STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 25, 2000
v	No. 214415 Kent Circuit Court
RICHARD JOHN WALSH, Defendant-Appellant.	LC No. 97-005917 FC

Before: Fitzgerald, P.J., and Saad and Whitbeck, JJ.

PER CURIAM.

The jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b (1)(a); MSA 28.788(2)(1)(a), for the sexual abuse of his niece and the court sentenced him to serve four to forty years' imprisonment. Defendant appeals as of right. We affirm.

I. FACTS AND PROCEEDINGS

In February 1997, when complainant was eighteen years old, she revealed to her family and to police that defendant had continually sexually abused her over a period of several years when she was a child. Complainant could not recall any dates on which the incidents of sexual abuse occurred. She recalled only that she used to accompany her mother on visits to her maternal grandmother's house two or three times a week. Defendant, the complainant's young uncle, lived in the grandmother's home. During the visits, defendant would take complainant into the basement and touch her vaginal area with his hands and mouth. Complainant testified that the abuse began before she was in first grade, because it was already occurring when her first grade class heard a presentation on acceptable and unacceptable touching. Complainant testified that the abuse ended shortly before defendant moved out of his mother's house to live with his girlfriend's (now wife) family.

According to complainant's trial testimony, she never told her mother about the abuse before 1997 because defendant told her that her mother would stop loving her if she found out. However, complainant told two childhood friends, MH and KT, about the abuse while they were in grade school. She made them promise not to tell anyone. When complainant was thirteen, she recounted the abuse in

a letter that she hid in the attic. The letter remained complainant's secret until the day in 1997 when she told her mother. Complainant retrieved the letter from the attic and handed it to her mother.

The prosecution charged defendant by information with first-degree criminal sexual conduct. The information charging defendant with criminal sexual conduct limited the time frame of the charge to 1986, when defendant was eighteen (and complainant was seven or eight). Presumably, the prosecution wanted to avoid any jurisdictional questions that would arise if defendant were charged with juvenile offenses.[1]

At trial, a controversy arose over the prosecutor's attempt to introduce evidence relating to the letter complainant wrote at age thirteen and the statements she made to her friends. Defendant objected to this evidence on hearsay grounds. The trial court allowed plaintiff to testify that she had told her friends about the abuse and that she had documented the abuse in the letter when she was thirteen. The friends, KT and MH, were permitted to testify that they had had conversations with complainant on certain occasions, but they could not testify to the content of these discussions. Complainant's mother was allowed to testify that complainant handed her a letter in February, 1997. Complainant's mother stated that complainant was emotionally distraught and crying when she gave her the letter, and that she banged on the table and shouted "it happened." The trial court struck the testimony that complainant yelled "it happened," and explained to the jury that statements complainant made outside the courtroom were not admissible as evidence.

At trial, defendant attempted to cast doubt on complainant's testimony that acts of abuse occurred in 1986. The apparent goal of his cross-examination was to emphasize complainant's vague memory concerning the time frame of the abuse. Complainant admitted during cross-examination that the abuse had stopped before defendant moved out of his mother's house, and that she was "not exactly sure when he moved out."

At the close of the prosecution's proofs defendant moved to dismiss the charges against him on the ground that the trial court lacked jurisdiction to hear his case. Defense counsel noted that during complainant's testimony she had stated that the abuse had begun when she was approximately four years old, at which time defendant would have been age fifteen, and ended when defendant moved from his mother's house. Counsel then made an offer of proof wherein he stated that defendant would testify that he had moved from his mother's house in 1984, when he was sixteen years old. Counsel argued that if the sexual abuse ended when he moved from his mother's home, and if that occurred before he reached the age of seventeen, the trial court had no jurisdiction to hear the case and therefore must dismiss the charges against defendant.

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[1] Arguably, the prosecution could also have charged defendant with offenses committed when he was fifteen or sixteen years old under the "automatic waiver" statute, MCL 600.606; MSA 27A.606. This statute has retroactive application and, theoretically, could have been used to prosecute defendant for offenses occurring before his seventeenth birthday. *In re Fultz,* 211 Mich App 299, 309-310; 535 NW2d 590 (1995), rev'd on other grounds 453 Mich 937; 554 NW2d 725 (1996). However, the prosecution did not pursue this option.

