STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 4, 2010
v	No. 289853 St. Joseph Circuit Court
JOHN HART VALENTINE, Defendant-Appellant.	LC No. 07-014679-FC

Before: OWENS, P.J., and SAWYER and O'CONNELL, JJ.

PER CURIAM.

After a jury trial, defendant John Hart Valentine was convicted of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b) (relationship), three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b) (relationship), and one count of possession of child sexually abusive materials, MCL 750.145c(4). He was sentenced to concurrent terms of 210 to 480 months' imprisonment for each CSC I conviction, 86 to 180 months' imprisonment for each CSC II conviction, and 23 to 48 months' imprisonment for the possession of child sexually abusive materials conviction, with 338 days' credit for time served. Defendant was also ordered to undergo lifetime electronic monitoring. Defendant now appeals as of right. We affirm.

I. FACTS

Defendant's convictions arose from the sexual abuse of his stepdaughter when she was 12 and 13 years old. The victim and her mother began living with the defendant in 2004, and the victim's mother married defendant in February 2005, when the victim was 11. According to the victim's mother, defendant and the victim got along very well at first: the victim and defendant had similar interests in movies and computer games, defendant would take the victim and her friends to the park, and the victim generally thought defendant was "cool." The victim admitted that at first, she thought defendant was "okay" because he was trying to be a friend to her, and not a stepfather, but she started to dislike him when he began sexually assaulting her.

Defendant began sexually assaulting the victim approximately one year after he married her mother. The victim was 12 when the abuse began. According to the victim, the first time defendant sexually assaulted her, he simply sat next to her and touched her breast. Other early sexual encounters that she had with defendant apparently consisted of touchings of this sort. But eventually, according to the victim, defendant began engaging in more extensive sexual activity

with her almost every night, unless she was menstruating. She made clear that defendant penetrated both her vagina and her anus with his penis during these encounters, although she also indicated that defendant often ejaculated outside her body. She also reported engaging in both fellatio and cunnilingus with defendant. Further, the victim reported that once defendant inserted a long, slender candle in her vagina and either touched or penetrated her anus with the candle.

The victim's mother worked an overnight shift at a factory. Although the family had a boarder stay with them for part of the time when the abuse occurred, he lived in the basement, while the victim, her mother, and defendant resided on the first floor. Defendant assaulted the victim late at night, when her mother was not home and the boarder was asleep. Apparently the assaults mostly occurred in the bedroom that defendant and the victim's mother shared. According to the victim, when defendant wanted to engage in sexual activity with her, he would give her advance notice and expect that she would come to him within a certain time. At times, he would wake the victim and tell her that she had a certain amount of time to come to his bedroom or he would return for her. At other times, he would knock on her door, signaling to the victim that she should come to his bedroom. If she did not come, he would then flash her lights on and off to indicate to her that she should come to his bedroom. Finally, if she still would not come, he would come to her directly. When he came to her directly, he sometimes would simply grab her wrists and drag her into his bedroom. Defendant would strike the victim if she tried to fight him off or did not do what he asked.

One night in the fall of 2007, when the victim was menstruating, defendant took her to his bedroom, fondled her, rubbed himself against her, and masturbated in her presence. He then took her to his computer and showed her pornography depicting a new sexual position that he wanted her to try with him the following night. The next evening, after attending a candlelight vigil for victims of domestic violence, the victim returned home and begged her mother to let her stay at a friend's house overnight. The victim then broke down and told her mother about the sexual abuse. The victim's mother took her to a friend's house, where they called the police. The victim's mother then took the victim to a domestic assault shelter in Battle Creek, apparently because her friend's roommate worked there and was familiar with its services.

Phyllis VanOrder, a registered nurse with the Department of Sexual Assault Services of Calhoun County and a sexual assault nurse examiner, was qualified as an expert in the field of sexual assault nurse examiner and testified concerning the duties of a sexual assault nurse examiner. VanOrder performed a sexual assault examination on the victim soon after she and her mother arrived at the domestic assault shelter in Battle Creek to report the abuse. VanOrder completed a physical examination of the victim and collected forensic samples from her body. VanOrder did not detect any signs of injury or visible trauma during her examination, but she explained that this did not necessarily mean that trauma or injury had not occurred in the past; often, injured areas of a female's genitalia can heal quickly and simply without any lingering sign of trauma. Further, VanOrder explained that visible trauma would not necessarily occur if a foreign object was placed in the vaginal canal or if a female engaged in repeated sexual intercourse over a long period.

Apparently, the victim's hymen was intact, although it does not appear that either party ever directly questioned VanOrder on this point at trial. However, VanOrder explained, in some detail, that the hymen is a stretchy membrane that surrounds the opening of the vagina, but does not cover the entrance to the vagina. Although the hymen can be injured in consensual sexual

activity and during a sexual assault, because it is a stretchy tissue, it can accommodate a penis, finger, foreign object, or even the passage of a baby during childbirth without trauma or injury.

Defendant was interviewed shortly after the victim made her allegations and denied assaulting the victim. Although the videotape of this interview was played to the jury, defendant exercised his right not to testify at trial.

II. PROSECUTORIAL MISCONDUCT

Defendant identifies three points during trial where he claims the prosecutor committed misconduct. We believe that none of the incidents identified by defendant warrant reversal of defendant's conviction and remand for a new trial.

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). "Generally, '[p]rosecutors are accorded great latitude regarding their arguments and conduct.' They are 'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.'" *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). To determine if a prosecutor's comments during his closing argument were improper, we must evaluate the prosecutor's remarks in context, in light of defense counsel's arguments and the relationship that these comments bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

First, defendant claims that the prosecutor committed misconduct during voir dire when he made reference to VanOrder; apparently, he takes issue with the prosecutor's comment that VanOrder was "one of the most educated people in that field."[1] This comment was part of a longer exchange that occurred during voir dire in which the prosecutor attempted to gauge the jury's receptiveness to VanOrder's anticipated testimony concerning the elasticity and resiliency of the hymen, even though such testimony would contradict conventional wisdom that the hymen is always damaged or broken when a female first engages in sexual intercourse and, therefore, can be used to prove virginity. Admittedly, the prosecutor's comment that VanOrder was "one of the most educated people in that field" could be considered an attempt to vouch for her credibility, especially considering that he made this comment when asking the jurors if they would fairly consider anticipated testimony by VanOrder that would challenge conventional wisdom. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009) ("A prosecutor may not vouch for the credibility of his witnesses by suggesting that he has some special knowledge of the witnesses' truthfulness.").

However, to the extent that the prosecutor's comment could be considered erroneous or inappropriate, reversal would not be required because the error is not outcome-determinative and did not result in a miscarriage of justice. *People v Brownridge* (*On Remand*), 237 Mich App

[1] We review preserved claims of prosecutorial misconduct de novo. *Abraham*, 256 Mich App at 272.

210, 216; 602 NW2d 584 (1999). The trial court immediately interrupted the prosecutor and instructed him and the jury venire that the prosecutor could not vouch for the credibility or qualifications of a witness. The trial court then indicated that the jury would ultimately determine whether VanOrder's testimony was credible and instructed, "Just because a witness says something, you have to apply your own common sense and everyday knowledge to their testimony." An erroneous legal argument made by the prosecutor can potentially be cured if the jury is correctly instructed on the law, *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002), and "[i]t is well established that jurors are presumed to follow their instructions," *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Further, immediately after the prosecutor finished questioning the jury venire on this point, defense counsel questioned the jury venire in a manner that clarified that the jury must look at all the evidence presented, and not simply the testimony of one witness, when determining whether defendant was guilty of the charged offenses. Considering that the jury was properly instructed regarding its duty to determine the credibility of witnesses and asked to consider all the evidence presented immediately after the challenged comment was made, any error that might have occurred as a result of the prosecutor's comment was properly corrected and is not outcome-determinative.

Next, defendant claims that the prosecutor committed misconduct during his introduction of Dr. Jim Henry, an expert witness, by vouching for his credibility.[2] Again, although a prosecutor may not vouch for the credibility of his witnesses, *Seals*, 285 Mich App at 22, the challenged comment by the prosecutor, even if erroneous, does not constitute outcome-determinative error, *Brownridge*, 237 Mich App at 216. The prosecutor immediately qualified his statement by reminding the jury that although Dr. Henry's credentials were impressive, he would not opine regarding whether the victim was telling the truth because the jury was ultimately responsible for determining credibility.[3] Accordingly, any "vouching" of Dr. Henry's

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[2] We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999).

[3] When he introduced Dr. Henry, the prosecutor stated,

> Ladies and Gentlemen, our first witness is Doctor Jim Henry. As he testifies about—about his experience and qualifications and as you look at his curriculum vitae, which will be put into evidence, you will see that he's nationally, if not world renowned, as one of the leading experts in the field of child sexual abuse and behavior. It's been his life's work. The world is lucky to have him.
>
> But anyway, what you won't hear from him or any of the witnesses, what they're all forbidden from telling you, is "I think [the victim] is telling the truth," or "I think [the victim] is lying."
>
> And the reason is it's the twelve of you who decide—finally decide this case—are the only persons to make that decision. He's not allowed to say it and wouldn't say it, okay. Everybody understand that? With that introduction, I'd ask Doctor Henry to please step forward.

credibility that might have occurred was immediately qualified by reminding the jurors that they, not Dr. Henry, were responsible for determining the credibility of witnesses.

Further, the trial court properly instructed the jury regarding the proper use of Dr. Henry's testimony. The trial court instructed the jury at the beginning of trial that it had the responsibility to decide what the facts of the case were by thinking about all the evidence and testimony and deciding "what each piece of evidence means and how important you think it is." The court then instructed the jury during Dr. Henry's testimony that his testimony was based on the hypothetical scenarios presented to him and would not necessarily reflect what later testimony would actually establish. At the end of trial, the court again instructed the jury that it had the authority to decide what the facts of the case were and that it could accept or reject any testimony of any witness. It then reminded the jury that although expert witnesses were permitted to give their opinions in court on matters related to their areas of expertise, the jury had no obligation to believe the expert's opinion. Instead, the jury was instructed to "decide whether you believe it and how important you think it is," taking into account the expert's qualifications and "the reasons and facts they gave for their opinion and whether those facts are true." Finally, the court instructed the jury that Dr. Henry's testimony concerning the behavior of sexually abused children could be considered only to determine whether the victim's words and actions after the alleged abuse occurred were consistent with those of sexually abused children; it could not be used to show that defendant abused the victim or as an indication that Dr. Henry believed that the victim was telling the truth.

Because we presume that the jury properly followed the instructions given to it, *Graves*, 458 Mich at 486, we conclude that the jury only considered Dr. Henry's testimony for a proper purpose. Considering that any "vouching" that the prosecutor might have done in commenting on Dr. Henry's credentials was immediately qualified by reminding the jury of its role in the case, and that the jury was properly and extensively instructed regarding the proper use of Dr. Henry's testimony, no plain error occurred and reversal is not warranted.

Finally, defendant claims that the prosecutor committed misconduct during his opening statement when he commented on defendant's decision to testify in his own defense.[4] In his opening statement, the prosecutor stated,

> We don't know whether or not Mr. Valentine will testify. But if he does, you judge his testimony just like you would judge anybody else's. But remember, he's the one that might get in trouble and that's the longest and one of the oldest reasons to lie in the world. And of course what's really important is, if he doesn't testify, you cannot consider that.

In *People v Fields*, 450 Mich 94, 108-109; 538 NW2d 356 (1995), our Supreme Court recognized that in order to effectuate a defendant's constitutional right against compelled self-incrimination, "no reference or comment may be made regarding defendant's failure to testify."

[4] This claim is unpreserved and subject to plain-error review. *Carines*, 460 Mich at 763-764.

Admittedly, the prosecutor's comment could be seen as alluding that defendant might choose not to testify because he might feel compelled to lie on the stand in order to avoid getting in trouble.

Regardless, this comment by the prosecutor, even if erroneous, does not constitute outcome-determinative error. *Brownridge*, 237 Mich App at 216. Although the prosecutor's statement was inartful, he made this statement in the midst of a general discussion regarding how the jury should gauge the credibility of witnesses, and it appears that the statement was intended to remind the jury that if defendant did choose to testify, he would have a motive to lie during his testimony in order to escape conviction. However, the comment was fleeting, and the prosecutor immediately reminded the jury both that it could not hold defendant's decision not to testify against him and that it had the authority to determine the credibility of all witnesses and accept or reject the testimony of each witness as it saw fit.

Further, the trial court specifically instructed the jury that the parties' opening statements are not evidence and "are only meant to help you understand how each side views the case." The trial court also told the jury that it must base its verdict only on the evidence. Further, the trial court instructed the jury that defendant was not required to produce evidence or otherwise prove his innocence. At the close of the trial, the trial court instructed the jury, "Every Defendant as [sic, has] the absolute right not to testify and when you decide the case you must not consider the fact that he did not testify. It must not affect your verdict in anyway [sic, any way]." The trial court also instructed the jury that the statements and arguments made by the parties' attorneys were not evidence, but were only meant to help the jury understand each side's legal theories, and that the jury "should only accept things the lawyer says that are supported by the evidence or by your own common sense—and general knowledge." Considering that the trial court properly instructed the jury not to treat the parties' opening statements as evidence and not to hold the fact that defendant did not testify at trial against him, and considering that the prosecutor's questionable comment was fleeting and immediately qualified by a reminder that defendant's decision not to testify should not be held against him, any error arising from the prosecutor's comment is not outcome-determinative and reversal is not warranted.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also claims that his counsel was ineffective for failing to challenge the improper statements made by the prosecutor. We disagree. Because defendant failed to move for a *Ginther*[5] hearing, our review is limited to mistakes apparent on the record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998).

Whether defendant has been deprived of effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We must first determine the facts and then decide whether these facts constitute a violation of defendant's right to effective assistance of counsel. *Id.* Factual findings are reviewed for clear error, while constitutional determinations are reviewed de novo. *Id.* "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving

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

otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In reviewing a claim of ineffective assistance of counsel, "[t]his Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

"A defendant is entitled to effective representation at every critical stage of the proceedings against him." *People v Abernathy*, 153 Mich App 567, 568-569; 396 NW2d 436 (1985). However, counsel is not ineffective merely because the outcome is not optimal. *People v Davidovich*, 463 Mich 446, 453 n 7; 618 NW2d 579 (2000). Instead, counsel is ineffective if it has "sunk to a level at which it is a problem of constitutional dimension." *Id.*

"To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense." *People v Riley* (*After Remand*), 468 Mich 135, 140; 659 NW2d 611 (2003). To demonstrate that counsel's performance was deficient, a defendant must establish that his attorney's representation "fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy." *Id.* "A sound trial strategy is one that is developed in concert with an investigation that is adequately supported by reasonable professional judgments." *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004).

To establish that counsel's deficient performance prejudiced the defense, the defendant must show that his attorney's representation "was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). In other words, the defendant must show that because of counsel's deficient performance, the resulting proceedings "were fundamentally unfair or unreliable." *Rodgers*, 248 Mich App at 714. This requires the defendant to demonstrate a reasonable probability that but for his counsel's unprofessional errors, the outcome of the proceeding would have been different. *Toma*, 462 Mich at 302-303.

Defendant appears to contend that his counsel was ineffective because she failed to object to the three aforementioned instances of claimed misconduct. We disagree. Defense counsel objected to the prosecutor's statement during voir dire that VanOrder was "one of the most educated people in the field." Because defendant does not explain how his counsel's prompt objection to this statement could still be considered ineffective assistance, this assertion of error lacks merit. Although defense counsel did not challenge the prosecutor's introduction of Dr. Henry or his questionable comment during his opening statement, these comments were fleeting, and any error was corrected by the prosecutor's qualification of these statements and by the trial court's instructions to the jury. Accordingly, any failure by defense counsel to object was not so prejudicial to defendant that he was denied a fair trial. *Toma*, 462 Mich at 302. Further, any objection could have simply drawn additional attention to these comments. Defense counsel's failure to object could simply have been a matter of trial strategy, and "this Court neither substitutes its judgment for that of counsel regarding matters of trial strategy, nor makes an assessment of counsel's competence with the benefit of hindsight." *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

IV. SENTENCING

Finally, defendant argues that the trial court improperly assessed a score of 15 points for Offense Variable (OV) 10 because defendant's actions were not predatory. We disagree. "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id.*, quoting *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). "A sentencing court may consider all record evidence before it when calculating the guidelines, including, but not limited to, the contents of a presentence investigation report, admissions made by a defendant during a plea proceeding, or testimony taken at a preliminary examination or trial." *People v Ratkov* (*After Remand*), 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded on other grounds 447 Mich 984 (1994).

The sentencing guidelines prescribe scoring 15 points for OV 10, which concerns exploitation of a victim's vulnerability where predatory conduct was involved. MCL 777.40(1)(a).[6] "[T]o be considered predatory, the conduct must have occurred before the commission of the offense." *People v Cannon*, 481 Mich 152, 160; 749 NW2d 257 (2008). "In addition, preoffense conduct must have been directed at a victim 'for the primary purpose of victimization.'" *Id.* at 161, quoting MCL 777.40(3)(a). Our Supreme Court set forth the following analytical questions to consider when determining whether the conduct in question was predatory:

> (1) Did the offender engage in conduct before the commission of the offense?
>
> (2) Was this conduct directed at one or more specific victims who suffered from a readily apparent susceptibility to injury, physical restraint, persuasion, or temptation?
>
> (3) Was victimization the offender's primary purpose for engaging in the preoffense conduct? [*Id*. at 162.]

"If the court can answer all these questions affirmatively, then it may properly assess 15 points for OV 10 because the offender engaged in predatory conduct under MCL 777.40." *Id.*

Defendant engaged in conduct both before and during the year-and-a-half long period in which he sexually abused the victim that was designed to exploit his close proximity to, and authority over, his middle-school-aged stepdaughter. Defendant's initial sexual contacts with the victim were inappropriate touchings. Although criminal acts in their own right, they also "set the stage" for the more egregious conduct that followed. Further, the victim described a pattern of conduct that often occurred before defendant sexually assaulted her. Defendant would come to the victim's bedroom and indicate that he wanted her to come to his bedroom within a certain period of time so he could assault her. Eventually, the victim came to realize that when

[6] Although defendant disputed that a score of 15 points was proper for this offense variable, he conceded in his brief on appeal that a score of ten points was proper. See MCL 777.40(1)(b) ("The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status").

defendant knocked on her bedroom door or flashed her lights late at night, he expected her to come to his room shortly thereafter for a sexual encounter. On some occasions, when the victim would not come to his bedroom, he would grab her by the wrists and drag her to his room. If she tried to resist his advances, he would strike her. All this misconduct occurred before defendant would actually engage in criminal sexual activity with the victim.

Further, defendant's misconduct was clearly directed at a particular susceptible victim, namely, his middle-school-aged stepdaughter. When the abuse occurred, this girl was presumably smaller and weaker than her stepfather. The victim's testimony made clear that on occasion, defendant would forcibly restrain and physically overpower her in order to take her to his room and assault her. Further, his misconduct was directed solely at the victim, and it occurred late at night, when her mother was at work and the boarder living in their house was asleep; it appears that the assaults only occurred when nobody was available to come to the victim's aid. In addition, it is clear that defendant engaged in this misconduct in order to sexually assault the victim. Accordingly, the trial court's decision to assess 15 points for OV 10 was not an abuse of discretion.

Affirmed.

/s/ Donald S. Owens
/s/ David H. Sawyer
/s/ Peter D. O'Connell