STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2007
v	No. 273904 Kent Circuit Court
CHARLES EDWARD BUCHAN, Defendant-Appellant.	LC No. 05-006887-FC

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(a) (victim under 13 years of age), and two counts of criminal sexual conduct in the second degree (CSC II), MCL 750.520c(1)(a) (victim under 13 years of age). The trial court imposed concurrent terms of imprisonment of 135 to 405 months for the conviction of CSC I, and 120 to 180 months for each conviction of CSC II. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

I. Facts.

Complainant, who was 14 years old at the time of trial, testified that, when she was ten or eleven years old, she was watching television at the home of defendant, then a friend of the family, when defendant started "touching" her on her "private parts." Complainant agreed that by "private parts" she meant "breast area" and "vaginal area." Complainant continued that she asked defendant to stop, but that he persisted. Complainant continued that defendant ordered her to disrobe, then did so angrily when she resisted, causing her to comply out of fear. Complainant testified that defendant again touched her vaginal and breast areas with his hand. Asked if defendant ever licked her, complainant answered in the affirmative; asked where, complainant specified "[m]y vaginal area." Complainant added that defendant admonished her not to tell anyone of what had happened.

On appeal, defendant argues that prosecutorial misconduct denied him a fair trial, that his trial attorney was constitutionally ineffective, and that the prosecutor failed to present legally sufficient evidence to support his conviction of CSC I.

II. Prosecutorial Misconduct.

Defendant asserts that the prosecuting attorney engaged in misconduct in several ways. However, defendant admits that there were no objections at trial to any of the prosecutorial conduct of which he now makes issue. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Accordingly, defendant bears the burden of showing not only plain error, but that the error resulted in the conviction of an innocent man, or seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763. Comporting with this standard is this Court's pronouncement in *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), that "[a]bsent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct."

Defendant first asserts that the prosecuting attorney improperly asked leading questions[1] of complainant, citing the following exchange:

Q: Can you tell . . . me and tell the jury where was he touching you?

A: On my private parts.

Q: And private parts above your waist?

A: Yes.

Q: And breast area?

A: Yes.

Q: Was he touching you there?

A: Yes.

Q: Do you have private parts below your waist?

A: Yes.

Q: Vaginal area?

A: Yes.

---

[1] "It is elementary that a leading question is one that suggests an answer." *Woods v Lecureux*, 110 F3d 1215, 1221 (CA 6,1997).

Q: Was he touching you there?

A: Yes.

* * *

Q: Did he do anything beside[s] touch you with his hand?

A: Yes—I don't remember. Yeah.

Q: Did he ever lick you?

A: Yes.

Q: And describe where he licked you[.]

A: My vaginal area.

"Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." MRE 611(c)(1). In this case, the prosecuting attorney was working with a witness who was both of tender years, and was being asked to describe a painfully personal experience. Had there been an objection, it would have been proper for the trial court to allow the prosecutor to ask leading questions to the extent that they were necessary to develop the witness' testimony. Accordingly, the prosecution's use of leading questions did not constitute prosecutorial misconduct.

Defendant next implies, without elaboration, that there was something improper about the prosecuting attorney's having asked a defense witness, who had testified to defendant's unproblematic history with children, to confirm that the witness had not "been here throughout this trial and heard the testimony from several witnesses like this jury has . . . ?" However, this was a reasonable way of bringing to the jury's attention that this witness's opinion was not necessarily based on all the facts.

Defendant next implies, again without elaboration, that something was amiss when the prosecuting attorney repeated that strategy with two other defense witnesses, who had testified that defendant interacted positively with the victim and other children, and also asked those witnesses if they were familiar with all the dynamics of sexually abused children. But we do not regard a prosecuting attorney's posing of a question intended to remind the jurors that they are hearing from a lay witness, not an expert in such matters, as misconduct.

Finally, defendant complains that the prosecuting attorney, in closing argument, stated that defendant had given complainant a cell phone and said, "now, little girl, I can get a hold of you any time I want." "Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case." *Schutte*, *supra* at 721. In this case, there was no evidence that defendant said any such thing. However, complainant's mother confirmed, on the defense's cross-examination, that defendant had given complainant a cell phone, and opined that, "[t]he cell phone was, here, little girl, now I can get a hold of you any time I want." The cell phone was thus in evidence, as was the mother's inference that defendant

gave it to her so that he could have ready access to complainant. The prosecutorial argument of which defendant here makes issue, then, was reflective of, and responsive to, testimony that the defense had elicited on cross-examination. That argument thus falls under the rubric of reasonable inferences arising from matters in evidence. Considered in context, the statement plainly attributed words to plaintiff only in the same figurative way the victim's mother had done so, not as an actual quotation. Contrary to defendant's assertions, there was no prosecutorial misconduct.

III. Assistance of Counsel.

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant first asserts that defense counsel was appointed by the trial court, but that counsel nonetheless demanded, and received some, payment from defendant. Assuming, without deciding, the truth of that account, however, the question remains, to what extent did this irregularity work against defendant's interests at trial? Defendant argues that by charging a fee to which he was not entitled, counsel created a conflict with defendant's interests, on the ground that counsel's duty of zealous representation would be compromised as a consequence of "fearing that [defendant] would file a grievance against him or notify the Circuit Court that fees had been charged," asserting that defense counsel "could not provide constitutionally sound representation . . . under these circumstances." We conclude that the facts as defendant has reported them may give rise to unnecessary financial hardship on defendant's part, or ethics inquiries and possible reproach on counsel's part, but that the assertion that this state of affairs necessarily hindered counsel's representation of defendant is an unsupported leap. We note that defendant specifies no aspect of counsel's performance that might have been better, or otherwise different, but for counsel's having demanded fees from defendant.

Defendant otherwise supports his ineffective assistance argument by pointing out that defense counsel interposed no objections in connection with the incidents defendant characterized as prosecutorial misconduct, as discussed in part II above. Because we concluded there that defendant brought no prosecutorial misconduct to light, we conclude here that those failures to object cannot support a claim of ineffective assistance. "Counsel is not obligated to make futile objections." *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989).

Defendant additionally argues that defense counsel should have requested a mistrial when a police witness mentioned that he had discussed the possibility of a polygraph test. In fact, the single reference to a polygraph occurred on cross-examination. Defense counsel asked the witness if he had discussed the case with defendant's lawyer, to which the witness replied, "[w]e discussed trying to set up a polygraph examination." The prosecuting attorney then objected, and the court sustained the objection and instructed the jury to disregard that answer. In the discussion that followed, while the jury was excused, defense counsel emphasized that he did not

mention any polygraph, but was for other reasons seeking to elicit testimony concerning the police officer's interview with defendant. The court held, "I do believe that the response was not invited by [defense counsel's] direct questioning, and I believe that my caution to the jury will remain and they are instructed not to consider this issue."

It is a "bright-line rule" that mentioning taking or passing a polygraph examination before a jury of is error. *People v Nash*, 244 Mich App 93, 97; 625 NW2d 87 (2000). However, not every reference to a polygraph examination necessarily constitutes error requiring reversal. *Id.* at 98. For example, when the mention of a polygraph examination is nonresponsive, or in any event brief, inadvertent, or isolated, it may not require reversal. *Id.*

In this case, the single volunteered mention of a polygraph test was brief, inadvertent, and isolated, and included no implication that defendant in fact took such a test, let alone what the results were. We are confident that had defense counsel moved the court for a mistrial, the court would properly have denied the motion. Counsel is "not required to argue a frivolous or meritless motion." *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Moreover, defendant does not dispute the trial court's conclusion that this was not error invited by defense counsel. Because this issue brings to light no error on defense counsel's part, defendant has failed to show that he was convicted without the benefit of effective assistance of counsel.

IV. Sufficiency of the Evidence.

When reviewing the sufficiency of evidence in a criminal case, we must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could find that each element of the crime was proved beyond a reasonable doubt. *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001). Review is de novo. *Id.*

Defendant argues that the prosecutor failed to present sufficient evidence that penetration occurred, for purposes of supporting the conviction of CSC I.

For purposes of criminal sexual conduct, "sexual penetration" is statutorily defined to include "cunnilingus." MCL 750.520a(p). This applies even where the oral contact does not include actual invasion of the vaginal cavity. *People v Legg*, 197 Mich App 131, 133; 494 NW2d 797 (1992).

Defendant acknowledges that complainant testified that he had licked her "vaginal area," but argues that this was not sufficiently specific to indicate actual oral-genital contact. However, although there were several references to the "vaginal area" in this regard (Tr I, 93), complainant responded affirmatively to questioning that referred less ambiguously to the vagina:

> *Q:* [H]ere on the witness stand you weren't sure if the defendant put his tongue on your vagina?
>
> *A:* Yes.
>
> * * *
>
> *Q:* [I]s it easy to discuss the defendant putting his mouth on your vagina?

A: No.

If the references to the "vaginal area" left some doubt whether actual oral-genital contact had occurred, this was clarified by the subsequent testimony given in connection specifically with the "vagina." For these reasons, defendant's challenge to the sufficiency of the evidence must fail.

Affirmed.

/s/ Bill Schuette
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher