

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 2, 2011

v

LUIS ALBERTO GUTIERREZ,
Defendant-Appellant.

No. 295169
Kent Circuit Court
LC No. 09-001077-FC

Before: OWENS, P.J., and MARKEY and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (penetration involving person under 13). The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12, sentenced defendant to 25 to 40 years' imprisonment. We affirm.

Defendant contends that the trial court improperly instructed the jury regarding penetration. We review jury instructions in their entirety to determine whether the trial court committed error requiring reversal. *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009). "Even if instructions are imperfect, reversal is not required if they fairly present the issues to be tried and sufficiently protect the defendant's rights." *Id.*

The trial court instructed the jury as follows:

The defendant is charged with the crime of first degree criminal sexual conduct. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

First, that the defendant engaged in a sexual act that involved entry into [the victim's] genital opening, or anal opening, or buttocks by the defendant's finger or fingers. Any entry, no matter how slight, is enough.

Defense counsel stated "No, your Honor," when the trial court finished its instructions and asked if the attorneys had "[a]nything further . . . on the record."

After hours of deliberations, the jury came back with a question: "For anal penetration to occur, does it need to occur only within the butt crack or does it need to occur in the anus?" The

court answered: “And, of course, the instruction I gave on first degree criminal sexual conduct mentioned genital opening, or anal opening, or buttocks, and my answer to the question is, anal penetration can occur within the crease of the buttocks.” Defense counsel indicated on the record that he had objected to the trial court’s answer to the question. He stated that an “anal opening[]” as listed under MCL 750.520a(r) was not synonymous with the crease of the buttocks.

Defendant argues that the trial court improperly instructed the jury when it stated that anal penetration can occur within the crease of the buttocks. We find no basis for reversal. First, defense counsel affirmatively approved the trial court’s initial instructions, which indicated that any entry within the buttocks was enough to prove penetration. Accordingly, he waived the issue. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). It is true that counsel objected when the trial court went on to clarify the instructions in response to the jury’s question, but we cannot find that this clarification requires reversal, given the situation faced by the trial court and given the other circumstances.

Sexual penetration means “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.” MCL 750.520a(r). In *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1982), this Court noted that the Legislature enacted different degrees of criminal sexual conduct to differentiate between sexual acts affecting only body surfaces (sexual contact) and sexual acts involving intrusions into body cavities (sexual penetration). The panel held that penetration of the labia majora constitutes penetration of the genital opening because the labia majora are beyond the body surface. *Id.*

Here, the victim testified that defendant touched her “[r]ough,” “[i]n [her] bottom.” She stated at trial that defendant’s fingers went “inside [her] bottom.” The victim told a detective that defendant “pok[ed] her in the middle of her butt,” later clarifying that the poking was “in her butt hole.” The victim’s mother testified that the victim told her that defendant “pok[ed] at her bottom” and put his fingers into her butt, although a nurse later testified that the mother had told her there was “no sexual penetration, just touching on the outside of the underwear.” The victim told a doctor that defendant had “rub[bed] her” in her genital area and that she did not think there had been penetration, and she told another doctor that defendant “put[] his fingers in [her] private” and touched her buttocks. The victim told a social worker that defendant touched her “private” (defined as her vaginal area) between her “front and bottom,” and “it hurt because he was doing it really hard”; he also “put[] his finger in [her] private.”¹ The evidence pertaining to a potential finding of anal penetration—i.e., defendant’s fingers going inside the victim’s

¹ A doctor testified that the victim was embarrassed while talking about the incident and that her embarrassment and unfamiliarity with the names and locations of body parts could cause a discrepancy in her statements about where she was touched.

“bottom,” defendant’s “poking . . . in her butt hole,” defendant’s “poking at her bottom”—involved more than just a mere cupping of the buttocks but instead involved actions beyond the body surface.

Given defense counsel’s initial approval of the jury instructions and the trial court’s task of clarifying those initial instructions, given the analogous case law, and given the facts of the case, we find no basis for reversal with regard to the supplemental instruction. Defendant’s rights were not unfairly impinged upon.

Defendant also claims that the prosecutor engaged in misconduct denying him a fair trial. Specifically, defendant asserts that the prosecutor improperly did the following: (1) asked him during cross-examination who taught him to look at the jury; (2) questioned him during cross-examination about a letter he sent out in jail under another inmate’s name; (3) improperly elicited a response from the court regarding the legality of a jail opening inmates’ mail; (4) objected to defense counsel’s closing remarks about medical personnel defendant called to testify; and (5) denigrated defendant and defense counsel and appealed to the jury’s sympathy and personal experiences during rebuttal closing argument. After reviewing these arguments, we conclude that the prosecutor did not engage in misconduct constituting plain error that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The issue of the trial court’s comment regarding the legality of a jail opening inmates’ mail was waived by defendant’s trial counsel when he affirmatively approved the court’s statement. *Carter*, 462 Mich at 215-216. Regarding the prosecutor’s cross-examination of defendant, we find that the prosecutor’s questions properly served to attack defendant’s credibility and to elicit admissions probative of defendant’s credibility and the element of penetration. See *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995) (when a defendant testifies on his own behalf, the defendant’s credibility may be impeached like any other witness). We also find that the prosecutor’s objection to defendant’s closing remark regarding medical personnel was a proper response to an inference created by defense counsel that the prosecutor was hiding something from the jury. See *People v Allen*, 351 Mich 535, 544; 88 NW2d 433 (1958).

Additionally, we find that the prosecutor’s rebuttal argument was not improper. Generally, prosecutors must not denigrate a defendant or defense counsel with intemperate and prejudicial remarks. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995); *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). However, prosecutors are not required to use bland terms when arguing to the jury. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). An otherwise improper remark by a prosecutor may not require reversal when the remark addresses an issue raised by defense counsel. *Kennebrew*, 220 Mich App at 608. The prosecutor’s statement during rebuttal that defense counsel’s arguments were reprehensible was

in response to defense counsel's sarcastic and crude² comments concerning the ten-year-old victim. Given the insensitive character of defense counsel's remarks regarding the victim's ability to distinguish "one hole from the other" and her vaginal shaving habits, the prosecutor's sharp response was not plain error. *Allen*, 351 Mich at 543-544.

Moreover, we conclude that the prosecutor's argument that defense counsel was attempting to put the police on trial was a proper response to defense counsel's argument that the police failed to investigate the case thoroughly. *Kennebrew*, 220 Mich App at 608. Also, we reject defendant's assertion that the prosecutor's arguments about the consistency of the victim's story and the victim's lack of a motive to lie were inappropriate. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997) (a prosecutor may argue from the facts that a witness is credible); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004) (prosecutor's comment during closing argument that police officers had no reason to lie was not improper). Finally, we reject defendant's argument that the prosecutor improperly asked the jury whether they had ever experienced good people doing bad things. *People v Simon*, 189 Mich App 565, 567; 473 NW2d 785 (1991) (a jury may properly use their own common sense and everyday experiences when assessing evidence).

Defendant argues that he was denied a fair trial because deputies escorted him in and out of the courtroom in the presence of the jury and a deputy sat next to him while he testified. First, we note that the record is silent regarding the presence and conduct of deputies. Therefore, defendant has not met his burden on appeal for obtaining relief. Second, even assuming that what defendant asserts is true, the presence of the deputies at defendant's trial would not have been inherently prejudicial and would not have indicated that defendant was dangerous or untrustworthy. *Holbrook v Flynn*, 475 US 560, 569; 106 S Ct 1340; 89 L Ed 2d 525 (1986); *People v Loy-Rafuls*, 198 Mich App 594, 598- 599; 500 NW2d 480 (1993), rev'd on other grounds 442 Mich 915 (1993). The jury could have easily inferred that the deputies were present to maintain court order, or could have thought nothing at all of their presence. *Holbrook*, 475 US at 569.

In a supplemental brief filed *in propria persona*, defendant argues that the prosecutor presented insufficient evidence to support his conviction. We review this issue de novo. *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001). We must examine the evidence in the light most favorable to the prosecution and determine whether a rational jury could have concluded that the essential elements of the crime were proven beyond reasonable doubt. *Id.* Evidentiary conflicts must be resolved in favor of the prosecution. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999). Circumstantial evidence and reasonable inferences arising from such evidence can be satisfactory proof of the elements of a crime. *Carines*, 460 Mich at 757.

² Defense counsel stated during his argument, "I apologize for being crude."

For the jury to find defendant guilty of first-degree criminal sexual conduct as it did in this case, the prosecution must have proved beyond a reasonable doubt that defendant sexually penetrated a person under the age of 13. MCL 750.520b(1)(a). The victim was ten years old at the time of the incident with defendant. The victim testified that defendant touched her “[r]ough,” “[i]n [her] bottom.” She testified that defendant’s fingers went “inside [her] bottom.” The victim’s testimony alone was sufficient to establish guilt beyond a reasonable doubt. See *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). Moreover, other witnesses testified that the victim told them about penetration.

In addition, there was related corroborating evidence. For example, the victim testified that when she went to Walgreens with defendant, defendant asked her whether she had ever been touched and told her that it was okay not to tell anyone if she had been touched. The victim also testified that defendant made her uncomfortable by the way he touched her when they wrestled. The victim’s mother testified that the victim became “withdrawn” after defendant touched her—she would not talk, joke, or wear shorts. Witnesses testified that when the victim told them about the pertinent incident with defendant, she was very upset, embarrassed, or crying.

Viewing the evidence in the light most favorable to the prosecution, a rational tier of fact could have concluded beyond a reasonable doubt that defendant committed first-degree criminal sexual conduct by sexually penetrating the victim.

Defendant next contends that his trial attorney rendered ineffective assistance of counsel in several respects. Because there was no hearing below regarding ineffective assistance of counsel, our review of defendant’s claim is limited to mistakes apparent in the appellate record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

To establish ineffective assistance of counsel, defendant must show that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different, *and* the attendant proceedings were fundamentally unfair or unreliable. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations omitted; emphasis in original).]

Defendant first contends that counsel was ineffective because counsel did not properly investigate (through an *in camera* hearing) and call witnesses that could have supported his defense that the victim’s story was fabricated. However, trial counsel is not obligated to interview every possible witness a defendant suggests. See *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (stating that a decision not to investigate must be assessed for reasonableness with a heavy measure of deference to counsel’s judgments); see also *People v Beard*, 459 Mich 918; 589 NW2d 774 (1998). The decision whether to call and question a witness is a matter of trial strategy. *People v Rocky*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A decision not to call a witness constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). A substantial defense is a defense that might have made a difference in the outcome of the trial. *Chapo*, 283 Mich App at 371.

The record indicates that during trial, counsel elicited testimony regarding defendant's proposed witnesses' involvement in this case; counsel did not ignore their involvement. Moreover, the record reveals that counsel's trial strategy was to establish that both the victim and her mother fabricated the story that defendant touched the victim. He employed numerous questions and arguments in support of this theory. Given counsel's efforts, we conclude that defendant was not deprived of the defense that the victim's story was fabricated. Counsel's decision to call the witnesses that he did instead of the witnesses that defendant now argues that counsel should have called was a matter of trial strategy. Defendant has not overcome the strong presumption that counsel's strategy was sound. *People v McGraw*, 484 Mich 120, 142; 771 NW2d 655 (2009).

Next, defendant argues that defense counsel's performance was deficient because counsel failed to request that the trial court instruct the jury about perjury and impeachment. Defendant contends that both the victim and her mother obviously provided inconsistent, impeachable, and perjurious testimony at trial. This argument lacks merit. The victim and her mother were not on trial in this case for perjury, so there was no need for a perjury instruction. Further, the trial court properly instructed the jury about assessing witness credibility and the factors the jurors could consider when determining whether to believe a witness. These instructions adequately covered the issues of impeachment and witness credibility. It was not objectively unreasonable for counsel to not ask the court to instruct the jury on perjury and impeachment.

