STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JEFFREY THOMAS COE, Defendant-Appellant.	UNPUBLISHED February 19, 2004 No. 243447 Genesee Circuit Court LC No. 2002-009593-FC
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JEFFREY THOMAS COE, Defendant-Appellant.	No. 243449 Genesee Circuit Court LC No. 2002-009740-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JEFFREY THOMAS COE, Defendant-Appellant.	No. 243450 Genesee Circuit Court LC No. 2002-009739-FH

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant was charged with numerous offenses in three separate files that were consolidated for trial before a jury. In LC No. 2002-009593-FC, the jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), one count each

of child sexually abusive activity, MCL 750.145c(2) and possession of child sexually abusive material, MCL 750.145c(4). In LC No. 2002-009740-FH, the jury convicted defendant of second-degree CSC, MCL 750.520c(1)(a). In LC No. 2002-009739-FH, the jury convicted defendant of two counts of child sexually abusive activity, and one count of second-degree CSC. The trial court sentenced defendant to concurrent terms of life in prison for each first-degree CSC conviction, 95 to 180 months for one second-degree CSC conviction and 86 to 180 months for the additional second-degree CSC conviction, 158 to 240 months for one child sexually abusive activity conviction and 95 to 240 months each for the two additional child sexually abusive activity convictions, and one year in jail for the possession of child sexually abusive material conviction. We affirm.

I. Prosecutorial Misconduct

Defendant argues that he was denied a fair trial by numerous instances of prosecutorial misconduct.[1] We disagree.

A. Standard of Review

As this Court explained in *People v McLaughlin*, 258 Mich App 635, 644-645; 672 NW2d 860 (2003):

> This Court reviews preserved claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30, 650 N.W.2d 96 (2002). The propriety of a prosecutor's remarks depends on all the facts of a case. *Id*. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To avoid forfeiture of review of this issue under the plain error rule, the defendant must demonstrate that: (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights. *Id*., citing *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The third factor requires a showing of prejudice, meaning that the error must have affected the outcome of the lower court proceedings.

B. Improper Questioning of Witnesses

Defendant asserts that the prosecutor "cut off" two defense witnesses during cross-examination. Defendant fails to adequately explain how the prosecutor's conduct was

[1] In his brief, defendant sets forth general legal principles governing the issue of prosecutorial misconduct and then lists several case citations. Defendant does not relate the legal principles to the citations provided. Rather, he announces his positions and leaves it to this Court to discover and rationalize the basis for his various claims. This is insufficient to properly present this issue for our review. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). But to the extent possible, we will address defendant's claims.

prejudicial. Rather, he merely offers numerous page citations with the notation that the prosecutor "cut off" witnesses. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (citation omitted). Further, despite his numerous page references, defendant objected only three times before the trial court. Also, defendant had ample opportunity to question the witnesses during redirect, and he could have given them the opportunity to complete any answer he wished. Accordingly, defendant has failed to establish the requisite prejudice to warrant reversal.

Defendant also alleges that, during cross-examination, the prosecutor belittled a twenty-year-old defense witness. Defense counsel objected, and the trial court sustained the objection. Thereafter, defense counsel asked the witness if she was offended by the prosecutor's manner of questioning, and she said no. Defendant has not shown how he was prejudiced by the prosecutor's questioning. Again, an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Watson*, *supra*. Further, the trial court dispelled any prejudice by instructing the jury that the lawyers' questions are not evidence. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, this claim does not warrant reversal.

C. Opening Statement

Further, defendant maintains that, during his opening statement, the prosecutor inappropriately left "the jury to speculate about other crimes [defendant] may be capable of committing":

> And [defense counsel] is right when he says in opening statement [sic] that he may not be as he appears. *He may be capable of much more than what he appears*, and I submit to you that that is a key point in this case. [Emphasis added.]

Defendant did not object to the prosecutor's comment, and no clear or obvious error is apparent. *Carines*, *supra*. Opening statement is the appropriate time to state a fact that will be proven at trial. *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). Although the prosecutor's remark bordered on argument, it did not suggest that defendant committed other crimes. Moreover, reading the challenged comment in context, it was clearly responsive to defense counsel's statement made during voir dire that defendant "isn't what he looks like." "'[A]n otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument.'" *Watson*, *supra* at 593, quoting *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Again, the trial court instructed the jury that the lawyers' comments are not evidence and this was sufficient to cure any perceived prejudice. *Long*, *supra*. Accordingly, this claim does not warrant reversal.

