

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD RAMIE DUNN,

Defendant-Appellant.

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UNPUBLISHED

November 28, 2006

No. 261218

St. Clair Circuit Court

LC No. 04-002045-FC

Before: Cooper, P.J., and Hoekstra and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of three counts of first degree criminal sexual conduct (CSC I), MCL 750.520b (multiple variables), one count of second degree criminal sexual conduct (CSC II), MCL 750.520c (multiple variables), and one count of furnishing obscene material to a minor, MCL 750.142. Defendant was sentenced to concurrent prison terms of 14 to 40 years for each count of CSC I, 10 to 15 years for CSC II, and 90 days for furnishing obscene material to a minor. We affirm.

In April of 2004, in a session with a licensed psychologist in private practice, defendant's stepdaughter alleged that defendant had molested her. The child's mother, Lorna Dunn, was present during this counseling session. The psychologist filed the required report with the Family Independence Agency, an investigation ensued, and this trial followed. At trial, the complainant testified that this misconduct began when she was six years old and continued until she was thirteen years old. She testified that defendant, during the earliest episodes, asked her to touch his penis, and then moved on to inducing her to perform fellatio on him, performing cunnilingus on her and digitally penetrating her, and touching her breasts with both his hands and mouth. She also stated that he showed her pornographic materials to instruct her in engaging in these sexual acts.

It is noteworthy that the complainant recanted her story three times throughout these proceedings: once just before the Preliminary Exam, once at the beginning of her trial testimony, and once after trial. Each time, however, the complainant recanted the recantation, explaining that she was concerned about the effect of prosecution and conviction on her mother and her stepbrother. As the trial judge stated during the post-trial hearing on defendant's motion for a new trial:

The jury had the benefit of factoring in the hesitancy and her problems and equivocation. To the degree that she did, she did that in open court and the jury had the opportunity of, of weighing that and looking at that when they weighed the believability and the credibility of, of the victim in the trial itself and to factor that in.

We agree with the trial court and add that the jury's weighing of all the factors before it in drawing conclusions about this matter is critical to our analysis.

We note before beginning our analysis that defendant characterizes the trial as a credibility contest throughout its brief on appeal. We agree that this sort of case may well turn if not solely, at least primarily, on the jury's reaction to the testimony of the apparent victim and the alleged perpetrator. Because we have only the written record of the proceedings below, we are not as well positioned as the jury, or the judge in a bench trial, to assess the subtleties beneath the verbatim text of the trial. We must therefore rely heavily on the jury's assessment of the credibility of complainant, defendant, and any other witnesses. Because the jury speaks only through its verdict, we will not lightly overturn a jury verdict.

#### I. Prosecutorial Misconduct

Defendant first argues that the prosecutor's repeated misconduct denied him a fair trial. "We review de novo claims of prosecutorial misconduct to determine whether defendant was denied a fair and impartial trial." *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003) Where, as here, defendant failed to object to the challenged conduct below, we review claims of prosecutorial misconduct for plain error affecting substantial rights. *Id.* "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence. Thus, where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal." *Id.* at 448-449.

We consider claims of prosecutorial misconduct on a "case by case" basis, examining the prosecutor's remarks in context. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). In this case we find that the prosecutor's conduct was improper, but we do not find that in context it rises to the level of reversible error.

Defendant first complains of the prosecutor's references in opening and closing remarks to statements allegedly made by the complainant's mother, Ms. Dunn, and stepbrother, Matthew. The prosecutor stated in her opening: "I don't know what they're going to tell you, but I suspect you're going to hear about what they told Deputy Baysinger when they were first interviewed in relationship to this case." The prosecutor detailed relevant statements allegedly made by Ms. Dunn in the interview with Baysinger, and then said:

That's what she told Deputy Baysinger at the time of the investigation. I don't know what she's going to say here, but I would suggest to you when you assess her credibility, when you assess her prior statement, when you look at these facts, it's going to corroborate what [complainant] tells you.

The prosecutor then summarized statements allegedly made by Matthew to Baysinger, again noting that those statements would corroborate the complainant's testimony, and again stating that she did not know what the witness would say on the stand. However, Baysinger testified that she had provided to the prosecutor a written statement received from Ms. Dunn, which differed in some details from Baysinger's report of the interview with that witness. Similarly, Matthew prepared a written statement that differed significantly in detail from Baysinger's report of the interview.

Defendant argues that the prosecutor suggested the hearsay statements could be used as substantive evidence to corroborate complainant's testimony, despite the fact that the only permissible use for a witness' prior inconsistent statement is to impeach the credibility of a witness. Defendant is correct that a witness' prior inconsistent statements may not be used as substantive evidence unless they were recorded as sworn testimony. *People v Lyles*, 148 Mich App 583, 589-590; 385 NW2d 676 (1986). However, because defense counsel failed to object, the question before us is whether the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness of the trial.

First, as to Ms. Dunn's prior statement and trial testimony, we find that the disparity is so slight as to be harmless. Baysinger's report indicated that Ms. Dunn had described an incident where she found her daughter and defendant in the tractor-trailer outside the house between one and two o'clock in the morning. Ms. Dunn's statement and trial testimony concurred on the critical points that the lights were off in the truck, and that the door was locked. The only difference is that at trial, Ms. Dunn denied she had told Baysinger that defendant had said he and his stepdaughter were sleeping in the truck, and testified that defendant had actually told her they were looking for a book. Irrespective of what defendant said, either version of Ms. Dunn's statement puts defendant and his stepdaughter in the dark, locked truck alone in the middle of the night. In context, we cannot say that the prosecutor's indication that the jury might consider Ms. Dunn's prior statement as substantive evidence denied this defendant a fair trial, given that the prior statement and her trial testimony aligned but for the one detail.

As to Matthew's prior statement and trial testimony, the issue is more complicated. It is well settled that evidence of a witness' prior inconsistent statement may be admitted to impeach that witness. *People v Kilbourn*, 454 Mich. 677, 683; 563 NW2d 669 (1997). However, "a witness who testifies that he does not remember the occurrence of a specific event may not be impeached by testimony that that event occurred." *People v Harrell*, 54 Mich App 554, 562; 221 NW2d 411 (1974) (citing *People v Durkee*, 369 Mich 618; 120 NW2d 729 (1963)). In this case, Matthew repeatedly said at trial that he did not remember telling Baysinger most of the details of incidents that Baysinger recorded in her report of her interview with Matthew. Matthew also stated in answer to one question that he was not sure he had made the statements and that he was not sure the incidents described had actually taken place. The prosecutor referred Matthew to his prior statement, and when he said he could not read well, the prosecutor read portions of the statement to him outside the hearing of the jury to refresh his recollection. Once Matthew said that he still did not recall making the statements or whether the incidents occurred, all of the prosecutor's questions that included the details in the prior statement became improper. Again, however, because defense counsel did not object to the prosecutor's conduct, the question before us is not whether error was committed, but whether the error resulted in the conviction of an actually innocent defendant or seriously affected the fairness of the trial.

In the ordinary course, a proper jury instruction might be expected to cure this error. *Ackerman, supra.* at 448-449. Here the judge's instruction to the jury included this caution:

Many things are not evidence, and you must be careful not to consider them as such. I'll now describe some of the things that are not evidence. . . .

The lawyers' statements and arguments are not evidence. They're only meant to help you understand the evidence and each side's legal theories. The lawyers' questions to witnesses are also not evidence. And you should consider these questions only as they give meaning to the witnesses' answers. And you should only accept things the lawyers say that are supported by the evidence and by your own common sense and general knowledge.

During defense counsel's closing argument, in response to an objection by the prosecutor about defense counsel's inaccurate characterization of part of the complainant's testimony, the trial judge added:

Well, I'm just going to caution the jury that remember, what a lawyer – as I said earlier, what lawyers say isn't evidence. The evidence is the sworn testimony and evidence that came in during the trial and its up to you through your collective memories to determine what that was.

However, to cure the error of improper use of prior inconsistent statements, the trial judge should have used standard jury instruction CJI2d 4.5.

The judge's instructions included this statement, which corresponds with the beginning of CJI2d 4.5: "Evidence has been offered that one or more witnesses in this case previously made statements inconsistent with the testimony — or their testimony at the trial. You may consider such earlier statements in deciding whether the testimony at trial was truthful." However, CJI2d 4.5 also states:

You must be very careful about how you consider this evidence. The statement was not made during this trial, so you must not consider it when you decide whether the elements of the crime have been proven. . . .

Then remember that you may only use [the statement] to help you decide whether you believe the witness's testimony here in court.

The two salient points in this portion of the standard instruction, that prior inconsistent statements may not be considered as substantive evidence, and that they are strictly limited to use in determining whether trial testimony was credible, are absent from the instructions given here.

In ordinary circumstances, this failure to give the proper instruction might rise to the level of reversible error. However, this case is extraordinary in that defense counsel stipulated to the admission into evidence of the very police report that includes the prior inconsistent statements the substantive use of which is now challenged on appeal. Given that the police report had been admitted, the trial judge was essentially precluded from instructing the jury that it may not consider the substance of the prior inconsistent statements. Limited to this peculiar

situation, we cannot find reversible error in the trial judge's failure to cure the error inherent in the prosecutor's improper questioning of Matthew about his prior statement.

Defendant next argues that the prosecutor committed misconduct by reading from Matthew's statement to Baysinger during closing arguments, specifically reading statements that Matthew had testified he did not recall making. Before reading from the report, the prosecutor told the jury they could consider what Matthew told Baysinger because Baysinger's report was admitted into evidence. Police reports that are adversarial to the defendant are not admissible as evidence under MRE 803(8), nor as business records under MRE 803(6), because records prepared in anticipation of litigation lack the inherent trustworthiness of records kept in the ordinary course of business. *People v McDaniel*, 469 Mich 409, 413-414; 670 NW2d 659 (2003). However, in this case, as noted above, the court did not rule on whether the police report was admissible. Instead, defense counsel stipulated to the admission. Because admission was by agreement of the parties rather than by an evidentiary ruling of the trial court, there is no evidentiary ruling for us to review.

As to the prosecutor's use of that evidence in closing argument, "[t]he general rule in Michigan is that a defendant's failure to object to allegedly improper remarks made by the prosecutor during closing argument precludes appellate review unless it can be said that an objection and the appropriate curative instruction could not have eliminated the prejudice arising from the prosecutor's statements." *People v Scott*, 65 Mich App 657, 659; 237 NW2d 602 (1975). Here defense counsel did not object, and we find that an instruction to the jury that Matthew's prior statement could be considered as impeachment evidence only, and not substantive evidence, could have eliminated any prejudice.

Defendant next argues the prosecutor engaged in misconduct by suggesting that defendant had a motive to lie because he had "something to lose." This argument is without merit. "A prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief." *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

We also reject defendant's argument that the cumulative impact of the alleged errors denied him a fair trial. The prosecutor's comments with respect to Ms. Dunn's conflicting statements before and during trial were not error because the disparity was not in the damaging details. The similar comments with respect to the differences in Matthew's prior statement and trial testimony were improper, but could have been cured by proper jury instruction but for the admission of the police report into evidence. The admission of the police report was by stipulation of the parties so, although odd, it was not evidentiary error on the part of the trial judge or misconduct by the prosecutor. Even taken altogether, we find there was no cumulative effect undermining defendant's due process rights.

## II. Ineffective Assistance of Counsel

Defendant next argues that his trial counsel afforded him ineffective assistance. We disagree. Defendant failed to preserve his claim of ineffective assistance by seeking an evidentiary hearing below. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Accordingly, our review of this unpreserved claim "is limited to mistakes that are apparent on the record." *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005).

Counsel is presumed effective, and a defendant seeking to demonstrate the constitutional ineffectiveness of counsel bears a “heavy burden.” *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). To establish ineffective assistance of counsel, a defendant must satisfy a two-pronged inquiry. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, a defendant must show that his attorney’s performance fell below an objective standard of reasonableness under the circumstances and according to professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 312-313; 521 NW2d 797 (1994). In doing so, a defendant must overcome the presumption that trial counsel’s performance constituted sound trial strategy. *Strickland, supra* at 690-691. Second, the defendant must show that this performance so prejudiced him that he was deprived of a fair trial. *Id.* at 687-688; *Pickens, supra* at 309. To establish prejudice, a defendant must show a reasonable probability that the outcome would have been different but for counsel’s errors. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

Defendant first argues that his trial counsel was ineffective for failing to object to the prosecutor’s alleged misconduct outlined above. While it may be true that it would have been sound trial strategy to object to the prosecutor’s improper opening comments about the potential disparity between Ms. Dunn’s and Matthew’s statements to Baysinger and the testimony they would give at trial, that does not necessarily mean failure to object was not a reasonable strategy. Given the harmlessness of the disparity between Ms. Dunn’s prior statement and trial testimony, and the judge’s instruction that the attorneys’ comments and questions could not be considered as evidence, we cannot find that counsel’s actions so prejudiced defendant that he was deprived of a fair trial; defendant has not established that but for these errors, there is a reasonable probability that the jury would have believed his story rather than his stepdaughter’s.

