STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2008
v	No. 276767 Monroe Circuit Court
DEXTER ELTON HARRIS, Defendant-Appellant.	LC No. 06-035464-FH

Before: Zahra, P.J., and Whitbeck and Beckering, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for first-degree criminal sexual conduct, MCL 750.520b(1)(f). He was sentenced, as a fourth habitual offender, MCL 769.12, to 25 to 40 years' imprisonment for the first-degree criminal sexual conduct conviction. We affirm.

Defendant first argues that five instances of prosecutorial misconduct denied him a fair trial. We disagree. Allegations of prosecutorial misconduct are reviewed on a case-by-case basis, analyzing the prosecutor's comments in view of defense arguments and the evidence admitted at trial, to determine whether a defendant has been denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); see also, *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995). Where, as here, the challenges are unpreserved, this Court reviews the claimed prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 752-753; 597 NW2d 130 (1999).

As a general rule, "prosecutors are accorded great latitude regarding their arguments and conduct." *Bahoda, supra* at 282. Further, a prosecutor is "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id*. If the prejudicial effects of a prosecutor's comments could have been dispelled with a timely jury instruction, then reversal is not required. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Defendant specifically argues that the prosecutor improperly bolstered the complainant's testimony with prior consistent statements the complainant made to Boismeir, a friend of the complainant. Soon after the sexual assault occurred, the complainant called Boismeir and asked for a ride home. During trial, the complainant testified that she told Boismeir, "I got drunk and – and smoked crack, and I was really ashamed and scared . . . just please take me home." Later

during defendant's trial, Boismeir testified that the complainant "just kept saying she messed up, she messed up. . . . She really made a big mistake, you know. . . . She was very embarrassed."

Boismeir also testified:

> And I – I looked at her, I said: Did somebody rape you? And she said no, and then she turned around and looked at me, and she said – I said: They raped you, didn't they? She said, Yeah. And she was just hysterical, and she cried.

A prior consistent statement of a witness made through a third party is not hearsay by operation of MRE 801(d)(1)(B), and is admissible if four elements are met. *People v Jones*, 240 Mich App 704, 706-707; 613 NW2d 411 (2000). These elements are: "(1) the declarant must testify at trial and be subject to cross-examination; (2) there must be an express or implied charge of recent fabrication or improper influence or motive of the declarant's testimony; (3) the proponent must offer a prior consistent statement that is consistent with the declarant's challenged in-court testimony; and, (4) the prior consistent statement must be made prior to the time that the supposed motive to falsify arose." *Id*. at 707.

Defendant is correct that the complainant's prior consistent statements to Boismeir were made after the supposed motive to testify falsify arose. Defendant maintained at trial that the complainant lied to "justify and/or to 'receive a pass' for leaving her minor child home overnight[[1]]." This motivation plainly would have existed before the sexual assault. Thus, Boismeir's testimony in regard to the complainant's statements was not admissible as prior consistent statements.

However, contrary to defendant's claim, Boismeir's testimony was admissible as "excited utterances" under MRE 803(2). The question of whether a prior consistent statement is admissible as an excited utterance under MRE 803(2) depends on "whether the statement was made when the witness was still under the influence of an overwhelming emotional condition," and "whether it related to the circumstances of the startling occasion." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

Boismeir testified that at the time the complainant admitted that she had been sexually assaulted, the complainant "was screaming, and she was throwing her arms, and I had to grab her and hold her and tell her that she was okay now." Boismeir also described the complainant as "scared to death," and "hysterical." This testimony shows that the complainant's stress regarding the sexual assault remained unabated when the complainant admitted to Boismeir that she had been raped, and that the complainant's statements were not influenced by other sources

[1] According to Patrick Miller, complainant's companion during the time period relevant to this case, the father of the complainant's 12 year-old son called the complainant on her cellular telephone sometime during the early morning hours of May 26, 2006, and was angry that the complainant had left her son home alone. The complainant testified that she did speak to her child's father, but recalled that her son stayed with his father on the night of May 25, 2006. According to the complainant, she contacted the child's father for the purpose of ensuring that the child woke up and went to school in the morning.

of stress. *Smith, supra* at 552. Similar to the situation described in *Smith*, the sexual assault in this case was a startling event for the complainant. *Id.* Boismeir's testimony shows that the complainant reported to Boismeir that she had been raped while still under the influence of the overwhelming emotional condition, and the complainant's statements related to the event, the sexual assault; therefore, the statement qualifies as an excited utterance and is admissible under MRE 803(2). *Smith, supra* at 554.

Defendant next asserts that the prosecutor improperly appealed to the jury's sympathy in order to convince it to overlook weaknesses in the case against defendant. During opening statement, the prosecutor said:

> Eventually [the complainant] went to the hospital, and you will find it remarkable, I think, that all along the way, whether it's with a close friend to whom she did not want to admit what had happened, she didn't want to say what happened. And what does that say about our society, where even now, you know, even now we think we have a much more progressive and humane and understanding thoughts about sexual assault, even now, the first reaction of a victim, of a woman, is to be deeply, deeply ashamed and sad and blaming themselves, because she wasn't even – because she didn't tell her best friend for a couple of minutes or more, she was so ashamed. But she did.

During closing rebuttal, the prosecutor reflected:

> She said she was ashamed. And, again, in this day and age, the way people – the way people talk about rape now, it's unbelievable, and yet it's true. Women that are attacked feel that shame.

A prosecutor may not appeal to the emotions and sympathies of the jurors. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, a prosecutor may comment on the credibility of his own witness and argue that the witness has no reason to lie, particularly where "there is conflicting evidence and the question of the defendant's guilt or innocence depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). In this case, the prosecution was not appealing to the juror's sympathy. Rather, the prosecution was responding to defendant's argument that the complainant's hesitation in telling Boismeir about the sexual assault could give rise to reasonable doubt. In arguing to the jury that rape victims often feel ashamed and hesitate to report that they have been assaulted, the prosecution was asserting that the complainant's testimony regarding defendant's criminal sexual conduct was credible.

Assuming the prosecutor's conduct in this instance was improper, any unfair prejudice to defendant could have been cured by a timely jury instruction. *Watson, supra* at 586. Here, the trial court specifically instructed the jury that: "You must not let sympathy or prejudice influence your decision." Jurors are presumed to have followed their instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). *Carines, supra* at 763. Accordingly, reversal is not warranted.

Defendant next asserts that the statements made by the prosecutor described above were also appeals to the jurors to convict defendant as a part of their civic duty. Prosecutors may not

"resort to civic duty arguments that appeal to the fears and prejudices of jury members." *Bahoda, supra* at 282. Although defendant argues that the prosecution appealed to the jurors to solve the problem of embarrassment of rape victims by convicting defendant, defendant does not explain how his conviction could alleviate the embarrassment or shame of future victims of criminal sexual conduct. "A party may not simply announce a position and leave it to the court to search for authority and develop arguments on the party's behalf." *People v McKinney*, 468 Mich 928, 929; 663 NW2d 469 (2003). Moreover, a thorough review of the record does not reveal that the prosecution actually requested the jury convict defendant to alleviate the embarrassment or shame of future victims of criminal sexual conduct. Thus, the prosecutor did not improperly appeal to the jurors' civic duty in order to obtain defendant's conviction.

Further, even if the prosecutor's conduct in this instance was arguably improper, any unfair prejudice to defendant could have been cured by a timely jury instruction. *Watson, supra* at 586. Here, the trial court instructed the jury that in rendering a verdict, "you may only consider the evidence that has been properly admitted in this case." Further, the trial court explained to the jury that the lawyers' statements and arguments are not evidence, and that the lawyer's questions to the witnesses are also not evidence. Jurors are presumed to have followed their instructions. *Mette, supra* at 330-331. Beyond an invitation to speculate, defendant has failed to demonstrate that the jury ignored its instruction to base its verdict solely on the evidence, and not on the prosecution's argument.

Defendant next contends that the prosecution improperly vouched for the complainant's credibility. Defendant argued that the prosecutor implied special knowledge that the complainant was telling the truth when he stated in closing rebuttal that:

> [The complainant] wanted to get with her friend so bad, and she called her, and she couldn't bring herself to tell the truth right away, but she did very soon, because of the shame and all the things she was feeling.

It constitutes improper argument for a prosecutor to vouch for a witness's credibility by impling that the prosecutor is privy to "special knowledge" that the witness is telling the truth. *Bahoda, supra* at 276. Further, a prosecutor may not make a factual statement to the trier of fact that is unsupported by the evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). However, a prosecutor is free to comment on a witness's credibility. *Thomas, supra* at 455. Moreover, a prosecutor may argue the evidence and all reasonable inferences relating to the prosecutor's theory of the case. *Bahoda, supra* at 282.

Defendant argues that the prosecutor's argument that the complainant told the truth was more effective because the prosecutor is a public official with inherent credibility. However, defendant does not explain what "special knowledge" of the complainant's truthfulness could have motivated the prosecutor to commit the alleged impropriety of commenting on the complainant's credibility. Further, considered in context, we are not persuaded that the prosecutor's argument implied that he had personal knowledge that the complainant was telling the truth.

Even if the prosecutor's conduct in this instance was arguably improper, any unfair prejudice to defendant could have been cured by a timely jury instruction. *Watson, supra* at 586. Here, the trial court specifically instructed the jury that it must decide which witnesses to believe

and how much weight to accord to each witness' testimony. The trial court explained: "You are free to believe all, none, or part of any person's testimony." Further, the trial court instructed the jury that the arguments and statements of the attorneys are not evidence, and thus, are not properly considered by it during deliberations. Jurors are presumed to have followed their instructions. *Mette, supra* at 330-331. Because defendant cannot demonstrate that the jury disregarded its instructions and based its verdict on the prosecutor's "special knowledge" of the witness' credibility, his allegations of improper vouching must fail.

Defendant contends that the prosecutor improperly argued that reasonable doubt was a doubt "which you can place a reason to." A prosecutor may not present an argument that states or infers that a defendant is required to prove something. See *People v Dixon*, 217 Mich App 400, 407; 552 NW2d 663 (1996). However, the prosecution did not assert at any point that, in this case, it did not have the burden of proving that defendant committed all of the elements of first-degree criminal sexual conduct beyond a reasonable doubt. Further, the trial court properly defined the concept of reasonable doubt for the jury after the allegedly improper prosecutorial remark was made. The jurors are presumed to have followed their instructions. *Mette, supra* at 330-331.

Defendant has also failed to demonstrate that any of the alleged instances of prosecutorial misconduct affected the outcome of his trial. *Carines, supra* at 763. Moreover, defendant does not argue, and the record does not show, that any of the instances of prosecutorial misconduct resulted in defendant's conviction despite his actual innocence, or that the error negatively impacted the fairness, integrity or public reputation of judicial proceedings. *Id*. Accordingly, reversal is not warranted.

Defendant argues that the cumulative effect of the five instances of alleged prosecutorial misconduct, when considered in the aggregate, denied him a fair trial and necessitates reversal. However, "only actual errors are aggregated to determine their cumulative effect." *People v LeBlanc*, 465 Mich 575, 592 n 12; 640 NW2d 246 (2002). Because defendant failed to establish that the prosecutor committed misconduct, there are no errors to aggregate, and there can be no cumulative effect. Consequently, reversal is not required.

Defendant next argues that his trial counsel's failure to object to the instances of alleged prosecutorial misconduct constituted ineffective assistance of counsel warranting reversal. Again, we disagree.

Where, as here, an ineffective assistance of counsel claim is unpreserved, this Court's review is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defendant has waived the issue if the record on appeal does not support defendant' assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). An ineffective assistance of counsel claim is a mixed question of law and fact. *LeBlanc*, *supra* at 579. A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate Constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id*.

An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance "fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich

281, 302; 613 NW2d 694 (2000). A defendant is required to overcome a strong presumption that sound trial strategy motivated trial counsel's conduct. *Id.* Additionally, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors in order to show prejudice. *Id*. at 302-303. Counsel's performance is "measured against an objective standard of reasonableness under the circumstances and according to prevailing professional norms." *People v Solomonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Moreover, "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Here, defendant contends that he was denied effective assistance of counsel because his trial lawyer failed to object to any of the five instances of prosecutorial misconduct subsequently identified by defendant's appellate counsel. However, defendant's arguments regarding the five instances of prosecutorial misconduct are all without merit, and defendant's trial counsel was not ineffective for failing to raise futile or meritless objections. *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). As such, defendant's argument that he was denied effective assistance of counsel fails.

Defendant next argues that the aggregate effect of the instances of prosecutorial misconduct, together with trial counsel's failure to object to each instance, was cumulative error that denied him a fair trial. We disagree. Again, "only actual errors are aggregated to determine their cumulative effect." *LeBlanc, supra* at 592 n 12. Because defendant failed to establish that the prosecutor committed misconduct, his trial counsel was not ineffective in failing to object to the instances of alleged misconduct. *Moorer, supra* at 76. There are no actual errors to aggregate here, and as such there can be no cumulative effect. Accordingly, defendant is not entitled to relief.

Affirmed.

/s/ Brian K. Zahra
/s/ William C. Whitbeck
/s/ Jane M. Beckering