STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v DEAN PHILLIP ANDREWS, Defendant-Appellant.	UNPUBLISHED March 9, 2004 No. 244568 St. Clair Circuit Court LC No. 02-000189-FH

Before: Smolenski, P.J., and Saad and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, involving a victim under thirteen years of age. MCL 750.520c(1)(a). The trial court sentenced defendant to two concurrent terms of imprisonment of five to fifteen years. Defendant appeals as of right. We affirm.

I. Facts

This case arose when a day care worker, defendant's wife, informed the grandmother of the complaining witness that the complainant, who was six-years old at the time of trial, had unzipped defendant's pants and spoke of opening "the barn door." The complainant's mother testified that when she told her son that she knew what had happened, he unexpectedly started crying, then explained that defendant would take him into the bathroom where they would both pull their pants down. Defendant would then place the complainant's hand on his penis and move it.

The complainant stated that defendant told him that he would go to hell if he told anyone. The complainant's mother testified that for a few weeks before she confronted her son, he asked her a lot of questions about whether he would go to hell for doing certain activities. The complainant was able to describe how defendant's penis looked and confirmed that defendant would sometimes ejaculate, his "pee pee" would be white.

II. Preliminary Examination Transcript

Defendant first argues that the trial court erred in regarding the complainant as unavailable for purposes of admitting that witness' testimony from the preliminary examination.

The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

MRE 804(b) authorizes the admission of earlier testimony of a witness who in the instant proceeding is unavailable. A witness is unavailable in this context if the declarant "(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or (3) has a lack of memory of the subject matter of the declarant's statement . . . ." MRE 804(a).

At trial, defense counsel argued for partial admission of the complainant's preliminary examination testimony to the extent that the complainant had to be considered unavailable for present purposes. The prosecutor suggested that, in that case, the whole transcript should be admitted into evidence. The trial court agreed that the witness was substantially unavailable, and recognized also that, to the extent the witness did testify, he was subject to impeachment with prior inconsistent statements from the preliminary examination, but also was subject to rehabilitation with prior consistent statements from that testimony. See MRE 801(d)(1). The court ruled that the transcript itself would not be admitted into evidence, but the parties had free rein to introduce any portion of it during the complainant's examination or closing argument.

Because the defense asked the trial court to hold that the complainant was unavailable for purposes of admission of that witness' preliminary examination testimony, objections to the court's decision to that effect are extinguished on appeal. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000). Defendant is not allowed to harbor error as an appellate parachute. *Id*. at 214.

Defendant additionally makes issue of the trial court's decision to admit the transcript for unfettered reference by both attorneys during closing arguments without also allowing the jury to review the exhibit. Because defendant did not object to the court's ruling, this issue is not preserved. Therefore, our review is for plain error only that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A trial court's wide latitude in deciding evidentiary questions includes the prerogative to admit an exhibit only in part or for limited purposes. See MRE 403. However, admitting the transcript of an earlier proceeding into evidence, but then bringing the material in question to the jury's attention mainly through the arguments of counsel, presents a procedural anomaly. The statements of counsel are not evidence, as the instant jury was instructed. For substantive, impeachment, or rehabilitative evidence to come in through the words of counsel at closing argument is thus improper. The trial court should have directed the attorneys to offer specific portions of the preliminary examination transcript for specific purposes, ruled on the admissibility of each under the various theories, and published the material to the jury as appropriate. Admitting the whole transcript for the unfettered use of counsel in closing arguments was plain error.

However, we find this error was harmless as it did not affect defendant's substantial rights. *Carines, supra*. Defendant asserts that the prosecution had an unfair advantage because it "was able to falsely attack defense counsel as having misrepresented the preliminary examination text in his quotes during closing argument," and further protests that the jury had "no basis for verifying the contents or context other than the prosecutor's unsworn assertions."

But the record confirms that defense counsel "devoted much of his lengthy closing argument to the inconsistencies in [the complainant's] claims by reading back preliminary examination passages to the jury," and thus, defendant fully capitalized on the court's ruling also. To the extent that the prosecution used the court's ruling to its advantage, defendant also had an equal opportunity to exploit this error and seized it. Additionally, defendant was free to object during the prosecution's closing argument and request a cautionary instruction regarding any instance of perceived prosecutorial misconduct. The court's ruling, though flawed, did not bar all avenues for correcting any misrepresentation made by the prosecution.

Defendant additionally argues that the trial court's decision "opened the door" for the prosecutor to attack defense counsel and vouch for witnesses. Defendant is presenting under the rubric of evidentiary error an argument that is essentially a claim of prosecutorial misconduct. But an issue that is not raised within the statement of questions in the brief on appeal is not properly presented for purposes of appellate review and need not be addressed. See MCR 7.212(C)(5); *People v Knox*, 256 Mich App 175, 203; 662 NW2d 482 (2003). Moreover, defendant points to no specific testimony that the prosecutor introduced from the transcript that was not made part of the record during the complainant's examination. We will not sift through the record evidence to uncover support for defendant's argument. *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). Thus, in regards to the prosecutor's comments referring to misrepresentations made by defendant, the jury could determine for itself, based on the evidence that was introduced during trial, whether a statement was accurate. For these reasons, defendant fails to show that appellate relief is warranted on this issue.

III. MRE 803A

Defendant argues that the trial court erred in allowing the complainant's mother to testify concerning the complainant's description of the events in question. MRE 803A authorizes admission of testimony, that would otherwise be excluded as hearsay, of a witness other than the declarant concerning the declarant's description of an incident involving a sexual act to corroborate the declarant's present testimony if the declarant was (1) under ten years old at the time, (2) spoke of the matter spontaneously, and (3) did so either immediately after the alleged incident or upon any delay that is "excusable as having been caused by fear or other equally effective circumstance."

Defendant argues that the evidence did not show that the statements in question were offered either immediately after an incident of sexual misconduct, or after excusable delay. We disagree. Defendant correctly points out that the record evidence showed no proximity between the complainant's statements and actual sexual incidents. However, the prosecutor also suggested that any delay resulted from fear. Although the court did not rule on that alternative basis for admitting the mother's testimony, we conclude that the testimony was indeed admissible for that reason. The evidence clearly established that the complainant did not tell anyone about the abuse because of defendant's threat of going to hell. Regardless of whether the complainant believed the particulars behind the specific threat, we think it obvious that an authoritative adult threatening a child with the specter of hell will instill a general fear in that child. This Court will not reverse when the trial court reaches the correct result, even if for a different reason. *Lavey v Mills*, 248 Mich App 244, 250; 639 NW2d 261 (2001). Therefore, we conclude that the complainant's mother's testimony concerning the complainant's account of the incidents with defendant was properly admitted under MRE 803A.

IV. Effective Assistance of Counsel

Defendant argues that he was convicted without the effective assistance of trial counsel. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *Id.* Defendant must further show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *Id.*

In this case, defendant predicates his claim of ineffective assistance on defense counsel's remarks in the presence of the jury that there were pending criminal sexual conduct charges against the complainant's father. The trial court chastised counsel and instructed the jury to disregard counsel's comments. The trial court ultimately allowed evidence establishing that the complainant's father had only a single felony conviction for attempted larceny, and that the father's incarceration had begun approximately four months before the allegations against defendant arose.

The trial court instructed the jury to decide the case solely on the evidence, which did not include the statements of counsel. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, the jury should have understood that the complainant's father had been incarcerated only for attempted larceny. If the jurors did not wholly disregard defense counsel's remarks, defendant may have derived some benefit from those innuendoes. Therefore, we agree with the trial court that injecting that subject into the proceedings was misconduct on defense counsel's part, but conclude that the result of the misconduct did not prejudice defendant. Defendant has not shown a reasonable probability that differing conduct by trial counsel in this regard would have resulted in a different trial outcome. *LeBlanc*, *supra*. Accordingly, defendant was not denied effective assistance of counsel on this basis.

V. Cumulative Error

Lastly, defendant suggests that if no single claim of error itself warrants reversal, such relief is nonetheless required in the face of the cumulative effect of all such errors. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). Defendant only showed error on the trial court's part in one instance, which we concluded was harmless, and, defense counsel's erroneous statement concerning why the complainant's father was incarcerated resulted in no prejudice to the defense. Therefore, because these errors were of little consequence, we find reversal of defendant's convictions is not warranted on the basis of cumulative error.

Affirmed.

/s/ Michael R. Smolenski
/s/ Henry William Saad
/s/ Kirsten Frank Kelly