

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAYSON ALAN PAYNE,

Defendant-Appellant.

UNPUBLISHED

January 22, 2004

No. 243032

Ottawa Circuit Court

LC No. 01-025082-FC

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) and (b). He was sentenced to concurrent terms of 144 to 360 months' imprisonment. He appeals as of right. We affirm.

Defendant first argues that a comment made by a prospective juror who was excused for cause tainted the venire. Defendant waived this issue for our review because he expressed satisfaction with the jury selection. Express approval of a matter below extinguishes the error. *People v Carter*, 462 Mich 206, 216-219; 612 NW2d 144 (2000).

Defendant next alleges several instances of prosecutorial misconduct that deprived him of his due process rights. Defendant failed to object to the alleged misconduct at trial and, thus, has failed to preserve this issue for appeal. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Id.* Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Schutte, supra* at 720. "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* at 721.

Defendant first contends that the prosecutor vouched for the complainant during closing argument. A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge not known to the jury that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). The prosecutor in this case never implied that he had some special knowledge that the complainant had testified truthfully. Rather, the prosecutor argued that the jury should believe the complainant's testimony because the evidence indicated that the complainant had no reason to contrive the allegations. Because a prosecutor is

free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *Id.* at 282, no error occurred.

Defendant next contends that the prosecutor's comments during voir dire and rebuttal argument regarding the alleged sexual crimes by some Catholic priests deprived him of a fair trial. The record indicates that during voir dire, the prosecutor questioned the prospective jurors about their opinions on the media coverage of the alleged sexual scandal committed against young boys by some Catholic priests. Read in context, we do not find the questioning improper. We have previously ruled that where a prosecutor's remarks are "designed to ferret out those jurors who might find sexually abusing a child to be conduct so abhorrent as to be inconceivable" the questioning is proper. *People v Dunham*, 220 Mich App 268, 270; 559 NW2d 360 (1996). Because the plain purpose of this questioning was for the prosecutor to determine whether the prospective jurors could accept the possibility that some people in positions of authority might sexually abuse children, the questioning was proper. Further, the record establishes that the line of questioning also focused on a defendant's right to be tried on the evidence only and not on any preconceived stereotype of a person's position of authority. We find no error.

Defendant relies on the decision in *People v Kelley*, 142 Mich App 671, 672-674; 370 NW2d 321 (1985), and argues that the prosecutor's rebuttal statement was prejudicial, requiring reversal. In *Kelley*, this Court reversed the defendant's conviction because the prosecutor, in closing argument, likened the defendant to John Wayne Gacey. This Court held that such comments were prejudicial. Here, in rebuttal, the prosecutor stated that "Catholic priests are well-respected people too, aren't they folks. Who's more well-respected." We do not find the statement on a par with the level of prejudice demonstrated in *Kelley*. The prosecutor did not liken defendant to any particular notorious individual.

Further, we consider the prosecutor's remark in the context of the closing arguments presented. *Schutte, supra* at 721. In *People v Jones*, 468 Mich 345, 353 n 6; 662 NW2d 376 (2003), our Supreme Court quoted with approval the doctrine of "fair response" that it previously adopted in *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995), as follows:

Regarding what is fair response, this Court in *Fields* stated, "the nature and type of comment allowed is dictated by the defense asserted, and the defendant's decision regarding whether to testify. When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *Id.* at 116. See also *United States v Robinson*, 485 US 25, 31; 108 S Ct 864; 99 L Ed 2d 23 (1988) (holding that when the prosecutor's statement that the defendant could have explained his story to the jury was made in response to the comments made by defense counsel, the prosecutor's statements did not infringe the defendant's Fifth Amendment rights).

The prosecutor's remark was a response to defense counsel's argument that the evidence established that the complainant's mother knew defendant when she was growing up and she carefully determined that defendant was a good role model for her son, and thus, defendant could not be "a monster" capable of criminal sexual conduct. Taken in context, the prosecutor's rebuttal statement fairly responded to defense counsel's closing argument that seemingly decent or well-respected people like defendant do not commit criminal sexual conduct.

Defendant also contends that the prosecutor introduced facts not in evidence. During rebuttal, the prosecutor stated that the complainant never informed anyone of the alleged sexual abuse for the same reason that the excused venireman in this case explained he did not want to talk publicly about his father having molested him. The statement was made as a fair response to defendant's closing argument. Defendant argued that the complainant's failure to come forward with the abuse indicated that there was no abuse. During rebuttal, the prosecutor attempted to discredit that argument by pointing out that people, such as the venireman excused in this case, do not like to disclose past sexual abuse. We find no error.

Nor are we persuaded by defendant's argument that the cumulative effect of the errors deprived defendant of his right to a fair trial. There was no impermissible vouching of the prosecutor's witness. The prosecutor's remarks during voir dire and rebuttal were proper.

Defendant next challenges as inadmissible bad acts evidence the complainant's mother's testimony that she told defendant he traded the complainant in for a "newer model – when he met [another child]" and that defendant responded by telling her that "[the other child] stole his heart the same way [the complainant] did." However, this statement was not specific bad acts testimony. A prior statement is not a prior bad act for purposes of MRE 404(b) "because it is just that, a prior statement and not a prior bad act." *People v Rushlow*, 179 Mich App 172, 176; 445 NW2d 222 (1989), *aff'd* 437 Mich 149 (1991). Thus, we find no error.

Defendant next argues that the trial court abused its discretion when it denied his motion for a mistrial after the complainant's mother testified that the relationship between the complainant and defendant ended when "all the stuff came out about the other children." We agree with the court's determination that the stricken testimony did not prejudice defendant's case. There was other evidence that defendant decided to end the relationship with the complainant after the complainant attained puberty and defendant befriended another child. Further, the court ordered the jury to disregard the statement. A jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The trial court did not abuse its discretion in denying defendant's motion.

Defendant next raises several alleged instances of ineffective assistance of counsel. Because defendant did not move for a *Ginther*¹ hearing to preserve the issue for appellate review, this Court's review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To prevail on a claim of ineffective assistance, a defendant must show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors. *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001). To establish a claim of ineffective assistance of counsel meriting reversal of a conviction, a defendant must show that counsel's deficient performance prejudiced the defense. *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003).

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant first argues that his counsel was ineffective for failing to move for a mistrial after the prospective juror indicated that he, the prospective juror, had been molested by his own father and he believed that defendant was guilty. In this case, defendant's counsel's immediate request to remove the juror for cause was granted. The record clearly establishes that defendant's counsel and the prosecutor continued an extensive voir dire of the other prospective jurors to ensure that they would be fair and impartial. Defendant fails to show prejudice.

Defendant next asserts that his counsel failed to object to the prosecutor's references during voir dire and rebuttal to the sexual misconduct of Catholic priests. As previously discussed, the references were not improper.

Defendant next asserts that his counsel failed to object to the prosecutor's comment in opening statements informing the jury that there would be evidence that another boy stole defendant's heart just as had the complainant. Defendant fails to show prejudice. The court instructed the jury not to consider the lawyers' opening statements as evidence, and the jury is presumed to follow the court's instructions. *Graves, supra*. Further, as previously discussed, the complainant mother's testimony with respect to the above statement was an admissible statement. *Rushlow, supra*.

Defendant next contends that counsel was careless in asking the complainant's mother an open-ended question on cross-examination that invited her to testify that defendant's relationship with the complaint ended when "all the stuff came out about the other children." We disagree. A review of the record indicates that counsel asked a careful question regarding the time frame in which the relationship ended between defendant and the complainant but that the witness provided a nonresponsive answer. Counsel immediately moved to strike the answer. In striking the answer, the trial court instructed the jury to disregard the answer. Counsel was not ineffective. Given the above, we conclude that defendant failed to establish a claim of ineffective assistance of counsel.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Michael J. Talbot