

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

AARON THOMAS BYRD,

Defendant-Appellant.

UNPUBLISHED

August 12, 2004

No. 245624

Calhoun Circuit Court

LC No. 01-002857-FC

Before: Murray, P.J., and Markey and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction¹ for first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under thirteen years of age). Defendant was sentenced as a third habitual offender to ten to twenty-five years’ imprisonment. We affirm.

I. Material Facts

The victim, age ten at the time of trial, lived with her family (including defendant who was her step-father) during the first half of 1999. The victim testified that she usually showered in the mornings, and would wrap a towel around herself afterward. According to the victim, defendant would occasionally go into the shower with her.² On one occasion, the victim went into her mother’s bedroom with defendant, who was on the bed wearing only a robe, and defendant touched the victim in her “private.” Defendant had told the victim to “just relax,” and then he “stuck” his “front private” inside her front “private part.”

Defendant testified on his own behalf, and denied the allegations. Defendant admitted that he sometimes rinsed the victim’s hair while she was showering and her mother was not there, but denied showering with her. Following the allegations, defendant called the doctor for an appointment for the victim, and informed the doctor’s office that the victim had a yellow

¹ Defendant was tried three times for first-degree criminal sexual conduct. The first two trials resulted in hung juries.

² Defendant worked for a tow-truck company that he owned and operated, and was able to be at home during the mornings to prepare the children, including the victim, for school.

discharge and that someone had touched her in her private parts. Upon the recommendation to report the allegations, defendant and the victim's mother reported the allegations. Defendant believed that the victim made the allegations against him because he spanked her for lying. Defendant also testified that he believed the victim's injury could have been caused by a bicycle accident. According to defendant, the victim apologized to him after she made the allegations.

The victim was initially examined by Sherry Stricker, a physician's assistant, pursuant to the chief complaint of vaginal burning and itching, yellow discharge, and strong-smelling urine. Stricker had been informed that there was possible sexual abuse. Stricker indicated that the victim's labia were red and that there were lesions, which was consistent with the chief complaint. The victim was later examined by Dr. Steven Guertin, who found an injury described as a very deep, v-shaped notch in the victim's hymen. Dr. Guertin determined the injury was approximately one or two weeks old to one-year old. Dr. Guertin explained that the victim's injury was rare for a seven-year-old female. Dr. Guertin acknowledged that there were possible accidental causes, but that the most common cause of that type of injury was sexual or genital-to-genital contact (i.e., placing the penis in that particular area).

II. MRE 609

Defendant first argues that he was denied the right to a fair trial by the admission and use of evidence of his prior felony conviction at trial. We disagree.

Defense counsel introduced the evidence, and did not object when the prosecutor questioned defendant regarding his conviction on cross-examination; accordingly, this issue has not been properly preserved for appellate review. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). To avoid forfeiture of this issue, defendant must establish that the plain error affected his substantial rights, i.e., that an error occurred, that the error was plain, i.e., clear or obvious, and that the plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Evidence of a prior conviction may be admissible for impeachment purposes pursuant to MRE 609(a); however, under MRE 609(c), "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date." Prior to defendant's parole in 1994, defendant was placed on a tether program with restrictions, including a daily curfew from 12:00 a.m. and 4:00 a.m., and a restriction that defendant was not permitted to leave the state of Michigan while in the program. The precise issue here is whether the phrase "release . . . from the confinement" under MRE 609(c) refers to the date when defendant was released from prison in October 1992 (as defendant argues),³ or

³ Although defendant contends that it was determined in the first trial that he was released from confinement in October 1992, the context of the transcript reveals that defense counsel was clarifying that defendant was released from prison in October 1992 as opposed to October 1991 (as defendant believed). Neither party addressed the precise issue now before this Court because there was no question at the time of the first trial that defendant's conviction was within the ten-year time frame.

whether defendant was released from confinement when he was actually paroled in 1994 (as the prosecution argues).

Interpretation of a court rule, which includes the rules of evidence, is subject to the same basic principles that govern statutory interpretation. *Smith v Henry Ford Hosp*, 219 Mich App 555, 558; 557 NW2d 154 (1996). We begin with the plain language of the court rule. *People v Phillips*, 468 Mich 583, 589; 663 NW2d 463 (2003). “When that language is unambiguous, we must enforce the meaning expressed, without further judicial construction or interpretation.” *Id.* Common words must be understood to have their everyday, plain meaning. *Id.*

The term “confinement” is defined as follows: “State of being confined; shut in; imprisoned; detention in a penal institution. Confinement may be by either a moral or physical restraint, by threats of violence with a present force, or by physical restraint of the person.” Black’s Law Dictionary (6th ed). Further, the term “confined” is defined, in relevant part, as “enclosed; restricted; kept in.” *The Random House College Dictionary* (1988).⁴ Thus, while confinement includes imprisonment or detention in a penal institution, it also includes the state of being confined (e.g., restricted).⁵

Historically, this Court has interpreted the term “confinement” narrowly, and has determined that placement on the tether program is not the equivalent of confinement in prison or jail. See *People v Britt*, 202 Mich App 714, 716-717; 509 NW2d 914 (1993); *People v Reynolds*, 195 Mich App 182, 183-185; 489 NW2d 128 (1992); *People v Smith*, 195 Mich App 147, 151-152; 489 NW2d 135 (1992); *People v Wagner*, 193 Mich App 679, 682-683; 485 NW2d 133 (1992); *People v Granquist*, 183 Mich App 343, 345-347; 454 NW2d 207 (1990). The *Britt* case, relying on the remaining above cited cases, determined that due process protections did not attach to the ex parte amendment of a probation order where the defendant was placed on a tether program. *Britt, supra* at 717. Focusing on the tether program itself, the *Britt* Court concluded that the tether program was not the equivalent of confinement in prison, noting that the electronic tether was simply a surveillance device for monitoring the defendant’s presence in his residence during curfew hours. *Id.*

In the instant case, defendant was placed on certain restrictions while in the tether program, including a curfew and a mandate that he stay within the state of Michigan. As stipulated by both parties at the post-conviction evidentiary hearing:

[O]n October 7th, of 1992, Mr. Byrd was released from prison, sent to the Battle Creek Correction Center where, the next day, October 8th, he was put on a tether, after which he was required to be at home between midnight and 4:00 a.m.,

⁴ The common usage of a nonlegal term is to be found in a lay dictionary. *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 240-241; 615 NW2d 241 (2000).

⁵ Defendant has attempted to argue (and encourages the proposition) that the plain language of MRE 609(c) supports his position; however, defendant failed to address the plain language of the terms “state of being confined,” and in fact, ignores these terms, although he has included them in his definition of “confinement.”

and during the remainder of the day, he was permitted to be anywhere he wished to be, other than he could not leave the State, and during that period of time, he was working in the family business. Mr. Byrd was not paroled until 1994.

In accordance with the plain language of MRE 609, although not “imprisoned,” defendant was certainly within a “state of being confined” (enclosed, restricted, or kept in) or “shut in,” given the restrictions placed on him in connection with the tether program prior to his parole in 1994. It was therefore at least arguable that defendant was “confined” for purposes of the evidentiary rule, or that he was not “released from confinement” until he was paroled in 1994. Regardless of whether the evidence was properly admitted, as this precise and close evidentiary issue has not been previously determined by a court of this state or of another jurisdiction, and it was defense counsel that actually admitted this evidence at trial, we find that defendant has failed to demonstrate a plain error. *Carines, supra*.⁶

Defendant also contends that the trial court should have exercised its discretion and excluded the evidence because it was more prejudicial than probative. Defendant has failed to demonstrate how the conviction was more prejudicial than probative. Further, there was no request to the trial court to utilize its discretion and find that the evidence was more prejudicial than probative. Therefore, defendant has failed to demonstrate a plain error affecting his substantial rights. *Carines, supra*.

III. Effective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel. We disagree. This Court reviews claims of ineffective assistance of counsel as mixed questions of law and fact, reviewing the trial court’s factual findings for clear error and reviewing de novo its rulings on questions of law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

In order to justify reversal on the ground that trial counsel was ineffective, a defendant must demonstrate (1) that counsel’s performance was deficient (i.e., counsel made errors so egregious that counsel was not performing as “counsel” guaranteed by the Sixth Amendment), and (2) that the deficient performance prejudiced the defense (i.e., there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defendant must overcome the strong presumption that counsel’s performance constituted sound trial strategy. *Id.*

First, defendant contends that trial counsel failed to object to the introduction of evidence of defendant’s prior criminal record. However, it was defense counsel that initially admitted the

⁶ Defendant relies on two cases to support his position; however, we find these cases do not apply to this issue. In *People v Washington*, 130 Mich App 579, 580-581; 344 NW2d 8 (1983), the Court merely determined that a trial judge is not compelled to compute unsuccessful periods of parole to the time of a final release from prison in order to determine the ten-year time period, and did not address the issue in this case. Further, in *People v Featherstone*, 93 Mich App 541, 544-545; 286 NW2d 907 (1980), the Court determined whether release from prison was a release from confinement and not the specific issue raised in this case.

evidence at trial and not the prosecutor. Further, as the precise issue relating to the introduction of the evidence had not been decided by a Michigan court or by a court of another jurisdiction, it was arguable that the evidence could have been admitted over a defense objection. Defense counsel's performance cannot be deemed deficient for failing to advance a novel legal argument. *People v Reed*, 453 Mich 685, 695; 556 NW2d 858 (1996). Additionally, it was sound trial strategy to admit potentially damaging evidence in order to counter the effect of that evidence. *People v Rodgers*, 248 Mich App 702, 716; 645 NW2d 294 (2001).

Next, defendant contends that trial counsel was ineffective for failing to object to the prosecutor's repeated claim that defendant admitted to the offense. On cross-examination at the post-conviction evidentiary hearing, defense counsel indicated it could be trial strategy to not object to the prosecutor's statement because it may draw more attention to the comment. Further, defense counsel countered the prosecutor's statement during his own closing argument.

Next, defendant argues that counsel was ineffective for failing to object to acts of prosecutorial misconduct. Defendant first contends that trial counsel should have objected to the prosecutor's use of defendant's forgery conviction. This argument is meritless because trial counsel initially introduced the conviction during direct examination. Defendant's remaining claims of prosecutorial misconduct are meritless; therefore, trial counsel was not required to make a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). See Section IV, *infra*.

Defendant further argues that trial counsel was ineffective for failing to develop two areas of Mary Byrd's (defendant's mother's) testimony. Defendant contends that trial counsel should have elicited testimony from Byrd to demonstrate that defendant and the victim had a normal, loving relationship, and that the victim feared going to her biological father's house because she would have been a better witness than the other trial witnesses. Defense counsel elicited or attempted to elicit this testimony from other witnesses,⁷ and it was a matter of trial strategy to do so. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant also argues that trial counsel was ineffective for failing to lay a proper foundation for the testimony of Mark Robison, defense counsel in the first two trials. See Section V, *infra*. Robison's testimony would have been cumulative because trial counsel elicited the sought testimony from Byrd.

Finally, defendant contends that trial counsel was ineffective for failing to investigate and present necessary expert witnesses to testify regarding the reactions of a child witness required to testify untruthfully (and whether such reactions were consistent with the victim's reactions), and to counter the prosecutor's argument that defendant's reactions to the allegations were indicative of guilt. "Trial counsel's conduct in this regard is presumed to be a permissible exercise of trial strategy." *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). "In order to

⁷ Defendant argued in his brief on appeal that "It was clear from other testimony that the complainant was terrified of visiting her natural father's home to the point where she would become ill to avoid it."

overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call these witnesses deprived him of a substantial defense that would have affected the outcome of the proceedings." *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994); see also *People v Grant*, __ Mich __; __ NW2d __ (Docket No. 119500, issued July 15, 2004).

Defendant has failed to demonstrate that counsel's failure to call the desired witness deprived him of a substantial defense that would have affected the outcome of the proceedings. The proposed expert testimony was sought to discredit Dr. Guertin and Dr. Randy Haugen, a psychologist who evaluated the victim, on certain points in their testimony; however, trial counsel conducted extensive cross-examination of each of the witnesses in an evident attempt to discredit their testimony. As defendant failed to meet both prongs of the test for a claim of ineffective assistance of counsel on any of the above issues, we find no error requiring reversal.

IV. Prosecutorial Misconduct

Defendant next argues that he was denied the right to a fair trial based on misconduct committed by the prosecutor. We disagree.

As the alleged instances of misconduct were not met with a timely objection, these unpreserved claims are reviewed for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453-45; 678 NW2d 631 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). This Court will not reverse on the ground of prosecutorial misconduct if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Abraham*, 256 Mich App 265, 274; 662 NW2d 836 (2003). "The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial." *Goodin, supra* at 432.

Defendant first contends that the prosecutor improperly shifted the burden of proof to defendant and by personally vouching for the victim's credibility during jury voir dire. After reviewing the statements in context, it is clear that the prosecutor was asking the jury to consider all the evidence presented in the case before rendering its verdict, and stating that the victim was not the person on trial. Further, defendant has failed to demonstrate a plain error affecting his substantial rights because the jury was instructed regarding the proper burden of proof, and was also instructed that the attorneys' statements were not evidence. As juries are presumed to follow their instructions, there was no plain error. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also argues that the prosecutor impermissibly indicated that defendant's initial reaction to the charges was not denial, but panic, which is indicative of guilt. Although a prosecutor may not vouch for a defendant's guilt, he may argue from the facts that the defendant is not worth of believe. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v Weatherspoon*, 171 Mich App 549, 558; 431 NW2d 75 (1988). Here, the prosecutor's opening presented his case in relation to the issues of credibility and the evidence he intended to present.

Defendant additionally contends that the prosecutor improperly stated that defendant admitted guilt at the inception of his trial testimony. Although the prosecutor's argument mischaracterized defendant's testimony, the jury was properly instructed that counsels'

arguments and statements were not evidence. Thus, defendant has failed to demonstrate a plain error affecting his substantial rights.

Defendant further contends that the prosecutor improperly used defendant's prior plea-based forgery conviction. However, defense counsel initially introduced the evidence. Once the evidence was introduced, defendant "'opened the door to a full and not just a selective development of that subject.'" *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). When credibility is in question, the prosecutor is free to argue a witness's credibility from the evidence. *Graves, supra* at 486-487. Here, the prosecutor could properly argue defendant's credibility in relation to defendant's prior plea-based conviction.

V. Right to Present a Defense

Finally, defendant argues that he was denied the right to present a defense when he was prevented from presenting critical evidence of the victim's bias. We disagree. This Court reviews the trial court's evidentiary ruling for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 60; 614 NW2d 888 (2000).

Defendant specifically argues that Robison should have been permitted to testify that although the victim was going to testify that defendant did not "molest" her, she changed her mind after two persons (including the assistant prosecutor from the preliminary examination) talked to her and indicated that if the victim did not testify that defendant committed the acts, she would be sent to live with her biological father. At trial, the court determined that Robison's testimony was inadmissible because defense counsel failed to lay a proper foundation for the testimony in accordance with MRE 613.

"Under MRE 613, subject to certain restrictions, a witness may be examined concerning a prior inconsistent statement for impeachment purposes." *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002). As explained by the *Rodriguez* Court, this Court has interpreted MRE 613 to require a proper foundation including reminding a witness of the place where the inconsistent statement took place and the people to whom a prior statement was made. *Id.* "When a party attempts to impeach a witness or refresh the witness' memory with a prior inconsistent statement made by that witness, a proper foundation must be laid by questioning the witness concerning the time and place of the statement and the person to whom it was allegedly made." *Id.*

Defense counsel did not question the victim's mother if she informed Robison that she was told that the victim would be removed from her custody if she did not testify the same way as she had previously said had happened. Defense counsel did not set forth a proper foundation regarding statements by the victim's mother to Robison, but merely set forth the proper foundation regarding statements made to Mary Byrd. Accordingly, given this Court's

construction of MRE 613, the trial court did not abuse its discretion by excluding Robison's testimony at trial.⁸

Affirmed.

/s/ Christopher M. Murray

/s/ Jane E. Markey

/s/ Peter D. O'Connell

⁸ We decline to address defendant's contention that the prosecutor's argument regarding the attorney-client privilege was erroneous because the trial court did not decide the issue based on such grounds, and this has no effect on the issue of whether the trial court abused its discretion.