STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 26, 2002
v	No. 223231 Oakland Circuit Court
ROBERT LEE SMITH, Defendant-Appellant.	LC Nos. 98-159303-FH 98-159304-FH

Before: Whitbeck, C.J., and Wilder and Zahra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b, and one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d, involving his daughter. He was acquitted of a second count of CSC III. Defendant was sentenced to concurrent prison terms of twenty to fifty years' imprisonment for the CSC I conviction and ten to fifteen years' imprisonment for the CSC III conviction. He appeals as of right. We affirm.

I. Prosecutorial misconduct claim

First, defendant argues that he was denied a fair trial because of prosecutorial misconduct. Claims of prosecutorial misconduct are decided case by case. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). This Court considers the prosecutor's conduct in context to determine whether it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). Here, many of the remarks challenged on appeal were responsive to argument and issues raised by defendant, see *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977), and, where defendant lodged an objection, the trial court gave curative instructions, *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988). Those curative instructions were sufficient to remove any prejudice resulting from the challenged comments. *Id*.

The prosecution's comment that defendant claims constituted improper vouching for the victim was in response to defense counsel's argument that various individuals had rallied to support the victim without inspecting her story. Moreover, the trial court instructed the jury that the fact the victim was considered credible by the police, prosecutor's office and district court judge was irrelevant and the verdict must be based on the evidence. The prosecution's comments, which defendant claims constituted a "play for sympathy" for the victim were not

objected to at the time of trial. Had defense counsel lodged a timely objection, any prejudice in regard to the comments could have been cured by an instruction. *Id*. Regardless, the trial court did instruct the jury that their verdict must not be the result of sympathy or prejudice. Insofar as defendant challenges the prosecution's remarks regarding alleged other acts, defendant opened the door for comment concerning such acts. *People v Pesquera*, 244 Mich App 305, 320-321; 625 NW2d 407 (2001). The prosecution's comments were proper response to defense counsel's cross-examination of the victim regarding other sex acts of defendant. Furthermore, the prosecution did not shift the burden of proof by commenting on the improbability of defendant's theory. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). The trial court gave a cautionary instruction that defendant does not have any burden to come forward with evidence. Under these circumstances, we conclude that the prosecution's conduct did not deny defendant a fair and impartial trial. *Reid, supra*.

II. Ineffective assistance of counsel claim

Defendant also argues that he was denied the effective assistance of counsel. Following an evidentiary hearing, the trial court rejected defendant's claim. A trial court's determination whether counsel was ineffective is subject to de novo review. *People v Kevorkian*, 248 Mich App 373, 410-411; __ NW2d __ (2001). We agree with the trial court that defendant has not shown that counsel's performance was deficient or that there was a reasonable probability that, but for counsel's alleged errors, the result of the trial would have been different. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997).

Defendant claims that his trial counsel was ineffective for failing to discover and use the report of Dr. Jeffrey London. According to Dr. London's report, the victim acknowledged "sexual activity with a boyfriend in the past." Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *Mitchell, supra* at 163, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), and the failure to present evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). Here, defendant claims that trial counsel's failure to introduce Dr. London's report could not have been a matter of trial strategy because defense counsel testified at the evidentiary hearing that he did not know about the report and, if he had, would have presented it at trial. Regardless, defendant cannot prevail on this claim because he has not shown that he was prejudiced by the failure to introduce the report. When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Defense counsel challenged the victim's truthfulness about her sexual activity through the examination of Dr. Isaac Powell, who testified that defendant did not show signs of a sexually transmitted disease that the victim had contracted. Thus, evidence suggesting that the victim may have had other sexual partners and was not credible was already before the jury.[1] Under these circumstances, defendant was not deprived a substantial defense or

[1] Furthermore, the fact that the report indicates the victim admitted "sexual activity" with a person other than defendant does not necessarily mean the victim engaged in the type of sexual contact that could have led to the transmission of the sexually transmitted disease. Also, the
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otherwise prejudiced by his counsel's failure to introduce Dr. London's report. *Daniel, supra*; *Hoyt, supra*.