The trial court agreed that it would lack jurisdiction if defendant had in fact been sixteen when the abuse ceased. However, the court noted that although complainant had testified that the abuse ended when defendant left his mother's home, she had also stated that the abuse continued through 1986 (when defendant would have been eighteen) and occurred only within defendant's mother's home. Thus, the court found that defendant's allegation that he moved from his mother's home in 1984 created a factual issue concerning the time frame of the abuse:

> In other words, I don't think the Court can simply summarily say, I'm sorry, complaining witness, you must be wrong because somebody else says you're wrong. I think that's a fact issue, which is one of the issues that, in the circumstances, may have to go to the jury.

On that basis, the court denied defendant's motion to dismiss and continued the case. Defendant chose not to testify. However, he called two of his childhood companions to support his argument that he had moved out of his mother's house when he was sixteen, meaning that no acts of abuse could have occurred in 1986, when he was eighteen. Mary Moon testified that she grew up next door to defendant and had frequently gone fishing with him. Moon recalled that the last year they had fished together was 1983, when defendant was fifteen years old. She stated that she could recall defendant's age at that time because that year a DNR officer had stopped them while fishing because he thought that defendant was older and wanted to check his fishing license. According to Moon, after that summer in 1983 she saw very little of defendant. On cross-examination, Moon admitted that she did not know for certain whether defendant had moved from his mother's house at that time, although she thought that he probably had because he was never present when she visited his mother's house. Lisa Swart, Moon's sister, testified that she also had spent a considerable amount of time with defendant during childhood, and that she saw defendant approximately five days a week until she was sixteen years old. Swart recalled that defendant began to date his future wife in 1984 and that after the fall of that year was not around his mother's house very often.

The prosecution was permitted to offer testimony to rebut the defense testimony indicating that he had moved from his mother's home in 1983 or 1984. Outside of the presence of the jury, the trial court noted a record from the 62-B District Court in Kentwood that showed that defendant, when arraigned on August 5, 1985, on a charge of shoplifting, gave his address as 7693 Thornapple Drive, his mother's address. This was eventually referred to before the jury as a "public record" that gave Thornapple River Drive as defendant's address on that date. The jury was instructed that it could consider this record as evidence in the case.

A police officer also testified that she had contact with defendant on July 26, 1985, and that at that time he gave his address to the officer as 7693 Thornapple River Drive.

Following closing arguments, the court first instructed the jury as follows:

> The prosecutor has alleged in the Information filed with the court that this crime took place during calendar [year] 1986. Now the prosecutor doesn't have to prove that the

> crime was committed on a specific date but the prosecutor must prove that it was committed within the range of dates selected and charged in the information, those dates being January 1, 1986 through December 31, 1986. *You must find that defendant committed alleged acts within that range of dates or you must find the defendant not guilty.* [Emphasis added.]

The trial court then included this time constraint as an element of the offense, thereby requiring the prosecution to prove that defendant had committed all of the elements of criminal sexual conduct during a time period when he was an adult:

> Now the defendant is charged with the crime of First Degree Criminal Sexual Conduct. To prove this charge the prosecutor must prove the following elements beyond a reasonable doubt:
>
> * * *
>
> *And, third, of course, as I have previously explained, the act must have occurred between the dates of January 1, 1986 and December 31st of 1986*. [Emphasis added.]

I

Defendant contends that the trial court lacked jurisdiction to hear the case against him because he was a juvenile at the time of the offense. We disagree. The circuit courts are presumed to have original jurisdiction in all matters not prohibited by law. Const 1963, art 6, see section 13; MCL 600.151; MSA 27A.151; *People v Goecke*, 457 Mich 442, 458; 579 NW2d 868 (1998). Here, the information charging defendant with the offense of criminal sexual conduct specifically limited the time frame of the charged conduct to acts which occurred in the calendar year 1986. According to both the information and the judgment of sentence, defendant was born on January 16, 1968, and thus he was eighteen years old at the time of the charged offense. Therefore, we do not agree with defendant that the trial court lacked jurisdiction because defendant committed the charged criminal acts while an adult.

Defendant says that the trial court's jurisdiction was nonetheless in controversy because of a factual dispute as to the year he left his mother's house and discontinued abusing complainant. He contends that the discrepancy between the witness' accounts raised the possibility that the last alleged incident of abuse occurred when he was still a juvenile, which, he claims, would deprive the court of its jurisdiction. He maintains, incorrectly, that by leaving this question to the jury, the trial court, in effect, relegated a question of law over jurisdiction to the jury. A review of the instructions given by the court indicates that the trial court did not submit the jurisdiction issue to the jury, but rather included a time constraint as an element of the offense, thereby requiring the prosecution to prove that defendant had committed all of the elements of criminal sexual conduct during a time period when he was an adult. The instructions given by the court indicate that it had decided jurisdiction relative to the time frame

charged in the information, leaving to the jury only the issue of whether defendant committed those crimes during that time frame.

Defendant argues that were this Court to find that the trial court did not err in submitting this factual issue to the jury, there was insufficient evidence presented at trial to prove that defendant committed the acts during 1986. We disagree. While defendant did introduce evidence to suggest the contrary, the complainant testified that she was certain the abuse was occurring regularly during 1986. This conflict in evidence was a fact question for the jury to resolve according to its determination of the witness' credibility. The credibility of witness testimony is a matter for the trier of fact to ascertain and will not be resolved anew on appeal. See generally *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998); *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

II

Defendant claims that he was prejudiced as a result of the information's failure to set forth a specific date on which the sexual abuses were alleged to have occurred. Because defendant failed to object or otherwise move to amend the information, we review only for prejudice to the defense or a "failure of justice" after considering "the whole proceedings." MCL 767.76; MSA 28.1016. The Legislature has provided that an information need only state the time of an offense "as near as may be." MCL 767.45(1)(b); MSA 28.985(1)(b). In *People v Naugle*, 152 Mich App 227; 393 NW2d 592 (1986), this Court established several factors that should be considered in determining to what extent specificity of the time of the offense will be required. These include: (1) the nature of the crime charged; (2) the complainant's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense. *Id*. at 233-234.

Here, defendant was charged with the sexual assault of a child. The abuse actually charged allegedly occurred between two and three times per week during a period when the complainant was eight years old. Although the complainant was unable to provide specific dates for these occurrences, she identified the offense dates "as nearly as the circumstances [would] permit." *Id*. at 236, quoting MCL 767.51; MSA 28.991. At trial, the complainant testified that although she could recall that the abuse occurred during her regular visits to the home of defendant's mother, she was unable to recall the specific dates of abuse. This Court has recognized that youthful complainants are often unable to recall the specific dates of abuse. Accordingly, this Court has held that this inability to recall specific dates should be one consideration in determining the degree of specificity of time required in the information. See *Naugle*, *supra* at 235 ("[C]hildren who are victims of ongoing sexual assaults have difficulty remembering the exact dates of the individual assaults"); see also *People v Howell*, 396 Mich 16, 29; 238 NW2d 148 (1976). Similarly, because the complainant was only eight years old at the time of the offense, we reject defendant's argument that she should now be held to an adult's standard of remembrance.

Moreover, we do not believe that the absence of a specific date for the alleged offense prejudiced defendant in preparing his case. There is nothing in the record to suggest that he could have presented a different defense at trial if the charge had been more specific concerning time. Because the abuse allegedly occurred so often and so regularly throughout the time period charged in the

information, it is unlikely that defendant would have been able to present a more viable defense than that which he presented at trial. See, e.g., *Naugle, supra* at 234-235. Under these circumstances, we do not believe that defendant has suffered any manifest injustice as a result of the prosecutor's failure to specify the exact dates on which the abuses occurred.

Defendant also appears to argue that the information was defective because the proofs indicated that the offenses occurred before 1986 and the information alleged that the offenses occurred during calendar year 1986. As noted above, the complainant recalled abuses occurring into 1986, the period charged in the information and limited by the court for the jury's consideration of guilt. Therefore, the proofs conformed to the information and defendant's argument to the contrary is meritless. *Naugle, supra* at 235.

III

Defendant contends that complainant should not have been permitted to testify that she told two friends about the abuse years before she informed the police or that she made a written account of the abuse when she was thirteen years old. Defendant did not object to complainant's testimony that she once told two friends about the abuse but instructed them to keep her secret.[2] To preserve an evidentiary issue for appeal, the party opposing the admission of evidence must object at trial on the same ground that the party asserts on appeal. MRE 103(a)(1); *People v Griffin,* 235 Mich App 27, 44; 597 NW2d 176 (1999). On review, we apply an abuse of discretion standard to evidence admitted over an objection. *People v Starr,* 457 Mich 490, 494; 577 NW2d 673 (1998). However, we review the admissibility of evidence to which an objection was not made for plain error affecting substantial rights. *People v Carines,* 460 Mich 750, 763-764; 597 NW2d 130 (1999). In *Carines,* the Supreme Court, relying on *United States v Olano,* 507 US 725; 113 S Ct 1170; 123 L Ed 2d 508 (1993), set forth a stringent standard to be applied by this Court before setting aside a conviction on a claim of unpreserved error:

> 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. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*Carines, supra* at 763-764 (footnote and citations omitted).]

[2] Defendant also claims that his trial counsel was ineffective because he failed to object to the testimony challenged on appeal. Although defendant may, in part, cast this as an ineffective counsel claim, we see this as an evidentiary claim and treat it as such.

The plain error test is "difficult to meet." *United States v King*, 73 F3d 1564, 1572 (CA 11, 1996), quoting *United States v Sorondo,* 845 F2d 945, 948-949 (CA 11, 1988). The doctrine should be invoked "sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result." *Olano, supra*.[3]

MRE 801(c) defines "hearsay" as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." We do not believe the testimony was admissible, as argued by the prosecutor both below and on appeal, under MRE 801(d)(1)(B). MRE 801(d)(1)(B) provides that the earlier statements of a declarant who testifies at trial are not hearsay if they are "consistent with the declarant's testimony and [are] offered to rebut an express or *implied charge against the declarant of recent fabrication or improper influence or motive.*" The prosecutor argues that the disputed testimony was necessary to rebut the natural implication that by waiting eleven years to come forward the complainant's testimony may have been fabricated. However, we note, as did the trial court, that at the time this testimony was admitted defendant had done nothing to raise this or any other implication that the complainant's allegations had been recently fabricated. Our research has uncovered no reported Michigan cases addressing whether, in the absence of some assertion by the opposing party, a naturally arising implication is sufficient to admit rebuttal evidence of a prior inconsistent statement under MRE 801(d)(1)(B). Although the rule is unclear in this regard, we do not believe that the disputed testimony was admissible under the rule.

MRE 801(d)(1)(B) is identical to its federal counterpart, FRE 801(d)(1)(B), regarding prior consistent statements of a declarant to rebut a charge of recent fabrication. See *People v Rodriquez (On Remand)*, 216 Mich App 329, 331; 549 NW2d 359 (1996). Thus, this Court finds persuasive federal cases that have construed FRE 801(d)(1)(B). *People v Valmareus Jones*, 240 Mich App 704, 707; ___ NW2d ___ (Docket No. 216507, rel'd 4/28/00), citing *People v Brownridge*, 225 Mich App 291, 302, n 4; 570 NW2d 672 (1997), aff'd in part, rev'd in part on other grounds 459 Mich 456, amended on other grounds 459 Mich 1276 (1999). In assessing the federal rule, the United States Supreme Court recently noted that the rule plainly "defines prior consistent statements as nonhearsay *only* if they are offered to rebut a charge of 'recent fabrication or improper influence or motive.'" *Tome v United States*, 513 US 150, 157; 115 S Ct 696; 130 L Ed 2d 574 (1995) (emphasis added), quoting Advisory Committee Notes on FRE 801(1)(d), 28 USC App, p 773. "Prior consistent statements may not be admitted to counter all forms of impeachment or to bolster the witness merely because she has been discredited." *Id*.; see also *People v Hallaway*, 389 Mich 265, 275-276; 205 NW2d 451 (1973). In this case, while there may have been some concern over the delay in reporting the abuse as it relates to the complainant's credibility, there was nothing in the

[3] The narrowness of the plain error rule is "a reflection of the importance, indeed necessity, of the contemporaneous objection rule to which it is an exception. The contemporaneous objection rule fosters finality of judgment and deters 'sandbagging,' saving an issue for appeal in hopes of having another shot at trial if the first one misses." *United States v Pielago,* 135 F3d 703, 709 (CA 11, 1998). Moreover, requiring timely objections allows trial courts to "develop a full record on the issue, consider the matter, and correct any error before substantial judicial resources are wasted on appeal and then in an unnecessary retrial." *Id.*

circumstances surrounding the delay to imply that the complainant had fabricated the story, nor was there anything from which to infer that she had been improperly influenced or motivated to make a false claim. "The Rule speaks of a party rebutting an alleged motive, not bolstering the veracity of the story told." *Tome*, *supra* at 157-158.

In conclusion, the challenged testimony was inadmissible under MRE 801(d)(1)(B). Its admission, therefore, was error. However, even if this was a "plain" error, defendant has not shown that the admission of the testimony affected his "substantial rights." In other words, defendant has not shown that the error affected the outcome of the proceedings. Additionally, even when all three prongs of the plain error test are met, this Court may exercise its discretion to correct the error only if the error resulted in the wrongful conviction of an innocent defendant or if the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Carines*, *supra* at 763-764. The error in this case does not rise to this level. There was strong and convincing evidence in this case that defendant continually sexually abused the victim over a period of several years when she was a child, proving defendant's guilt. There is no other evidence that this error seriously affected the fairness, integrity or public reputation of judicial proceedings.[4]

IV

Defendant claims that his counsel was ineffective for failing to adequately cross-examine prosecution witnesses, call additional defense witnesses, and generally prepare a defense in this case. We find defendant's conclusory allegations to be without merit.

Generally, decisions concerning which witnesses to call, what evidence to present, and the questioning of witnesses are considered part of trial strategy. *People v Julian*, 171 Mich App 153, 158-159; 429 NW2d 615 (1988). However, failure to call witnesses or present other evidence may constitute ineffective assistance of counsel if the failure deprives the defendant of a substantial defense. *Id*. at 159. Because defendant did not move for a hearing or a new trial on the basis of ineffective assistance of counsel below, this Court's review is limited to mistakes apparent on the record. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996). While defendant alleges that more

[4] To the extent that defendant claims that the trial court erred in admitting the testimony of complainant's mother and friends regarding the letter written by complainant when she was thirteen years old and their conversations with complainant concerning the abuse, we note that defendant did object to this testimony and, therefore, we review this claim for an abuse of discretion. *Starr*, *supra*, at 494. However, we conclude that any error in the admission of this evidence was harmless. Whether a preserved nonconstitutional error is harmless depends on "the nature of the error" and its effect on the reliability of the verdict "in light of the weight and strength of the untainted evidence." *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996). An error justifies reversal if it is more likely than not that it affected the outcome. *People v Lukity*, 460 Mich 484, 493, 495; 596 NW2d 607 (1999). While complainant's friends and mother acknowledged having conversations with complainant, they were not allowed to testify as to the substance of those conversations. Additionally, complainant's mother was not allowed to testify to the contents of the letter. Under these circumstances, we believe that it is unlikely that any error in the admission of the testimony affected the outcome at trial. *Id.*

aggressive cross-examination and the presentation of additional defense witnesses would have benefited his defense, nothing in the record supports these claims.

V

Defendant argues that he was deprived of a fair trial by several instances of prosecutorial misconduct during closing argument. These assertions are without merit. Our consideration of unpreserved challenges to alleged prosecutorial misconduct is again limited to plain error affecting defendant's substantial rights. *Carines, supra*.

Defendant complains of the prosecutor's reference to testimony that the complainant confided in friends about the abuse and that she wrote an undelivered letter to document the abuse. However, this error was presumably cured by the trial court's instruction that attorneys' statements are not evidence. In any event, this alleged error does not warrant reversal because a prosecutor is entitled to argue the evidence admitted at trial. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant avers that the prosecutor improperly characterized defense witnesses as liars and improperly vouched for the credibility of a prosecution witness during closing argument. A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that the witness is testifying truthfully. *Id.* at 276. A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is "not worthy of belief." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *People v Robert Jones*, 60 Mich App 681, 686; 233 NW2d 22 (1975). Here, the challenged remarks regarding defendant were made in reference to the testimony and evidence presented at trial. The prosecutor was advancing her position that various claims made by defendant were not credible in light of contradictory evidence adduced at trial. Likewise, the prosecutor did not personally vouch for the credibility of the prosecution witnesses, but rather argued that the facts and evidence demonstrated that the witnesses were credible. In this context, the remarks were not improper.

Defendant claims that the prosecutor improperly stated her personal belief in the truthfulness of her witnesses and defendant's guilt. When evaluating a claim of prosecutorial misconduct, the reviewing court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether they denied the defendant a fair trial. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Here, the challenged remark was preceded by a lengthy review of the testimony and evidence produced during trial. In that context, the comment was not a statement of the personal beliefs of the prosecutor regarding the guilt of defendant, nor was it a statement of her personal belief in the truthfulness of her witnesses. Rather, it was rather a conclusion argued on the basis of the evidence. A prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case. *Bahoda, supra* at 282. Therefore, the challenged remark was not improper and did not deny defendant a fair trial.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Henry William Saad
/s/ William C. Whitbeck