

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD RANKIN ARMSTRONG,

Defendant-Appellant.

UNPUBLISHED

December 18, 2007

No. 272104

Otsego Circuit Court

LC No. 05-003403-FH

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), and sentenced to concurrent prison terms of 7 to 15 years each. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that he is entitled to a new trial because defense counsel was ineffective for failing to admit defendant's cell phone billing statement into evidence. Because defendant failed to raise this issue below in a motion for a new trial or request for an evidentiary hearing, our review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel's error, there was a reasonable probability that the result of the proceedings would have been different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233 (2003) (citations omitted).]

The decision regarding what evidence to present is presumed to be a matter of trial strategy. *People v Rockett*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To overcome the presumption that counsel's strategy was sound, the defendant must show that his attorney's omission deprived him of a substantial defense. *People v Caballero*, 184 Mich App 636, 642; 459 NW2d 80 (1990); *People v Hopson*, 178 Mich App 406, 412; 444 NW2d 167 (1989). "A

substantial defense is one that might have made a difference in the outcome of the trial.” *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

The record shows that defense counsel tried once without success to admit the billing statement into evidence, then tacitly withdrew it and did not later seek its admission. However, the record does not show that the absence of the statement deprived defendant of a substantial defense. While using the statement to examine the complainant, defense counsel made it clear that she had placed many telephone calls to defendant after he allegedly committed the charged offenses. Counsel indicated that the statement showed over 300 calls. After having the complainant identify 12 such calls over a five-day period, counsel stated, “I can go on like this,” but noted that he had made his point that defendant had received numerous calls from the complainant’s cell phone after the offenses were committed. Thus, admission of the billing statement itself would have been cumulative. The failure to present cumulative evidence generally does not constitute ineffective assistance of counsel. *People v Carbin*, 463 Mich 590, 603-604; 623 NW2d 884 (2001); *People v Bedford*, 78 Mich App 696, 702-703; 260 NW2d 864 (1977).

Defendant next argues that he was denied a fair trial when the prosecutor improperly vouched for the complainant “by placing the prestige of his office behind her testimony.” Because defendant did not object to the prosecutor’s remarks at trial, this issue is not preserved. Therefore, review is precluded unless defendant establishes a plain error that affected the outcome of the trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

“The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted).” *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). The reviewing court must examine the prosecutor’s remarks in context on a case-by-case basis. *Id.* at 272-273. The propriety of a prosecutor’s remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The prosecutor’s remarks are not to be taken out of context; his closing argument should be considered in its entirety and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Hedelsky*, 162 Mich App 382, 386; 412 NW2d 746 (1987); *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982).

The prosecutor cannot vouch for the credibility of a witness or suggest that he has some special knowledge concerning a witness’s truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Nor may he “attempt to place the prestige of his office, or that of the police, behind a contention that the defendant is guilty” *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973). He may, however, comment on the credibility of his own witness during closing argument and argue from the facts that the witness should be believed or has no reason to lie. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

Defendant takes issue with a single statement comprising four sentences. It is clear from the context that the prosecutor urged the jury to conclude from the evidence that the complainant’s testimony was truthful and argued that it should not conclude otherwise from the fact that she had once made a false allegation of rape because that false statement was not made under oath. Because the prosecutor’s statement was tied to the evidence and did not constitute a

personal opinion regarding the complainant's credibility or suggest that his office or the police knew the complainant to be a truthful person, we find no plain error.

Affirmed.

/s/ Christopher M. Murray

/s/ Joel P. Hoekstra

/s/ Kurtis T. Wilder