STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 25, 2009
v	No. 284652 Oakland Circuit Court
WILLIAM STANLEY PATTISON, Defendant-Appellant.	LC No. 06-210963-FC

Before: Cavanagh, P.J., and Markey and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct (with a person under the age of 16 who was related to defendant), MCL 750.520b(1)(b), and pandering, MCL 750.455. Defendant was sentenced to 40 to 60 years' imprisonment for his criminal sexual conduct convictions and 1 to 20 years' imprisonment for his pandering conviction. Defendant appeals by right. We affirm.

Defendant alleges he was denied a fair trial because of eight instances of prosecutorial misconduct. Specifically, defendant alleges the prosecutor engaged in misconduct by 1) asking the first similar-acts witness, LP, irrelevant questions about how defendant's former wife, Denise Pattison, felt about defendant's relationship with another woman, SB, 2) reading from LP's preliminary examination transcript without a proper purpose, 3) explicitly asking LP to relate hearsay by asking if the victim ever confided in LP, 4) questioning another similar-acts witness, KB, by reading selected and incriminating portions of a police interview transcript to the jury, 5) interrogating KB about an irrelevant and highly inflammatory incident regarding the custody of her children, 6) eliciting hearsay testimony from defendant's sister, Natalie Pattison, about a telephone call to LP, 7) improperly eliciting hearsay by asking Natalie about what KB had told her, and 8) in closing argument improperly referring to other unnamed victims. Defendant alleges that the cumulative effect of this misconduct deprived him of a fair trial. Because defendant either failed to object or objected on grounds other than those asserted on appeal, this Court's review is limited to plain error affecting defendant's substantial rights. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005).

First, a review of the questions the prosecutor asked LP about defendant's relationship with SB, in context, reveals that they were relevant because they related to Denise's credibility and demonstrated her willingness to consistently ignore defendant's inappropriate behavior, including his abuse of the victim. MRE 402; *People v Mills*, 450 Mich 61, 72; 537 NW2d 909

(1995), modified 450 Mich 1212 (1995) (The credibility of a witness is always relevant.) Thus, the testimony called into question Denise's assertion of defendant's innocence and tended to explain the victim's willingness to recant prior allegations because despite defendant's behavior, Denise would vouch for him. *Id*. Plain error requiring reversal did not occur.

Second, defendant contends the prosecution effectively testified for LP by reading portions of the LP's preliminary examination testimony to establish how many times defendant sexually abused her. Defendant argues the prosecutor was neither attempting to refresh nor impeach LP's testimony. We disagree because "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660-661; 608 NW2d 123 (1999). MRE 803(5) permits a party to refresh the recollection of a witness. In *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007), this Court held in similar circumstances that where the victim's testimony was somewhat equivocal, the prosecutor's effort to refresh her memory using the preliminary examination was not improper where the evidence was arguably admissible considering MRE 612 and MRE 803(5). Here, LP's testimony regarding the number of occurrences of sexual abuse was equivocal, and the prosecutor's good-faith effort to refresh her memory does not constitute misconduct.

Third, we conclude the record shows the prosecutor did not attempt to elicit hearsay from LP regarding whether the victim confided in her but rather he merely asked if a conversation occurred between LP and the victim. The prosecution did not ask for the substance of the conversation, and the posed question would not have elicited any hearsay. "Hearsay" is defined as "a statement, other than 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).

Fourth, the prosecutor did not engage in misconduct when she impeached KB with the substance of a previous statement to police. MRE 607 states, "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." MRE 613(b) permits the examination of a witness about a prior inconsistent statement. "Inconsistent out-of-court statements of a witness are admissible only for impeachment purposes and, since they would otherwise be hearsay, cannot be used as substantive evidence of the truth of the matter asserted." *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1981). A proper foundation must be laid before attempting to impeach a witness by offering extrinsic evidence of a prior inconsistent statement. *Barnett v Hidalgo*, 478 Mich 151, 165; 732 NW2d 472 (2007). Here, the prosecutor laid a proper foundation and because KB denied that her statements to police were true, the prosecution was permitted to impeach KB with her previous statements.

Fifth, we agree that the prosecutor improperly used extrinsic evidence (i.e. a police report) to impeach KB about a collateral matter (i.e. the reason she lost custody of her children). In general, extrinsic evidence may not be used to impeach a witness on a collateral matter. *People v Teague*, 411 Mich 562, 566; 309 NW2d 530 (1981); MRE 608(b). Nevertheless, defendant has not proved that the error was outcome determinative because this evidence had no bearing on defendant's guilt or innocence. "Error warranting reversal does not occur where a defendant fails to articulate how he was harmed." *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). There was no plain error requiring reversal.