D. Closing Argument

Defendant asserts that, during closing argument, the prosecutor misstated the law regarding first-degree CSC and penetration when he stated:

> And then when he turns her over, what does he do? How is he able to expose her anal cavity? He goes like that [indicating with his hands] again, and he puts stress. [The statute] doesn't require that he put his fingers all the way in . . . That's another cavity. Any part of the vaginal area, the lips, any part of the rectum, to the annual cavity, however slight, that's another count.
>
> * * *
>
> And ask yourself this. If the key is intrusion, if the key is however slight to any part of the cavity, *what could be more intrusive than what he did to her, his intent, and putting her up to a camera to look at it later*? [Emphasis added.]

Defense counsel objected, noting that any intrusion must be physical. The trial court overruled the objection. Thereafter, the prosecutor stated that defense counsel was "absolutely right. It's a physical intrusion." The prosecutor then went on to argue, "And ask yourself is it a physical intrusion that he moves his thumbs repeatedly until he holds [the vaginal lips] open."

A defendant may be deprived of a fair trial if a prosecutor makes a "clear misstatement of the law that remains uncorrected." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). But if the jury is correctly instructed on the law, an erroneous legal argument made by the prosecutor can be cured. *Id*. Under MCL 750.520b(1)(a), "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person" who "is under 13 years of age." "Sexual penetration" is defined to mean "sexual intercourse, . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body. . . ." MCL 750.520a(o). Viewed in its entirety, the prosecutor's discussion of penetration, i.e., a "physical intrusion," "however slight," comported with the statutory definition. Accordingly, this claim does not warrant reversal.

Defendant also alleges that he was denied a fair trial by the prosecutor's remark during closing argument that "[o]nce a pedophilia [sic] always a pedophilia [sic]." A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995).

Here, defendant did not make a timely objection to the prosecutor's remark, and no clear or obvious error is apparent. *Carines, supra*. Viewed in context, the prosecutor's comment was focused on refuting defense counsel's claims made throughout trial that, although defendant committed the acts, he was not criminally responsible because he was unable to control his behavior because of his 1997 closed head injury. The prosecutor argued that defendant's character before the 1997 injury was irrelevant to the issues at trial and, although defendant's expert witnesses testified that the head injury could affect an individual's sexual force, both experts conceded that it would not cause a person to sexually assault children. A prosecutor is free to argue the evidence and all reasonable inferences arising from the evidence as they relate to his theory of the case, and is not required to make his points using the blandest possible terms. See *Schutte, supra* at 721-722.

E. Injection of "Nonrecord" Matters into Evidence

We reject defendant's claim that the prosecutor interjected inadmissible and irrelevant facts into evidence. In support of this claim, but without argument, defendant cites instances in which the prosecutor inquired about how defendant spent his settlement money and his purchase of a boat, and the prosecutor's statement that a witness was a special education student. In each instance, defense counsel objected, and the trial court sustained the objection. Defendant failed to request a curative instruction or otherwise request any other action by the trial court. The prosecutor did not pursue the matters further or discuss them during closing argument. In its preliminary instructions, the court directed the jury to consider only properly admitted evidence, follow its instructions, and decide the case based only on the evidence. Under these circumstances, defendant has failed to demonstrate that he was denied a fair trial.

We also reject defendant's cursory claim that he was prejudiced by the prosecutor's comment that defendant led a "private life." The prosecutor made the comment during an objection to defense counsel's inquiry of defendant's mother regarding defendant's state of mind. The prosecutor's comment did not imply that defendant's desire for privacy was indicative of guilt, and defendant has failed to adequately explain how this comment denied him a fair trial. *Watson, supra*.

