

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESUS MANUEL NEGRON,

Defendant-Appellant.

UNPUBLISHED
December 2, 2008

No. 275204
Oakland Circuit Court
LC No. 2006-209497-FH

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of six counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age). Defendant was sentenced, as a fourth habitual offender, MCL 769.12, to 7 to 30 years' imprisonment for each conviction. Defendant appeals as of right, and we affirm.

The first argument defendant presents on appeals is that, because the verdict was against the great weight of the evidence, the trial court erred in denying his motion for a new trial. A trial court's determination on a motion for a new trial based on the great weight of the evidence is reviewed for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Defendant's convictions stem from his alleged sexual contact with JM, 10 to 11 years old during the incidents in question, and HM, eight to nine years old during the incidents in question. JM and HM are sisters whose family moved in with defendant and his family for about a year starting in February 2005. The assaults are alleged to have occurred in defendant's house.

For two reasons we disagree with defendant's argument that JM's and HM's trial testimony differed so drastically from their preliminary examination testimony and prior statements to the Care House interviewer that their trial testimony lacked any probative value, and thus, the verdict is against the great weight of the evidence.

First, the girls' inconsistencies were adequately explained such that the girls' testimony was not deprived of all probative value. For instance, Care House interviewer Amy Allen testified that it is not unusual for children JM's and HM's age to remember a sequence of events in different orders and to recount an incident in different ways depending on with whom the children are speaking. Also, the girls testified that they were nervous and/or slightly confused

regarding some details when testifying, but again, they never retracted their assertions that they were touched on their genitals by defendant at least three times each.

Second, defendant effectively cross-examined the girls, strenuously emphasizing the inconsistencies between their trial testimony and preliminary examination testimony and statements to employees of Care House. His strategy was to discredit the girls and portray their testimony as so incredible as to be insufficient to convict him. However, it is the province of the jury - not this Court - to determine questions of fact and assess the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *Id.* at 647. Here, although the girls’ testimony was, in some instances, inconsistent with their prior testimony or prior statements to employees of Care House, it cannot be said that their testimony was impeached to the extent that it was deprived of all probative value or that it was contradicted by indisputable physical facts. *Id.* at 645-646. Significantly, the girls did not waive in their testimony that defendant touched their vaginal area and chest, or that they were each touched on at least three separate occasions. This is sufficient to find defendant guilty of the charged offenses.

Given the circumstances, defendant failed to “establish that an innocent person had been found guilty, or that the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to permit the verdict to stand.” *Id.* at 647. Thus, the trial court did not err in denying defendant’s motion for a new trial.

Next, defendant argues that the trial court erroneously admitted hearsay. This unpreserved argument of evidentiary error is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must establish that: (1) an error occurred, (2) the error was plain, (3) and the plain error affected the defendant’s substantial rights, i.e., it affected the outcome of the lower court proceedings. *Id.*

Defendant alleges as hearsay (1) Amy Allen’s testimony regarding JM’s and HM’s markings on the anatomical drawings during their Care House interviews, which showed where on their bodies defendant had touched them, and (2) Allen’s testimony concerning HM’s statement during her Care House interview that, on two of the occasions when defendant touched her, she was underneath a blanket watching a movie. Defendant asserts that this testimony improperly bolstered JM’s and HM’s testimony.

Hearsay is defined as “a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” MRE 801(c). A statement is an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion. MRE 801(a). Defendant argues that Allen’s testimony was inadmissible under MRE 803A, and the prosecution offers no case law, rule of evidence or other legal authority to dispute defendant’s argument, instead only arguing the facts. We will not take on the prosecution’s duty to provide legal support for a position. See *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

In any event, defendant is correct that the statements were inadmissible under MRE 803A, as JM’s statement was made when she was older than 10, and both JM’s and HM’s

statements to Allen were not the first statements they made about the incidents. The statements therefore did not meet the criteria under the rule. MRE 803A.

However, even though Allen's testimony about what JM and HM said about the incidents was improperly admitted, defendant cannot establish prejudice. *Carines, supra* at 762-763. The untainted evidence against defendant was strong. As we already noted, although there were some inconsistencies between the girls' trial testimony and their preliminary examination testimony and statements to Care House employees, the girls' trial testimony was not deprived of all of its probative value. The inconsistencies were aptly explained as arising from the difficulties attendant to a young child being expected to remember a sequence of events over time in the same order or in the same exact manner, and also the girls admitted that their nervousness in testifying caused them to misstate a few details of the incidents. Notably, the girls did not waive in their testimony that defendant touched their genitals and they were each touched on at least three separate occasions. Thus, even though a portion of Allen's testimony was improperly admitted, defendant suffered no prejudice. *Id.*

Defendant also argues that the prosecutor engaged in misconduct sufficient to deprive him of a fair trial. This Court reviews a defendant's unpreserved claims for plain error affecting his substantial rights. *Id.*

Prosecutorial misconduct issues are decided on a case-by-case basis, and entails reviewing the pertinent record to evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's remarks depends on all the facts of the case. *Id.* Prosecutorial comments must be read as a whole "and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial" *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

Defendant first claims that the prosecutor argued facts not in evidence by remarking in his closing argument that JM's statements to her Girl Scout leader, Jeonne Hall, corroborated her claims of sexual assault. Hall testified that she approached JM at school one day when JM was found crying after Hall taught a lesson on sexual assault. Hall indicated that JM told her what had occurred with defendant, but Hall did not go into specifics concerning what exactly JM told her. In his closing argument, however, the prosecutor remarked that JM testified that defendant touched her chest and squeezed it, "just like what she told the person from – Ms. Hall, from the Girl Scouts." Hence, defendant is correct in that the prosecutor argued facts not in evidence. Although the prosecutor erred in doing so, defendant cannot establish prejudice. As noted above, there was significant untainted evidence against defendant. In addition, the challenged remark was fleeting and unlikely to cause prejudice because the jury had already heard Hall's testimony and had independent knowledge that, contrary to the prosecutor's remark, Hall did not specify what JM told her. Also, the court instructed the jury to base its decision solely on the evidence and emphasized that the lawyers' statements and arguments were not evidence. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998) (juries are presumed to follow a trial court's instructions).

We also reject defendant's argument that the prosecutor grossly mischaracterized the facts by claiming that the girls were consistent in their allegations. Viewed in context, there was no mischaracterization. The prosecutor expressly pointed out that the girls were not consistent on every single detail, stating, "defense counsel harped – or talked a little bit about consistency

and how these girls weren't consistent. And, yes, you know what, they weren't." The prosecutor conceded that the girls were not consistent on some details of the assault, owing to their young age and inability to remember with 100 percent precision all of the details of the assaults, but argued that they had always been consistent on the general theme of having been touched on their genitals by defendant. The prosecutor's statements did not constitute a mischaracterization, at least not of the type serious enough to cause prejudice. In addition, as pointed out above, any potential prejudice would have been alleviated by the jury instructions directing the jury that the lawyers' statements were not evidence. Accordingly, defendant's prosecutorial misconduct argument fails.¹

Finally, defendant argues that he is entitled to resentencing because of scoring errors and because his sentence violates *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, since defendant's sentences are within the appropriate guidelines range and he cannot demonstrate that the trial court made scoring errors,² defendant cannot raise this issue on appeal. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). In addition, sentences falling within the recommended guidelines range are presumptively proportionate. *People v Drohan*, 264 Mich App 77, 92; 689 NW2d 750 (2004). Also, defendant's *Blakely* argument is unavailing because Michigan's sentencing scheme is wholly unaffected by the holding in *Blakely*. See *People v Harper*, 479 Mich 599, 613-614; 739 NW2d 523 (2007); *Drohan*, *supra* at 162-164.

¹ Defendant argues that his counsel was ineffective for failing to object to hearsay testimony and for failing to object to the prosecutor's misconduct. As we held above, the evidence challenged as hearsay was not prejudicial. Consequently, counsel was not ineffective for failing to object to the testimony. See *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995) (stating that a failure to pursue a meritless objection does not constitute ineffective assistance of counsel). Furthermore, defendant failed to establish that the prosecutor mischaracterized the facts when he stated that the girls' testimony was overall consistent. Thus, counsel was not ineffective for failing to object to the prosecutor's remark. *Id.* Although the prosecutor did argue facts not in evidence when he suggested that Hall testified regarding the specifics of the sexual assault incidents, he cannot demonstrate that this rendered the proceedings fundamentally unfair or the outcome of the trial likely would have been different had counsel objected. Accordingly, defendant's ineffective assistance argument is without merit.

² Defendant alleges that Offense Variables (OV) 4 and 10 were improperly scored. However, JM's feelings of fear resulting from the sexual abuse are sufficient to warrant an assessment of ten points under OV 4. See *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004) (holding that ten points under OV 4 are warranted where the victim felt fear during the encounter). Also, the trial court did not abuse its discretion in assessing 15 points for OV 10 because the victims' young ages were exploited by defendant, and the fact that defendant committed most of the assaults when no one else was around him tends to demonstrate predatory conduct. See *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003) (finding that "the timing of the assault [when no other persons were present] and its location [in the isolation and seclusion of the basement] are evidence of preoffense predatory conduct").

Affirmed.

/s/ Elizabeth L. Gleicher

/s/ Kirsten Frank Kelly

/s/ Christopher M. Murray