

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CALVIN KINTE COLLINS,

Defendant-Appellant.

UNPUBLISHED

March 15, 2007

No. 266788

Calhoun Circuit Court

LC No. 2005-000363-FC

Before: Fort Hood, P.J., and White and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(a) (engaging in sexual penetration with a person under 13 years of age), and two counts of second-degree criminal sexual conduct (CSC-2), 750.520c(1)(a) (engaging in sexual contact with a person under 13 years of age). He was sentenced as an habitual offender, fourth offense, MCL 769.12, to thirty to sixty years' imprisonment for each CSC-1 conviction and eighteen to thirty years' imprisonment for each CSC-2 conviction. We affirm.

Defendant first asserts that the trial court abused its discretion in denying his request for substitution of appointed counsel. We disagree. We review a trial court's denial of a request for substitution of appointed counsel for an abuse of discretion. *People v Traylor*, 245 Mich App 460, 462; 628 NW2d 120 (2001). An abuse of discretion standard acknowledges that there will be circumstances in which there will be more than one reasonable and principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

The accused in a criminal prosecution "shall enjoy the right . . . to have the Assistance of counsel for his defence." US Const, Am VI. Denying indigent defendants the right to appointed counsel violates the due process clause of the 14th Amendment. *Gideon v Wainwright*, 372 US 335, 342-343; 83 S Ct 792; 9 L Ed 2d 799 (1963). An indigent defendant is guaranteed the right to counsel; however indigent defendants are "not entitled to have the attorney of [their] choice appointed simply by requesting that the attorney originally appointed be replaced." *Traylor*, *supra* at 462. A substitution of appointed counsel will be granted only where there is a showing of good cause and the substitution will not unreasonably disrupt the judicial process. *Id.* A defendant demonstrates good cause by showing a legitimate difference of opinion over a fundamental trial tactic. *Id.*

In this case, defendant requested substitute counsel at a pretrial hearing held one day before the trial was scheduled to begin. Defendant complained that defense counsel advised him to accept a plea, and that defense counsel was not “fighting” for him.¹ The trial court rejected defendant’s request, noting that there was no breakdown of the attorney-client relationship and that defense counsel was an experienced attorney, who had a duty to explain the relative risks and benefits of accepting the plea offer or going to trial, and who would represent defendant conscientiously. Defendant’s allegation that defense counsel was “not representing me right” did not constitute good cause for seeking substitute counsel. *Traylor, supra* at 463. Further, although defense counsel acknowledged that he considered defendant’s alibi defense to be problematic given that the victim’s testimony was indefinite as to the dates involved, the record demonstrates that counsel vigorously represented defendant at trial, cross-examining the prosecution’s witnesses, and exerting significant efforts to advance defendant’s alibi defense during defendant’s case-in-chief. Also, defense counsel’s purported decision not to prepare motions, i.e., a motion to dismiss in this case,² fell within the category of “professional judgment and trial strategy,” which did not constitute good cause for substitution. *Traylor, supra* at 463. Finally, the record does not support defendant’s argument that defense counsel was forcing him to accept a plea agreement or that there was a dispute over whether to proceed to trial or to accept the prosecution’s offer. After the trial court explained to defendant the consequences of accepting the prosecution’s plea or proceeding to trial, defendant clearly rejected the prosecution’s plea offer, and the matter proceeded to trial with counsel effective assistance.

Defendant additionally argues that the prosecution’s rebuttal denied him a fair and impartial trial. We disagree. We review claims of prosecutorial misconduct de novo, *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005), and on a case by case basis. *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005), vacated in part and remanded in part 477 Mich 856; 720 NW2d 754 (2006). Without a timely objection, “defendant must show plain error that affected his substantial rights, i.e., that the error was outcome determinative.” *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We will not find error requiring reversal where a curative instruction could have prevented any prejudicial effect. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Generally, the prosecution has “great latitude to argue the evidence and all [reasonable] inferences relating to the [prosecution’s] theory of the case.” *Walker, supra* at 542. While the prosecution may use emotional language during closing argument, *Ackerman, supra* at 454, the prosecution “may not appeal to the jury to sympathize with the victim.” *Walker, supra* at 543. The prosecution may not vouch for the credibility of its witnesses, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), but it may argue a witness is credible based on the facts and evidence in the case. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). We

¹ In passing, defendant also argues that he moved to dismiss his case without assistance from defense counsel. However, defendant ignores that his defense counsel filed and argued that motion on defendant’s behalf.

² As previously noted, defense counsel filed and argued this motion on behalf of defendant, but defendant apparently prepared that motion.

review the prosecutor's comments as a whole and evaluate them in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Ackerman, supra* at 452.

Defendant asserts that the prosecutor's argument was an improper appeal to sympathy, rather than an argument regarding the victim's credibility. We disagree.

On appeal, defendant emphasizes that the victim's credibility was key, and we note that defense counsel challenged the victim's credibility during his closing argument, stating:

[I]f I engaged in the hobby of sky diving . . . and [the victim] handed me my parachute and said "Take my word for it, your parachute is fine, it will work, there's nothing wrong with it" would you put it on and jump out of the plane or would you stop and check or have someone else check for you?

If you would do either of the latter, check yourself or have someone else double check it, you've got a reasonable doubt and I submit to you that there is more than ample reason that you've been given in this case to have reasonable doubt and I ask you to find Mr. Collins not guilty . . .

On rebuttal, the prosecutor argued that the victim was a credible witness based on the facts and evidence of the case. To refute defense counsel's implied allegation that the victim fabricated the allegations, the prosecutor detailed the evidence, including that the victim was interviewed several times and then "poked and prodded and sampled" by the physician. The prosecutor continued:

[the victim] had nothing to gain. She hasn't seen the defendant for over two years or almost two years . . . She has everything to lose. The thing she worried about for five years was the embarrassment. The thing she worried about for five years was having to think about it and she was sitting here having to think about it for half a day and explain it to how many strangers. To come into court and testify, nerve wracking enough. To come into court and tell these strangers these kinds of things with the perpetrator sitting how many feet away is not something someone does for fun.

Taken in context, these comments were a fair response to defendant's arguments regarding the complainant's credibility, and did not constitute an improper appeal to the jury's sympathy. Because the challenged comments were responsive to defendant's attack on the victim's credibility and because the jury received a general, curative instruction, we find no error requiring reversal. See *Walker, supra* at 544-545.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Helene N. White
/s/ Stephen L. Borrello