Sixth, we conclude the prosecution did not improperly elicit hearsay testimony from Natalie regarding whether she told LP or the victim that she believed their allegations. As

discussed previously, if a proper foundation is laid, a party may properly use a prior inconsistent statement to impeach a witness. Because Natalie testified at trial that she supported defendant, the prosecutor was legitimately attempting to impeach her with a prior inconsistent statement that she believed the LP's allegations of sexual abuse. Additionally, Natalie's statement was never used by the prosecution to prove the truth of the matter asserted, i.e. that Natalie believed LP's allegations, rather it was properly used to attack Natalie's credibility at trial. MRE 613(b); MRE 607. Plain error requiring reversal did not occur.

Seventh, the prosecutor did not improperly elicit hearsay when she asked Natalie to relate what KB told her during a telephone conversation. Because the prosecution used the statement made by Natalie to demonstrate the effect on the hearer, the evidence was not hearsay. MRE 801(c); *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007); *People v Flaherty*, 165 Mich App 113, 122; 418 NW2d 695 (1987). Plain error requiring reversal did not occur.

Finally, we conclude that the record does not support the claim that the prosecutor improperly alluded to "other victims" during her closing argument. We must examine alleged improper comments of the prosecutor in context. *Cox, supra* at 451. And, a prosecutor has wide latitude and may argue the evidence and all reasonable inferences from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Our review of the entire context surrounding the challenged argument reveals that the prosecutor was arguing the evidence and reasonable inferences to explain why the witnesses had changed their stories, why the victim recanted, and the tactics defendant employed to prevent the abuse from coming to light. The challenged questions were designed to invoke reflection about the case and consideration of evidence supporting a conviction. The prosecutor was not limited to the blandest language possible. *Cox*, *supra* at 451. Here, the prosecutor properly used emotional language relating the evidence to her theory of the case when she asked the jury when the threats were "going to end." *Bahoda*, *supra* at 282; *Ackerman*, *supra* at 453-454. When the comments are viewed in light of the defense argument that the victim fabricated her story, the prosecutor was clearly calling on the jury to use its common sense, which is appropriate. See *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992); CJI2d 3.6(2). Regardless, the trial court instructed the jury that the lawyer's arguments were not evidence and the jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Consequently, defendant has not shown that plain error affected his substantial rights. *Cox*, *supra* at 451.

Defendant also alleges he was denied a fair trial on the basis of the cumulative effect of the alleged errors. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003). But reversal is warranted only if errors were so seriously prejudicial that in combination they denied defendant a fair trial. *Id*. Here, there was only one instance of prosecutorial misconduct, and it does not warrant reversal. There are no other errors to accumulate.

Defendant next contends he was denied effective assistance of counsel because the defense counsel failed to object to the eight instances of alleged prosecutorial misconduct. Because an evidentiary hearing was not held and because the trial court made no factual findings, this Court's review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an

objective standard of professional reasonableness, and that it is reasonably probable that, but for counsel's ineffective assistance, the result of the proceeding would have been different." *Id*. To be effective, "counsel need not make a futile motion." *People v Petri*, 279 Mich App 407, 415; 760 NW2d 882 (2008). As fully discussed above, defendant's arguments pertaining to seven of the eight alleged instances were without merit. Because the prosecutor's conduct was proper, any objection by defense counsel would have been futile. *Id.* Thus, defendant was not denied effective assistance of counsel.

With respect to counsel's failure to object to the improper impeachment of KB on a collateral matter, defendant cannot establish that the outcome of the proceeding would have been different. *Jordan*, *supra* at 667. The one error did not touch upon the ultimate question of defendant's guilt and the evidence against defendant was overwhelming. See *Petri*, *supra* at 413 ("In any event, defendant's claim of ineffective assistance of counsel on this ground cannot succeed because there is no reasonable probability that an objection would have made a difference in the outcome."). Defendant is not entitled to relief regarding counsel's failing to object to alleged prosecutorial misconduct.

Defendant also alleges he was denied effective assistance of counsel when defense counsel failed to object to the victim's testimony that defendant was fired from the Department of Corrections as a result of sexual improprieties. Wise counsel will at times determine "it is better not to object and draw attention to an improper comment." *Bahoda*, *supra* at 287 n 54. Defendant has failed to overcome the strong presumption that defense counsel's decision to not object was sound trial strategy because defense counsel may have believed it was better to avoid drawing the juror's attention to the fact that defendant's employment with the Department of Corrections was terminated as a result of alleged sexual improprieties. *Petri*, *supra* at 411. And, given the strength of the evidence, we cannot conclude that, but for defense counsel's failure, the result of the proceedings would have been different. *Jordan*, *supra* at 667.

Defendant further contends that defense counsel was ineffective for failing to request a remedy after noting to the trial court that defendant believed jurors saw deputies chain and escort him at the end of the day. The record did not establish that any member of the jury actually saw defendant in restraints; consequently, defendant has failed to establish a factual predicate for his claim. *Ackerman*, *supra* at 455.

Defendant also alleges multiple instances of ineffective assistance of counsel combined to deny him a fair trial. Because none of the alleged instances constituted ineffective assistance of counsel, reversal of defendant's convictions is unwarranted. *McLaughlin*, *supra* at 649.

