STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 15, 2009
v	No. 285173 Wayne Circuit Court
ALI ABDALLAH ISMAIL, Defendant-Appellant.	LC No. 07-021276-FC

Before: O'Connell, P.J., and Talbot and Stephens, JJ.

PER CURIAM.

After a jury trial, defendant Ali Abdallah Ismail was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under the age of 13), and was sentenced to 25 to 40 years' imprisonment. He appeals as of right. We affirm.

First, defendant argues that he was entitled to an instruction on the offense of second-degree criminal sexual conduct because it is a necessarily included lesser offense. Defendant also contends that a reasonable jury could have returned a verdict on the lesser offense because the facts of this case were of the "he said she said" variety and there was no physical evidence. We disagree. We review issues of law arising from jury instructions de novo, but we review a trial court's decision regarding whether an instruction was applicable to the facts of the case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006).

A lesser-included offense may be either a necessarily included lesser offense or a cognate lesser-included offense. "'[A] requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.'" *People v Smith*, 478 Mich 64, 69; 731 NW2d 411 (2007), quoting *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002), overruled in part on other grounds *People v Mendoza*, 468 Mich 527 (2003). A cognate lesser-included offense is one that shares some common elements with and is of the same class as the greater offense, but also has elements not found in the greater offense. *People v Perry*, 460 Mich 55, 61; 594 NW2d 477 (1999). An instruction on a cognate lesser-included offense is not permissible. MCL 768.32(1); *Smith*, *supra* at 73.

Second-degree criminal sexual conduct is a cognate lesser-included offense of first-degree criminal sexual conduct because it is possible to commit first-degree criminal sexual conduct without having committed second-degree criminal sexual conduct. *People v Lemons*,

454 Mich 234, 253-254; 562 NW2d 447 (1997) (noting that CSC II requires proof of an intent not required by CSC I). Therefore, the trial court's decision not to instruct the jury on second-degree criminal sexual conduct did not constitute error. See *id.*

Further, contrary to defendant's assertion that he was individually charged with second-degree criminal sexual conduct, he was actually charged with first-degree criminal sexual conduct and second-degree criminal sexual conduct in the alternative, pursuant to the prosecution's request at the preliminary examination, which the court granted. Also, despite whether second-degree criminal sexual conduct is classified as a cognate or necessarily included lesser offense of first-degree criminal sexual conduct, a rational view of the evidence would not support the instruction on second-degree criminal sexual conduct. The victim testified that there was penetration, while defendant claimed the incident never happened. There was no evidence that sexual contact absent penetration occurred. Therefore, the trial court did not err in failing to instruct on second-degree criminal sexual conduct.

Next, defendant argues that he was denied the effective assistance of counsel because his trial counsel failed to cross-examine Sergeant Patricia Penman using the Forensic Interview Protocol or to call an expert witness to evaluate Penman's interview of the victim under the protocol and to determine how previous interviews of the victim could have affected her story. We disagree.

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review factual findings for clear error and constitutional issues de novo. *Id.* Although defendant moved this Court to remand for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), his motion was denied and a hearing was not conducted. Therefore, our review of defendant's ineffective assistance claim is limited to mistakes apparent on the record. *People v Riley* (*After Remand*), 468 Mich 135, 139; 659 NW2d 611 (2003).

Under the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, the guaranteed right to counsel encompasses the right to the effective assistance of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). The right to effective assistance of counsel is substantive and focuses on the actual assistance received. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). "'To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.'" *People v Scott*, 275 Mich App 521, 526; 739 NW2d 702 (2007), quoting *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). "Defendant must overcome the strong presumption that counsel's performance was sound trial strategy." *Dixon*, *supra* at 396. Defense counsel's decisions regarding what evidence to present and whether to call and question witnesses are matters of trial strategy that will only constitute ineffective assistance of counsel if they deny a defendant a substantial defense. *In re Ayres*, 239 Mich App 8, 21-22; 608 NW2d 132 (1999). A substantial defense is one that might have made a difference in the outcome of the trial. *Id*. at 22.

Defendant argues that either during Penman's cross-examination or through calling an expert witness, his counsel should have elicited the importance of recording the interview and keeping detailed documentation of what the child victim said. Defendant also contends that his counsel could have elicited testimony that the interview should have occurred in a relaxing environment void of distractions and testimony concerning how forensic interviewers seek to protect a child's story from being tainted.

We cannot conclude that defendant was deprived of a substantial defense, because defendant failed to establish a reasonable probability that the result of the proceeding would have been different had these suggested tactics been implemented. Defense counsel made the jury aware during the cross-examination of Penman that her interview of the victim was not recorded and that there was no way to know exactly what the victim said or how she said it. Further, the victim consistently told her story to multiple people, including a friend from school, two of her aunts, and the emergency room doctor. Defendant suggests that by repeating her story, the victim actually reduced her credibility, but he provides no support for this assertion. Therefore, considering the consistency of the victim's story and noting that defense counsel partially pointed out to the jury the flaws with Penman's interview of the victim, defendant cannot show that the outcome would have been different if defense counsel had cast doubt on the interview procedures used by Penman in the manner suggested by defendant. Therefore, defendant was not denied the effective assistance of counsel.

Next, defendant argues that he was denied a fair trial because there were multiple instances of prosecutorial misconduct and that his counsel was ineffective for failing to challenge these instances of misconduct. We disagree. Although we generally review issues of prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial, because this issue is unpreserved, we review for plain error affecting defendant's substantial rights. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005).

Defendant first argues that the prosecutor vouched for the credibility of the victim in her closing argument. A prosecutor may not vouch for the credibility of her witnesses by implying that she has some special knowledge concerning her witnesses' truthfulness. *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). However, a prosecutor may comment on her own witnesses' credibility, especially where credibility is at issue and to rebut charges of fabrication by the defense. *Thomas*, *supra* at 455; *Schutte*, *supra* at 721-722. The prosecutor is free to argue the evidence and reasonable inferences arising from the evidence in support of a witness's credibility. *Schutte*, *supra* at 721-722. However, the prosecutor must refrain from commenting on her "personal knowledge or belief regarding the truthfulness of the . . . witnesses," *Thomas*, *supra* at 455, and she may not "convey a message to the jury that the prosecutor had some special knowledge or facts indicating the witness's truthfulness," *People v Bahoda*, 448 Mich 261, 277; 531 NW2d 659 (1995).

The prosecutor stated in her closing argument:

> I submit to you that [the victim] is telling you the truth, and let me tell you why. There are things that you should look at in determining whether or not she's telling the truth. And I submit to you that when you go through those things using

> your common sense and your reason, you can only conclude that she is the one who is telling the truth in this case.
>
> So let's start with motive. Let's talk about whether or not [the victim] has a motive to make a story up. Well, we know from her, she said that she had a good relationship with her uncle; that she's not making this up.
>
> We heard from [the victim's] mom, who said, "I've seen them together a bunch of times. Never seemed to have any problems."
>
> You heard from the defendant himself get in the witness stand and say that he had a good relationship with his niece.
>
> There has been no testimony about any type of motive, why she would make this up. So I submit to you that she has no motive to lie. She came in and told you the truth because it's what happened to her.

Nothing in this statement would indicate to the jury that the prosecutor possessed any personal or special knowledge regarding the truthfulness of the victim's testimony. *Bahoda*, *supra* at 277. There was no physical evidence in this case and defendant contradicted the victim's allegations by testifying that nothing happened. The prosecutor was free to argue that the victim was credible, especially where credibility was an issue in the case. *Thomas*, *supra* at 455. Therefore, the prosecutor did not commit misconduct by merely arguing that the victim had no motive to lie.

Defendant also argues that the prosecutor attempted to shift the burden of proof onto defendant to prove his innocence. Although a prosecutor may not attempt to shift the burden of proof, *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), "attacking the credibility of a theory advanced by a defendant does not shift the burden of proof," *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005).

The prosecutor stated in her closing argument:

> Let's talk a little bit about the defendant's own actions and what he said in the witness statement—on the witness stand. He says that the brother comes to his house. He's told that night about the allegations, but yet he never calls the police, and he never demands that the child is taken to the hospital. Again, it's a family matter, and we're going to take care of it as a family.

Here, the prosecutor was not attempting to shift the burden of proof by pointing to any failure by defendant to present certain evidence. Rather, the prosecutor attacked defendant's theory that nothing happened. In this context, plaintiff's statements were "proper commentary on the weaknesses of defendant's theory of defense and did not constitute prosecutorial misconduct." *Id.* at 635.

Next, defendant argues that the prosecutor committed misconduct by repeatedly stating that defendant had been released from jail the day of the incident. However, defendant opened the door to these references during his testimony, when he offered this fact during direct

questioning by his counsel. Further, defendant has not shown how the additional references by the prosecutor are outcome-determinative, especially since the jury initially heard this fact from defendant during his testimony.

Finally, defendant argues that his counsel was ineffective for failing to challenge and request curative instructions regarding the above-mentioned instances of alleged prosecutorial misconduct. However, because there was no prejudicial error introduced by the prosecutor's conduct, defendant's claim of ineffective assistance fails. Counsel is not ineffective for failing to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael J. Talbot
/s/ Cynthia Diane Stephens