

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

DOUGLAS O'NEIL FRANKS,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 227158

Grand Traverse Circuit Court

LC No. 99-007968-FC

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of four counts of first-degree criminal sexual conduct, MCL 750.520b, and one count of second-degree criminal sexual conduct, MCL 750.520c. He was sentenced to one term of life in prison and three terms of sixty to ninety years for the first-degree CSC convictions, and ten to fifteen years for the second-degree CSC conviction, all sentences to be served concurrently. He appeals as of right. We affirm.

Defendant was charged with sexually abusing his children between 1986-1992. The children, who testified as young adults, stated that defendant was verbally and physically abusive and forced them to engage in sexual acts, including penile-vaginal intercourse, fellatio, and genital manipulation. Defendant was alternately generous with gifts and physically and verbally abusive, and repeatedly threatened to kill the children or their mother if they reported his actions.

Barbara Cross, a clinical social worker, testified as an expert witness in the field of child sexual abuse syndrome. She testified that delayed disclosure is common in sexual abuse cases involving children, that children could be silenced by threats or coercion, and that it is not unusual for children to visit a person who has abused them because children would retain a loyalty to the person and would not want the abuse to be disclosed. On cross-examination, Cross stated that it was possible that a child could fabricate an allegation of sexual abuse as a response to years of physical abuse.

Detective Richard Robbins testified that he interviewed defendant, who initially denied the children's allegations but then stated that he might have touched the children when he was under the influence of drugs or alcohol. Robbins stated that he arranged a second interview with defendant, but defendant later telephoned and said he could not appear due to a death in the family.

Defendant testified on his own behalf. He stated that he got along very well with his children. He acknowledged that he disciplined his children, but denied ever striking them or verbally abusing them. Defendant denied engaging in any sexual activity whatsoever with the children and denied threatening to hurt or kill them. He stated that he told Robbins that he could not appear for the second interview because he had been informed by Marilyn Franks of a death in the family. That information turned out to be erroneous.

Richard Robbins testified on rebuttal that when he telephoned to find out why defendant did not appear for the second interview, defendant told him that he went out of town for a family funeral. Robbins stated that after he heard defendant's testimony he used the Law Enforcement Information Network (LEIN) to attempt to locate Marilyn Franks, but was unsuccessful. He acknowledged that, under certain circumstances, a name would not appear on a LEIN search.

During closing argument, the prosecutor emphasized that although the children delayed reporting the abuse perpetrated by defendant, they eventually came forward voluntarily. The prosecutor stated that the children placed their trust in the jurors and that it was time for defendant to be told that he was guilty.

Defense counsel argued that the prosecutor was relying on emotion, and urged the jurors to see defendant's children as the young adults they were and not as the small children depicted in the photographs introduced into evidence. Counsel emphasized that defendant denied each and every allegation and theorized that the children alleged that defendant abused them in order to curry favor with their mother or to please their interviewers.

In rebuttal closing argument, the prosecutor argued that defendant was not a credible witness. He noted that defendant stated that he did not keep a firearm under his bed; however, two of the children testified that a firearm was located under the bed. Although defendant testified that a woman named Marilyn Franks telephoned and told him in error that his cousin had been killed, the prosecutor emphasized that no such person could be located. The prosecutor further argued that, at this point, the children had no reason to fabricate accusations because they were no longer under defendant's control.

The jury found defendant guilty as charged. At sentencing, defendant raised various challenges to the scoring of the applicable judicial sentencing guidelines. The trial court denied each challenge. The guidelines as scored by the court recommended life or a minimum sentence range of ten to twenty-five years for the first-degree CSC convictions. The court sentenced defendant to a term of life in prison for one of the first-degree CSC convictions, a term of sixty to ninety years for each of the remaining first-degree CSC convictions, and a term of ten to fifteen years for the second-degree CSC conviction, to be served concurrently.

On appeal, defendant first argues that he was denied the effective assistance of counsel. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's performance resulted in prejudice. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). To demonstrate prejudice, a defendant must show a reasonable probability

that but for counsel's error, the result of the proceedings would have been different. *Toma, supra* at 302-303. Counsel is presumed to have afforded effective assistance, and a defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Specifically, defendant argues that trial counsel was ineffective because he failed: (1) to provide a rational defense to the charges by procuring a qualified expert witness in the area of repressed sexual abuse revealed during adult therapy; (2) to object to references to extraneous matters, including a restraining order that had been entered against defendant, the requirement that defendant's visitation with his children be supervised, and defendant's problems with drugs and alcohol; (3) to prevent repeated references to defendant's failure to appear for a second interview with Detective Robbins; (4) to move to exclude a self-serving statement made by one of the children to her mother regarding abuse; and (5) to object to improper and irrelevant rebuttal testimony from Orla Frost and Robbins. We disagree in each instance.

