STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS HAROLD WOLFF,

Defendant-Appellant.

UNPUBLISHED
December 27, 2002

No. 224041
Oakland Circuit Court
LC No. 98-160174-FH

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct ("CSC"), MCL 750.520d(1)(a), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). He was sentenced to concurrent terms of five to fifteen years' imprisonment for the third-degree CSC conviction and 1-1/3 to 2 years' imprisonment for the fourth-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant was convicted of engaging in sexual conduct with a mentally impaired teenage child while staying as a guest in her home. The victim initially disclosed to her mother that defendant engaged in some touching in February 1998, pointing to her breasts and vaginal areas to show where she was touched. After the victim's mother contacted the police, the victim was interviewed twice by a social worker at Care House. At the time of the Care House interviews, it was believed that the victim might not understand the concepts of inside and outside vaginal touching. Before the victim testified at the preliminary examination, these concepts were related to her in the context of referring to the use of a tampon. The victim then stated that "Tom's wiener" had gone where her tampon goes. The victim provided this same information at the trial when questioned by the prosecutor.

I

Defendant first challenges the victim's competency to testify at the preliminary examination and the subsequent trial. Defendant also argues that he should have been afforded a pretrial "taint" hearing to determine whether the victim's testimony was tainted by improper questioning by, at the very least, her mother.

We find it unnecessary to address defendant's claim concerning the victim's competency at the preliminary examination or his related claim that the trial court erred by denying his

motion to quash. Under the circumstances of this case, any error was harmless. *People v Hall*, 435 Mich 599, 613-614; 460 NW2d 520 (1990); *People v Staffney*, 187 Mich App 660, 662-663; 468 NW2d 238 (1990). The trial court independently considered the victim's competency to testify at trial and determined that she was competent. Reviewing that ruling under the applicable evidentiary standard, MRE 601, we conclude that the trial court did not abuse its discretion in determining that the victim was competent to testify at trial. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999); *People v Watson*, 245 Mich App 572, 583; 629 NW2d 411 (2001).

Further, defendant has not demonstrated that the trial court erred by refusing to hold a pretrial "taint" hearing on suggestive interviewing techniques. Even assuming that there may be circumstances to warrant such a hearing, the offer of proof made by defendant here was insufficient to trigger a pretrial inquiry into whether the victim's statements or testimony was tainted by suggestive interviewing techniques. *State v Michaels*, 136 NJ 299, 312-316; 642 A2d 1372 (1993). Indeed, even with the benefit of the trial testimony, during which defendant was afforded an opportunity to present evidence of his "taint" theory, we note that defendant failed to sufficiently identify evidence of suggestive interview techniques. As such, this claim affords no basis for relief.

Next, having reviewing the record de novo, we conclude that the trial court did not err in denying defendant's motion for a directed verdict. *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001). The basis for defendant's motion was that the victim was not a credible witness. However, as the trial court observed, the credibility of the victim's testimony was for the jury to decide. *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *Watson, supra* at 583.

Defendant has failed to sufficiently brief his claim that he was denied his right of confrontation, having failed to cite any supporting authority. A party may not announce a position and leave it to this Court to discover and rationalize its basis. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). In any event, we find no merit to defendant's position because, while the right of confrontation encompasses an opportunity to cross-examine a witness under oath at trial, a defendant does not have a constitutional right to a successful cross-examination. *Watson, supra* at 584.

II

Defendant argues that trial court erred by admitting evidence of prior statements made by the victim to her mother under MRE 804(24). We conclude that any error was harmless.

Initially, we find no abuse of discretion with regard to the trial court's evaluation of the trustworthiness requirement of MRE 803(24). *People v Katt*, 248 Mich App 282, 296; 639 NW2d 815 (2001), lv gtd 466 Mich 889 (2002).[1] Our principal concern is with the requirement

[1] We note that leave to appeal was limited by the Supreme Court to the issue of whether the testimony of a protective services worker regarding statements made by the victim to her was properly admitted under MRE 803(24). We do not anticipate that the Court's decision would affect this case because, unlike in *Katt*, we find that the admission of the victims' statements to
(continued…)

that the statements be "more probative of the point for which it is offered than any other evidence that the proponent can procure through reasonable efforts." Here, the purpose of the statements was not directed at the substantive issue of how defendant touched the victim, but rather at establishing the content of the victim's prior statements. The prosecutor argued, "I won't be able to ask [the victim], she is not capable of testifying *that she said that*" (emphasis added). Because the "probative on point" requirement is not directed at how the statement can be established, but rather its substantive value if admitted to prove the truth of the matter asserted, we find merit to defendant's claim that the trial court abused its discretion by admitting the statements under MRE 803(24). Unlike *Katt, supra*, where the victim's statement was determined to be the most probative evidence of the defendant's involvement in sexual offenses, here the details regarding the charged sexual offenses were provided by the victim's own testimony.