Next, defendant contends that counsel's cross-examination was deficient because counsel failed to question the victim about shaving her genitalia. Defendant argues that it was vital for counsel to question her about shaving her genitalia because the shaving explained the cause of the irritation that doctors identified. This argument also fails. As with calling a witness, a trial attorney's decision regarding how to cross-examine a witness is a matter of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). A court will find an attorney's representation ineffective on the basis of strategy only if the strategy employed was unreasonable. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). The failure of a trial strategy does not automatically render it unreasonable. See *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant is correct to argue that the victim's shaving could have caused the irritation in her genital area. However, counsel's decision not to ask the victim about the shaving was a matter of strategy. Counsel instead chose to elicit this information from one of the doctors. This was not unreasonable. Moreover, counsel argued during his closing argument that the victim's shaving caused the irritation. Counsel's cross-examination of the victim was not deficient.

Defendant claims that counsel was deficient because he failed to object to various instances of prosecutorial misconduct. We have reviewed each of defendant's assertions and find that in each instance, there was no prosecutorial misconduct. The prosecutor properly commented on witnesses' testimony, properly presented the case based on viable evidence, and did not argue facts that were not in evidence but instead made proper arguments and inferences based on the evidence. Counsel was not required to make meritless objections to the prosecutor's conduct. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Next, defendant argues that counsel was deficient because he failed to file pretrial motions, hold an evidentiary hearing, or object at trial to exclude testimony from Kelli Braate, Sarah Brown, and Holly Bathrick. Specifically, defendant argues that the testimony of these three witnesses regarding what the victim told them was hearsay and inadmissible.³ Hearsay is “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). Generally, hearsay is inadmissible, unless an exception applies. MRE 802.

Bathrick and Brown testified for defendant on direct examination. The record indicates that defense counsel called Bathrick to testify that the victim told her that defendant stuck his fingers in her “private,” which was inconsistent with the victim’s testimony at trial that defendant stuck his fingers in her anus. Decisions on how to question witnesses are matters of trial strategy. *People v Horn*, 279 Mich App 31, 39: 755 NW2d 212 (2008). Although the victim’s statement to Bathrick was hearsay and no exception appears to apply, counsel himself elicited the testimony, and because it showed that the victim made inconsistent statements concerning penetration, it was helpful to the defense. There was no ineffective assistance of counsel with regard to the testimony.

The record indicates that defense counsel called Brown, a doctor, to testify that the victim’s pubic area was shaved and that she did not find any injuries to the victim’s vagina or anus. This testimony supported defendant’s contention that he neither sexually penetrated the victim nor caused her genital irritation. It is true that counsel failed to object during the prosecutor’s cross-examination of Brown when Brown testified regarding the victim’s statements about how defendant touched her. We find, however, that the victim’s statements were admissible under MRE 803(4) as statements made for purposes of medical treatment concerning the inception of the victim’s vaginal pain and irritation. Again, counsel does not have to make meritless objections. *Kulpinski*, 243 Mich App at 27.

With regard to Braate’s testimony, Braate testified concerning what the victim told her about the Walgreens incident, how defendant made her uncomfortable when they wrestled, and how defendant touched her. These out-of-court statements made by the victim were hearsay, and no exceptions appear to apply. However, Braate’s testimony was cumulative to and consistent with the victim’s testimony at trial. Thus, even if counsel had objected or moved to have Braate’s testimony excluded, there is not a reasonable probability that defendant would have been acquitted. Defendant’s ineffective assistance of counsel claim fails on this ground because defendant cannot show prejudice.

Finally, defendant contends that counsel was ineffective because he failed to move for a directed verdict and did not request a mistrial when the victim exited the witness stand without

³ Although MRE 803A provides a hearsay exception for certain statements made by a declarant under the age of ten concerning sexual acts performed with the declarant by the defendant, the victim in this case was not under the age of ten when she made the statements that defendant asserts are hearsay.

being excused. These arguments fail. With regard to the directed-verdict motion, defense counsel had no obligation to argue a meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Additionally, the record does not indicate that the victim exited the witness stand without the trial court's permission. The record reveals that, during her testimony on direct examination, the victim asked to take a break, and the court immediately granted a brief recess. Then, at the conclusion of her testimony, the court excused her. Defendant has failed to establish the factual predicate of this claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). He has not provided any citations to the record indicating that improper conduct occurred, and reversal is not warranted.

Affirmed.

/s/ Donald S. Owens

/s/ Jane E. Markey

/s/ Patrick M. Meter