Defendant also claims that his trial counsel was ineffective for failing to call high school counselor Diane Harris and teacher Wendy Cutler as defense witnesses. Defendant asserts that Harris and Cutler would have supported the defense claim that the victim was a liar. As stated, the decision to call particular witnesses is presumed to be a matter of trial strategy. *Mitchell, supra* at 163; *Rockey, supra*. This Court will not "assess counsel's competence with the benefit of hindsight." *Id*. at 76-77. In light of the other testimony and evidence challenging the victim's credibility and mental state, defendant was not deprived a substantial defense by his counsel's failure to call Harris or Cutler. *Daniel, supra*; *Hoyt, supra*.

Defendant further claims that trial counsel presented psychologist Elaine Swenson's testimony "in an ineffectual manner" because counsel did not interview Swenson or obtain her records prior to trial. Defense counsel elicited testimony from Swenson regarding her opinion of the victim's truthfulness about the allegations of sexual abuse. Swenson testified that she found the victim's affect while recounting the alleged events to be inappropriate for someone that suffered abuse. Swenson also stated at trial that the victim had a thought disturbance, which could have effected her perceptions. Given the substance of Swenson's trial testimony, defendant was not prejudiced by the alleged unpreparedness in regard to that witness. *Caballero, supra*. Overall, defendant has not overcome the strong presumption of effectiveness and was not denied a fair trial because of ineffective assistance of counsel. *Mitchell, supra* at 156.

III. Claim regarding questioning by jurors

Next, defendant contends that the trial court abused its discretion in allowing jurors to submit questions to witnesses. Our review of the record indicates that most of the questions properly served to clarify the testimony or "help unravel otherwise confusing testimony." *People v Heard*, 388 Mich 182, 187-188; 200 NW2d 73 (1972); *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982). Further, the questions were posed to the witnesses only after counsel for the parties had the opportunity to review and discuss the admissibility of the questions with the trial judge at a bench conference. Thus, the questions as posed were not objected to and we are not persuaded that the questions resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

IV. Claim regarding qualification of an expert

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statement that the victim engaged in "sexual activity" is not necessarily contrary to her trial testimony that defendant was the only person with whom she had sexual intercourse. It was incumbent upon defendant to develop a record at the evidentiary hearing in regard to what was meant by "sexual activity." See *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), and *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990). Defendant failed to do so.

Defendant further argues that the trial court abused its discretion in permitting gynecologist Carol Rizzo to testify as an expert in the area of sexual abuse of adolescents and sexually transmitted diseases. A trial court's decision whether a witness is qualified to give an expert opinion is reviewed for an abuse of discretion. *People v Peebles*, 216 Mich App 661, 667; 550 NW2d 589 (1996). Michigan endorses a broad application of the requirements for qualifying an expert. *Bouverette v Westinghouse Corp*, 245 Mich App 391, 400; 628 NW2d 86 (2001); see MRE 702. "[A]n opposing party's disagreement with an expert's opinion or interpretation of facts, and gaps in expertise, are matters of the weight to be accorded to the testimony, not its admissibility." *Bouverette, supra* at 401. Here, Dr. Rizzo testified that, in addition to her obstetric and gynecological training, she had served as the campus gynecologist at Vista Home for Girls in Detroit for twelve years. At that job, she saw approximately ten young women per month who had suffered from abuse or trauma and most of whom had contracted a sexually transmitted disease. Dr. Rizzo also testified that she had taken courses and been a member of an association of adolescent pediatric gynecologists and had training and experience in diagnosing and treating sexually transmitted diseases. Contrary to defendant's suggestion on appeal, the doctor did not testify as an "expert" in urology, rather she challenged the method used by defendant's urologist, Dr. Powell, to test defendant for a sexually transmitted disease and Dr. Powell's claim that defendant was unlikely to pass the disease to the victim if he was asymptomatic. In light of Dr. Rizzo's credentials and experience, the trial court did not abuse its discretion in permitting her testimony.

V. Cumulative error claim

Given our conclusion that each of the foregoing issues on appeal lack merit, we reject defendant's final argument that the cumulative effect of the alleged errors denied him a fair trial. *People v Snider*, 239 Mich App 393, 429 n 6; 608 NW2d 502 (2000).

Affirmed.

/s/ William C. Whitbeck
/s/ Kurtis T. Wilder
/s/ Brian K. Zahra