

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON MILTON GALINEAU,

Defendant-Appellant.

UNPUBLISHED

August 23, 2007

No. 268492

Kent Circuit Court

LC No. 05-003442-FH

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct (CSC 2), MCL 750.520c(1)(b), and third-degree criminal sexual conduct (CSC 3), 750.520d(1)(a). Defendant was sentenced to 2 to 15 years in prison for the CSC 2 conviction, and 4 to 15 years in prison for the CSC 3 conviction. Defendant now appeals as of right, and we affirm.

Defendant argues that the admission of an expert witness's opinion testimony regarding the veracity of the victim violated his due process right to a fair trial. Defendant did not object to the challenged testimony below. Thus, we review this issue for outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, (1) an error must have occurred, (2) the error must have been plain, i.e., clear or obvious, and (3) the plain error must have affected substantial rights. *Id.* Even if a defendant establishes these requirements, we will reverse only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when the error seriously affected the fairness, integrity or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

Generally, it is improper for "a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Our Supreme Court has enunciated general principles regarding the testimony of expert witnesses¹ in child sexual abuse

¹ It does not appear that the caseworker in this case was ever actually qualified as an expert witness. Nonetheless, we see no reason not to apply these same rules.

cases: “(1) an expert may not testify that the sexual abuse occurred, (2) an expert may not vouch for the veracity of a victim, and (3) an expert may not testify whether the defendant is guilty.” *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). However,

(1) an expert may testify in the prosecution’s case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim’s credibility. [*Id.* at 352-353.]

In this case, the prosecution asked the caseworker about the victim’s demeanor, and the following exchange occurred:

Q. And could you describe for the jury what [the victim’s] demeanor was when you interviewed her at that time?

A. [The victim] was reluctant to come into the interview. She came into the office with a girlfriend, a peer. She wanted the peer to be in the room with her for support. She was very quiet, very soft spoken, her head down. She would play with her hair. She took a great deal of time when asked questions, to the point that at times we thought that she hadn’t heard the question or that she was not going to answer the question.

She appeared to be embarrassed, and by that, her color would rise in her neck, in her face, but she also appeared to be struggling to give her answers as truthfully as possible, in that there were times that she would be asked a question, she would answer it, and then think about it and say, “No, that’s not quite right,” and then correct herself.

Q. So just so I’m clear, when you say she was struggling to give truthful answers, it appeared that, not that she was having a problem separating truth, but she was just making an effort to be truthful? Is that how you’re trying to characterize it?

A. She was making an effort to be extremely truthful, yes.

* * *

Q. And in terms of being upset and not particularly wanting to speak to somebody at least initially, is that something that’s also consistent with other sexual victims that you’ve interviewed over the course of your career?

A. Absolutely. I would have been more suspicious if she would have been bubbly and wanted to talk about it.

While the prosecutor's initial inquiry may have sought a response concerning the victim's demeanor rather than the victim's veracity, the prosecutor's follow-up question appears to have been an improper inquiry into the victim's veracity. *Peterson, supra* at 352. Nevertheless, even assuming that the question and testimony regarding the victim's veracity constituted error, we do not find that this error requires reversal.

While defendant argues that this was a close case that amounted to a "swearing match between accused and accuser," he fails to consider the effect of his own admissions. Defendant's admissions essentially corroborated much of the victim's testimony. Thus, the victim's veracity was verified by defendant, himself. Further, any prejudice resulting from the prosecutor's examination of the caseworker could have been cured by a timely objection and curative instruction. *People v Knapp*, 244 Mich App 361, 385; 624 NW2d 227 (2001). Defendant has failed to demonstrate plain error affecting his substantial rights in this regard. *Carines, supra* at 763. His claim does not warrant reversal. *Knapp, supra* at 385.

Next, defendant argues that the prosecution committed misconduct during closing argument by improperly expressing its personal opinion that a key defense witness had lied to the jury. This unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The prosecution's role and responsibility is not merely to convict, but to seek justice; thus, the test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003); *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We review claims of prosecutorial misconduct on a case-by-case basis, examining the entire record and evaluating the prosecution's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Generally, the prosecution has great latitude to argue the evidence and all reasonable inferences relating to its theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). We evaluate the prosecution's comments in light of defense counsel's arguments and the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

During closing argument the prosecutor argued that a statement by the victim's mother was inconsistent with defendant's admissions, and suggested that the victim's mother might have been lying in an attempt to protect defendant. Defense counsel subsequently argued that the victim's testimony was inconsistent with that of the other individuals who were present at the time of the offenses:

[The victim's mother] told you it would be very—she would definitely have noticed if [defendant] would have gotten out of bed and gone and left the room. Maybe he got up like he sometimes does, went to the bathroom and came back. That's possible because it's routine.

She wouldn't remember a specific instance. She [said], "I would remember a specific instance where he got up and left the room, didn't come back

for a while and then came back.” And she said, “He woke up next to me in bed the next morning.”

During rebuttal, the prosecution responded to defense counsel’s arguments:

[Defense counsel] talks about [the victim’s mother] would have noticed if he was gone for that long of a time. To be blunt, I think [the victim’s mother] was covering for him. I think she was covering for him at the hotel, which is why I brought [the arresting officer] in. She’s covering for him now. She doesn’t even want to admit what she did at the hotel.

* * *

Why lie about that? Because you know something’s up and you know he’s in trouble, and you don’t want it to happen to him. Well, guess what? Something’s up and he’s in trouble, and she doesn’t want something to happen to him.

The challenged rebuttal argument was a response to defense counsel’s argument that the victim’s mother would have noticed if defendant had gotten up and left the room. The prosecution argued that the victim’s mother’s testimony was dubious. The prosecution also argued that a reasonable inference could be made that the victim’s mother was “covering for” defendant. The prosecution merely argued, in response to defense counsel’s assertions, that the victim’s mother had a motive to lie—to protect defendant—and that this explained why her testimony conflicted with the arresting officer’s testimony.

Given the great latitude afforded to the prosecution to argue the evidence and all reasonable inferences relating to its theory of the case, we conclude that the prosecution’s rebuttal was an argument based on the evidence admitted at trial and reasonable inferences derived therefrom. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997) (noting that “[a] prosecutor may . . . argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief”). Defendant has failed to establish plain error affecting his substantial rights. *Ackerman, supra* at 448. In reaching this conclusion, we reject defendant’s contention that a curative instruction could not have eliminated the prejudicial effect of any error. Even if the prosecution’s comment was plainly erroneous, a curative instruction could have eliminated any undue prejudice to defendant. *People v Moorner*, 262 Mich App 64, 79; 683 NW2d 736 (2004). Finally, in reaching our conclusion we also note that the record does not support defendant’s contention that the prosecution was asserting “extra-record knowledge” regarding the victim’s mother’s credibility or expressing a personal belief that defendant was guilty. See *Bahoda, supra* at 276; *Knapp, supra* at 382.

Lastly, defendant argues that he was denied his Sixth Amendment right to the effective assistance of counsel when defense counsel failed to object to or move to strike the caseworker’s allegedly improper testimony, and when defense counsel failed to object to the alleged

prosecutorial misconduct in closing argument. Defendant did not move for a *Ginther*² hearing or a new trial, and his claims are accordingly unpreserved. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Our review is therefore limited to error apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

We have already determined that neither the caseworker's testimony nor the prosecutor's closing argument constituted outcome-determinative plain error in this case. Because neither alleged error was decisive to the outcome, defendant necessarily cannot show that either alleged error resulted in actual prejudice. Accordingly, defendant's claims of ineffective assistance of counsel must fail. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994) (to prove ineffective assistance of counsel, "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 Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000) (to establish ineffective assistance of counsel, the defendant must show that "there is a reasonable probability that, but for [counsel's errors], the factfinder would not have convicted the defendant").

Affirmed.

/s/ Richard A. Bandstra
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).