Defendant also claims that he was denied a fair trial when, during cross-examination, the prosecutor asked him if he was aware that a particular woman had been involved in an abusive relationship. Although the challenged question was irrelevant, it does not warrant reversal. Defense counsel objected, and the trial court sustained the objection and admonished the prosecutor in the presence of the jury. Defendant failed to request a curative instruction or request any other action by the trial court. The prosecutor did not pursue the matter further. Additionally, the trial court's instructions that the jury must consider only properly admitted evidence, and that the lawyers' statements are not evidence, were sufficient to cure any perceived prejudice. *Long, supra*. Accordingly, this claim does not warrant reversal.

F. Mischaracterization of Testimony

Defendant argues that, when cross-examining him, the prosecutor mischaracterized testimony when he commented that defendant's family members had testified that, before the accident, defendant "stayed away from kids." As noted by plaintiff, defendant's mother and sister testified that, before the accident, defendant stated that he would not have children, and that he "wasn't into kids."[2] Accordingly, this claim is without merit.

G. Improper Use of Language

We reject defendant's claim that he was prejudiced by the prosecutor's statement that defendant "rattled off [his former] jobs" when asked about his prior employment. There is no indication that the phrase was used in a derogatory manner, and defendant has failed provide any support for such a conclusion. *Watson, supra*. Further, viewed in context, the prosecutor's comment was fleeting and made in the midst of defendant's testimony about his various jobs.

[2] Although defendant challenged the prosecutor's statement regarding what his family said, the testimony by his family members actually appears to have supported his asserted defense.

We also reject defendant's claims that he was denied a fair trial by the prosecutor's alleged use of the terms "smut" and "despicable" during trial. Defendant has failed to provide a record citation showing where the prosecutor actually used those terms. See MCR 7.212(C)(7). Rather, an examination of the cited portion of the transcript shows that, in response to a defense objection, the trial court cautioned the prosecutor to "ease off" such language as "smut" and "despicable," and the prosecutor agreed. In any event, defendant has failed to provide any argument supporting his claim that the prosecutor's alleged use of such language was sufficiently prejudicial as to deny him a fair and impartial trial. *Watson, supra.*

III. Trial Court's Conduct

A. Voir Dire

Defendant argues that the trial court belittled his insanity defense by using the terms "whacked out" and "crazy" when questioning three prospective jurors:

> *Trial Court*: Do you feel so strongly about your experience, that if they proved he was *whacked out*, insane when all this was going on that you would reject that?
>
> *Juror Rogers*: I probably would . . .
>
> * * *
>
> *Trial Court*: Could a person ever be so *crazy* that they could not be responsible for their acts? What do you think about that?
>
> *Juror Richardson*: In my upbringing, no.
>
> * * *
>
> *Trial Court*: Well, if they prove to you that the guy was *crazy*, *insane*?
>
> *Juror Sommerfield*: I have a problem accepting the insanity plea. [Emphasis added.]

Because defendant did not challenge the trial court's conduct below, this Court reviews this unpreserved claim for plain error affecting his substantial rights. *Carines, supra*.

A defendant tried by a jury has a right to a fair and impartial jury. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994); see also *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). There are no "hard and fast rules" regarding what constitutes acceptable voir dire; rather, the trial court is granted wide discretion in the manner employed to achieve an impartial jury. *Id.* at 186-187. But a court's conduct may not pierce the veil of judicial impartiality. The appropriate test is whether the court's comments, reviewed in their entire context, were of such a nature as to unduly influence the jury and thereby deprive the defendant of his right to a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 340-341; 543 NW2d 342 (1995).

Here, defendant has failed to show plain error regarding the trial court's voir dire. Although the court used the challenged terms, it most frequently used the legal terms to describe the defense, and used the term "crazy" only after a prospective juror first used the word in answering a question. The court then asked the prospective juror if he understood the difference between mental illness and mental insanity. Further, during voir dire, the court instructed the prospective jurors on the law regarding insanity, and asked if they could follow that law.

Additionally, the trial court never implied that defendant was crazy, nor did it use the term in a derogatory manner. Rather, the court addressed the jury in a conversational manner to establish a comprehensible discourse with them in an attempt to discover whether three prospective jurors, who seemingly had problems accepting the law with regard to insanity, could follow the law. The trial court, clearly cognizant of the prospective jurors' hesitation, chose to use uncomplicated terms in an effort to ferret out whether the jurors could remain impartial. In fact, the court excused each of the three jurors with whom it had the dialogues. Further, the trial court's comments were impartial and did not suggest the court's opinion regarding the insanity defense. The court also instructed the jurors to disregard any speculation they might have about the court's personal views. Moreover, in light of defendant's failure to object to the trial court's comments, and his satisfaction with the composition of the jury, defendant has failed to establish that the jury was unduly influenced by the trial court's comments during voir dire. Accordingly, defendant has failed to establish plain error. *Carines, supra*.

B. Incorrect Evidentiary Ruling

Defendant also claims that, during trial, the court eviscerated his defense by incorrectly deciding an evidentiary matter. We disagree.

During the testimony of Dr. Lewis, defense counsel asked if he had heard any evidence that defendant was not a pedophile before the accident causing his head injury. The prosecutor objected, and the trial court stated that there was no evidence to show that defendant was not a pedophile before his head injury. Although defendant did not object to the court's statement, on the following day, he moved for a mistrial. During the discussion of the matter, the trial court noted that its comment was incorrect, and asked defense counsel what he "would like [it] to say to the jury?" In response, defense counsel asked to recall the doctor, and requested that the trial court instruct the jury that the defense could prove, by circumstantial evidence, that defendant had a normal life before the accident or that he did not have any sexual dysfunction before the accident. Thereafter, the trial court instructed the jury, as requested. The trial court stated that it "need[ed] to correct [it]self," that it may have been incorrect when it stated that there was no evidence that defendant was not a pedophile before the accident, that defendant is allowed to prove by circumstantial evidence that he was normal before the head injury. It also reiterated that the jurors were the sole finders of fact. The court also granted defendant's request to recall the doctor to ask the questions that it incorrectly denied. Following the instruction, defense counsel indicated that he was ready to proceed, thanked the judge, and made no further objection.

Here, the trial court corrected its error, gave an appropriate curative instruction, and allowed defendant to recall the witness. Defendant has failed to demonstrate any prejudice. Moreover, because defense counsel acquiesced in the trial court's handling of the matter and effectively withdrew his request for a mistrial, any challenge in this regard was waived. *People v*

Carter, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Consequently, because the waiver "extinguished" any error, reversal of defendant's convictions is not warranted on this basis. *Id.* at 219-220.

IV. Unavailable Transcript

Defendant argues that he was effectively denied his right to appeal because defense counsel's closing argument, the prosecutor's rebuttal argument, the trial court's instructions, and the jury verdict and polling were inadvertently lost.[3] Defendant contends that he is entitled to a new trial, because the unavailable transcripts may contain prejudicial errors.[4] We disagree.

While the inability to obtain a transcript of a criminal proceeding may so impede a defendant's right to appeal that a new trial must be ordered, *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981), the unavailability of a transcript does not automatically require vacation of a defendant's conviction. This Court must determine whether the unavailability of those portions of the trial so impedes the enjoyment of the defendant's constitutional right to an appeal that a new trial must be ordered. *People v Audison*, 126 Mich App 829, 834-835; 338 NW2d 235 (1983). If the surviving record is sufficient to allow evaluation of a defendant's claims on appeal, the defendant's constitutional right is satisfied. *Id*. Further, the defendant carries the burden of demonstrating prejudice resulting from the missing transcripts. *Bransford v Brown*, 806 F2d 83, 86 (CA 6, 1986). Although demonstrating prejudice is difficult in the absence of the transcripts, a defendant must present something more than gross speculation that the transcripts were requisite to a fair appeal. *Id*.

Here, defendant asserts that the unavailable transcripts, encompassing defense counsel's closing argument, the prosecutor's rebuttal argument, the trial court's instructions, and the jury's verdict and polling, may contain errors. Defendant's mere assertion that the transcripts might reveal error is too speculative to warrant a new trial. *Id*. Accordingly, appellate relief is not warranted.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra

[3] Apparently, the videotaping device was turned off, and not reactivated.

[4] Defendant asserts that, because of the timing of the discovery of the missing record, the settlement of the record procedure set forth in MCR 7.210(B)(2)(a) could not be employed.