STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 16, 2010
v	No. 287325 Branch Circuit Court
TODD DUANE WEBB, Defendant-Appellant.	LC No. 06-128656-FC

Before: Stephens, P.J., and Gleicher and M.J. Kelly, JJ.

PER CURIAM.

A jury convicted defendant Todd Duane Webb of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim younger than 13), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim younger than 13), for sexually assaulting his daughter. The trial court sentenced defendant to concurrent terms of 15 to 30 years' imprisonment for the CSC I conviction and 7 to 15 years' imprisonment for the CSC II conviction. Defendant appeals as of right. We affirm.

I

Defendant initially complains that the trial court improperly qualified Lynnette Lubinski as an expert witness in the field of child sex abuse counseling under MRE 702. At trial, the prosecutor elicited preliminary testimony by Lubinski summarizing her training and experience, and the prosecutor urged the trial court to declare her "an expert in the field of child abuse sex counseling." The trial court inquired of defense counsel whether he had "any objection[,]" and counsel replied, "No." We decline to consider this question further because defense counsel's intentional relinquishment of any objection to Lubinski's qualifications as an expert operates as a waiver of defendant's appellate challenge to Lubinski's qualifications, which extinguishes any error. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Defendant also avers that because he did not raise the issue of the victim's postincident behavior and did not challenge the victim's credibility, Lubinski improperly testified that the victim behaved in a manner consistent with that of other sexual abuse victims. An expert witness may testify in a child sexual abuse case "regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim *or* to rebut an attack on the victim's credibility." *People v Peterson*, 450 Mich 349, 373; 537 NW2d 857, mod on other

grounds 450 Mich 1212 (1995) (emphasis in original). A defendant must raise the issue of the victim's postincident behavior or credibility before an expert may testify that the victim behaved in a fashion consistent with that of a sexually abused child. *Id*. at 373-374.

Contrary to defendant's assertions, the record reflects that defendant raised the issue of the victim's postincident behavior when defense counsel elicited testimony that the victim did not disclose the sexual abuse for several years after its occurrence. Additionally, defendant testified that his former wife "brainwashed" the victim, thus plainly challenging the victim's credibility. Pursuant to *Peterson*, 450 Mich at 373, once defendant introduced the victim's postincident behavior and questioned her credibility, the prosecutor justifiably presented expert witness testimony to explain that the victim's delayed disclosure was consistent with the actions of many other sexually abused children. Consequently, the trial court correctly admitted Lubinski's testimony for the limited purpose of explaining the victim's questioned conduct and credibility.

Defendant further suggests that Lubinski's testimony exceeded the scope of permitted testimony authorized in the trial court's pretrial order in limine when she opined that children rarely fabricate sexual abuse allegations, thus wrongfully vouching for the victim's credibility. Because the record shows that defense counsel bore sole responsibility for eliciting the testimony of Lubinski that defendant now challenges on appeal, we decline to further consider this purported error that defendant precipitated at trial. *Carter*, 462 Mich at 214 ("Counsel may not harbor error as an appellate parachute.").

II

Defendant next avers that his counsel rendered ineffective assistance in several respects. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first 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). This Court reviews for clear error a trial court's findings of fact, and considers de novo questions of constitutional law. *Id*.

To establish ineffective assistance of counsel, a defendant generally must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303, 308-327; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312, 326-327; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Id.* at 714-715.

A

Defendant first alleges that defense counsel should have requested a cautionary jury instruction addressing Lubinski's testimony. Defendant neglects to identify the specific limiting

