gave at the same proceeding. He was under the age of ten when the statement was made, and the statement was introduced by his mother (someone other than the declarant). Furthermore, despite defendant's arguments to the contrary, we conclude that the trial court did not abuse its discretion when it found that the statement was

spontaneous and made without indication of fabrication and that the victim's delay in making the statement was excusable as a result of fear of defendant.

Here, the victim's mother asked him if defendant had ever touched him in a place where he should not have touched him. He responded in great detail about what defendant had done to him without further prompting from his mother. Furthermore, his mother's question did not suggest an answer. Therefore, we conclude that the trial court did not abuse its discretion when it found that the victim's statement was spontaneous and made without manufacture. Given the victim's young age, defendant's position of authority over him, the nature of what defendant was doing to him, defendant's threats that he would spank him if he told his mother,¹ and the fact that his older sister told him that she thought he should not say anything to anyone, we conclude that the trial court did not abuse its discretion when it found that the victim's delay in making the statement was excusable as a result of fear. *Dunham, supra*, p 272. Therefore, we hold that the trial court did not abuse its discretion when it admitted the contested statement under MRE 803A. *Geno, supra*, pp 631-632; *Dunham, supra*, pp 271-272.

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette

¹ It should be noted that the victim testified he did not believe defendant's threats.