We reject the prosecutor's suggestion that MRE 801(d)(1)(B) provides an independent basis for admitting the statements. In order for a prior consistent statement to be admitted under MRE 801(d)(1)(B), it must predate the alleged fabrication, influence or motive to lie. *Tome v United States*, 513 US 150, 156; 115 S Ct 696; 130 L Ed 2d 574 (1995); *People v Rodriquez (On Remand)*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996). Here, it was the defense theory that the challenged statements by the victim to her mother were influenced by suggestive questioning techniques. Thus, because the challenged statements did not predate the alleged improper influence, the statements were not admissible under MRE 801(d)(1)(B). Cf. *Washington v Schriver*, 255 F3d 45, 58 n 9 (CA 2, 2001).

Nevertheless, we find that any error in admitting the statements was harmless under the circumstances of this case. We reject defendant's claim that any error is of constitutional magnitude. Contrary to what defendant argues, defendant was not denied his right to cross-examine the victim about the alleged statements when she testified at trial. *Watson, supra* at 584. Looking to the standard for evaluating a preserved, nonconstitutional error, the pertinent inquiry is whether, after examination of the entire record, it affirmatively appears that it is more probable than not the error was outcome determinative. *Lukity, supra* at 495-496. Here, it was the defense theory that the victim's trial testimony concerning alleged sexual abuse was the product of repeated suggestive questioning, beginning with the questioning by the victim's mother, which led to the challenged statements. Thus, we do not view the statements as being prejudicial to defendant. Furthermore, the victim's disclosure to her mother that she was touched by defendant was consistent with both defendant's prior statements and trial testimony that he could have accidentally touched the victim when he pushed her out of his bed.

In sum, in the context of the entire record, we conclude that any error in admitting the challenged statements under MRE 803(24) was harmless.

III

Defendant next argues that misconduct by the prosecutor deprived him of a fair trial. Having examined each of defendant's preserved and unpreserved claims of prosecutorial

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her mother was error; however, we ultimately conclude that this error was harmless.

misconduct in context, we disagree. Issues of prosecutorial misconduct are decided on a case-by-case basis, *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), to determine whether defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). This Court must review the pertinent part of the record and evaluate the prosecutor's remarks in context. *Schutte*, *supra* at 721.

A

Defendant first challenges on appeal several statements made by the prosecutor in her opening statement. We find that the prosecutor did not improperly vouch for the victim's credibility in her opening statement regarding the victim's ability to distinguish right and wrong or the Care House interviews because she did not suggest that she had any special knowledge concerning the victim's truthfulness. *Bahoda*, *supra* at 276. In the first instance, the prosecutor merely stated what she believed the evidence would show, and in the second, the prosecutor simply explained the Care House process. Also, we believe that the prosecutor's unchallenged remarks about what "teachers" may tell the jury, while arguably constituted error because no teacher testified, were made in good faith because the prosecutor intended to call a teacher and a teacher's aide, and no prejudice occurred because the court instructed the jury that opening statements were not evidence. *Id*. at 281; *Schutte*, *supra* at 721-722; *People v Wolverton*, 227 Mich App 72, 76-77; 574 NW2d 703 (1997). Defendant's remaining challenges are either unsupported by the record or the error was cured by a cautionary instruction to the jury. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

B

Defendant next argues that the prosecutor's questioning of several trial witnesses constituted misconduct. Any error caused by the prosecutor's questioning of defendant regarding conversation he had with his attorney was sufficiently cured by the court's cautionary instruction, which served to dispel any improper inference the jury may have drawn from defendant's assertion of his attorney-client privilege. *Id*.; See *People v Foster*, 175 Mich App 311, 318; 437 NW2d 395 (1989), overruled in part on other grounds 450 Mich 94 (1995). We also find that defendant failed to prove that the prosecutor attempt to elicit testimony from the victim's mother regarding the victim's counseling was in bad faith, and not merely an attempt to establish the chronology of events. Prosecutorial misconduct may not be predicated on a good faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Defendant's challenge to the prosecutor exceeding permissible limits in exacting testimony from the victim's parents regarding the victim's truthful character is not properly before this Court because defendant fails to cite to the specific testimony at issue. A party may not leave it to this Court to search for the factual basis to sustain or reject a position. *Mudge*, *supra* at 105.

C

Defendant also argues that the prosecutor committed misconduct by intentionally withholding videotape evidence of a "mirror experiment" that it was required to produce pursuant to a pretrial discovery order. Defendant does not cite to nor can we find any such pretrial order. In any event, the remedy for violation of a discovery order lies in the court's discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). In this case, the trial court ordered the remedy requested by defendant, testimony

regarding the experiment was stricken from the record, and the jury was instructed that it could not consider the testimony in its deliberations. Therefore, defendant effectively waived review of the issue, and may not now harbor any error as an appellate parachute. *People v Carter*, 462 Mich 206, 214-215, 612 NW2d 144 (2001).

D

Finally, defendant argues that several of the prosecutor's comments during her closing and rebuttal arguments constituted misconduct. First, we find that the prosecutor did not improperly appeal to sympathy of the jury because the comments were not so inflammatory as to cause prejudice and the jury was instructed not to let sympathy or prejudice influence its decision. *Watson, supra* at 591. Second, defendant did not object at trial to the prosecutor's comments during closing argument regarding defendant's sleeping habits, and we conclude that defendant has not established plain error because the trial court's jury instruction was sufficient to dispel any prejudice even if error existed. *Schutte, supra* at 721-722. Lastly, we find that the prosecutor's remarks during rebuttal do not constitute plain error requiring reversal because, in both instances, they were in response to defense counsel's argument. *Watson, supra* at 593. Thus, defendant has failed to establish actual errors, singularly or cumulative, served to deprive him of a fair trial. *Bahoda, supra* at 263-264; *Watson, supra* at 594.

IV

Defendant next argues that the trial court should have precluded the prosecutor from calling the social worker who interviewed the victim at the Care House as a rebuttal witness, where defense counsel was precluded from calling the prosecutor as a trial witness. We find that this issue was not preserved because defendant did not object to the rebuttal testimony on this ground at trial. *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996). Further, we are unpersuaded that defendant has established plain error. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999). The trial court did not abuse its discretion in allowing the social worker's testimony in rebuttal in light of the expert testimony presented by defendant concerning suggestive interview techniques. *People v Figgures,* 451 Mich 390, 399; 547 NW2d 673 (1996). The question whether defendant should have been allowed to call the prosecutor as a witness was presented to the trial court as a separate matter. Because defendant has not adequately briefed the trial court's ruling regarding this issue, we need not address it. *Mudge, supra* at 105. Nonetheless, we are satisfied from our review of the record that the prosecutor was not a necessary witness and, accordingly, find no abuse of discretion. *People v Ulecki,* 152 Mich App 801, 809; 394 NW2d 114 (1986); see also *United States v Roberson,* 897 F2d 1092, 1098 (CA 11, 1990).

V

Defendant also argues that the trial court abused its discretion by allowing testimony regarding his possession of condoms. We disagree. Defendant objected to this evidence at trial on the basis of relevancy. Considering the prosecutor's offer of proof to link the condoms to the overnight bag that defendant would take to the victim's home, we conclude that the trial court did not abuse its discretion in denying defendant's motion in limine. The evidence was circumstantially relevant to the charges. MRE 401; *People v Sabin (After Remand),* 463 Mich 43, 56-57; 614 NW2d 888 (2000). Whether defendant's exculpatory explanation for possessing

the condoms was credible was for the jury to decide. Contrary to defendant's claim on appeal, the record does not reflect that the evidence was offered or admitted as evidence of defendant's private sexual activities.

VI

Finally, defendant argues that he is entitled to resentencing because the trial court relied on improper sentencing considerations in deciding to sentence him at the top end of the sentencing guidelines recommended minimum sentence range for third-degree CSC. Having examined the trial court's remarks as a whole, we conclude that defendant has failed to establish an invalid sentence, and, thus, his sentence can not be vacated. MCR 6.429(A); *People v Raby*, 456 Mich 487, 497; 572 NW2d 644 (1998)[2]; *People v Whalen*, 412 Mich 166, 169-170; 312 NW2d 638 (1981). Although characterizing defendant as having an illness, the trial court's remarks as a whole reflected a legitimate consideration of defendant's potential for rehabilitation. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). Further, the prosecutor's mere disclosure that defendant refused to take a polygraph examination does not give rise to prejudice requiring resentencing, *People v Pottruff*, 116 Mich App 367, 378; 323 NW2d 402 (1982), especially considering that the trial court expressly stated that it was disregarding that information.

Affirmed.

/s/ Michael R. Smolenski
/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

[2] *Raby* is still good law as it applies to the judicial sentencing guidelines pursuant to which a defendant is sentenced for offenses committed before January 1, 1999. *People v Hegwood*, 465 Mich 432, 438; 636 NW2d 127 (2001). The instant offense occurred in February 1998.