instruction that his counsel should have requested, and offers no authority in support of his suggestion that his counsel should have sought a particular limiting instruction.[1] See *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006), aff'd 482 Mich 851 (2008) (observing that an appellant who fails to adequately brief an issue "has abandoned this issue on appeal"). The record reflects that the trial court did instruct the jury, consistent with CJI2d 5.10, that it did not have to assign any special weight to Lubinski's expert psychological testimony. Presumably, defendant intends to reference CJI2d 20.29, which cautions jurors to consider testimony by an expert in the field of child sexual abuse "only for the limited purpose of deciding whether [the victim]'s acts and words after the alleged crime were consistent with those of sexually abused children," not "to show that the crime charged here was committed," that "the defendant committed it," or that the victim "is telling the truth." At trial, defendant theorized that the victim's testimony about four instances of sexual abuse between September 2001 and March 2002 lacked credibility because the overnight visits could not have occurred in this period and the victim's mother had "brainwashed her into" lodging sexual abuse allegations against him. Had defense counsel requested that the trial court read CJI2d 20.29, it reasonably could have undermined the defense theory by highlighting to the jury that the victim's failure to promptly report her allegations of abuse appeared consistent with Lubinski's testimony that most sexual abuse victims delay disclosure. Consequently, defendant has not overcome "the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy." *Rodgers*, 248 Mich App at 714-715.

B

Defendant also maintains that his counsel inadequately prepared for trial. Defendant identifies two insufficiently investigated witnesses, himself and his father, but our review of the record reveals no evidence or suggestion that defense counsel did not meet with or prepare for trial defendant or his father. At trial, defense counsel called defendant and his father to elicit their denials that defendant had the opportunity to sexually assault the victim, in additional support of which defendant's father introduced a diary he kept. The prosecutor subsequently impeached defendant's father by pointing out that the content of one particular diary entry about which he testified at trial differed from the relevant diary content that the police had copied before trial. However, the record does not substantiate that the impeachment of defendant's father had any relationship to the purported unpreparedness of defense counsel. Because defendant has entirely failed to establish a factual predicate for his claim that defense counsel insufficiently prepared for trial, we reject this contention of ineffective assistance. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

C

Defendant further criticizes his counsel for attempting to introduce at trial the entirety of the circuit court file in his divorce action, thus "muddl[ing]" the otherwise clear evidence that

[1] Defendant refers generally to *Peterson*, 450 Mich 349, and *People v Ortiz*, 249 Mich App 297; 642 NW2d 417 (2002), neither of which prescribes the reading of a specific instruction that would apply under the facts of this case.

"there could not have been any sexual contact [with the victim] in 2001 when the child was in kindergarten." Defendant neither rationalizes the basis for his position that juror confusion arose from defense counsel's actions nor offers any authority supporting that counsel's challenged conduct fell below an objective standard of reasonableness.[2] *Martin*, 271 Mich App at 315. Moreover, in light of defense counsel's repeated and consistent efforts at trial to question the victim, her mother, defendant and others with respect to the limited nature of defendant's court-authorized visits in the period when the victim believed that the sexual assaults took place, we detect no reasonable likelihood that defense counsel's actions regarding the divorce file altered the outcome of the trial or otherwise deprived defendant of a fair trial.

D

Defendant asserts that defense counsel inexcusably failed to invoke MRE 703 as a ground for objecting to Lubinski's trial references to data underlying her opinion testimony. Pursuant to MRE 703,

> The facts or data in the particular case upon which an expert bases an opinion or inference shall be in evidence. This rule does not restrict the discretion of the court to receive expert opinion testimony subject to the condition that the factual bases of the opinion be admitted in evidence thereafter.

"It necessarily follows that an expert witness may not base his or her testimony on facts that are not in evidence." *People v Unger*, 278 Mich App 210, 248; 749 NW2d 272 (2008). "But the reference to facts or data 'in the *particular case*' limits the type of evidence that must be admitted into evidence to facts or data that are *particular* to that case." *People v Yost*, 278 Mich App 341, 390; 749 NW2d 753 (2008) (emphasis in original). At the outset of Lubinski's testimony about statistics and studies investigating the time windows in which young victims of sexual assaults reveal their abuse, defense counsel requested that court mark and identify the documents that formed the basis for Lubinski's statistical testimony. Before permitting Lubinski's direct examination to continue, the trial court permitted defense counsel to read the documentation that supplied the basis for Lubinski's statistical testimony. Because the statistical and study documentation about which Lubinski testified did not relate to specific facts or data regarding the victim's sexual assaults in this particular case, MRE 703 did not mandate its introduction into the trial record. *Id*. Therefore, defense counsel did not render ineffective assistance of counsel to the extent that he failed to offer a meritless objection premised on MRE 703. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

E

In defendant's last ineffective assistance contention, he raises "[d]efense counsels [sic] strange statement to the court, after the trial began, regarding prior negotiations" as "but another indication . . . that counsel was not prepared for this trial." Once again, defendant has neglected to elaborate his argument with either citation to the trial court record or any controlling authority,

[2] Defendant does not even identify any of the orders or statements that he believes merited introduction at trial.

essentially abandoning this contention. *Carbin*, 463 Mich at 600; *Martin*, 271 Mich App at 315. Presumably, defendant's complaint relates to defense counsel's comments, outside the presence of the jury, apprising the court for the record that "several negotiation sessions with the prosecuting attorney" had occurred, and that defense counsel had unsuccessfully urged defendant to accept "what [counsel] thought would be a reasonable resolve [sic] for this matter." Because defense counsel's notification of the trial court took place in the jury's absence, even assuming error in some regard, no reasonable likelihood existed that the notification might have affected the jury's verdict or deprived defendant of a fair trial.

III

Defendant next claims that the trial court's failure to inform the defense of court communications with the jury in the midst of deliberations mandate reversal of his convictions. "The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record." MCR 6.414(B). However, a violation of this rule does not automatically warrant reversal. *People v France*, 436 Mich 138, 142-143; 461 NW2d 621 (1990). Rather, "[a] reviewing court must reverse the conviction if it determines that a defendant has been prejudiced by an ex parte communication with the jury." *Id*. at 163. Prejudice means "any reasonable possibility of prejudice." *Id*. at 162 (internal quotation omitted).

The trial court file contains two notes from the jury, which read, "We would like to see all the evidence," and "We would like to see [the victim] & Judge Cherry's testimony." To determine the extent of any prejudice, we initially must characterize the trial court's subsequent communication with the deliberating jury as substantive, administrative, or housekeeping. *France*, 436 Mich at 163-164. "Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication has no presumption of prejudice." *Id*. at 163. Both of the jury's notes inquiring about the availability of trial evidence for review fall squarely within the category of administrative communications.

The record reflects that the trial court allowed the jury to review videotaped testimony of the victim and Branch Circuit Court Judge Michael Cherry, whom defense counsel called to discuss certain occurrences in defendant's divorce case. However, the record does not contain the precise language the court employed in permitting the testimony review, and does not substantiate that the trial court notified defense counsel of his decision to allow the review. Even assuming that defense counsel would have objected to the trial court's communications and allowance of the testimony review, defendant does not explain on appeal how the trial court's testimony review ruling might have constituted an abuse of discretion, MCR 6.414(J), or how any reasonable possibility of prejudice arose from the trial court's decision to allow review of the victim's and Judge Cherry's testimony. In summary, although the trial court should have fully complied with the mandates of MCR 6.414(B), we deem reversal unnecessary because defendant has not demonstrated "any reasonable possibility of prejudice" flowing from the administrative communications between the jury and the trial court. *France*, 436 Mich at 162-163, 166.

Defendant additionally criticizes the trial court for making no effort to inform defense counsel of a note instructing the jury to take its lunch break. The transcript does not document

the lunch break authorization, but the file contains a note from the trial court advising the jury, "Ladies and gentlemen you may go to lunch at this time. You must not discuss the case with anyone during the lunch hour. Please return by 1:30 p.m. When all 12 of you have returned to the jury room, you may resume your deliberations." Even assuming again that the trial court neglected to communicate with defense counsel regarding the lunch authorization notice, the notice constitutes a housekeeping communication that "carries the presumption of no prejudice," and defendant on appeal has not identified "any reasonable possibility of prejudice" deriving from the trial court's housekeeping instruction.

