

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK WESLEY HENDRIX,

Defendant-Appellant.

UNPUBLISHED

September 11, 2007

No. 269105

Tuscola Circuit Court

LC No. 05-009526-FH

Before: Borrello, P.J., and Jansen and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of nine counts of third-degree criminal sexual conduct (sexual penetration with a minor between 13 and 16 years of age), MCL 750.520d(1)(a), and was sentenced to concurrent prison terms of ten to fifteen years on each count. Defendant appeals as of right and we affirm.

Defendant raises several issues on appeal. First, defendant argues that he was prejudiced when the prosecution asked him whether he believed that the complainant and another prosecution witness were lying. Defendant did not object below to the prosecution's questions in this regard.

As conceded by the prosecution, the challenged questioning was improper. See *People v Buckley*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, defendant fails to show that his substantial rights were affected by the brief questioning. A showing that a plain error affected substantial rights "generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The *Buckley* Court found no prejudice in the scenario with which it was presented. *Buckley, supra* at 17. "This was not a case where the defendant might have been prejudiced by improper bolstering of the credibility of prosecution witnesses or by allowing an opinion on his guilt or credibility to be expressed." *Id.* "[T]he substance of the exchange indicates that defendant dealt rather well with the questions." *Id.* Defendant in the instant case also responded "rather well" to the questions. He answered them straightforwardly in a manner consistent with his theory of the case, and he did not dwell on his opinion regarding the other witnesses' credibility.

Given defendant's handling of the brief questioning, "there is no basis to conclude that . . . the error seriously affected the fairness, integrity, or public reputation of the judicial

proceedings.” *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). In light of the weight of the properly admitted evidence, particularly including the complainant’s testimony, defendant also fails to show that the error “resulted in the conviction of an actually innocent defendant.” *Id.* Lastly, although defendant argues that a curative instruction could not have cured the error, he does not explain why this is so. A curative instruction is sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970), and jurors are presumed to follow their instructions, *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). Reversal on this basis is not warranted. See *Buckey, supra* at 17-18.

Defendant also claims that his trial counsel was ineffective for failing to object to the abovementioned questioning. In order 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 Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). For the reasons stated above, defendant has failed to establish the requisite level of prejudice. In other words, defendant has not established a reasonable probability that the result of the proceedings would have been different absent the challenged questioning. See *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Next, defendant contends that the trial court erred by upwardly departing from the sentencing guidelines. We disagree. MCL 769.34(3) allows a trial court to depart from the sentencing guidelines range “if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” “The factors relied on by a court in finding a ‘substantial and compelling’ reason must be objective and verifiable.” *People v Geno*, 261 Mich App 624, 635-636; 683 NW2d 687 (2004).

At the sentencing hearing, the court chose to upwardly depart from the guidelines because, “based upon what I now know of the case, and also the memorandum submitted by the prosecuting attorney, . . . after the defendant [was] charged with these crimes awaiting trial, he continue[d] to exhibit predatory conduct.” The court had been provided with a letter that defendant wrote to a 13-year-old girl while he was in custody. The letter included phrases of an overtly sexual nature and specifically directed the 13-year-old girl, “Don’t includes [sic] your age when you write to me.”

Defendant was clearly caught making objective and verifiable overtures—some with a decidedly sexual nature—in this correspondence. The trial court properly found that defendant was continuing to exhibit predatory behavior toward children even after his arrest, and indeed while he was in custody. The court did not err in upwardly departing from the guidelines on this basis. *Geno, supra* at 637; *People v Armstrong*, 247 Mich App 423, 425-426; 636 NW2d 785 (2001).

Defendant also asserts that his right to a fair trial was violated by the testimony of a police officer, who stated that when he asked defendant during a telephone conversation to come to the station for an interview, defendant refused. The cited testimony does tend to infringe on defendant’s general right against self-incrimination. See *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Nevertheless, it is clear from the context that the prosecutor did not intend to solicit this response from the officer. The prosecutor merely asked the officer whether defendant had “den[ie]d knowing any 13 year olds.” In general, an unresponsive, volunteered

answer that injects improper evidence into a trial is not a basis for granting a mistrial, unless the prosecutor knows in advance that the witness will give the testimony. *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). There is no such indication here.

While police officers have a special duty to refrain from making prejudicial and irrelevant remarks during their testimony, *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983), such testimony may not require reversal if other evidence clearly establishes the defendant's guilt, *People v Snider*, 239 Mich App 393, 419-420; 608 NW2d 502 (2000); see also *People v O'Brien*, 113 Mich App 183, 209; 317 NW2d 570 (1982). Here, the challenged testimony did not introduce evidence of defendant's alleged criminality or link him to the crime. Moreover, the testimony of the victim and defendant's former cellmate clearly provided sufficient, independent evidence of defendant's guilt. Defendant's motion for a mistrial on this ground was properly denied.¹ See *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005).

Finally, defendant contests the venue of his trial, contending that his sexual contact with the complainant occurred in several counties other than Tuscola County. The felony information set forth four counts of vaginal intercourse, 5 counts of fellatio, and one count of cunnilingus. The court dismissed the final count.

"Venue is a part of every criminal prosecution and must be proved by the prosecutor beyond a reasonable doubt." *People v Webbs*, 263 Mich App 531, 533; 689 NW2d 163 (2004). We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element was proven beyond a reasonable doubt. *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001).

The complainant testified that she and defendant engaged in vaginal intercourse between eight and ten times at her home in Tuscola County. She also stated that she performed fellatio on defendant five times at her home. This evidence was sufficient to establish the requisite venue with respect to the counts for which defendant was convicted.² Defendant suggests that the

¹ Defendant also asserts that the testimony of the officer was inadmissible because he had not yet received *Miranda* warnings when he spoke to the officer. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). However, defendant has failed to adequately brief this claim. Therefore, it is abandoned on appeal. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). In any event, this claim is without merit because defendant was not in police custody at the time and could not have reasonably believed that he was in custody while on a telephone call. While the police must provide *Miranda* warnings to a suspect before custodial interrogation, *People v Dennis*, 464 Mich 567, 572-573; 628 NW2d 502 (2001), it is clear that defendant in the present case was not in custody as he was free to end the telephone call, see *People v Eggleston*, 148 Mich App 494, 500; 384 NW2d 811 (1986).

² Moreover, at the time of defendant's motion for directed verdict, defendant contested only one of the ten charges for lack of venue. See MCL 767.45(1)(c) (stating that "[n]o verdict shall be set aside or a new trial granted by reason of failure to prove that the offense was committed in the county or within the jurisdiction of the court unless the accused raises the issue before the case is submitted to the jury").

testimony of the victim alone was insufficient to prove that the crimes occurred in Tuscola County. However, we defer to the jury's superior ability to assess the witnesses' testimony. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that the charged crimes all occurred in Tuscola County. *Harmon, supra* at 524.

Affirmed.

/s/ Stephen L. Borrello

/s/ Kathleen Jansen

/s/ Christopher M. Murray