Counsel and defendant made the decision to forego calling an expert witness and to rely on counsel's cross-examination of the prosecution's witness, Barbara Cross. The failure to call a witness or to present other evidence constitutes ineffective assistance only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), mod on other grounds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of a trial. *In re Ayres*, 239 Mich App 8, 22; 608 NW2d 132 (1999). Defendant's theory was that the children's accusations were not true and that the children were either relating false memories or were leveling false charges to please their mother. On cross-examination, Cross acknowledged that some persons have false memories of sexual abuse and that some charges are leveled for ulterior motives. Defendant presented his theory through the cross-examination of Cross. He was not deprived of a substantial defense because he did not call an expert witness.

In addition, defendant's assertion that counsel was ineffective by failing to object to certain evidence is without merit. Counsel's decision to refrain from objecting to questions regarding issues such as the restraining order entered against defendant, defendant's use of drugs and alcohol, and a self-serving statement made by one of the children was consistent with the defense theory that the abuse charges were fabricated by defendant's former wife. We do not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Finally, the rebuttal evidence offered by the prosecution was proper. Counsel was not required to advocate a meritless position by objecting to that evidence. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that the prosecutor engaged in misconduct requiring reversal of his conviction. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of the defense arguments and evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). A claim of prosecutorial misconduct is reviewed de novo; however, we review a trial court's findings of fact for clear error. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

Defendant contends that the prosecutor committed misconduct in the following particulars: (1) asking improper questions that were designed to introduce evidence effectively

portraying defendant as a bad man who should be convicted; (2) engaging in improper conduct designed to inflame the passions of the jury by displaying photographs of the children when they were very young; (3) improperly arguing that the jury had a civic duty to convict him by stating that the children had placed their trust in the jury; and (4) improperly suggesting that the jury rely on the prosecutor's superior personal knowledge when the prosecutor stated that he knew defendant had lied about receiving a telephone call from Marilyn Franks.

Defendant did not object to the prosecutor's allegedly improper conduct. Absent an objection, reversal is warranted only if plain error occurred that 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); *Schutte*, *supra*. Defendant placed his character in issue by testifying on direct examination that he was a loving, considerate father who involved himself in his children's lives and who would not consider harming them. Defendant's introduction of this evidence permitted the prosecutor to introduce evidence to demonstrate that defendant's character was not as impeccable as claimed. *People v Leonard*, 224 Mich App 569, 594; 569 NW2d 663 (1997). The prosecutor properly questioned defendant regarding his commitment to his children by inquiring about matters such as his history of spanking the children and his lack of knowledge of graduation dates.

Even if we assume that the prosecutor's questions regarding other issues, such as defendant's failure to pay child support in a timely manner, the entry of a restraining order, and possible arrests for driving under the influence of alcohol, constituted improper evidence of prior bad acts, MRE 404(b)(1), we conclude that defendant's substantial rights were not affected. *Carines*, *supra*. These issues were peripheral and were not similar in nature to the offenses with which defendant was charged. Moreover, any prejudicial effect generated by the questions could have been cured by a timely instruction. See *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), citing *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Any error that occurred did not seriously affect the fairness, integrity, or public reputation of the proceedings. *Carines*, *supra*.

Furthermore, defendant's assertion that the prosecutor presented improper argument to the jury is without merit. Photographs depicting the children as they appeared at the time of the alleged acts were relevant to demonstrating the age of the children when the acts occurred, as opposed to their ages when they testified. See *People v Curry*, 175 Mich App 33, 46; 437 NW2d 310 (1989) ("Photographs are admissible if they are pertinent, relevant, competent and material on any issue in the case."). The prosecutor was entitled to argue from the evidence that the jury should conclude that the children's testimony was worthy of belief, and was entitled to note that other testimony demonstrated the consistency of the children's accounts. *Schutte*, *supra*. Similarly, the prosecutor was entitled to argue from the evidence that defendant was not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor did not improperly suggest that the jury rely on his superior personal knowledge when he told the jury that "we" know that defendant was lying when he testified that he received a telephone call from someone named Marilyn Franks. The prosecutor based his statement that defendant was lying on the evidence that a police search discovered no one by the name of Marilyn Franks. This was a reasonable inference based on the evidence. *Schutte*, *supra*.

The prosecutor did make an improper civic duty argument when he stated that the jury should convict defendant because the children had placed their trust in the jurors. However, the

prejudicial effect of this remark could have been cured by a timely instruction that the prosecutor's argument was not evidence, *Launsbury, supra*, an instruction that was ultimately given in any event by the trial court following closing arguments. Defendant's substantial rights were not affected. *Carines, supra*.

Defendant further argues that the prosecutor denied him a fair trial by introducing improper rebuttal evidence on a collateral matter. We disagree. "Rebuttal evidence is admissible to 'contradict, repel, explain, or disprove evidence produced by the other party and tending to weaken or impeach [that evidence].'" *People v Pesquera*, 244 Mich App 305, 314; 625 NW2d 407 (2001). Whether rebuttal evidence is proper depends on the proofs introduced by the defendant, and not merely what he testified to on cross-examination. *Id.* If the evidence responds to evidence introduced by or to a theory developed by the defendant, it is proper rebuttal. *Id.* The admission of rebuttal evidence is within the discretion of the trial court. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

Defendant introduced evidence regarding a telephone call from Marilyn Franks on redirect examination in an attempt to explain his failure to appear for the scheduled interview with Robbins. Defendant's introduction of this evidence opened the door for rebuttal evidence to contradict his assertion. *Pesquera, supra* at 314. Robbins testified on rebuttal that no person named Marilyn Franks could be located and that defendant told him that he did not appear for the second interview because he went out of town to attend a family funeral.

Defendant did not object to the admission of Robbins' testimony that Franks could not be located. In the absence of an objection, any error is forfeited unless it was plain and affected defendant's substantial rights. *Carines, supra; Pesquera, supra* at 316. The rebuttal evidence did not pertain to a purely collateral issue and had a direct bearing on defendant's credibility. The credibility of a witness is always a material issue. *People v Layher*, 238 Mich App 573, 580; 607 NW2d 91 (1999), *aff'd* 464 Mich 756; 631 NW2d 281 (2001). No plain error occurred.

Defendant argues that the trial court erred and abused its discretion in imposing sentence. Specifically, defendant contends that the trial court: (1) failed to consider relevant factors when fashioning the sentences imposed; (2) erroneously scored several offense variables, which resulted in the imposition of sentences based on an unsupported and/or false predicate; (3) deviated from the sentencing guidelines for reasons already accounted for in the guidelines; and (4) abused its discretion by imposing disproportionate sentences for the first-degree CSC convictions. We disagree.

A sentence may be set aside only when it is invalid. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997). A sentence is valid if it is proportionate. *People v Milbourn*, 435 Mich 630, 651; 461 NW2d 1 (1990). "[T]he 'key test' of proportionality is not whether the sentence departs from or adheres to the recommended [guidelines] range, but whether it reflects the seriousness of the matter." *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). If the sentence is proportionate, an error in the calculation of the guidelines provides no basis for relief. *People v Raby*, 456 Mich 487, 496; 572 NW2d 644 (1998).

We conclude that defendant's sentences of life and sixty to ninety years on his CSC I convictions reflect the seriousness of the crimes committed by defendant, and are proportionate to his circumstances and the nature of his offenses. The evidence established that defendant

sexually abused his own children on a regular basis for a number of years. He repeatedly threatened to kill them or their mother if they reported his actions. He treated one child like a prostitute by offering her money after committing penile-vaginal intercourse. Defendant engaged in a pattern of abusing the children and then giving them money or gifts. He displayed no remorse for his actions. Defendant was forty-six years old at the time he was sentenced; however, this fact does not render his sentences disproportionate. When appropriate to the offense and the offender, a trial court may impose a sentence for a term of years that has the effect of avoiding eligibility for parole. *People v Lemons*, 454 Mich 234, 258; 562 NW2d 447 (1997).

A trial court must articulate on the record the reasons for the sentence imposed. The purpose of this requirement is to aid appellate review and to avoid injustice based on sentencing error. *People v Terry*, 224 Mich App 447, 455; 569 NW2d 641 (1997). In imposing sentence, the court emphasized that defendant victimized his own children, that the children would suffer the effects of defendant's actions for their entire lives, and that defendant had no remorse for his actions. The trial court stated that because of the heinous nature of the crimes committed, and because the defendant was in the position of being one of the worst forms of a predator, that it had as its goal in imposing sentence the intent to prevent defendant from ever being released into society. This articulation was sufficient. *Id.* at 456.

Because the sentence is proportionate, there is no basis for relief as to the sentence on appeal. *Raby, supra* at 496. Thus, we need not consider the guidelines scoring challenges raised by defendant.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra
/s/ Joel P. Hoekstra