STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARTHUR ALLEN FENWICK,

Defendant-Appellant.

UNPUBLISHED
November 9, 2004

No. 249058
Cass Circuit Court
LC No. 02-010390-FH

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a), and assault with intent to commit second-degree CSC, MCL 750.520g(2), for which he was sentenced to two years' probation with the first year in jail. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that he was denied a fair trial due to prosecutorial misconduct and that defense counsel was ineffective for failing to object to the misconduct. The issue of prosecutorial misconduct has not been preserved because defendant did not object at trial. Therefore, review is normally precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, because defendant raises this issue in the context of ineffective assistance of counsel, this constitutional issue is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Defendant failed to raise the ineffective assistance of counsel claim below in a motion for a new trial or an evidentiary hearing. Thus, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Defendant's girlfriend, Staci Bethuram, testified that she was unable to remember much of what transpired on the night in question. The prosecutor elicited testimony from Bethuram regarding two prior boyfriends who had been charged with sex offenses. Defendant argues that such evidence was irrelevant because it was offered to prove that defendant must be a sex offender because Bethuram always dated sex offenders. However, as is clear from the prosecutor's argument, the evidence was introduced in an attempt to prove that Bethuram's professed inability to recall much of what happened was fabricated, born of a desire to protect defendant as she had her prior boyfriends rather than of an actual loss of memory. Evidence

showing bias or prejudice of a witness is always relevant because witness credibility is a material issue in every case. *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001).

Furthermore, the prosecutor's remarks during closing argument regarding this evidence was proper because a prosecutor may comment on his own witness' credibility during closing, *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004), and may argue that "a witness is not worthy of belief or is lying," *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990). Therefore, defendant has not show plain error with respect to the prosecutor's questioning of Bethuram and closing argument. Because defendant has not established error, counsel was not ineffective for failing to object. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant also argues that the trial court erred in denying his request for an instruction on the lesser offense of fourth-degree CSC. A court is only required to instruct on a necessarily included lesser offense or attempt, be it a felony or a misdemeanor, if requested to do so and the lesser offense is clearly supported by a rational view of the evidence. *People v Silver*, 466 Mich 386, 388; 646 NW2d 150 (2002). The court is not to instruct on uncharged cognate lesser offenses. *People v Cornell*, 466 Mich 335, 354; 646 NW2d 127 (2002). A necessarily included lesser offense is "an offense which contains some of the elements of the greater offense, but no additional elements," such that the "greater offense cannot be committed without committing the lesser offense." *People v Norman*, 184 Mich App 255, 259-260; 457 NW2d 136 (1990). Whether a particular offense is a lesser included offense of another offense is a question of law that is reviewed de novo on appeal. *People v Nickens*, 470 Mich 622, 625-626; 685 NW2d 657 (2004).

Defendant cites *People v Reese*, 114 Mich App 644, 646; 319 NW2d 610 (1982), and *People v Gorney*, 99 Mich App 199, 205; 297 NW2d 648 (1980), for the proposition that fourth-degree CSC is a necessarily lesser included offense of second-degree CSC. But defendant's reliance is misplaced. *Reese* engaged in no analysis of this issue, only citing *Gorney* for this proposition. And the *Gorney* Court did not state that fourth-degree CSC was always a necessarily lesser included offense of second-degree CSC. Rather, *Gorney* stated that "the fourth-degree [CSC] provision is a necessarily lesser included offense of the second-degree [CSC] provision of which the defendant herein was convicted, the only difference between the greater and lesser offense being the added element of personal injury." *Gorney*, *supra* at 205. The defendant in *Gorney* was convicted of second-degree CSC pursuant to MCL 750.520c(1)(f).

But in this case defendant was charged with second-degree CSC predicated on sexual contact with a child under the age of thirteen, MCL 750.520(1)(a). There is no form of fourth-degree CSC which is subsumed by this form of second-degree CSC and, because there was no evidence to suggest that the victim was other than twelve years old at the time of the offense, fourth-degree CSC was not a necessarily included lesser offense of the crime charged. *Norman*, *supra* at 260-261 (holding that fourth-degree CSC was not a necessarily included lesser offense

of second-degree CSC where the latter offense was predicated on the victim being under thirteen years of age). Therefore, defendant was not entitled to an instruction on fourth-degree CSC.

Affirmed.

/s/ Christopher M. Murray
/s/ David H. Sawyer
/s/ Michael R. Smolenski