STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

COREY GENE WALKER,

Defendant-Appellant.

UNPUBLISHED
October 23, 2012

No. 301039
Delta Circuit Court
LC No. 10-008302-FH

Before: MURPHY, C.J., and SAWYER and HOEKSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his jury conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under 13 years of age). Defendant was sentenced as a fourth-offense habitual offender, MCL 769.12, to six to 20 years' imprisonment. For the reasons stated in this opinion, we affirm.

In December 2009, the victim, who was eight years old at the time, was at home with her two sisters,[1] her grandmother, and defendant. Defendant is the victim's father's brother. The victim testified that after her grandmother left the home, defendant asked her to sit on the couch next to him, and then placed his hand inside her pajama pants and "[put] his finger in [her] front and back." She stated that he also kissed her on the neck, and then took her to the basement and kissed her lips. The victim's sisters testified that they witnessed defendant kissing the victim and placing his hand inside her pants. When the victim's parents returned to the home, the victim and her sisters informed them about defendant's conduct. The victim's parents contacted the police four days later. The victim's mother and father both testified at trial that they delayed reporting the incident so that they could make sure the girls were telling the truth.

On appeal, defendant raises several allegations of error in regard to the testimony of the victim's parents about the fact that they delayed reporting defendant's conduct to the police in order to ensure their daughters were telling the truth.

---

[1] The victim and her two sisters are all the victim's mother's children; however, one of the victim's sisters is not the biological child of the victim's father.

None of the alleged errors are properly preserved for appeal because defendant did not object to the challenged testimony during trial. *People v Giovannini*, 271 Mich App 409, 414; 722 NW2d 237 (2006). We review allegations of unpreserved, constitutional error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763. "Reversal is warranted only when the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

Defendant first argues that the victim's parents improperly vouched for the credibility of the victim when they testified that they waited to report the incident until they were sure their daughters were telling the truth.

"It is generally 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).

The victim and her sisters reported defendant's conduct to the victim's parents on the same day the abuse occurred, which was December 30, 2009. The victim's parents did not contact police until January 3, 2010. The prosecutor asked the victim's mother about the delay during trial:

> *Q.* Okay. Did you that same day call or go to law enforcement?
>
> *A.* No.
>
> *Q.* And, again, why not?
>
> *A.* We wanted to make sure that we were getting the story . . . wanted to make sure that this was the truth coming from the girls. I didn't want to make unfair allegations. So after we were certain that we were hearing—they're consistent with their story, we went to public safety.
>
> * * *
>
> A. We just—we talked to them separately and together, my husband and I, and then we did it, my husband and I did it each separately to ask them what happened, and we wanted to make sure . . . they were telling us actually what happened. We wanted to make sure it was true and actually what did happen, and they were telling us the same story.
>
> *Q.* Did you believe [the victim]?
>
> *A.* Yes.

Defense counsel then addressed similar questions to the victim's mother on cross-examination, resulting in the following testimony:

Q. And you didn't go down to the police station?

A. No.

Q. You didn't seek the police because you didn't believe what the children were telling you, right?

A. I wanted to make sure the story was true.

Q. You didn't believe it?

A. Yes, I did.

* * *

Q. Okay. You didn't go on the 31st?

A. No.

Q. On the 31st you actually bring the children back around [defendant]?

A. It was either the 31st or the 1st, and we didn't know he was going to be there.

* * *

Q. And you don't go to the police that night?

A. No.

Q. Don't go on the 1st to the police?

A. No.

Q. Don't go on the 2nd to the police?

A. No.

Q. Four or five days later until you actually go to the police, right?

A. Yes. On the 3rd.

The prosecutor and defense counsel both made similar inquiries when examining the victim's father, who testified similarly to the victim's mother, but admitted that he waited to report the allegations to the police because he was skeptical at first.

Defendant argues on appeal that this testimony constituted improper vouching for the victim's credibility, and maintains that it should not have been permitted by the trial court. We disagree. In this case, the explanation for the delay in reporting the charged conduct to authorities is intrinsically interwoven with whether the victim's parents believed the victim and her sisters. Thus, it is clear that the intent of the testimony was not to improperly vouch for the victim's veracity. Moreover, the trial court instructed the jury that it must determine the credibility of the witnesses. Finally, it is clear that defense counsel wanted to elicit testimony regarding the delay in reporting and whether the victim's parents believed her as part of his defense strategy. Under these circumstances, no plain error occurred in the admission of the testimony.

Similarly, defendant argues that the prosecutor's elicitation of the parents' testimony regarding waiting to ensure their daughters were telling the truth before contacting police constituted prosecutorial misconduct. "Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context." *People v Brown*, 294 Mich App 377, 382-383; 811 NW2d 531 (2011).

In this case, even if the parents' testimony was inadmissible, "a prosecutor's good-faith effort to admit evidence does not constitute misconduct." *Id.* at 383. The testimony was relevant to the delay in reporting the allegations to the police. The parents' reason for the delay was made an issue by defendant, who argued that the victim's parents delayed because they did not believe defendant engaged in inappropriate conduct. In light of the evidence and argument presented at trial, defendant has not established bad faith; accordingly, defendant has failed to demonstrate plain error affecting his substantial rights in regard to the prosecutor's conduct. Moreover, because any prejudice to defendant resulting from the testimony could have been cured by a timely objection and curative instruction, no miscarriage of justice will result from our failure to reverse on this issue. See *People v Noble*, 238 Mich App 647, 661; 608 NW2d 123 (1999).

Defendant also argues that the testimony violated his right to confront his accusers because it referenced evidence not in the record. Defendant does not identify the evidence that the testimony allegedly referenced, but merely states, under the heading "right to confrontation," that "the comments conveyed the impression that evidence not presented to the jury, but known to the prosecutor and witnesses, supports the charges against defendant and thus jeopardizes [defendant's] right to be tried solely on the basis of the evidence presented to the jury." Defendant's treatment of this issue is insufficient to warrant review. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority." *People v Kelly*, 231 Mich App 627, 640; 588 NW2d 480 (1998). Nevertheless, the record demonstrates that defendant was able to confront all the parties involved at trial; accordingly, no Sixth Amendment violation occurred. See *People v Fackelman*, 489 Mich 515, 525-528; 802 NW2d 552 (2011).

Finally, defendant argues that defense counsel was ineffective for failing to object to the parents' testimony regarding why they waited to inform authorities about defendant's conduct.

Because defendant failed to move for an evidentiary hearing in regard to the alleged ineffective assistance of counsel, our review of defendant's claim is limited to errors apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). In order to prevail on an ineffective assistance of counsel claim, the burden is on the defendant to demonstrate that defense counsel's performance fell below an objective standard of reasonableness, and that the deficiency so prejudiced defendant as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Prejudice occurs if there is a "reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt." *Id.* at 312 (quotation and citation omitted). Further, defendant must overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Id.* at 61.

In this case, the subject of the delay was a central part of the theory of defense. Defense counsel raised the parents' delay in reporting during his opening statement to the jury. Defense counsel stated that the parents wait "four or five days before going to the police. They don't go to the hospital, they don't go get a physical examination done . . . they don't believe the story that the kids are telling them." Consistent with his theory of the case, defendant not only allowed the prosecutor to develop testimony about why the parents waited to go to the police, but focused his cross-examination of the parents on their delay in reporting. Because defense counsel wanted to focus on the delay in reporting, his failure to object to the parent's testimony explaining that they first wanted to make sure their daughters were telling the truth in response to questions regarding why they did not immediately report the allegations was clearly trial strategy. Under these circumstances, defendant has failed to demonstrate defense counsel's performance fell below an objective standard of reasonableness. Accordingly, defendant has not demonstrated that defense counsel was ineffective.

Next, defendant argues that his right to present a defense was violated when the trial court limited the scope of defense counsel's redirect of defendant's mother. Specifically, defendant claims that because defense counsel was not permitted to elicit redirect testimony from his mother about the dysfunction of his family, he was prevented from presenting the defense that the charges were false and merely the product of family rivalries.

The trial court's determination regarding the proper scope of redirect examination is reviewed for an abuse of discretion. *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998). An abuse of discretion occurs when the chosen outcome falls outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Defendant did not object to the trial court's limitation of redirect on constitutional grounds during trial. Accordingly, defendant's argument regarding his right to present a defense is not properly preserved for appeal and is reviewed for plain error affecting his substantial rights. *Carines*, 460 Mich at 752-753, 764.

The scope of redirect examination is generally limited to the scope of the previous cross-examination. See *People v Weatherford*, 193 Mich App 115, 121-122; 483 NW2d 924 (1992). However, a court has the discretion to "permit open redirect examination." *Stevens*, 230 Mich App at 507.

In this case, the witness was cross-examined about whether defendant came to her house often, how she made notes to remember the events surrounding the day of the crime, and about defendant's history of residence. On redirect, defense counsel attempted to elicit testimony regarding the relationship between the witness and the victim's mother, and the relationship between defendant and the victim's mother. The prosecution objected based on the line of questioning being outside the scope of cross-examination, and the trial court sustained the objection.

The trial court followed the general rule and limited the scope of defense counsel's redirect to matters explored by the prosecution on cross-examination. Following the general rule does not constitute an abuse of discretion. The trial court had the discretion to permit the line of inquiry if it determined it was relevant and not unduly prejudicial, but the decision not to do so was within the range of principled outcomes. See *Babcock*, 469 Mich at 269. Accordingly, we conclude that the trial court did not err.

Defendant also argues that defense counsel was ineffective for failing to object to the trial court's limitation of redirect on constitutional grounds. However, because the trial court did not abuse its discretion by limiting the scope of redirect to the scope of cross-examination, any objection would have been futile. Defense counsel is not required to make futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Thus, defendant has failed to demonstrate that defense counsel's performance fell below an objective standard of reasonableness.

Moreover, defendant was able to present his defense that the allegations were false and motivated by family rivalries because evidence regarding the dysfunction of the family was admitted at different points during the trial. Defense counsel was permitted to elicit testimony from defendant's mother that the victim's mother caused "horrible problems" in the family, and that the victim's mother has a daughter with defendant's older brother. The victim's father testified that he was suspicious that the victim's mother might be having a covert relationship with defendant, and another family member testified that the victim's mother was dishonest. Further, during his closing argument, defense counsel argued that the charges were false and were the result of the family's dysfunction and jealousies. Accordingly, defendant was not prevented from presenting any defense. Therefore, defendant has failed to demonstrate ineffective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Joel P. Hoekstra