STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2001
v	No. 216730 Bay Circuit Court
RICHARD CONRAD WITBRODT, Defendant-Appellant.	LC Nos. 98-001264-FC; 98-001265-FC

Before: Cavanagh, P.J., and Markey and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) and (b), and sentenced to concurrent prison terms of twenty-five to forty years for each conviction. He appeals as of right. We affirm, but remand for correction of the judgment of sentence in lower court no. 98-001265-FC.

Defendant first claims that errors by the trial court, the prosecutor, and defense counsel in connection with the testimony of Lynn Butterfield, who testified about behaviors of child sex abuse victims, deprived him of a fair trial. Although it is plain from the record that Butterfield was presented to the jury as an expert witness, with an instruction that limited the jury's use of her testimony to deciding if the complainant's acts and words were consistent with those of sexually abused children, and that the parties and the trial court treated Butterfield as an expert witness, defense counsel did not expressly approve Butterfield's status as an expert. However, neither did he object to the challenged testimony. Accordingly, we review this unpreserved issue for plain error affecting defendant's substantial rights. *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999)

Examined in this context, we find no basis for relief. Although MRE 702 requires a judicial determination of expert qualifications, *Anton v State Farm Mutual Automobile Ins Co*, 238 Mich App 673, 678; 607 NW2d 123 (1999), and MRE 103(d) permits a court to take notice of plain error, we find no basis in the record for concluding that Butterfield was not qualified as an expert or that her testimony should have been excluded. See *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995); *People v Beckley*, 434 Mich 691, 713-714; 456 NW2d 391 (1990). For this reason, we also reject defendant's claim of prosecutorial misconduct in this regard, because it does not plainly appear that the prosecutor

made a bad faith attempt to admit expert testimony. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000); *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Finally, limiting our review to the record, defendant has not shown that defense counsel was ineffective for failing to object to Butterfield's testimony or to voir dire Butterfield regarding her qualifications. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). Defense counsel need not make frivolous objections. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant next claims that defense counsel was ineffective by introducing evidence of the notes written by the victim to her mother and boyfriend, and by introducing the taped recording of the police interview of the victim's boyfriend. Again, limiting our review to the record, *Avant, supra*, we conclude that defendant has failed to overcome the strong presumption that the challenged actions were sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The evidence, particularly the notes, was not inconsistent with the defense strategy of attacking the victim's credibility by attempting to show that the victim had fabricated a story of abuse in the note to her boyfriend, resulting in a situation that grew and escalated beyond her control.

Defendant next claims that the prosecutor's remarks during rebuttal argument deprived him of a fair trial. The only remark that was preserved with an appropriate objection at trial was the remark that defendant contends was an improper opinion concerning whether defendant's son gave truthful testimony. Viewed in context, however, we conclude that the prosecutor's remarks were based on the evidence presented at trial and, therefore, were not improper. *Schutte, supra* at 722. We have considered defendant's remaining claims of prosecutorial misconduct, none of which received an appropriate objection at trial, and conclude that defendant has failed to show any plain error affecting his substantial rights. *Schutte, supra* at 720. The challenged rebuttal remarks, examined in context, did not deprive defendant of a fair and impartial trial. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Defendant next claims that the trial court erred by failing to give a limiting instruction on the use of the complainant's testimony concerning other sexual acts between complainant and defendant. However, defendant did not request a limiting instruction at trial and plain error is not apparent from the record. *Carines, supra*. The trial court was under no obligation to sua sponte provide a limiting instruction. *People v DerMartzex*, 390 Mich 410, 416-417; 213 NW2d 97 (1973). Further, we reject defendant's alternative claim that defense counsel's failure to request the instruction constituted ineffective assistance of counsel. Limiting our review to the record, defendant has not overcome the strong presumption that the challenged action was sound trial strategy. *Toma, supra; Avant, supra*. Defense counsel reasonably may have thought it counterproductive to emphasize that the other acts were also separate criminal offenses. *DerMartzex, supra.*

Defendant raises two additional trial-related claims in his brief filed propria persona. In reviewing these claims, we decline to consider the documents submitted with defendant's pro se appeal brief that were not presented below. A party may not enlarge the record on appeal. *People v Williams*, 241 Mich App 519, 524 n 1; 616 NW2d 710 (2000).

Defendant argues that prosecution witnesses violated the trial court's oral sequestration order. Although a trial court has the discretion to caution sequestered witnesses not to discuss evidence, the record here does not factually support defendant's claim that such an order was made in this case. *People v Davis*, 133 Mich App 707, 714; 350 NW2d 796 (1984). Thus, defendant has not established the threshold requirement of demonstrating plain error for this unpreserved issue. *Carines, supra*.[1]

Defendant's second pro se claim is that the jury verdict was based on insufficient evidence and is against the great weight of the evidence.[2] We decline to review defendant's claim that the jury verdict was against the great weight of the evidence because defendant did not present this issue to the trial court in a motion for a new trial. *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). However, we may consider defendant's challenge to the sufficiency of the evidence, even though that issue was not raised below. *People v Patterson*, 428 Mich 502, 505; 410 NW2d 733 (1987). In considering this issue, we must "view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with a jury's credibility determination. *People v Norris*, 236 Mich App 411, 422; 600 NW2d 658 (1999). Contrary to what defendant argues, the prosecutor was not required to negate every reasonable theory consistent with innocence. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Viewed in a light most favorable to the prosecution, the complainant's testimony was sufficient to enable a rational trier of fact to find that the essential elements of the charged offenses were proven beyond a reasonable doubt. It was not necessary that the complainant's testimony be corroborated. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 642-643 n 22; 576 NW2d 129 (1998).

Having considered all of the trial-related issues raised by defendant in propria persona and through appellate counsel, we find no basis for reversal due to cumulative error. Only actual errors are aggregated to determine their cumulative effect. *People v Bahoda*, 448 Mich 261, 292

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[1] Defendant also argues that the trial court abused its discretion by allowing the complainant to remain in the courtroom after she testified in the prosecution's case-in-chief. We could decline to consider this claim because it is not set forth in the statement of questions presented. *People v Yarger*, 193 Mich App 532, 540 n 3; 485 NW2d 119 (1992). In any event, we note that no abuse of discretion is apparent from the record. *People v Jehnsen*, 183 Mich App 305, 308-309; 454 NW2d 250 (1990). See also MCL 780.761.

[2] Defendant's claim that instructional errors were also present is not set forth in the statement of this issue and, therefore, is not properly before this Court. *Yarger, supra* at 540 n 3. In any event, we note that, before deliberating, the jury was instructed on reasonable doubt consistent with CJI2d 3.2, which adequately conveys the concept of reasonable doubt. *People v Cooper*, 236 Mich App 643, 656; 601 NW2d 409 (1999). We also note that the trial court did give a cautionary instruction on the use of prior inconsistent statements. In light of this record, we find defendant's assertions of instructional error inadequate to establish plain error. *Carines, supra* at 763. See also MRE 801(d)(1); *Avant, supra* at 511.

n 64; 531 NW2d 659 (1995). Defendant has not shown actual errors that deprived him of a fair trial. *Id.*; *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987).

Next, defendant argues that he did not receive the effective assistance of counsel at sentencing. Although defendant was entitled to the effective assistance of counsel at sentencing, *People v Dye*, 6 Mich App 217, 219; 148 NW2d 501 (1967), we find no error apparent from the record in this case. *Avant*, *supra* at 507. The decision to challenge the accuracy of information in the presentence report may be ascribed to defense strategy. *People v Lawrence*, 206 Mich App 378, 380; 522 NW2d 654 (1994). In view of the consistency between the information in the presentence report and the complainant's testimony at trial concerning the number of prior sexual encounters between the victim and defendant, defendant has failed to show that counsel's failure to object to the presentence report information was objectively unreasonable or was not sound strategy. *Toma*, *supra*.

Defendant also challenges the length of his sentences, arguing that they are disproportionate. We conclude that the trial court did not abuse its discretion by imposing concurrent sentences of twenty-five to forty years each. *People v Bennett*, 241 Mich App 511, 515-516; 616 NW2d 703 (2000). The sentences are proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.*; see also *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995); *People v Cain*, 238 Mich App 95, 132; 605 NW2d 28 (1999).

Finally, while not addressed by the parties, we note that the judgment of sentence in lower court no. 98-001265-FC incorrectly identifies defendant's conviction offense as falling under subsection (b) of MCL 750.720b(1), when, in fact, defendant was convicted of violating subsection (a) of the statute. Accordingly, we remand for the ministerial task of correcting the judgment of sentence.

Defendant's convictions and sentences are affirmed. Remanded for correction of the judgment of sentence in lower court no. 98-001265-FC. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Jeffrey G. Collins