STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 1, 2007
v	No. 265839 Oakland Circuit Court
TROY ANTHONY WARD, Defendant-Appellant.	LC No. 2005-202593-FC

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions and sentences for two counts of second-degree criminal sexual conduct (CSC II) (person under 13), MCL 750.520c(1)(a). He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent sentences of 85 to 360 months' imprisonment for each conviction. We affirm.

I. FACTS

Defendant's convictions arise from events that occurred while he lived with his girlfriend, the victim (his girlfriend's seven-year-old daughter), and the couple's son in an apartment located in Southfield, Michigan.

The victim testified at trial that defendant sexually abused her two times. The first time was when she was six years old, sometime after school started and near Halloween of 2004.[1] She explained that she and defendant were sitting on the living room couch watching television in the morning, while her mother and brother were still sleeping, when defendant put his finger under her gown and panties and touched the outside of her "front private part." The victim gestured to show how the defendant touched her—he made "circles" as he touched her. After the prosecutor reminded the victim that she had testified before, at the preliminary examination, that defendant had touched her inside her private part, the prosecutor then asked which part defendant touched, and the victim responded, "I think that was inside."

[1] The victim originally testified that this was a school day, but on cross-examination, she said that it was a Saturday.

The victim testified that a second incident occurred around the same time. She stated that she was in the living room playing catch with defendant, using her baby brother's ball, when she hit defendant in the groin area and "hurt" him. After she hit defendant, she touched his "peanut" though "a hole in his drawers." When first asked why she touched his "peanut," she did not remember. But in response to a leading question, she said that defendant told her to touch it. She gestured to show how she touched defendant, and she explained that gray "bubbles" came out of his "peanut" as she touched it.

Defendant told the victim not to tell anyone, but she could not remember when he told her that. The victim first testified that she did not tell her mother what happened, but when reminded of her earlier testimony, she remembered testifying that she told her mother. When asked again whether she told her mother about the abuse, she said that she did. On cross-examination, she testified that she told her mother after the second incident. After she told her mother, defendant stopped touching her.

On the Sunday after Thanksgiving 2004, the victim told her aunt about the incidents. The next day, the victim's father took her to the Southfield Police Department and Botsford Community Hospital. An emergency room physician, examined the victim but found no evidence of trauma or of any abnormalities, which he said was true "more often than not" in cases of abuse.

At trial, defendant's theory of the case was that the victim's father encouraged the victim to make up the allegations against defendant because he was jealous of defendant's relationship with the victim's mother. During testimony, defendant adamantly denied touching the victim and denied that he watched television or played catch with her. He admitted that he rented the apartment for the victim's mother and her children and lived there for about three weeks, but he testified that he moved out in September because the victim's mother was having problems with the victim's father. Defendant also testified that he was never at the apartment in October or November 2004; he said he lived with his cousin.[2]

The jury found defendant not guilty of first-degree CSC but found defendant guilty of two counts of the lesser-included offense of second-degree CSC. Defendant moved for a new trial on April 21, 2006. No action was taken on the motion. On July 3, 2006, defendant again moved for a new trial based on slightly different grounds. The trial court denied the restated motion for a new trial on July 19, 2006. Defendant now appeals.

II. MOTION FOR NEW TRIAL

Defendant first argues that the trial court erred when it denied his motion for a new trial based on ineffective assistance of counsel. Defendant claims that counsel was ineffective for

[2] Defendant's cousin testified that defendant lived with her until she "down-sized" in September 2004, but he did not spend every night at the apartment. After September, defendant occasionally slept on her couch and kept some of his belongings in her home.

failing to object to the testimony of three witnesses at trial regarding "other," uncharged bad acts of penetration between defendant and the victim. We disagree.

A. Standard of Review

A trial court "may grant a new trial on any ground that would support appellate reversal of the defendant's conviction or if the court believes that the verdict has resulted in a miscarriage of justice." *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000); see also MCR 6.431(B). Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent an abuse of that discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when the result is outside the principled range of outcomes. *People v Carnicom*, 272 Mich App 614, 617; 727 NW2d 399 (2006). If counsel was ineffective, and defendant was prejudiced by counsel's failure, defendant is entitled to a new trial. See *People v Wilson*, 242 Mich App 350, 354; 619 NW2d 413 (2000).

B. Analysis

To prove an ineffective assistance of counsel claim, defendant must establish that counsel's performance was deficient under an objective standard of reasonableness, and that, but for counsel's error, the result of the proceeding would have been different; therefore, he was denied a fair trial. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004). Defendant bears a "heavy burden" to overcome the presumption that counsel was effective. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Moreover, defendant bears the burden of proving that counsel's action or inaction was not sound trial strategy. See *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

MRE 404(b) limits the admission of evidence of other "bad acts" unless the evidence is offered for a proper purpose, is relevant, and its probative value is not substantially outweighed by its potential for unfair prejudice. *People v VanderVliet*, 444 Mich 52, 65, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994). We conclude that it is not implicated in this case because the challenged testimony did not actually involve additional or other bad acts. Although defendant stated in the opening statement that the victim claimed the abuse happened on numerous occasions, the testimony at trial showed that she consistently spoke about two incidents, although her claims of what happened in each varied. Cheryl Marks, Dr. Mark Cynar, and Marita Smith all testified that the victim or her father told them about two incidents. The victim described one incident that involved defendant putting his finger in her vagina and a second incident that involved defendant's penis. The victim's statements did not describe additional or "other" bad acts to Marks, Cynar, and Smith; for that reason, MRE 404(b) does not apply and admitting the testimony was proper because "the facts and circumstances surrounding the commission of a crime are properly admissible as part of the res gestae." *People v Shannon*, 88 Mich App 138, 146; 276 NW2d 546 (1979). An objection would have been meritless because the admission of the evidence was proper, so counsel was not ineffective for failing to object. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Moreover, counsel's elicitation of Marks's testimony and his failure to object when the prosecution elicited testimony from Dr. Cynar and Smith regarding the victim's statements was actually trial strategy. Defendant's theory of the case was that the victim's father encouraged her to fabricate the accusations because he did not like defendant and wished to gain an advantage in

post-divorce matters. The fact that the victim made numerous allegations and that those allegations varied, assisted the defense in proving that the victim was not credible and that the allegations were fabricated.

We are aware that a chosen strategy is not "effective" if it is objectively unreasonable. *People v Dalessandro*, 165 Mich App 569, 577-578; 419 NW2d 609 (1988); see also *Washington v Hofbauer*, 228 F3d 689, 704 (CA 6, 2000). Counsel is not ineffective, however, merely because a strategy did not work. *People v Stewart* (*On Remand*), 219 Mich App 38, 42; 555 NW2d 715 (1996). Further,

> [j]udicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight . . . . [*Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (internal citation omitted).]

After our review of the record, we conclude that counsel's strategy was sound strategy despite its lack of success. There is no indication that counsel misunderstood the law or that the strategy was objectively unreasonable. By admitting evidence of the inconsistencies between the victim's pretrial allegations and her trial testimony, counsel not only forced the prosecutor to acknowledge and address the weaknesses of the case against defendant, he also provided substantial evidence to support the fabrication defense. Without the evidence of the inconsistencies, counsel's theory of fabrication would have been much weaker. Although the victim's testimony at trial was not perfectly consistent over the course of the examination and differed in minor respects with her preliminary examination testimony, the jury would likely have overlooked those minor differences in light of her young age and her presumed nervousness at having to testify in a courtroom full of strangers. For counsel's fabrication strategy to succeed, more significant examples of inconsistencies were required, and the challenged testimony provided those. Thus, we conclude that, although the strategy included some risk, it was sound, and counsel was not ineffective for relying upon it. *Hofbauer*, *supra* at 704. Defendant has not demonstrated that his counsel was ineffective. *Tommolino*, *supra* at 17. Thus, the trial court did not abuse its discretion when it denied defendant's motion for a new trial. *Wilson*, *supra* at 354.

III. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecutor committed several instances of misconduct in closing argument, and that even if the individual errors do not require reversal, the cumulative effect of the errors denied defendant a fair trial. Again, we disagree.

A. Standard of Review

Defendant did not object to the challenged statements at trial; thus, our review is limited to plain error affecting defendant's substantial rights. *People v Callon*, 256 Mich App 312, 329;

662 NW2d 501 (2003). An error affects defendant's substantial rights if it is prejudicial, or seriously affects the fairness, integrity, or public reputation of the judicial proceedings, or it resulted in the conviction of an actually innocent defendant. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

When a defendant challenges a statement made in closing argument, we examine the pertinent part of the record and evaluate the remarks in context to determine if defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). The remarks are read as a whole and evaluated in light of defense arguments and their relationship to the evidence and testimony at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Reversal is not required "if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005).

B. Analysis

Defendant offers three specific instances where the prosecutor improperly bolstered or denigrated the witnesses' testimony by referring to his personal experiences. Defendant first argues that the prosecutor improperly bolstered the credibility of the victim's aunt when he argued that her repeated conversations with the victim regarding inappropriate touching were a reasonable thing to do and that he had a similar conversation with his own seven-year-old nephew.[3] Second, defendant argues that the prosecutor unfairly denigrated the victim's mother and improperly judged her behavior when he stated that if his child was the victim, he would have accompanied her to the hospital and to the police, and he would not have brought a lawyer when he spoke with the police.[4] Defendant finally argues that the prosecutor improperly expressed his personal view of defendant's credibility when he noted that, unlike on television, in his experience, defendants do not break down on the witness stand and confess to the crime.[5]

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[3] Specifically, the prosecutor said, "I have a seven-year-old nephew. I don't have children myself, but I've had that conversation with him. It's not unusual . . . ."

[4] The prosecutor commented as follows:

> And lord knows that if it's my child who my ex is saying that something had happened to them, I'm going to be there every step of the way even if it's just to get the side of the story that she wanted people to hear . . . . I wouldn't show up . . . at the police station with an attorney and I certainly would show up at the minute they were going to the police and anytime my child goes to the doctor's office or to the hospital or the emergency room, I'm going to be there to make sure that she's treated properly, that she's seen properly.

[5] The prosecutor stated:

> And who's the defendant? He's a man who testified to you, for you in an untruthful manner. He was untruthful about pretty much everything. Television has Matlock get up there and have someone break down and cry on the stand. That's not what's going to happen here, ladies and gentlemen. You don't get those moments. In the ten years that I've been a prosecutor, I've never had a

(continued…)

Defendant claims that this last argument improperly used the prestige of the prosecutor's office to obtain a conviction.

A prosecutor may not vouch for a witness's credibility in a closing argument to imply some "special knowledge" of the truthfulness of the witness. *Bahoda*, *supra* at 276. However, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). "'[P]rosecutors are accorded great latitude regarding their arguments and conduct.' They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *Bahoda*, *supra* at 282 (internal citations omitted).

Here, at oral argument, the prosecutor conceded that the above remarks were improper. But even with this concession, we conclude that reversal is not required in this case because defendant has failed to show plain error affecting his substantial rights. The prosecutor's conduct was not so egregious that a curative instruction would not have counteracted any prejudice. *People v Dobek*, 274 Mich App 58, 66 n 3, 732 NW2d 546 (2007); *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The statements regarding his conversation with his nephew, the behavior of the victim's mother and the reference to his prosecutorial experiences were brief, not inflammatory, and immediately followed by references to the evidence at trial. Moreover, the jury was instructed both that it must decide the case on the evidence alone and that the lawyer's statements were not evidence. The instructions were sufficient to dispel any unfair prejudice from the challenged comments. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). The jury is presumed to follow the court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant's claim that the prosecutor argued a "fact" not in evidence—that the victim's statements were consistent—is also without merit. It is clear from a reading of the remark in context that the prosecutor simply argued that the victim was as consistent in her retellings of the abuse as one could expect a seven-year-old child to be. The prosecutor clearly did not disregard the victim's inconsistent testimony, but addressed the inconsistencies in closing. The statement was not improper. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

Even where each challenged remark is not so prejudicial on its own that a timely objection and curative instruction could not have alleviated the prejudice, the cumulative effect of several minor instances of misconduct may require reversal. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). The test is whether the effect of the errors was so seriously prejudicial that defendant was denied a fair trial. *Id.*; *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

Defendant's cumulative error argument also fails. To reverse on the grounds of cumulative error, the errors complained of must be of consequence. *People v Cooper*, 236 Mich

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(…continued)

> defendant get up on the stand, deny it, deny it, deny it and then after I ask him four questions break down in a ball and say I did it.

App 643, 659-660; 601 NW2d 409 (1999). After a careful review of the record, we conclude that defendant has not shown errors of consequence which, when combined, had a prejudicial effect so serious that defendant was denied a fair trial. The evidence against defendant was sufficient; the remarks did not compromise defendant's defense; and they were not so powerful and persuasive that if they had not been made, a juror would have voted for acquittal. *Id.* Reversal is not required.

IV. IMPARTIAL JURY

Defendant also argues that his Sixth Amendment right to an impartial jury that reflected a fair cross-section of the community was violated. We disagree.

A. Standard of Review

"[T]o . . . preserve a challenge to the jury array, a party must raise [the] issue before the jury is empanelled and sworn." *People v McKinney*, 258 Mich App 157, 161; 670 NW2d 254 (2003). Defendant did not object at trial; thus, this issue is unpreserved. *Id.* We review an unpreserved constitutional issue for plain error that affects defendant's substantial rights, meaning that it is prejudicial, or seriously affects the fairness, integrity, or public reputation of the judicial proceedings, or resulted in the conviction of an actually innocent defendant. *Carines*, *supra* at 761, 763-764.

B. Analysis

To succeed on a claim of racial discrimination in the composition of the jury venire or pool that violates the Sixth Amendment, defendant must first show a prima facie case of racial discrimination. *People v Glass*, 464 Mich 266, 275; 627 NW2d 261 (2001). To determine if a prima facie violation of the fair-cross-section requirement of the Sixth Amendment, US Const, Am VI, has occurred, the court must find:

> (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process. [*People v Smith*, 463 Mich 199, 215; 615 NW2d 1 (2000), quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979).]

Defendant has met the first prong of the test because "African-Americans are considered a constitutionally cognizable group for Sixth . . . Amendment purposes." *People v Hubbard* (*After Remand*), 217 Mich App 459, 473; 552 NW2d 493 (1996). Defendant has not, however, met the second and third prongs of the test. Defendant has provided evidence of two incidents where the jury pool included no African-Americans. Two instances of underrepresentation, however, is insufficient to show underrepresentation in general. See *People v Williams*, 241 Mich App 519, 526; 616 NW2d 710 (2000). Likewise, defendant fails to meet the third prong. "[S]ystematic exclusion cannot be shown by one or two incidents of a particular venire being disproportionate." *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). Thus,

defendant has not shown a prima facie case of racial discrimination, and his Sixth Amendment claim fails.

V. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that his counsel was ineffective for failing to raise the issue of the absence of African-Americans in the jury pool. Again, to succeed on his claim, defendant must show that counsel's performance was deficient under an objective standard of reasonableness, and that, but for counsel's error, the result of the proceeding would have been different; therefore, he was denied a fair trial. *Grant*, *supra* at 485-486. Here, the lower court record does not include any evidence that African-Americans were substantially underrepresented in the venire or that the absence of African-Americans from the jury venire was the result of systematic exclusion. Thus, there is no evidence that there was a reasonable probability that the result would have been different if counsel had objected. *Id.*

VI. SENTENCING GUIDELINES

Defendant next argues that because no medical records, expert testimony, results of interviews, or other observations of the victim's behavior were admitted into evidence to prove that the victim suffered serious psychological injury, the trial court erred in scoring ten points for offense variable (OV) 4. We disagree.

A. Standard of Review

We review a sentencing court's scoring of points under the sentencing guidelines for an abuse of discretion. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Where there is any evidence to support the court's scoring decision, it will be upheld. *Id*.

B. Analysis

The sentencing court must score ten points for OV 4 when the victim suffers "serious psychological injury requiring professional treatment." MCL 777.34(1)(a). Or "if the serious psychological injury may require professional treatment." MCL 777.34(2). "In making this determination, the fact that treatment has not been sought is not conclusive." *Id*. Contrary to defendant's argument, the prosecution was not required to prove that the victim suffered serious psychological injury by a preponderance of the evidence because defendant did not challenge the accuracy of the fact. *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993).

The victim testified at trial that defendant's abuse made her feel "not good." Her father read a statement during sentencing in which he stated that his daughter experienced pain and suffering from being violated by defendant. He noted that she was "stressed" and would have to seek professional help for perhaps the rest of her life. Thus, there is evidence in the record to support the score. See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004) (concluding that the victim's testimony that she was "fearful during the encounter" with the defendant was sufficient evidence to support a score of ten points). The father's testimony provides evidence in the record to support the score, so we affirm the sentencing court's decision. *Hornsby*, *supra* at 468.

Defendant's final argument on appeal, that his sentence violated his constitutional rights as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), is without merit. Our Supreme Court has clearly held that Michigan's sentencing is indeterminate and thus, the rulings in *Blakely* do not affect Michigan's legislative sentencing guidelines. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette