STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	FOR PUBLICATION December 16, 2021 9:15 a.m.
v	Nos. 351665; 354834 Livingston Circuit Court
RICHARD THOMAS ISROW II, Defendant-Appellant.	LC No. 19-025624-FH

Before: SAWYER, P.J., and RIORDAN and REDFORD, JJ.

PER CURIAM.

In these consolidated appeals,[1] defendant appeals following his jury-trial convictions of assault with intent to commit criminal sexual conduct (CSC) involving sexual penetration, MCL 750.520g(1); interfering with a crime report, MCL 750.483a(2)(b); interference with electronic communications, MCL 750.540(5)(a); domestic violence, second offense, MCL 750.81(4); and fourth-degree child abuse, MCL 750.136b(7). The trial court sentenced defendant to serve terms of incarceration of 28 months to 10 years for assault with intent to commit CSC involving sexual penetration, 28 months to 10 years for interfering with a crime report, one to two years for interference with electronic communications, 296 days for domestic violence, and 296 days for fourth-degree child abuse. For the reasons discussed herein, we affirm.

I. FACTS

This case arises out of a domestic dispute that occurred in 2019 between defendant, his ex-fiancée, SD, and their four-year-old daughter. Defendant and SD's engagement ended in 2016 after defendant pushed SD during a domestic dispute, for which he pleaded guilty to domestic violence.

[1] In Docket No. 351665, defendant appeals his original judgment of sentence. In Docket No. 354834, defendant appeals from a judgment of sentence entered after resentencing. The same issues are raised in both appeals, and defendant does not challenge his sentences.

SD testified that during the 2019 incident at issue in this appeal, defendant attempted to have sexual intercourse with her after she repeatedly refused, pinned her down on the floor to prevent her from leaving, threw her phone against the wall to prevent her from calling the police, and threw a set of keys; the keys hit their four-year-old daughter in the back of the head. Defendant, on the other hand, testified that he did not attempt to have sexual intercourse with SD after she became angry. Defendant admitted that he intentionally tossed the keys out the front door using an underhand throw, and he acknowledged that he threw the keys in the direction of where his daughter had been standing seconds earlier. Defendant testified that he did not realize that his daughter was there and did not intend for the keys to hit her.

II. ANALYSIS

A. INSUFFICIENT EVIDENCE

Defendant argues there was insufficient evidence for the jury to find him guilty of fourth-degree child abuse because the offense is a specific-intent crime and he did not intend to harm his daughter when he threw the keys. We disagree.

"Questions of statutory interpretation and issues relating to the sufficiency of the evidence are reviewed de novo." *People v Thorne*, 322 Mich App 340, 344; 912 NW2d 560 (2017). When reviewing claims of insufficient evidence, the appellate court must determine whether "the jury could have found each element of the charged crime proved beyond a reasonable doubt." *People v Smith*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 349900, issued 3/11/2021); slip op at 2-3 (quotation marks and citation omitted). "Circumstantial evidence and reasonable inferences arising from that evidence can constitute satisfactory proof of the elements of a crime. . . ." *Id.* at ___; slip op at 3 (quotation marks and citations omitted).

A court's overriding goal when interpreting a statute is to "give effect to the Legislature's intent." *People v Peltola*, 489 Mich 174, 181; 803 NW2d 140 (2011). This is determined by looking at the words of the statute. *Id.* "If the statutory language is unambiguous, no further judicial construction is required or permitted because we presume the Legislature intended the meaning that it plainly expressed." *Id.* To determine whether the language is unambiguous, "[w]e interpret those words in light of their ordinary meaning and their context within the statute and read them harmoniously to give effect to the statute as a whole." *Id.*

Typically, a specific-intent crime requires that the prosecution prove the defendant subjectively desired or knew a prohibited result would occur from that act. *People v Gould*, 225 Mich App 79, 85; 570 NW2d 140 (1997). In contrast, a general-intent crime generally requires that the prosecution prove the defendant intended to perform a physical act, or recklessly performed the physical act required, irrespective of whether the defendant subjectively intended to accomplish the result. *Id.*

In *People v Maynor*, 256 Mich App 238, 242-243; 662 NW2d 468 (2003), this Court noted the differences in the statutory language governing first-degree and second-degree child abuse. A defendant is guilty of second-degree child abuse if the defendant "knowingly or intentionally commits an act likely to cause serious physical or mental harm to a child regardless of whether harm results," MCL 750.136b(3)(b), whereas a defendant is guilty of first-degree child abuse if

the defendant "knowingly or intentionally causes serious physical harm or serious mental harm to a child," MCL 750.136b(2). This Court concluded that the Legislature's choice of different language in each of these statutes was intentional. *Maynor*, 256 Mich App at 242. In other words, by including the phrase "commits an act" in the second-degree statute and not in the first-degree child abuse statute, the Legislature must have "contemplated the situation where a person intended an act, but perhaps not the consequences of the act." *Id.*

The plain language of the fourth-degree child abuse statute is similar to the language in the second-degree child abuse statute. The fourth-degree child abuse statute provides, in relevant part, that a defendant is guilty of fourth-degree child abuse if "[t]he person knowingly or intentionally commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child, regardless of whether physical harm results." MCL 750.136b(7)(b). The phrase "knowingly or intentionally" modifies the phrase "commits an act," not the phrase "poses an unreasonable risk of harm or injury to a child." No mental state modifies the phrase "poses an unreasonable risk of harm or injury to a child." This grammatical structure mirrors that of the second-degree child abuse statute. Therefore, the same comparison can be made between first-degree and fourth-degree child abuse that was made in *Maynor* comparing first-degree and second-degree child abuse. The grammatical structure of both the second-degree and fourth-degree child abuse statutes suggests that the act must be done "knowingly or intentionally," but the defendant need not know or intend that the act pose an "unreasonable risk of harm or injury to a child." Therefore, fourth-degree child abuse is a general-intent crime.

The evidence was sufficient to allow the jury to find beyond a reasonable doubt that defendant either knowingly or intentionally threw the keys, and that this action posed an unreasonable risk of harm or injury to defendant's child. Defendant admitted that he intentionally tossed the keys. The keys hit defendant's four-year-old daughter in the back of the head. Throwing a set of keys knowing a child had been standing in the vicinity of the location in which the keys were thrown seconds before poses an unreasonable risk of harm or injury to a four-year-old child. Therefore, there was sufficient evidence to support defendant's conviction of fourth-degree child abuse.

B. PROSECUTORIAL MISCONDUCT

Defendant argues that he was denied a fair trial when the prosecutor suggested during closing argument that the jury could consider the testimony of police officers when considering the credibility of SD and defendant. Defendant contends that this suggestion constituted an improper attempt to persuade the jury to accept the police officers' "credibility determination" concerning SD's version of events. We disagree.

"[T]o preserve an issue of prosecutorial misconduct, a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant did not take either of these steps. This issue is therefore unpreserved and is reviewed for plain error. See *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third prong

requires a defendant show "prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

Claims of prosecutorial misconduct "are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Anderson*, 331 Mich App 552, 565; 953 NW2d 451 (2020) (quotation marks and citation omitted). A prosecutor cannot "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness," *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), or mischaracterize evidence, *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). However, the prosecutor may argue from the evidence, and reasonable inferences from it, to support a witness's credibility. *People v Bennett*, 290 Mich App 465, 478; 802 NW2d 627 (2010). The prosecutor also "may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 426; 884 NW2d 297 (2015).

