

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD A. MYERS,

Defendant-Appellant.

UNPUBLISHED

June 18, 2002

No. 226744

Wayne Circuit Court

LC No. 99-005702

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b, involving his stepdaughter. He was sentenced to two concurrent terms of ten to eighteen years' imprisonment. He appeals as of right. We affirm.

First, defendant argues that he was denied a fair trial when the prosecutor elicited testimony regarding his other alleged sexual misconduct with complainant. Because defendant did not object to the testimony below, this issue is not preserved. Accordingly, we review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The record indicates that the prosecutor gave notice of her intent to introduce evidence of similar acts, MCR 404(b)(2), and that the trial court gave the jury a limiting instruction. Moreover, complainant's testimony that defendant, a member of her household, engaged in oral sex with her and had her rub his penis was admissible to corroborate complainant's testimony. *People v DerMartzex*, 390 Mich 410, 413-415; 213 NW2d 97 (1973); *People v Engelman*, 434 Mich 204, 222; 453 NW2d 656 (1990). Plain error has not been shown.

Next, defendant argues that the trial court abused its discretion by admitting complainant's testimony about her own out of court behavior. The admission of evidence is within the trial court's discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000). Again, this issue was not preserved with an objection below. For the most part, defendant mischaracterizes this testimony as hearsay. MRE 801. We find no plain error requiring reversal. *Carines, supra* at 763.

Defendant also contends that the trial court abused its discretion in admitting the testimony of complainant's cousin, Mary. It was defendant's theory that complainant was fabricating the allegations of abuse because she wanted her mother to divorce defendant and return to complainant's father. Mary's testimony about complainant's behavior at the time of the

alleged assaults was relevant under MRE 401, because it tended to rebut defendant's theory that the allegations were fabricated. We find no abuse of discretion. *Jones, supra* at 706.

Defendant argues that he was denied a fair trial because the prosecutor said in her opening statement that complainant's cousin Mary would testify that complainant returned to bed crying and that defendant was waiting at the door "to see if anything was going to be said." Mary testified that she was "almost positive" that complainant was crying when she returned to bed and that, after complainant returned, Mary saw defendant standing in the door, in the dark. Although the evidence was not later presented exactly as the prosecutor expected, there is no indication that the prosecutor was acting in anything but good faith in her opening remarks, and defendant was not prejudiced. Accordingly, reversal is not required. *People v Wolverton*, 227 Mich App 72, 75-77; 574 NW2d 703 (1997).

Defendant contends that the prosecutor improperly elicited a statement from a police officer that the officer "attempted to talk with" defendant about the charges. The prosecutor did not pursue this subject upon receiving the officer's answer, nor did the officer further comment on the subject. Under the circumstances, the officer's unresponsive, volunteered answer is not grounds for reversal. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999).

There is no merit to defendant's claim that the information was not specific enough because it alleged that defendant inserted his penis into complainant's vagina two times "12/93 thru 12/95." Complainant testified that the sexual assaults occurred several times during that time frame. Although she did not remember a specific number, she testified to four specific incidents at trial. Defendant expresses concern that he could be convicted for additional incidents of sexual abuse between the specified dates. An exact date need not be specified in the information, however, particularly in a criminal sexual conduct case involving a child. *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986); *People v Stricklin*, 162 Mich App 623, 634; 413 NW2d 457 (1987).

Defendant argues that the prosecutor improperly used the complainant's prior written statement to impeach his own witness, purporting to refresh her recollection. We disagree. It was apparent that complainant had trouble remembering occasional details of the assaults that occurred when she was between the ages of seven and eleven. Contrary to defendant's claim, the prosecutor did not reveal the contents of the prior statements to the jury and the statements were not admitted as evidence. The trial court did not abuse its discretion in allowing complainant to use the prior statement to refresh her memory. MRE 612; *Jones, supra* at 706. Even assuming error, it was harmless because instead of benefiting the prosecution, the testimony made the victim appear confused.

Defendant argues that the trial court erred by prohibiting him from using one of complainant's statements to impeach another of her statements, through the testimony of a police officer. Counsel was attempting to show through the police officer's testimony that complainant had made inconsistent statements. Defendant acknowledges on appeal that he was trying to impeach complainant's credibility through the testimony of the police officer. Defendant was not attempting to use an out-of-court statement to impeach trial testimony, MRE 801(d)(1), but rather, was trying to compare two out-of-court statements of someone other than the witness. He cites no authority suggesting that this is a proper method of impeachment. We are not persuaded

that the trial court abused its discretion in prohibiting the statements to be used for this purpose. *Jones, supra* at 706.

Defendant also contends that resentencing is required because the trial court failed to articulate its reasons for his sentence. A sentence within the recommended guidelines' range¹ is presumptively proportionate. *People v Beneson*, 192 Mich App 469, 470; 481 NW2d 799 (1992). The record reflects that the trial court indicated its awareness of the guidelines' range before sentencing defendant to a minimum sentence at the extreme low end of the guidelines. Under the circumstances, remand for additional articulation is not warranted. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997); *People v Bailey (On Remand)*, 218 Mich App 645, 646-647; 554 NW2d 391 (1996); *People Lawson*, 195 Mich App 76, 77-78; 489 NW2d 147 (1992).

Finally, defendant argues that he was denied the effective assistance of counsel. Because defendant did not request a *Ginther*² hearing below, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, defendant must show that counsel made errors so serious that he was not functioning as the counsel guaranteed under the Sixth Amendment and that the deficient performance prejudiced the defense so as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* Also, this Court will not substitute its judgment for that of trial counsel in matters of trial strategy, *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999), or assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Decisions about calling and questioning witnesses are matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). For the most part, the alleged deficiencies relate to the issues previously addressed in this opinion. Consistent with our discussion of those issues, we find no serious errors that prejudiced the defense or deprived defendant of a fair trial. Furthermore, defendant has not overcome the presumption of sound trial strategy with regard to counsel's cross-examination of witnesses.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray

¹ Because the offenses were committed prior to the January 1, 1999, effective date of the statutory guidelines, MCL 769.34(1) & (2), the judicial guidelines apply in this case.

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).