IV

Defendant submits that the trial court erred by failing to sua sponte read the jury the limiting instruction concerning expert testimony in CJI2d 20.29. After the trial court completed its final instructions to the jury and excused them to commence deliberations, the trial court engaged in the following colloquy with defense counsel.

> *The Court*: [Defense counsel,] any objections to the instructions?
>
> *Defense counsel*: I have none.
>
> *The Court*: Do you waive written claims and contentions?
>
> *Defense counsel*: Yes, sir.

Defense counsel's express approval of the jury instructions and affirmative waiver of any instructional challenges extinguished any claims of instructional error. *Carter*, 462 Mich at 215-216.

V

Defendant insists that during closing argument the prosecutor improperly vouched for the victim's credibility.

> Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. 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 Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). But appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives

the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Schutte*, 240 Mich App at 720.

Defendant apparently challenges the following passage of the prosecutor's closing argument:

> Ladies and gentlemen, credibility; okay, the judge is going to read you instruction on credibility. Credibility is believability, okay. In this trial, basically the . . . two different versions of the facts are it happened or it didn't happen. . . . Defendant's defense here is it never happened because I didn't live at the house. I was a transient. . . . [B]ut what you have to determine as a jury is which side of this story you're going to believe. . . . Victim's side of the story we have three different witnesses. We have the mother, the sister and the victim. The victim—I would submit to you if you listened to all of their testimony, it's fairly consistent all the way through. . . . The point is both daughters and the mother all said, when visitations occurred, it occurred at that trailer on these dates at that time in 2001 as well as in 2002. *Everybody seems to, from the victim's side of the argument, be consistent with their testimony all the way through. Is there any question in your mind? Do any of you believe or disbelieve? That's a decision you have to make whether those visitations occurred at that trailer over that timeframe. I submit to you I don't think there's any doubt here that those visitations occurred.* [Emphasis added.]

A review of the prosecutor's challenged remarks in context reveals that he properly pointed out to the jury that the details of the victim's sexual assault descriptions found corroboration in the testimony of the victim's sister and her mother; the prosecutor simply did not vouch for the victim's credibility by implying that he possessed "some special knowledge of [her] truthfulness. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Therefore, we detect no plain error.

VI

Defendant finally complains that the jury's verdict went against the great weight of the evidence, which agreed that defendant had only two supervised visits with the victim and her sisters in 2001, and thus precluded the jury's finding that he could have committed the charged sexual assaults. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). "A verdict may be vacated only when it does not find reasonable support in the evidence, but is more likely to be attributed to causes outside the record such as passion, prejudice, sympathy, or some extraneous influence." *People v DeLisle*, 202 Mich App 658, 661; 509 NW2d 885 (1993) (internal quotation omitted). "'Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.'" *Musser*, 259 Mich App at 219, quoting *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). "Unless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable

physical facts or defied physical realities, the trial court must defer to the jury's determination." *Id*. (internal quotation omitted).

Defendant's great weight of the evidence argument ignores (1) the victim's mother's testimony that between September 2001 and March 25, 2002, she offered defendant several overnight visits with the victim and her sisters not specifically authorized in court visitation orders, and that the children spent several overnights in the trailer defendant shared with his father, (2) the victim's testimony that on four overnight visits between September 2001 and March 25, 2002, defendant locked her in his bedroom, rubbed her outer vagina with his fingers, then placed a finger inside her vagina, and (3) the victim's elder sister's testimony at trial that on at least one of the trailer-based overnight visits with defendant, while trying to sleep in the living room the sister heard through defendant's closed bedroom door the victim crying, the sister knocked on the bedroom door, but defendant instructed her to return to bed. Although defendant and his father denied that the children had any overnight visits in 2001 or early 2002, the jury had the prerogative to choose whether to believe the prosecutor's version of events or defendant's directly contradictory version. *Musser*, 259 Mich App at 219. Ample evidence incriminated defendant, and "we cannot say that . . . [it] was deprived of all probative value or that the jury could not have believed it, or that the [incriminating] testimony contradicted indisputable physical facts or defied physical realities." *Id*.

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly