STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 27, 2004
v	No. 247721 Livingston Circuit Court
DAVID ALLEN SCHAUER, Defendant-Appellant.	LC No. 02-013099-FC

Before: Bandstra, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(b). The trial court sentenced defendant to 15 to 30 years' imprisonment. We affirm.

Defendant argues on appeal that error requiring reversal occurred where the prosecution introduced at trial "inadmissible, highly prejudicial hearsay testimony" and that he received ineffective assistance of counsel because defense counsel failed to object to the testimony. To the extent that defendant's analysis focuses on the admission of evidence, we review this unpreserved claim for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). With respect to his ineffective assistance of counsel claim, "defendant must show (1) that his trial counsel's performance fell below an objective standard of reasonableness, and (2) that defendant was so prejudiced that he was denied a fair trial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different." *People v Moorer*, __ Mich App __, __; __ NW2d __ (May 18, 2004) [Docket No. 244119] "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *Id.*

Here, defendant takes issue with six portions of trial testimony that he asserts constitute inadmissible hearsay that defense counsel should have objected to and that should not have been admitted at trial. Having reviewed the indicated portions of the record, we conclude that the two challenged sections of testimony from the victim's mother were admissible. Neither the testimony that the victim "never wavered" nor that she read a note that the victim had written that stated concerns regarding what defendant had done were testimony regarding an out-of-court statement offered for the truth. MRE 801(c). Further, failing to object to admissible evidence is not ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 424; 608 NW2d 502 (2000).

With respect to the four remaining portions of testimony that defendant challenges on appeal as containing inadmissible hearsay, we conclude that defendant has not established outcome-determinative plain error, nor has he overcome the presumption of effective assistance of counsel. At trial, the victim read out loud a note she had written to her mother and a statement she wrote for Trooper Milburn.[1] Troopers Milburn and Coulter testified regarding the victim's oral statements during police interviews. While this evidence consisted of hearsay, we conclude that defense counsel's failure to object was a matter of sound trial strategy. As evident from defense counsel's opening statement, defendant's theory was that the victim was not credible, that she had a motive to lie, and that there were inconsistencies in her story. As alluded to during his opening statement, defense counsel's apparent strategy was to allow in every out-of-court statement the victim made so that he could highlight the inconsistencies in her story to attack her credibility. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Given this record, we cannot say that defendant was denied effective assistance of counsel or that plain error affected defendant's substantial rights.

Defendant next argues that the prosecutor engaged in misconduct depriving defendant of a fair trial when she introduced herself to the prospective jury before voir dire as "one of your assistant prosecuting attorneys," referenced "your [p]rosecuting [a]ttorney, David Morse," and later vouched for the victim's credibility during closing argument. We disagree. Because defendant failed to object during trial, our review is for outcome-determinative plain error. *Carines*, *supra*.

First, we conclude that the prosecutor's introduction was not improper. Her initial words to the trial court and before the prospective jurors were that she represented "the People of the State of Michigan." Moments later, the prosecutor stated that she is "one of your assistant prosecuting attorneys" and then referenced "your prosecuting attorney, David Morse." Read in context, the prosecutor's introductory statements were not improper because it should have been clear to the jury that the prosecutor represents the citizens of Michigan and that, because the jury is likewise comprised of Michigan citizens, she is the jury's prosecutor. See *Milo v Texas*, 214 SW2d 618, 618-619 (Tex Crim App, 1948) (the Texas Court of Criminal Appeals found that a statement to the jury that the prosecutor represents that state of Texas and society was one of "common knowledge" and that it was not subject to objection).

In any event, even assuming misconduct occurred, it easily could have been cured by way of an objection. We will not reverse based on prejudice from prosecutorial misconduct that the trial court could have cured with a timely instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Here, the trial court could have alleviated any confusion that arose from the prosecutor's references by reminding the jury that the prosecutor represents the State of Michigan and not any private individual or group of individuals. Because any prejudice from the references could have been cured, we find no error requiring reversal.

[1] Defense counsel affirmatively stated "no objection" to the admission of the victim's note and the statement to Trooper Milburn, therefore these admissions actually pose no error to review. *People v Carter*, 462 Mich 206, 215-216, 218-219; 612 NW2d 144 (2000).

With respect to defendant's argument that the prosecutor engaged in impermissible misconduct when she vouched for the credibility of the victim, we find this argument to be without merit. While a prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), a prosecutor may argue from the facts that the defendant or another witness is worthy of belief, *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). From our review of the record it is apparent that the prosecutor was not vouching for the victim's credibility on the basis of some special knowledge that she was telling the truth. Rather, the prosecutor was asking the jury to consider the victim's credibility and to consider whether she was sophisticated enough at age fifteen to successfully lie about the allegations. Because it is the jury's duty to determine credibility, *People v McElhaney*, 215 Mich App 269, 287; 545 NW2d 18 (1996), the statement was an appropriate one. The prosecutor pointed out to the jury that the victim was believable because she had been making the same allegations to members of several different agencies for over a year. The prosecutor's suggestion that the facts and the victim's youth warranted the conclusion that she was credible was not improper.

In a related argument, defendant contends that trial counsel was ineffective for failing to object to the prosecutor's improper vouching. This argument is without merit because trial counsel is not ineffective for failing to advocate a meritless position. *Snider, supra* at 425.

Finally, defendant argues that the trial court erred in scoring fifty points for offense variable (OV) 7, MCL 777.37, which concerns aggravated physical abuse, because there was insufficient evidence to support the trial court's finding that defendant threatened physical violence against the victim or her family. We disagree. We review the trial court's scoring under the guidelines for clear error. *People v Hicks*, 259 Mich App 518, 522; 675 NW2d 599 (2003).

At the time of the offense, OV 7, MCL 777.37,[2] required the sentencing court to assign fifty points if it found that the victim was treated with "terrorism, sadism, torture, or excessive brutality." MCL 77.37(2)(a) defined terrorism as "conduct designed to substantially increase the fear and anxiety a victim suffers during the offense."

Here, evidence presented at trial supported the trial court's finding that defendant threatened physical violence against victim or her family. The victim testified that the sexual assaults began when she was seven or eight and that they continued until just after she turned fifteen. Victim testified that, after the sexual assault that occurred on January 5, 2002, defendant told her that, if she ever told anyone, "he would hurt [the victim], something bad would happen to [her] or one of [her] family members." The victim testified that ever since the sexual assaults started, defendant has threatened her and her family, and that she was afraid something would happen to her or a family member if she told anyone. Trooper Coulter, who interviewed the victim, testified that the victim said that defendant told her on one occasion that "if she told

[2] MCL 777.37 has since been amended by 2002 PA 137, removing references to the word "terrorism."

anybody he would kill her or he would go to jail and she would end up in foster care." Given this evidence and in light of the definition of terrorism, we conclude that the trial court did not err in scoring OV 7. "A scoring decision is not clearly erroneous if the record contains any evidence in support of the decision." *Hicks, supra* (quotations, citations, and emphasis omitted).

To the extent that defendant further argues that the threats must occur during the offense, we find no statutory language mandating this conclusion. Although for conduct to be deemed terrorism it must be designed to increase a victim's fear and anxiety suffered *during* the offense, MCL 777.37(2)(a), it does not follow that defendant's previous threats, including a threat to kill, would not increase the victim's fear and anxiety during the commission of the instant offense. Accordingly, defendant's argument lacks merit.

Affirmed.

/s/ Richard A. Bandstra
/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra