STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK MCGIVNEY,

Defendant-Appellant.

UNPUBLISHED
April 23, 2009

No. 282547
Lenawee Circuit Court
LC No. 07-013049-FH

Before: Markey, P.J., and Fitzgerald and Gleicher, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions of seven counts of child sexually abusive activity, MCL 750.145c(2), and seven counts of using a computer to commit a crime, MCL 752.796. Defendant was sentenced, as a second habitual offender, MCL 769.10, on October 19, 2007, to 7 to 30 years in prison for all 14 convictions. We affirm.

Defendant first argues on appeal that the jury's verdict was against the great weight of the evidence. We disagree.

A trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A verdict is against the great weight of the evidence only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id*.

Defendant's convictions arise from his possession of images of child pornography on his home computer and on seven computer disks found in his house. Defendant argues that the verdict was against the great weight of the evidence because he introduced evidence at trial that many people use his computer and, therefore, someone else might have downloaded the illegal images. He further argues that because he bought the computer disks in bulk from a yard sale, there is no evidence that he is sufficiently connected to the images found on the disks. He further notes that the images on the disks were dated from 2004.

Contrary to defendant's assertion, a considerable amount of evidence against defendant was adduced at trial. Most importantly, some images from each of the disks were also found on defendant's computer, providing a basis for concluding that defendant had used the disks since he purchased them. Additionally, the date of the images is irrelevant because the prosecutor

never limited her case regarding when or how defendant obtained the illegal images. Further, defendant indicated to police on multiple occasions that he knew about the images on his computer and the disks in his apartment; he apparently had the erroneous notion that his actions had not been illegal.

The mere existence of conflicting evidence does not support the conclusion that the jury's verdict was against the great weight of the evidence. It was for the jury to resolve the conflicts in the evidence. *Unger, supra* at 232. In order to warrant a new trial, conflicting evidence must preponderate so heavily against the verdict that it amounts to a miscarriage of justice. *Id*. The mere possibility, without evidence, that someone else might be responsible for spreading child pornography throughout defendant's possessions does not give rise to a miscarriage of justice. The verdict was not against the great weight of the evidence.

Defendant next argues that the prosecutor committed misconduct by arguing facts unsupported by the evidence. We disagree.

Defendant failed to preserve this issue because he did not contemporaneously object and request a curative instruction. *Unger, supra* at 234-235. An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting defendant's substantial rights. *Id*.; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id*. at 329-330.

A prosecutor may not make any statements of fact to the jury that are unsupported by the evidence. She may, however, argue all reasonable inferences arising from facts in evidence. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007).

In her closing argument, *defense counsel* argued that defendant could not have downloaded all of the images attributed to him because some of them were downloaded on days of the week that defendant was rarely at home. Defendant worked as a truck driver. In her rebuttal argument, the prosecutor noted that defendant had a laptop computer which he used to connect to the internet at truck stops, so he did not have to be at home to download child pornography.

Defendant argues that this argument was unsupported by the facts in this case. On the contrary, defendant himself testified that he used his laptop computer to access the internet at truck stops. The prosecutor did not intimate, as defendant argues, that there was evidence of defendant's specific internet activity at truck stops. The prosecutor merely responded to defense counsel's argument with a reasonable inference drawn from defendant's own testimony. There was no plain error.

Defendant next argues that his trial counsel was ineffective for failing to object to a variety of errors. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial

court's factual findings are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.* However, because there was no *Ginther*[1] hearing, our review is limited to mistakes apparent on the record. *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008).

Generally, counsel is presumed effective and the defendant must show that: (1) counsel's performance fell below an objectively reasonable standard, and (2) that defendant was so prejudiced by counsel's deficiency that there is a reasonable probability that, without the error, the outcome would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Further, the defendant must demonstrate that "the attendant proceedings were fundamentally unfair or unreliable." *Id*. In order to demonstrate that counsel's performance was deficient, a defendant must also overcome a strong presumption that counsel was pursuing sound trial strategy, even if the strategy is ultimately unsuccessful. *Id*. at 715. An appellate court will not substitute its judgment for that of defense counsel on questions of trial strategy. *Id.*

Defendant first argues that his trial counsel was ineffective for failing to object to the prosecutor's argument regarding defendant's use of the internet at truck stops. Because this argument did not constitute misconduct, defense counsel was not ineffective for failing to object to it. *Rodgers*, *supra* at 715.

Defendant next argues that defense counsel was ineffective for failing to object to two instances of hearsay. In one instance, defendant's neighbor, Barbara Weigel, testified that she heard defendant's daughter, Kristina McGivney, exclaim, "Oh my God, dad's doing it again." Weigel looked at the computer and saw that McGivney had discovered images of child pornography on defendant's computer. The hearsay statement was brief and seemingly unanticipated. This Court has recognized that it may be trial strategy to avoid drawing attention to a brief, improper statement where no tangible benefit can arise from an objection. *Horn*, *supra* at 40. The prosecutor did not pursue the hearsay statement. Weigel's testimony without the brief hearsay statement would not be significantly different. Defendant has not offered any argument to overcome the strong presumption that defense counsel was engaging in sound trial strategy by ignoring the brief comment. *Rodgers*, *supra* at 714.

Further, we note that there was considerable other evidence to support the jury's verdict in this case, as detailed above. There is no reason to conclude that the outcome of the trial would have been any different without this testimony, even if defense counsel were in error. *Unger*, *supra* at 243; *Rodgers*, *supra* at 714.

In the second instance of hearsay, police officer James Loffing testified that Weigel told him that there was child pornography on the computer defendant had in his apartment. Weigel testified to this same information at trial. Thus, there was no prejudice from Loffing's recounting of Weigel's complaint against defendant because it was merely cumulative. Because there was no prejudice, defendant cannot overcome the presumption that defense counsel was engaging in sound trial strategy when she ignored this hearsay testimony. *People v Bahoda*, 448 Mich 261, 287, n 54; 531 NW2d 659 (1995) (observing failure to object to innocuous errors may

[1] *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

constitute trial strategy); *Unger*, *supra* at 242. Further, because it was not prejudicial, any error by defense counsel would not require reversal because the outcome of the trial would be no different without the error. *Unger, supra* at 243; *Rodgers*, *supra* at 714.

Defendant next argues that defense counsel was ineffective for failing to object to three instances of alleged other acts evidence, ostensibly contrary to MRE 404(b). Evidence of "other crimes, wrongs, or acts" is inadmissible unless it is logically relevant under MRE 402, legally relevant under MRE 404(b), and its probative value is not substantially outweighed by unfair prejudice under MRE 403. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004); *People v VanderVliet*, 444 Mich 52, 61-64; 508 NW2d 114 (1993).

First, defendant argues that Weigel's hearsay testimony was also improper other acts evidence. There is no evidence that McGivney's statement was referring to conduct by defendant *other than* the same conduct for which he was tried and convicted. Thus, the statement was clearly not introduced solely for the purpose of proving defendant's conformity with certain conduct. It was relevant evidence, and it was not improper other acts evidence. *VanderVliet*, *supra* at 74; MRE 404(b). Defendant also argues that Weigel's testimony that defendant had admitted to her that he had downloaded child pornography in the past was improper other acts evidence. Similarly, there is no indication that this was evidence of anything other than the instant crimes. The evidence was therefore highly relevant and not *unfairly* prejudicial. Thus, counsel was not ineffective for failing to object to proper testimony. *Rodgers*, *supra* at 715.

Third, Weigel testified, "When I first moved to Adrian, it was brought up to me about his daughter, and then supposedly that he molested –," which the trial court immediately struck from the record and the prosecutor ignored. Defense counsel could not be expected to object to testimony to which the trial court interjected to *sua sponte* struck it from the record. Such an objection would be futile and possibly irksome to the trial court. Counsel is not ineffective for failing to raise futile objections. *Rodgers*, *supra* at 715.

Finally, defendant argues that when the prosecutor played a tape of Detective Vincent Emrick's conversation with defendant during redirect-examination of Emrick, he improperly introduced evidence outside the scope of cross-examination. In fact, the tape was introduced into evidence after Emrick's examination and just before the prosecutor rested her case. So, defendant's argument is unsupported by the facts.

Defendant also argues in a supplemental brief that defense counsel was ineffective for failing to object to the trial court's error in scoring defendant's offense variables (OVs) during his sentencing. We disagree.

Because defendant failed to raise this issue in his motion for a new trial, our review of this issue is limited to the existing record. *Horn*, *supra* at 38.

Defendant argues that the court erred in scoring 25 points for OV 13. Twenty-five points should be scored for OV 13 where the offense was part of felonious criminal activity involving three or more "crimes against a person." MCL 777.43(1)(b). Defendant argues there is no evidence that his crimes were not against any specific "person."

Defendant erroneously interprets the phrase "crimes against a person" to have a colloquial meaning. On the contrary, the sentencing guidelines clearly define this phrase. MCL 777.5 states, "Crimes against a person are designated 'person'" in part 2 of the sentencing guidelines. Child sexually abusive activity, MCL 750.145c(2), is designated "person" in part 2 of the guidelines. MCL 777.16g. Thus, defendant's crime constitutes a "crime against a person" for the purposes of the sentencing guidelines, including OV 13. Defendant's argument is unavailing. Accordingly, defendant's trial counsel was not ineffective for failing to raise this erroneous objection. *Rodgers*, *supra* at 715.

Defendant's final argument in his supplemental brief is that defense counsel was ineffective for failing to object to the expert qualifications of multiple prosecution witnesses. We find no merit in defendant's argument. None of the witnesses identified by defendant were offered as experts. Defendant's argument on this issue is nearly incoherent and primarily reiterates the quality of the evidence introduced against him at trial. There is no indication that defense counsel erred with respect to the introduction of these witnesses.

We affirm.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Elizabeth L. Gleicher