Defendant also claims that counsel was ineffective for failing to object to the admission of the police report, the hearsay evidence underlying the claims of prosecutorial misconduct. The failure to object to inadmissible evidence may support a claim of ineffective assistance of counsel. Cf. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000). But the failure to do so may also constitute reasonable trial strategy, which we do not second-guess with the benefit of hindsight. See *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Here defense counsel explained the strategy on the record, and therefore per *Matuszak, supra*, we are precluded from second guessing its viability. During closing argument, defense counsel noted that she specifically stipulated to the introduction of Baysinger’s police report and the statements written by Ms. Dunn and Matthew because she wanted the jury “to be able to look at these statements, side by side” in order to focus their attention on the inconsistencies, highlighting that the specific details in the police report that would have corroborated the complainant’s story were notably absent from the witnesses’ written statements. Counsel also noted that Baysinger had failed to provide Ms. Dunn or Matthew with copies of the reports prepared after the interview with each witness. Counsel suggested it would have been “common sense” to “do some follow-up” with the witnesses, for “correcting, or, or making sure everyone’s on the same page,” creating the implication that the inconsistencies in the witnesses’ stories were the fault of the police or prosecutor. Although unusual, we cannot say that this strategy was unsound. That the strategy “ultimately failed does not constitute ineffective assistance of counsel.” *People v Kevorkian*, 248 Mich App 373, 415; 639 NW2d 291 (2001). Defendant has

failed to overcome the presumption that trial counsel's performance constituted sound trial strategy. *Strickland, supra* at 690-691.

Defendant argues that his trial counsel was further ineffective for failing to object to the trial court's allegedly erroneous jury instruction on prior statements made by a witness. We disagree. Defendant misquotes the trial court's instruction by altering the sentence and paragraph structure. Defendant states in its brief that the trial court instructed the jury that:

Evidence has been offered that one or more witnesses in this case previously made statements inconsistent with the testimony — or their testimony at the trial. You may consider such earlier statements in deciding whether the testimony at trial was truthful and in determining the facts of the case.

The court's actual instruction was substantively different:

Evidence has been offered that one or more witnesses in this case previously made statements inconsistent with the testimony — or their testimony at the trial. You may consider such earlier statements in deciding whether the testimony at trial was truthful.

And in determining the facts of the case you should not decide this case based on which side presented more witnesses. Instead, you should think about each witness and each piece of evidence and whether you believe them. Then you must decide whether the testimony and evidence that you believe proves beyond a reasonable doubt that the Defendant is guilty.

As we noted above, the trial court did not give the entire applicable standard jury instruction, but that is not the error defendant claims on appeal. We conclude that the record does not support a claim of error because the court did not in fact give the instruction to which defendant objects.

Defendant next argues that his trial counsel was ineffective for failing to object to the trial court's jury instruction as to the elements of counts I through III (CSC I). He argues that the court's instruction effectively directed the jury to convict him on the CSC I counts if it determined he committed acts sufficient for a conviction under any one of the three counts. This argument is without merit because defendant has failed to establish a reasonable probability that the outcome would have been different but for the error. *Toma, supra* at 302-303.

Having reviewed the evidence presented at trial, we conclude that the jury's conviction of defendant as to all three counts of CSC I was based fundamentally on a credibility determination. The evidence directly supporting defendant's CSC I convictions came exclusively from the complainant, who testified that she repeatedly performed fellatio on defendant, and that he repeatedly performed cunnilingus on and digitally penetrated her. Defendant denied having engaged in any inappropriate activity concerning or involving the complainant. The remainder of the evidence proffered by the prosecutor concerned specific instances of conduct circumstantially tending to corroborate the complainant's testimony. Clearly, the jury considered the complainant credible and defendant not credible. There is neither record evidence nor rational reason to suggest that the jury would have believed the complainant as to some of her testimony but not the whole of it. *Mack, supra* at 125 (limiting review of unpreserved

ineffective assistance claims to mistakes apparent on the record). It follows that had the court's instruction been clarified, as defendant urges it should have been, the result would have been the same. The evidence was otherwise sufficient to support the three counts of CSC I. Coupled with the clarity of the verdict form, and the court's explicit instruction to the jury that it consider and find each CSC count separately, we find no reasonable probability that defendant's claim of error was outcome determinative. *Toma, supra* at 302-303.<sup>1</sup>

### III. Evidentiary Error/Due Process Violation

Defendant next argues that he was denied due process by the investigating officer's destruction of an original diagram, drawn by a witness, as a photocopy admitted into evidence was allegedly altered from the original. We disagree. Because defendant failed to preserve this issue by raising it below, we review for plain error affecting substantial rights. *People v Carines*, 460 Mich. 750, 764; 597 N.W.2d 130 (1999).

The Due Process Clause of the Federal Constitution guarantees certain access to evidence in the context of a criminal prosecution. See *Arizona v Youngblood*, 488 US 51, 55; 109 S Ct 333; 102 L Ed 2d 281 (1988); *People v Cress*, 466 Mich 883; 646 NW2d 469 (2002). In the context of state action involving improper handling of potentially exculpatory evidence, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Youngblood, supra* at 58. The existence of bad faith turns "'on the [government actor's] knowledge of the exculpatory value of the evidence at the time it was lost or destroyed.'" *United States v Wright*, 260 F3d 568, 571 (CA 6, 2001) (citation omitted and alteration in original). "To establish bad faith, then, a defendant must prove 'official animus' or a 'conscious effort to suppress exculpatory evidence.'" *United States v Jobson*, 102 F3d 214, 218 (CA 6, 1996).

Defendant has failed to demonstrate bad faith in the investigating officer's actions. That the officer discarded the original diagram does not demonstrate "'official animus'" or "'a conscious effort to suppress exculpatory evidence,'" *id.*, particularly given that she photocopied the original and this copy was admitted as a trial exhibit. The mere destruction of the original diagram coupled with the production of a photocopy is insufficient to establish bad faith. See *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1991) (noting the sufficiency of a summarized report in lieu of destroyed investigation notes, and that otherwise the defendant had failed "to make a showing of bad faith on the part of the police"). Defendant bears the burden of demonstrating error on appeal, *People v Pipes*, 475 Mich 267, 279; 715 NW2d 290 (2006), and he has here failed to demonstrate bad faith sufficient to establish a due process violation.

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<sup>1</sup> Defendant also argues that the court erroneously instructed the jury as to "penile" penetration. This argument is irrelevant. Because the complainant expressly denied that any penile penetration occurred, the court's instruction to that effect was merely superfluous. It is insufficient grounds upon which to predicate error. See *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995) ("Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights.").

#### IV. Sentencing Issue

Defendant argues finally that he was improperly assessed 15 points for OV 8, asporting the victim, based on the victim's allegation that one of the incidents occurred when defendant took her into his truck and locked the door. This Court in *People v Spanke*, 254 Mich App 642, 646-648; 658 NW2d 504 (2003), considered the undefined term asportation, the determinant in scoring OV 8, and found that it does not require the forcible movement of the victim, but merely requires the victim be moved to a location of greater danger. In that case, OV 8 was properly scored at 15 points because

The victims were moved, even if voluntarily, to defendant's home where the criminal acts occurred. The victims were without doubt asported to another place or situation of greater danger, because the crimes could not have occurred as they did without the movement of defendant and the victims to a location where they were secreted from observation by others. [*Spanke*, supra at 648.]

Defendant argues that because this fact was not specifically found beyond a reasonable doubt by a jury, he was sentenced in violation of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). This argument is without merit. Our Supreme Court has recently held that Michigan's sentencing scheme does not offend the Sixth Amendment under *Blakely* because maximum sentences under the sentencing scheme are statutorily established. *People v Drohan*, 475 Mich 140, 146-164; 715 NW2d 778 (2006). *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. *Id.*

Affirmed.

/s/ Jessica R. Cooper  
/s/ Joel P. Hoekstra  
/s/ Michael R. Smolenski