

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COLE BENJAMIN HOOKER,

Defendant-Appellant.

UNPUBLISHED

December 28, 2006

No. 263625

Grand Traverse Circuit Court

LC No. 04-009631-FC

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). Defendant was sentenced to serve concurrent prison terms of 210 to 420 months on the CSC I convictions and 120 to 180 months on the CSC II conviction. Defendant appeals as of right. We affirm.

I

Defendant first argues that he was denied his right to a fair trial due to prosecutorial misconduct. Specifically, defendant argues that the prosecutor made an improper burden-shifting argument, that she attempted to unfairly bolster the complainant's credibility through the testimony of the complainant's mother and counselor, and that she mischaracterized the testimony of one prosecution witness during closing arguments.

We review preserved claims of prosecutorial misconduct on a case-by-case basis to determine whether the defendant received a fair and impartial trial. *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). Unpreserved claims are reviewed for plain error affecting the defendant's substantial rights. *Id.* at 645. "The propriety of a prosecutor's remarks depends upon the facts of a case." *Id.*

A

Defendant challenges the following comments made during the prosecutor's opening statement:

[T]he judge is going to tell you that if [the complainant] testifies and you believe her testimony beyond a reasonable doubt, and her testimony satisfies those elements, that that's enough. That's sufficient evidence to find the Defendant guilty. So first of all, keep in mind that in order to find the Defendant not guilty you have to decide that you don't believe [the complainant].

Defendant complains that these comments were improper burden-shifting argument and that the prosecutor repeated this improper theme in closing and rebuttal argument. We find no plain error.

“Arguments regarding the weight and credibility of the witnesses and evidence presented by defendant do not shift the burden to the defendant to prove his innocence, but rather question the reliability of the testimony and evidence presented.” *People v Fields*, 450 Mich 94, 107; 538 NW2d 356 (1995). The prosecutor followed the cited remarks with an examination of how the complainant's story was supported by the evidence. By asking the jury to consider the credibility of the complainant, the prosecutor did not suggest or imply that the burden of proof was on defendant to prove the complainant had lied. Indeed, nothing in the prosecutor's statement implicitly suggested that the burden of proof was on defendant. Given that the complainant's testimony and defendant's testimony were directly contradictory, it is logical to state that in order to find defendant not guilty, the complainant has to be disbelieved. Accordingly, defendant's argument is without merit.

B

Defendant also claims that the prosecutor improperly attempted to bolster the credibility of the complainant through the testimony of her mother and her counselor. MRE 608(a)(2) provides that evidence of a witness's truthful character may be supported by opinion or reputation evidence “after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.” As plaintiff points out and the record indicates, defense counsel's strategy centered on trying to discredit the credibility of the complainant during her testimony. Thus, under MRE 608, the prosecutor's subsequent attempts to elicit testimony from the complainant's mother and counselor demonstrating the complainant's capacity for truthfulness were not improper.

C

Additionally, defendant argues that the prosecutor misrepresented the counselor's testimony during closing arguments. Plaintiff concedes that the cited comments by the prosecutor were unsubstantiated. See *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994) (“A prosecutor may not argue the effect of testimony that was not entered into evidence at

trial.”). However, the trial court was “deprived of an opportunity to cure the error,” *id.* at 687, by a contemporaneous objection. Moreover, the court instructed the jury that its verdict must be “based only on the evidence,” that “[t]he lawyers’ statements and arguments are not evidence,” and that the jury “should only accept things the lawyers say that are actually supported by the evidence” “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, defendant fails to establish plain error affecting substantial rights. *McLaughlin, supra* at 645.¹

II

Defendant also argues that he was denied the effective assistance of counsel due to his attorney’s failure to object to the admission of a videotape of the initial interview between defendant and the investigating officer. Defendant also contends that his counsel should have presented expert witness testimony to counter the testimony of the complainant’s counselor. We disagree. In order “to find that a defendant’s right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel’s performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

Trial counsel for defendant did not object to admission of the videotaped interview, nor did he request that a cautionary instruction be given to the jury. In the video, the investigating officer discusses the crime of which defendant was accused in only vague and general terms. Defendant does not confess on the video and spends much of the interview talking about his problems with alcohol abuse. It was not unreasonable for defense counsel to believe that the video could garner sympathy for defendant because of the officer’s disclosure of defendant’s alleged victimization as a child. We will not second-guess matters of trial strategy or use the benefit of hindsight when assessing counsel’s competence. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Similarly, defendant’s claim that defense counsel denied him a fair trial by failing to offer expert testimony to counter the testimony of the complainant’s counselor concerning behavior patterns and patterns of disclosure of victims of sexual abuse also fails. “[C]ounsel’s failure to call a particular witness is presumed to be trial strategy. This Court will not substitute its judgment for that of trial counsel in matters of trial strategy.” *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999) (citation omitted).

¹ Defendant’s “cumulative effect” argument is without merit. Only one error was identified, and it alone was not sufficient to warrant a new trial. *People v Bahoda*, 448 Mich 261, 292 n 64; 531 NW2d 659 (1995) (observing that “only actual errors are aggregated to determine their cumulative effect”). Similarly, defendant’s claim of ineffective assistance based on counsel’s failure to object to alleged prosecutorial misconduct fails.

III

Finally, we reject defendant's argument that the trial court abused its discretion in denying his motion for a new trial. Defendant's assertion that the evidence adduced did not support the verdict is based on his assertion that the complainant was not credible. Clearly, the jury found the complainant to be more credible than defendant. We defer to the jury's superior ability to assess witness credibility. *People v Stiller*, 242 Mich App 38, 42; 617 NW2d 697 (2000).² Defendant's assertion that a new trial should have been granted on the basis of newly discovered evidence is similarly unsubstantiated because defendant cannot show either that the evidence could not have been discovered using reasonable diligence during trial or that a different result is probable upon retrial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003). Finally, with respect to defendant's assertion that a new trial should have been granted due to defense counsel's failure to object to the admission of an unedited videotape of his police interview, we have already determined that counsel's strategy was a reasonable one. In any event, a party may not claim that an error requires reversal if the error is based on actions to which he contributed by plan or negligence. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003), disapproved in part on other grounds, 469 Mich 967 (2003).

Affirmed.

/s/ Stephen L. Borrello
/s/ Janet T. Neff

² As for the assertion that defendant was in jail on July 23, 2003, this assertion comes from the testimony of defendant's fiancée and is supported by documentary evidence. With respect to Count IV, however, the jury was charged with determining if defendant had committed CSC I in the "summer" of 2003. Thus, this argument has no merit.