During closing arguments, the prosecutor stated:

> Luckily, there is actually a jury instruction that you are going to get which is going to give you sort of some things to consider when you are assessing credibility. Some, ah, factors to look at to help you make a decision which hopefully will be helpful to you. I thought I'd go through a couple of those things. I want you to think about these things when you think about the testimony of the witnesses that you heard from. *And I don't want you to get pigeonholed into only thinking about [SD's] testimony versus the defendant's testimony, because I didn't just call all those other witnesses*[2] *just to drag this trial out, right? I called them to testify because I thought they would provide information to you that would help you when you were looking at this jury instruction about credibility, okay? So, I don't want you to fall into the trap of thinking that you only have two people to choose from. Two people to listen too [sic], and only one version to pick, okay?* [Emphasis added.]

A review of the prosecutor's remarks in context does not support defendant's argument that the prosecutor improperly asked the jury to accept any determination of the police witnesses regarding SD's credibility. Rather, the prosecutor simply noted that the testimony of the police officers might assist the jury in determining which of the other witnesses' testimony was credible. Defendant has failed to show plain error in the challenged remarks.

[2] The "other witnesses" referenced by the prosecutor during closing arguments were all police officers.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues in the alternative that trial counsel was ineffective by failing to object to the prosecutor's statement during closing arguments. We disagree.

A claim of ineffective assistance of counsel "presents a mixed question of fact and constitutional law." *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). All "findings of fact are reviewed for clear error, while the legal questions are reviewed de novo." *Id*. When "the reviewing court is left with a definite and firm conviction that the trial court made a mistake," there is clear error. *People v Douglas*, 496 Mich 557, 592; 852 NW2d 587 (2014) (quotation marks and citation omitted).

The United States and Michigan Constitutions protect a criminal defendant's right to a fair trial. US Const, Am VI; Const 1963, art 1, § 17. This includes the right to effective assistance of counsel. *Strickland v Washington*, 466 US 668, 686; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Smith*, ___ Mich App ___, ___; ___ NW2d ___ (2021) (Docket No. 346044, issued 2/18/2021); slip op at 10. Trial counsel is ineffective when "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Strickland*, 466 US at 686. Trial counsel's performance is presumed to be effective, and defendant has the heavy burden of proving otherwise. *Id*. at 690. To establish an ineffective assistance of counsel claim, a defendant must show "(1) that trial counsel's performance was objectively deficient, and (2) that the deficiencies prejudiced the defendant." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018), citing *Strickland*, 466 US at 688.

Ineffective assistance of counsel claims "center on deficiencies in the defense counsel's decision-making . . . ." *Randolph*, 502 Mich at 14. There is a strong presumption that trial counsel's decision-making is the result of sound trial strategy. *People v White*, 331 Mich App 144, 149; 951 NW2d 106 (2020). A court must determine whether strategic decisions were made by trial counsel after a less than complete investigation. *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). "If counsel's strategy is reasonable, then his or her performance was not deficient." *Randolph*, 502 Mich at 12. Failure to raise a futile objection or advance a meritless argument does not constitute ineffective assistance of counsel. *People v Zitka*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket Nos. 349491 and 349494, issued 1/7/2021); slip op at 9. In addition, failing to raise an objection may be consistent with a sound trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008). A deficiency prejudices a defendant when there is a reasonable probability that but for trial counsel's errors, the verdict would have been different. *Randolph*, 502 Mich at 9.

Trial counsel's failure to object to the prosecutor's closing argument did not amount to ineffective assistance of counsel because objecting to this statement would have been futile. See *Zitka*, ___ Mich App at ___; slip op at 9. As previously concluded, the prosecutor's comments about witness credibility were appropriate and did not improperly vouch for the veracity of any witness. In addition, trial counsel may have failed to object for strategic reasons, which does not amount to ineffective assistance of counsel. See *Unger*, 278 Mich App at 242. Trial counsel may have thought that objecting to the prosecutor's statement would bring more attention to the police

officers' statements, which would cut against defendant's strategy during closing arguments of emphasizing the differences between defendant's and SD's testimony.

Affirmed.

/s/ David H. Sawyer
/s/ Michael J. Riordan
/s/ James Robert Redford