Defendant next argues that his 40-year sentence was disproportionate. Because the sexual abuse occurred between 1994 and 1995 before the legislative sentencing guidelines were enacted, the judicial sentencing guidelines applied. *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000); MCL 769.34(2). Therefore, the appropriate standard of review is abuse of discretion. *People v Milbourn*, 435 Mich 630, 634-636; 461 NW2d 1 (1990). The Michigan Supreme Court has noted "a given sentence can be said to constitute an abuse of discretion if that sentence violates the principle of proportionality, which requires sentences imposed by the trial court to be proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Id*. This Court reviews questions of constitutional law de novo. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006).

Specifically, defendant argues the trial court considered reasons that were already accounted for in the guidelines. "[T]he key test is whether the sentence is proportionate to the seriousness of the matter, not whether it departs from or adheres to the guidelines' recommended range." *Milbourn, supra* at 661. Further, "[a] court may justify an upward departure by reference to factors considered, but adjudged inadequately weighed, within the guidelines, as well as by introducing legitimate factors not considered by the guidelines." *People v Castillo*, 230 Mich App 442, 448; 584 NW2d 606 (1998). Conversely, a sentence that is outside the guidelines recommended range "that is imposed without reference to legitimate factors not adequately considered by the guidelines may be disproportionate." *Id*.

Defendant argues the guidelines already accounted for the repeated nature of the assaults pursuant to offense variable (OV) 12, multiple criminal sexual penetrations, and OV 25, three or more contemporaneous criminal acts, and the trial judge's reliance on these facts to justify a departure was improper. The trial court is permitted to depart from the sentencing guideline recommendation if the factors considered by the guidelines were inadequately weighed within the guidelines and other factors not considered by the guidelines. *Castillo, supra* at 448. Under OV 12 of the judicial sentencing guidelines, 50 points is scored for two or more penetrations. *People v Raby*, 218 Mich App 78, 82; 554 NW2d 25 (1996). OV 25 "provides for a . . . maximum score of fifteen points for three or more criminal acts." *Id.*. Neither of these offense variables adequately weighed the numerous times defendant penetrated his own daughter, the victim, over a long time period, and the trial court was permitted to consider the uncharged acts defendant perpetrated against the other victims, who testified at trial, that were not contemplated by the sentencing guidelines. See *People v Coulter (After Remand)*, 205 Mich App 453, 456; 517 NW2d 827 (1994) ("A sentencing court is allowed to consider the facts underlying uncharged offenses, pending charges, and acquittals."); *Milbourn, supra* at 660 ("In some cases, there may be important sentencing factors that are not included in the sentencing guidelines. Perhaps the clearest example of such a factor is the prior relationship, if any, between the victim and the offender."). Additionally, the trial court appropriately noted that defendant used his position as a Department of Corrections officer and a reserve police officer to intimidate the victim into not reporting his crimes. Defendant using his position to cover up his crimes was also a valid reason to depart from the sentencing recommendation because it was not adequately considered in the scoring of those guidelines. Further, evidence at trial also demonstrated that defendant preyed on young female victims in his own family as well as friends of the victim, sexually abused girls over several years and then manipulated them into not reporting the abuse. This evidence amply demonstrated that defendant was a pedophile who would pose a danger to society in the future. See *People v Kahley*, 277 Mich App 182, 189; 744 NW2d 194 (2007) (the trial court properly concluded pedophiles are not amenable to treatment and are likely to repeat their conduct).

We conclude the trial court did not abuse its discretion because defendant's sentence was proportionate to the offender and the offenses. *Milbourn, supra* at 636, 661. As noted, defendant sexually abused several females in his own family over the course of many years, abused his position of authority as their father figure, intimidated the victims with his status as a correction's officer and a reserve police officer, was in a unique position to reoffend with other young female family members, and the abuse severely impacted the victim's life. Thus, the trial court did not abuse its discretion when it sentenced defendant to a minimum sentence of 40 years. See, e.g., *People v Lemons*, 454 Mich 234, 255-256; 562 NW2d 447 (1997) (a sentence

that was approximately three times longer than the sentencing guidelines recommendations was not excessive for a defendant who had sexually abused his children and stepchildren); *People v Brzezinski (After Remand)*, 196 Mich App 253, 254-255; 492 NW2d 781 (1992) (the trial court did not abuse its discretion imposing a maximum sentence where the defendant had repeatedly sexually abused his children, as young as three, and the abuse occurred over a period of years).

Defendant also alleges the trial court was not permitted to depart from the sentencing guidelines based on judicial fact-finding pursuant to *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, *Apprendi, supra* at 466, and *Blakely, supra* at 296, are inapplicable to Michigan's indeterminate legislative sentencing scheme. *Drohan, supra* at 163-164. Because defendant was sentenced pursuant to the judicial sentencing guidelines and because his sentence, while a departure from the sentencing guidelines, was within the statutory maximum of a life sentence, this argument lacks merit. *Id*. at 164; MCL 750.520b(2)(b).

We affirm.

/s/ Mark J. Cavanagh
/s/ Jane E. Markey
/s/ Alton T. Davis