

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIUS LLOYD LEEK,

Defendant-Appellant.

UNPUBLISHED

May 13, 2004

No. 246781

Wayne Circuit Court

LC No. 02-004102-01

Before: Fitzgerald, P.J., and Jansen and Talbot, JJ.

PER CURIAM.

Defendant, a teacher, was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520(b), and second-degree criminal sexual conduct, MCL 750.520(c), both involving a nine-year-old student. Defendant was sentenced to concurrent terms of nine to fifteen, and four to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant argues on appeal that he was denied a fair trial because of prosecutorial misconduct. We do not agree. This Court considers alleged prosecutorial misconduct in context to determine whether it denied defendant a fair and impartial trial. *People v Reid*, 233 Mich App 457, 466; 592 NW2d 767 (1999). A prosecutor is afforded great latitude in closing argument, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and may use strong and emotional language in making his argument so long as it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra*.

Here, the prosecutor's comments regarding the demeanor of the complaining witness and the factors to consider in assessing his credibility were not improper. To the extent that any of the prosecutor's comments suggested that she was vouching for the child, the trial court subsequently instructed the jury that the statements of counsel were not evidence, and that the jury was the sole judge of credibility in this case. The jury is presumed to follow the instructions of the court. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant was not denied a fair and impartial trial. *Reid, supra*.

Defendant also argues that counsel was ineffective for failing to object to the prosecutor's remarks. Because no *Ginther*¹ hearing was held on defendant's claim of ineffective assistance of counsel, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

To establish a claim of ineffective assistance of counsel, the burden is on defendant to show that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the deficient performance prejudiced the defense as to deprive defendant of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.* This Court will not substitute its judgment for that of trial counsel regarding matters of trial strategy. *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999). In every criminal trial, trial counsel must balance the "meager benefit" of raising an objection "against the potential that the jury would believe defense counsel did not want them to hear the prosecutor's analysis of the evidence." *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995), Boyle, J. The decision whether to raise an objection is "the quintessential example of trial strategy." *Id.* Defendant has not overcome the presumption that counsel's actions were reasonable or that any alleged defects detrimentally affected the result of the trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Defendant also argues that his statement should have been suppressed, sua sponte, because it was not video-taped or recorded. This claim was not preserved below and, as counsel acknowledges, it has previously been rejected by this Court. *Id.* Unpreserved errors are reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We decline to revisit this question, MCR 7.215(C)(2), and find no plain error here.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Kathleen Jansen
/s/ Michael J. Talbot

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