STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALBIN JASKIEWICZ,

Defendant-Appellant.

UNPUBLISHED
February 2, 1999

No. 191174
Macomb Circuit Court
LC Nos. 92-000214 FC
92-000215 FC
92-000216 FC
92-000217 FC
92-000218 FC
92-000337 FC

Before: White, P.J., and Markman and Young, Jr., JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of seven counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and sentenced to seven prison terms of eight to fifteen years each, to be served concurrently. Defendant appeals as of right. We affirm.

This case arose from allegations that defendant sexually molested his step-daughter over the course of a seven-year period. According to the victim, defendant began molesting her in 1979, when she was eight years old, and continued until 1986, when she was fifteen. The alleged incidents included acts of cunnilingus, fellatio, digital vaginal penetration, and "french kissing." The incidents allegedly occurred every other night, Monday through Thursday, and without notice at other times of the day.

Defendant first argues that the trial court erred in denying his motion for a mistrial and in failing to give a cautionary instruction after the victim testified, in violation of a pretrial order, that defendant also "liked" her sisters. We disagree. This Court reviews a trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997). A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *People v Haywood*, 209 Mich App 217, 227; 530 NW2d 497

(1995). An unresponsive, volunteered answer by a witness to a proper question, that injects improper evidence into a trial, generally is not grounds *per se* for a mistrial unless the prosecutor knew in advance that the witness would offer the unresponsive testimony or the prosecutor conspired with or encouraged the witness to offer that testimony. *People v Hackney*, 183 Mich App 516, 532; 455 NW2d 358 (1990).

Here, before trial, the court prohibited the prosecutor from introducing evidence of two particular instances where defendant allegedly made sexual advances towards the victim's sisters. Subsequently, during the prosecutor's questioning of the victim with regard to her moving out of defendant's house and into her brother's house, the following exchange occurred:

> *Q*: Didn't your brother come – your brothers come over to visit at all when you lived over on Highlight and Chicago Road?
>
> *A*: No. My brothers were never welcome, *just my sister's [sic], because they are all female and he likes them all*.
>
> *Q*: Let me ask you this: When you went to your brother's house, you say Paul's?
>
> *A*: Yes.

It is undisputed that the victim's answer was unresponsive and volunteered. Further, the prosecutor did not follow up on this response and question the victim further regarding any alleged sexual misconduct between defendant and her sisters. After the victim offered her unresponsive answer, the prosecutor continued to inquire about the victim's move to her brother's house. Subsequent answers did not indicate that anything sexual occurred between defendant and the sisters or what, if any, acts defendant allegedly committed with the sisters.

Although defendant moved for a mistrial here, he did not request that a curative instruction be given to the jury or that the answer be stricken from the record. See *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988); *People v Barker*, 161 Mich App 296, 306; 409 NW2d 813 (1987). Under these circumstances, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

We also reject defendant's claim that he was denied effective assistance of counsel at trial. Because defendant failed to make a testimonial record in the trial court in connection with a motion for a new trial or an evidentiary hearing, our review is limited to the facts contained on the record. *People v Hedelsky*, 162 Mich App 382, 387; 412 NW2d 746 (1987). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been

different. *Id.* A defendant must also overcome the presumption that the challenged action or inaction represented trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

With respect to his first specific argument of ineffective assistance-- concerning allegedly inadequate discovery-- defendant has failed to indicate what "meaningful discovery" counsel failed to conduct and what evidence such discovery would have revealed. In addition, defendant has failed to show that he was prejudiced by defense counsel's failure to file a pretrial motion to exclude "the testimony regarding an alleged viewing of pornographic movies" by the victim. *Effinger, supra.* Further, defense counsel's decision not to object to the victim's mother's testimony that *she* was abused by defendant may have been a matter of trial strategy either to avoid calling undue attention to such testimony or to show the mother's motivation for testifying against defendant. Similarly, defense counsel's decision not to request a cautionary instruction with regard to the victim's testimony, in violation of the court's pretrial ruling, may have been a matter of trial strategy to avoid re-emphasizing the statement. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987).

Second, defense counsel was not obligated to object to the prosecutor's remarks in opening and closing arguments because they were not improper. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Third, defendant has failed to provide record support for his claim that defense counsel argued that defendant was "unequivocally responsible." Indeed, the record indicates that defense counsel clearly argued that defendant was not guilty of the charged crimes and that the victim was not credible. Thus, ineffective assistance of counsel has not been established.

We also reject defendant's claim that he was denied a fair and impartial trial because of several alleged instances of prosecutorial misconduct. Because defendant did not object to the challenged remarks at trial, appellate review of this issue is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). We do not find this to be the case. First, the record does not indicate that the prosecutor addressed the question of defendant's disposition after the verdict. *People v Szczytko*, 390 Mich 278, 285; 212 NW2d 211 (1973); *People v Wallace*, 160 Mich App 1, 6; 408 NW2d 87 (1987). Second, evidence was presented to support the prosecutor's remarks that the victim testified as to "hundreds of sexual assaults." Finally, viewed in its entirely, the prosecutor's closing argument did not constitute an appeal to the jury's sympathy. See *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988). Moreover, a timely objection and curative instruction could have cured any alleged prejudice resulting from the remarks. In addition, the trial court instructed the jury that the arguments of counsel were not evidence. *People v Ullah*, 216 Mich App 669, 682-683; 550 NW2d 568 (1996). Thus, a miscarriage of justice has not been shown.

Defendant's final argument is that his constitutional right to a speedy trial was violated where he waited 3-1/2 years for trial. The determination of whether a defendant was denied a speedy trial is a mixed question of fact and law. The factual findings are reviewed for clear error, while the constitutional

issue is a question of law subject to de novo review. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997). We find this argument meritless.

In support of his argument, defendant focuses on two separate periods of delay: (1) the original twenty-four month period before charges were dismissed previously for lack of a speedy trial; and (2) the 1-1/2 year period expended during the prosecutor's appeal. With regard to the first twenty-four month period, defendant makes the same arguments that he made before this Court previously. *People v Jaskiewicz*, unpublished opinion per curiam of the Court of Appeals, issued 6/6/95 (Docket No. 174567). As such, the arguments are barred by the law of the case doctrine. Under the law of the case doctrine, an appellate court's determination of law will not be decided differently on a subsequent appeal in the same case if the facts remain materially the same. *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996).

Next, with regard to the period of time expended during the prosecutor's successful appeal, it is established that the taking of an appeal by the State constitutes a good cause for delay, when carried out reasonably, and time consumed on such an appeal is not considered in derogation of a defendant's right to a speedy trial. See *People v Chism*, 390 Mich 104, 113; 211 NW2d 193 (1973); *People v Missouri*, 100 Mich App 310, 321; 299 NW2d 346 (1980); *People v Stewart*, 61 Mich App 167, 174; 232 NW2d 347 (1975). Defendant does not argue that the amount of time expended during the prosecutor's appeal itself was excessive in any way.

Disregarding the two foregoing periods of delay, defendant's trial commenced approximately three months after the charges were reinstated. Defendant does not allege any prejudice from this three-month period of delay, and any such argument likely would be futile. See *People v O'Quinn*, 185 Mich App 40, 47-48; 460 NW2d 264 (1990). Accordingly, defendant's right to a speedy trial was not violated.

Affirmed.

/s/ Helene N. White
/s/ Stephen J. Markman
/s/ Robert P. Young, Jr.