STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 6, 1999
v	No. 207986 Cass Circuit Court
DAVID STEPHEN FOSTER, Defendant-Appellant.	LC Nos. 96-008868; 96-008869

Before: Cavanagh, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and one count of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). The trial court sentenced defendant as a second habitual offender, MCL 769.10; MSA 28.1082, to twenty-five to fifty years' imprisonment. Defendant appeals as of right. We affirm.

The complainant, who is defendant's nephew, testified that defendant began massaging him when he was ten or eleven years old. When the complainant was thirteen, defendant began performing fellatio on him; this continued at least three or four times a week until the complainant was seventeen. Defendant claimed that any alleged fellatio did not occur until after the complainant was sixteen, and that any contact that occurred beforehand was not for the purpose of sexual gratification.

I

On appeal, defendant first argues that the trial court abused its discretion by permitting the complainant's younger brothers to testify regarding the similar acts committed against them. The decision whether to admit or exclude evidence is within the trial court's discretion. This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Defendant claims that the testimony of other similar acts was prohibited by MRE 404(b). We disagree. The testimony was relevant to the issue of intent, a proper purpose under MRE 404(b)(1), and was offered to negate any suggestion that the activity in question was not for the purpose of sexual gratification. Cf. *People v Starr*, 457 Mich 490, 500-501; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 79-81; 508 NW2d 114 (1993). The probative value of the evidence was not substantially outweighed by unfair prejudice. See *Starr, supra* at 500 ("The danger the rule seeks to avoid is that of unfair prejudice, not the prejudice that stems from the abhorrent nature of the crime itself."). The trial court did not abuse its discretion in admitting the evidence.

II

Next, defendant contends that he was denied a fair trial by the admission of testimony in violation of the marital communication privilege, MCL 600.2162(2); MSA 27A.2162(2). However, defendant did not object to the introduction of his former wife's testimony at trial.[1] A plain, unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases where prejudice is presumed or reversal is automatic. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994).

We conclude that any error in the admission of the testimony could not have been decisive of the outcome in this case. On direct examination, defendant's ex-wife testified that after she told him that a warrant was going to be issued for his arrest, he left town. Defendant argues that this testimony was damaging because it established that defendant fled the jurisdiction when he learned of the impending warrant. However, the testimony of defendant's ex-wife in this regard was essentially cumulative to that of Detective Sergeant James Uebler, who testified that defendant failed to turn himself in as expected and was eventually apprehended in Illinois. Moreover, on cross examination, defense counsel elicited from defendant's former wife that defendant told her that he intended to turn himself in when he was ready, thus providing corroboration for defendant's subsequent testimony that he "was just waiting to go in till [he] felt [he] was ready." Under the circumstances, we conclude that any error in the admission of defendant's former wife's testimony was harmless.

III

Defendant next raises numerous claims of prosecutorial misconduct. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Green*, 228 Mich App 684, 692-693; 580 NW2d 444 (1998).

A

Defendant argues that his convictions must be reversed because the initial filing of numerous other counts constitutes prosecutorial vindictiveness, resulting in a denial of due process. However, defendant did not raise this claim in the trial court. "[A]n objection at the appellate level 'comes far too

late.'" *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995), quoting *People v Stevens*, 130 Mich App 1, 4; 343 NW2d 219 (1983).

In any case, a prosecutor has broad discretion in determining the extent of the prosecution. *People v Watts*, 149 Mich App 502, 510; 386 NW2d 565 (1986). Although defendant was ultimately tried on only one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct, the record reveals ample support for the conclusion that numerous other acts of criminal sexual conduct were committed. There is no indication in the record of any vindictiveness or improper motivation on the part of the prosecutor. See *id*. at 511.

B

Defendant further maintains that he was denied a fair trial because of numerous allegedly improper and prejudicial remarks by the prosecutor. However, defendant did not object at trial to most of the remarks that he now claims were improper. Absent an objection, appellate relief 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).

Although defendant claims that a number of remarks were not supported by the evidence, we believe that the challenged remarks constituted proper commentary on the evidence and reasonable inferences drawn therefrom. See *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). A prosecutor is not required to state inferences and conclusions in the blandest possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In addition, a prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief. *Id*. When the prosecutor's remarks are viewed in context, the record does not support defendant's claims that he improperly vouched for the credibility of a witness or made a civic duty argument. See *Bahoda*, *supra* at 276; *People v Schmitz*, 231 Mich App 521, 533; 586 NW2d 766 (1998). Nor are we persuaded that the prosecutor acted in bad faith, or that defendant was otherwise prejudiced, when the prosecutor referred to certain testimony in his opening statement that was later not produced at trial. See *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997). To the extent that some of the challenged remarks can be considered improper, a cautionary instruction could have eliminated any resulting prejudice. Thus, we conclude that defendant was not entitled to relief on this issue.

IV

Next, defendant argues that he was deprived of a fair trial because the jury venire was tainted when several potential jurors were excused due to their personal experiences with sexual assaultive conduct or sexual assault victims. We disagree. A criminal defendant has a constitutional right to be tried by a fair and impartial jury. See US Const, Am VI; Const 1963, art 1, § 20; *Schmitz*, *supra* at 528. However, it is not necessary that a jury be without impression or opinion as long as the jurors can lay aside their impressions and base the verdict on the evidence. *People v Jenkins*, 10 Mich App 257, 262; 159 NW2d 225 (1968). Here, there is no indication in the record that the excused jurors contaminated the entire venire. Every juror who remained on the panel clearly stated his or her intent to

base the decision on the evidence and not on preconceived opinions or extraneous evidence. Defendant has not demonstrated the existence of error requiring reversal.

V

Next, defendant asserts that he was denied a fair trial when a juror was selected from a venire that had been dismissed and was subsequently recalled. However, by failing to object to the jury selection process below, defendant has waived this issue. See *Schmitz, supra* at 526; *People v Ho*, 231 Mich App 178, 183; 585 NW2d 357 (1998). In any event, there is no indication on the record that the late-added juror was exposed to any prejudicial information that affected his ability to be fair and impartial.

VI

Defendant also contends that his rights to due process and confrontation were violated because some of the jurors complained that they could not hear part of the complainant's testimony. However, by failing to raise this issue below, defendant has waived any claim of error. See *id.* at 193. The purpose of the appellate preservation of error requirement is to induce litigants to do what they can in the trial court to prevent error and eliminate its prejudice, or to create a record of the error and its prejudice.[2] *Schmitz, supra* at 527-528. Here, there is no indication in the record that the error affected the outcome of the proceedings. See *Grant*, *supra*.

VII

Defendant next maintains that he was denied a fair trial when Detective Uebler stated that the original charges included "several multiple count warrants." However, because defendant did not object to this comment below, our review of this issue is only for manifest injustice. See *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). As the jury was already aware that there were numerous other alleged acts of sexual abuse, we conclude that this unsolicited comment did not result in manifest injustice.

VIII

Defendant further argues that the trial court abused its discretion in admitting an audiotape of a telephone conversation between defendant and the complainant's father. We disagree. The audiotape was properly authenticated through the father's testimony, as required by MRE 901. See *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991).

IX

Defendant next claims that his convictions must be reversed because he was denied the effective assistance of counsel. Because defendant did not raise the issue of ineffective assistance of counsel in a motion for a new trial or an evidentiary hearing below, appellate review is foreclosed unless the record contains sufficient detail to support defendant's claims. See *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995).

Most of defendant's claims relate to issues previously discussed in this opinion. With regard to these claims, we conclude that defendant has failed to establish either that counsel's performance was deficient or that he was prejudiced by the alleged deficiency. See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). Defendant has not overcome the presumption that counsel's decision not to object to the disclosure that defendant wrote a letter while in jail constituted sound trial strategy. See *Stanaway*, *supra* at 687. Finally, defendant's claims that counsel failed to review the presentence report with him prior to sentencing and failed to object to allegedly false information in the presentence report are not supported by the record. For these reasons, we conclude that ineffective assistance of counsel has not been established.

X

Defendant's final claim of error is that the cumulative effect of multiple errors warrants reversal in the present case. However, no cognizable errors have been identified that deprived defendant of a fair trial. Accordingly, reversal under this theory is unwarranted. See *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).

Affirmed.

/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra
/s/ Hilda R. Gage

[1] Defendant contends that he objected to the admission of the evidence at trial. Our review of the record indicates that defendant did object after the prosecutor's opening statement regarding the admission of statements made to defendant's former wife during the marriage. However, before defendant's ex-wife testified, the following transpired concerning her anticipated testimony:

> [THE PROSECUTOR]: I have indicated to her that she cannot discuss anything that has been said by Mr. Foster to her. It's my intention in calling her to discuss what happened after these allegations came to light.
>
> The anticipated testimony is that at one point . . . she became aware that the police were contacted, that there was going to be a warrant issued. She told Mr. Foster there was going to be a warrant issued because Mr. Uebler had said that, and he had left the State of Michigan and took off, and that's the extent of the testimony.
>
> THE COURT: I don't foresee the need to make any rulings in advance with regard to that offered testimony, unless [defense counsel] claims otherwise.
>
> [DEFENSE COUNSEL]: No, no. I have copies of the statements of Mrs. Jankoviak June 15 and the 17th. I have the 16th which the Court ruled not permissible.
>
> There's a reference here to Paul Bella.

[THE PROSECUTOR]: I've instructed her not to use his name.

[DEFENSE COUNSEL]: All right, that's fine, unless there's something else objectionable.

THE COURT: Right, I understand you still have the right to object as the testimony comes in, but I don't see any need to rule in advance. It appears that based on the offer, that it's permissible testimony.

[2] In any case, although defendant claims that the prosecutor later inaccurately summarized the complainant's testimony, our review of the record indicates that the complainant consistently testified that he was thirteen when defendant began performing fellatio on him.