STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 15, 2010
v	No. 283632 Oakland Circuit Court
SAMMY B. BAKER, Defendant-Appellant.	LC No. 2007-216658-FH

Before: WHITBECK, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of third-degree criminal sexual conduct (sexual penetration of a person at least 13 but less than 16 years old), MCL 750.520d(1)(a), four counts of fourth-degree criminal sexual conduct (sexual contact with a person at least 13 but less than 16 years old, by a person at least five years older than the victim), MCL 750.520e(1)(a), and contributing to the delinquency of a minor, MCL 750.145. Defendant was sentenced to 10 to 15 years' imprisonment for each of the third-degree criminal sexual conduct convictions, 16 months to 2 years' imprisonment for each of the fourth-degree criminal sexual conduct convictions, and 90 days' imprisonment for the contributing to the delinquency of a minor conviction. We affirm.

Defendant first argues that his convictions were against the great weight of the evidence and that the trial court therefore should have granted his motion for a new trial. We disagree. We review for an abuse of discretion a trial court's grant or denial of a new trial based on the weight of the evidence. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). 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 McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001).

In making his argument, defendant relies on conflicts in the testimony. However, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *People v Lemmon*, 456 Mich 625, 647; 576 NW2d 129 (1998). Except in extraordinary circumstances, such as where testimony is deprived of all probative value or contradicts indisputable physical facts or physical realities, deference must be given to the trier of fact. *Id*. at 645-647. Indeed, the resolution of credibility questions is within the exclusive province of the trier of fact. *People v DeLisle*, 202 Mich App 658, 662; 509 NW2d 885 (1993).

Defendant failed to show that the testimony of the prosecution's witnesses was impeached to the extent that it was deprived of all probative value such that the jury could not believe it. *Lemmon*, 456 Mich at 642-643. The record reflects that there were inconsistencies *and* consistencies surrounding the testimony of the victim and her friend, as well as the victim's prior statements. The victim testified that her clothes were off during the incident when defendant had sex with her in the backseat of his car, and that her friend was in the front seat of the car when this occurred. However, the victim's friend testified that she was outside of the car and that the victim's clothes appeared to be on during the incident. Nevertheless, the victim's friend also testified that she was not watching the entire time. The victim's testimony also contained inconsistencies, when compared to her prior statements, regarding the order in which defendant assaulted her and the conduct that occurred during the assaults.

Regardless of these inconsistencies, a review of the record shows that the crux of the testimony of the victim's friend and the victim was consistent and that the victim's testimony was materially consistent with her prior renditions of the incidents. We note that "[t]he jury is 'free to believe or disbelieve, in whole or in part, any of the evidence presented at trial.'" *Unger*, 278 Mich App at 228, quoting *People v Eisenberg*, 72 Mich App 106, 115; 249 NW2d 313 (1976). Further, defendant has failed to show how any testimony contradicted indisputable physical facts or physical realities. *Lemmon*, 456 Mich at 645-647. Therefore, on this record, it would not be a miscarriage of justice to allow the verdicts to stand, *McCray*, 245 Mich App at 637, and the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Next, defendant argues that the testimony from Diane Zalecki, a nurse who examined the victim, regarding the statements the victim made to Zalecki about her allegations constituted inadmissible hearsay. Because defense counsel expressed satisfaction with the admission of the evidence and testimony from Zalecki, counsel waived review of this issue. *People v Carter*, 462 Mich 206, 215, 217-219; 612 NW2d 144 (2000).

At any rate, defendant's argument is unavailing because the alleged hearsay testimony was admissible under MRE 803(4), which allows the admission of

> [s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment.

As noted in *People v Garland*, 286 Mich App 1, 8-9; 777 NW2d 732 (2009):

> The rationale supporting the admission of statements under this exception is the existence of (1) the reasonable necessity of the statement to the diagnosis and treatment of the patient, and (2) the declarant's self-interested motivation to speak the truth to treating physicians in order to receive proper medical care.

In *Garland*, this Court held that a sexual assault victim's statements to the examining nurse at a nonprofit facility that provided medical care to victims of sexual assault were admissible under MRE 803(4) because the statements were reasonably necessary for the victim's treatment and

diagnosis, even though the victim did not have any immediately apparent physical injuries. *Garland*, 286 Mich App at 9.

In the instant case, like in *Garland*, the victim's statements to Zalecki were reasonably necessary for her treatment and diagnosis. After going to a hospital two days after the last assault, defendant was referred to another facility, where Zalecki, a nurse specializing in examinations of victims of sexual assault, took a medical history from the victim and did a full body examination. According to Zalecki, the victim's statements regarding the assault were necessary in order for Zalecki to target her examination. Although Zalecki collected possible evidence that could have been used for the prosecution, she was not affiliated with any police agency and the police investigation occurred separately from Zalecki taking a medical history from the victim.

In addition, like the victim in *Garland*, the victim here had a self-interested motivation to obtain medical treatments. The victim was over the age of ten, which created a rebuttable presumption that she understood the need to tell the truth to Zalecki. See *id*. Although Zalecki did not find any apparent injuries to the victim, this does not rebut the presumption because injuries inflicted on victims of sexual assault, including psychological injuries, can be impossible to detect at first, but still require diagnosis and treatment. *Id*. at 9-10. Thus, as the prosecution argues, regardless whether this testimony could be characterized as nonhearsay under MRE 801(d)(1)(B) (dealing with prior consistent statements), the testimony was properly admitted.

Defendant also argues that the victim's mother, Detective Kevin McNally, and a Care House interviewer, Amy Allen, all provided hearsay testimony regarding the victim's out-of-court statements. However, a review of the record shows that none of these witnesses testified regarding the substance of the victim's statements. Therefore, their testimony was proper.

Next, defendant alleges that several instances of prosecutorial misconduct denied him a fair trial. We disagree. We generally review claims of prosecutorial misconduct de novo to determine if the defendant was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). However, because this issue was not preserved for appellate review, we review the claim for plain error affecting defendant's substantial rights. *Id*.

Prosecutorial-misconduct issues are decided on a case-by-case basis, and we must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). In addition, the prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001).

> A prosecutor may not make a factual statement to the jury that is not supported by the evidence . . . but he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case . . . . The prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms. [*People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007).]

Defendant argues that the prosecutor committed misconduct by presenting inadmissible hearsay testimony. Defendant does not elaborate on this argument other than to mention it in passing in his brief. "'An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . .'" *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), quoting *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Thus, defendant has abandoned this argument on appeal. Regardless, the alleged hearsay testimony that defendant complained of above was properly admitted. Therefore, assuming that defendant's prosecutorial-misconduct argument is predicated on this testimony, defendant's claim is without merit.

Next, defendant argues that the prosecutor elicited improper testimony from McNally when McNally testified that he believed there was sufficient evidence against defendant. However, a finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence. *Noble*, 238 Mich App at 660. On cross-examination, defense counsel asked McNally whether he had tested the victim's clothes, to which McNally replied that they were not forwarded for testing. After defense counsel had opened the door on this issue, the prosecutor asked McNally on redirect why he had not preserved the clothing for testing, to which McNally replied: "Well with the Start exam and the fact that the clothing could have – it could have been tainted at that point. She could have taken it off, deposited it with other clothing. I thought that we had sufficient evidence."

Defendant has failed to show that the prosecutor acted in any way other than in good faith in trying to elicit testimony from McNally regarding why he did not have the victim's clothing tested. This question came on redirect after defense counsel delved into this topic on cross-examination. Therefore, after evaluating the question and response in context, we conclude that defendant has failed to establish prosecutorial misconduct.

Defendant also argues that the prosecutor committed misconduct by improperly eliciting testimony from Allen that the Care House team had ruled out alternative hypotheses regarding the victim's allegations and that the victim made statements consistent with the allegations that brought her to the Care House. A portion of the challenged testimony is as follows:

> *Q*. And for [the victim] did she make statements consistent with the allegations that brought her to Care House?
>
> *A*. [The victim]?
>
> *Q*. Yes.
>
> *A*. Yes.

In addition, the prosecutor asked whether Allen was able to rule out alternative hypotheses and Allen testified that the Care House team ruled out alternative hypotheses for the victim and her friend. There is insufficient evidence that the prosecutor was acting in bad faith in eliciting this testimony. The prosecutor did not ask Allen to testify regarding the details of the victim's allegations. Moreover, we find no basis to conclude that this testimony affected the outcome of the case. See *Watson*, 245 Mich App at 586 (discussing the plain-error doctrine); see also *Dobeck*, 274 Mich App at 71. Therefore, reversal is unwarranted.

Defendant also argues that the prosecutor argued facts not in evidence in her closing argument and vouched for the victim's credibility. Specifically, defendant argues that the prosecutor vouched for the victim's credibility and argued facts not in evidence by contending that the victim's testimony was consistent with her prior statements and consistent with her friend's testimony.

A review of the record shows that the prosecutor did not imply that she had some special knowledge about the victim's credibility. See *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004) ("a prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness"). Further, the prosecutor acknowledged during her closing argument that there were some inconsistencies concerning the victim's testimony and her prior statements and Amber's testimony. In addition, the prosecutor properly argued that the victim's testimony was mostly consistent with her prior statements. Therefore, no misconduct occurred.

In addition, defendant argues that the prosecutor argued facts not in evidence by offering possible explanations with regard to why the victim's marijuana test was negative. However, the prosecutor did not deny that the drug test was negative. Rather, the prosecutor explained the apparent inconsistency between the victim's negative drug test and her testimony that she smoked marijuana with defendant by arguing that it was unclear when the victim smoked marijuana with defendant and whether she inhaled. Again, the prosecutor is free to argue the evidence and all *reasonable inferences* arising from it as they relate to his theory of the case, and need not confine his argument to the blandest possible terms. *Dobek*, 274 Mich App at 66. No misconduct occurred.

Lastly, defendant argues that he was denied the effective assistance of counsel by his trial counsel's failure to object to the various instances of alleged prosecutorial misconduct and the admission of inadmissible hearsay testimony.

As already addressed, the disputed testimony was properly admitted. Further, defendant failed to establish any instance of prosecutorial misconduct. Therefore, defendant's claim of ineffective assistance fails. Counsel is not ineffective for failing to raise futile objections, *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004), and any hypothetical failure on the part of counsel did not affect the outcome of the proceedings, *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

In addition, defendant is not entitled to a hearing pursuant to *People v Ginther*, 390 Mich 436, 442-444; 212 NW2d 922 (1973), on this issue. A defendant is not entitled to a remand for a *Ginther* hearing as a matter of right. See *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). Because defendant has failed to demonstrate that there are factual issues regarding his counsel's performance that require further inquiry, no hearing is necessary. *Id*.

Affirmed.

/s/ William C. Whitbeck
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood