STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2010
v	No. 289432 Oakland Circuit Court
CARLOS ROBERT GARCIA, Defendant-Appellant.	LC No. 2008-221344-FC

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

PER CURIAM.

Defendant Carlos Robert Garcia appeals as of right from his convictions of five counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age). The trial court sentenced defendant to 285 months' to 50 years' imprisonment for each of the CSC I convictions and to 10 to 15 years' imprisonment for each of the CSC II convictions. We affirm, although we remand this case for correction of an apparent clerical error in the judgment of sentence.

Defendant first argues that error occurred with respect to the admission of testimony regarding defendant's sex-related statements to the victim and her girlfriend. We review the trial court's decision to admit evidence for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575, 289; 629 NW2d 411 (2001).

We conclude that there was no error in the admission of defendant's sex-related statements to the victim and her girlfriend. Although defendant argues that the statements were inadmissible other-acts evidence under MRE 404(b), these *statements* were not governed by MRE 404(b). *People v Goddard*, 429 Mich 505, 514-515; 418 NW2d 881 (1988). "[A] prior statement does not constitute a prior bad act coming under MRE 404(b) because it is just that, a prior statement and not a prior bad act." *People v Rushlow*, 179 Mich App 172, 174; 445 NW2d 222 (1989), aff'd 437 Mich 149 (1991); see also *Goddard*, 429 Mich at 518. Moreover, the statements were relevant because they tended to show that defendant's touching of the victim was done for a sexual purpose. See MCL 750.520a(q) (defining "sexual contact"); see also MRE 401 (defining "relevant evidence"). The statements were directed at the victim and her friend, occurred around the same time as the abuse, and showed that defendant thought of the victim in a sexual manner. The fact that the victim's testimony was corroborated by her friend's testimony

regarding the statements was also relevant to support the victim's credibility, which was a hotly contested issue at trial.

Moreover, the probative value of the evidence was not substantially outweighed by the danger of any unfair prejudice. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod on other grounds 450 Mich 1212 (1995); MRE 403. Indeed, the challenged evidence was more than marginally probative because, as discussed, it was relevant in terms of proving sexual purpose and corroborating the victim's testimony. See, generally, *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

Further, there was no error in failing to give an other-acts evidence limiting instruction because this instruction was inapplicable, it was not requested, and defense counsel approved of the instructions as given. Additionally, because it would have been futile to request this instruction, defense counsel did not render ineffective assistance in failing to request it. Counsel was not required to raise meritless objections or make meritless arguments. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Next, defendant asserts that he was denied a fair trial by the trial court's instruction that the jury could convict defendant based on the victim's testimony alone, if the testimony established guilt beyond a reasonable doubt. The record reflects that counsel agreed to the giving of the challenged instruction and approved of the trial court's instructions after they were read. Defendant has, therefore, waived any allegation that the challenged instruction was erroneous, because he affirmatively approved of the instruction as given at trial. *People v Carter*, 462 Mich 206, 214-215; 612 NW2d 144 (2000); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

Nonetheless, the challenged instruction complied with the law and did not unfairly bolster the victim's credibility. MCL 750.520h provides that "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g." The standard jury instruction, CJI2d 20.25, correctly provides: "[t]o prove this charge, it is not necessary that there be evidence other than the testimony of *[name complainant]*, if that testimony proves guilt beyond a reasonable doubt." See *People v Smith*, 149 Mich App 189, 195; 385 NW2d 654 (1986) (finding no error in giving the predecessor of the standard instruction "which accurately states the law as provided in MCL 750.520h"). The instruction did not relieve the prosecutor of the burden of proof beyond a reasonable doubt or remove an element from the jury's consideration. Defendant's reliance on the nonbinding case of *People v Gammage*, 2 Cal 4th 693; 828 P2d 682, 684, 687 (1992), is unavailing because in that case, the California Supreme Court held that it was proper to give instructions that one witness's testimony was sufficient to prove a fact and that the jury should evaluate witnesses' testimony carefully. Finally, because the challenged instruction in the present case was legally accurate and did not violate defendant's right to a fair trial, defense counsel's performance with respect to it was not deficient; she was not required to raise a meritless objection regarding the instruction. *Snider*, 239 Mich App at 425.

Defendant also raises several claims of error in his supplemental brief on appeal. Defendant first argues that several instances of prosecutorial misconduct occurred. "'Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.'" *People v Unger*, 278 Mich App 210, 234-235; 749

NW2d 272 (2008), quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). These issues are not preserved, and review is for outcome-determinative plain error. *Unger*, 278 Mich App at 235.

"[T]he [general] test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Allegations of prosecutorial misconduct are examined on a case-by-case basis, and this Court must view a prosecutor's statements and conduct in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). A prosecutor may not vouch for the credibility of a witness by asserting that the prosecutor's office possesses special knowledge that the jury does not have; however, a prosecutor is free to argue that a witness is worthy or unworthy of belief based on the evidence. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). A prosecutor is also permitted to respond to a defendant's theory of defense and arguments. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Remarks may not require reversal where they are responsive to matters raised by the defendant, even if, standing alone, they may have been deemed improper. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). "The prosecutor may not attempt to place the prestige of his office, or that of the police, behind a contention that the defendant is guilty, but he may argue that the evidence shows that the defendant is guilty." *People v Cowell*, 44 Mich App 623, 628; 205 NW2d 600 (1973).

After thoroughly reviewing the record, we find no plain errors. Defendant first argues that the prosecutor improperly vouched for the victim when she argued that the victim

> gets to talk to you because she's under oath and she tells you she's going to tell the truth about other embarrassing, how did she characterize it, embarrassing, gross things. She talks to you about, because she has to tell the truth when I ask it, why did you follow [defendant] upstairs?

In making these comments, the prosecutor did not assert that she possessed independent knowledge that the victim was being truthful and did not personally vouch for the victim's credibility. The prosecutor did not place the prestige of her office behind the victim. Rather, the prosecutor was fairly responding to the defense. Viewing the prosecutor's arguments as a whole, she was responding to defendant's argument that the victim fabricated the abuse by pointing out that the victim had not gained anything by coming forward with the sexual abuse. Instead, the victim was compelled to testify – because she was under oath at trial and subject to questioning – about uncomfortable, embarrassing, and intimate details regarding the abuse.

Further, the prosecutor permissibly argued that the jury should conclude that the victim was credible – not based on the prosecutor's own, independent knowledge, but because of the evidence and common sense. "[A] prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Thomas*, 260 Mich App at 455.

Defendant has not established the existence of any plain error in the prosecutor's arguments; therefore, he cannot prevail on appeal. *Callon*, 256 Mich App at 329. Further, defendant has failed to establish that a curative instruction could not have alleviated any possible prejudicial effect of the challenged comment. *Id*. at 329-330. In fact, the trial court instructed

the jury that the lawyers' arguments were not evidence, that the jury had to decide the case based on the evidence, and that it was the jury's role to determine whether a witness was credible, considering a variety of factors such as a witness's motivation to tell the truth. The jury is presumed to follow its instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Finally, because the comment was proper, defense counsel cannot be deemed ineffective for failing to raise an objection to it. *Snider*, 239 Mich App at 425.

Next, defendant asserts that the prosecutor violated *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), in failing to disclose several items of evidence and investigate certain individuals.

> A criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant's guilt. In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005) (internal citations omitted).]

Defendant argues that the prosecutor withheld exculpatory evidence by failing to call the victim's biological father to testify at trial. We conclude that defendant has failed to establish a *Brady* violation by the prosecutor. A *Brady* violation occurs when the prosecutor withholds favorable evidence *from the defense*. *Id*. at 448. The biological father was listed as a witness for the prosecution, defendant acknowledges that he knew of this witness and that the witness was present during trial, and there is no indication that the prosecutor withheld his identity or any favorable evidence. Additionally, defendant has offered no record support that this witness would have provided favorable or exculpatory testimony for defendant. *Id*. Finally, defendant has not established that he did not possess the evidence or could not have obtained it with reasonable diligence. *Id*.[1]

Defendant next claims that the prosecutor was aware that the victim and her mother accused defendant of sexually abusing other females. Defendant cites a child protective services intake report dated March 18, 2008, and a petition in child protection proceedings. These documents are not contained in the lower court file. A party cannot expand the record on appeal, and this information may therefore not be considered. *People v Powell*, 235 Mich App 557, 561

[1] Defendant also briefly argues that "other witnesses" would have testified favorably. Defendant fails to provide the names of any of these individuals, elaborate on their proposed testimony, or explain how the prosecutor withheld information. An appellant may not, in his brief on appeal, simply announce a position or assert an error and then leave it to this Court to discover and rationalize the basis for his claims, unravel and elaborate upon his arguments, and search for authority to support his position. *People v Albert Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Defendant has thus abandoned this claim.

n 4; 599 NW2d 499 (1999). Moreover, defendant does not allege that the prosecutor failed to disclose this information to *defendant*; rather, he argues that the prosecutor withheld this evidence from the jury. Such a claim does not establish a *Brady* violation. *Cox*, 268 Mich App at 448. Defendant does not allege that the prosecutor withheld these documents or the related information from him before trial. Defendant's brief acknowledges that he was aware of the information. Defense counsel requested that she be allowed to use information from the neglect case when cross-examining Hart, and the prosecutor indicated that hundreds of pages of discovery were provided to counsel regarding the neglect case. Moreover, during cross-examination of Hart, defense counsel referred to the petition. Defendant has failed to establish that the prosecutor failed to disclose the other alleged accusations to defendant or that defendant did not have the information. *Id*.

Although evidence that the victim and her mother made false accusations that defendant sexually abused other individuals would constitute favorable evidence because it could impeach the victim's and the mother's credibility, see *People v Lester*, 232 Mich App 262, 281-282; 591 NW2d 267 (1998), relief is not warranted here, given that defendant failed to show that the prosecutor withheld this information and given that the record supports that defendant was in fact aware of the other accusations and had the petition from the neglect case.

Defendant's reliance on *Hurd v People*, 25 Mich 405 (1872), superseded by statute as recognized in *People v Koonce*, 466 Mich 515, 518-521; 648 NW2d 153 (2002), is unavailing. In *Hurd*, 25 Mich at 415, the Michigan Supreme Court held that a prosecutor

> can never, in a criminal case, properly claim a conviction upon evidence which, expressly or by implication, shows but a part of the *res gestae*, or whole transaction, if it appear [sic] that the evidence of the rest of the transaction is attainable.

The Court in *Koonce*, 466 Mich at 519-521, recognized that the res gestae rule from *Hurd* (that the prosecutor was required to present all the witnesses that were present during the transaction), was subsequently abrogated by statute to merely require that the prosecutor list all witnesses and all known res gestae witnesses. Further, in the present case, the prosecutor did not fail to present the "whole transaction" in failing to present the victim's and the mother's alleged accusations that defendant had sexually abused other females, when defendant was on trial only for his sexual abuse of the victim.

Defendant next argues that the prosecutor failed to produce at trial any of the victim's statements during the forensic interview that would have shown that the victim accused defendant of sexual abuse at her mother's direction. However, the record does not support that the prosecutor withheld the victim's statements from her interview. To the contrary, the record reflects that counsel requested production of the transcript of the interview and used it at trial to question the victim, although it was never admitted into evidence. Defendant has therefore failed to establish that the prosecutor possessed favorable evidence, i.e., that the interview contained the alleged statements, or that the prosecutor withheld the evidence, given that defendant possessed a copy of the interview transcript. *Cox*, 268 Mich App at 448.

Defendant also asserts that the prosecutor withheld from the jury the victim's letter to a court in California about her biological father. Defendant asserts that the letter contained claims

of sexual abuse against her father. Again, defendant argues that the prosecutor withheld the letter from the *jury*; defendant makes no claim that the prosecutor withheld the evidence from *defendant*, and a *Brady* violation requires that the evidence be withheld from the defendant. *Id*. Further, the record indicates that defendant knew of the letter and thus could have attempted to present it himself at trial. *Id*. In fact, defense counsel elicited the existence of this letter during cross-examination of the victim. Defendant has failed to prove that he did not possess the letter or that the prosecutor withheld this evidence, given that defense counsel specifically questioned the victim about the letter.

We further find that the record does not support that the prosecutor withheld from defendant the victim's medical report. Again, defendant argues that the prosecutor withheld the report from *the jury*; he does not claim that the prosecutor failed to provide the defense the report. Moreover, the evidence in question – that the report showed no history of sexual intercourse – was in fact presented to the jury, and the record indicates that defense counsel did in fact possess the report at trial.

Defense counsel cross-examined the victim's mother about the victim's doctor appointment and presented the report to refresh her memory. Further, the mother testified that the report indicated that the victim had no history of sexual intercourse. The victim testified that she did not tell the doctor anything about her sexual history. The record thus reflects that the pertinent substance of the report was presented to both defendant and the jury, and defendant has failed to establish a *Brady* violation. *Id*.

Defendant next asserts that the prosecutor failed to conduct a proper investigation regarding the mother's therapist and regarding a note that was taped to the victim's school locker. We again find no plain error. Because defendant acknowledges that the prosecutor failed to investigate these issues, he has likewise failed to establish that the prosecutor possessed exculpatory evidence and withheld it. *Cox*, 268 Mich App at 448. He has also failed to explain what favorable evidence such investigations would have produced. *Id*. The prosecutor was not required to "seek and find exculpatory evidence." *People v Coy*, 258 Mich App 1, 21-22; 669 NW2d 831 (2003).

Defendant further asserts that the prosecutor committed misconduct by arguing facts that were not placed in evidence. Prosecutors "may not argue the effect of testimony that was not entered into evidence at trial." *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

Defendant first argues that the prosecutor committed misconduct in arguing that the custody dispute between the victim's mother and the victim's biological father was "taken care of" and that there was no evidence of a custody dispute between the mother and defendant. We conclude that, when they are viewed in the context of her whole argument and defendant's defense, the prosecutor's arguments were permissible based on reasonable inferences from the evidence. *Bahoda*, 448 Mich at 282. The prosecutor was responding to defendant's assertions that the victim fabricated the allegations because she did not like her father and defendant was trying to help him obtain custody of the victim, and that the victim's mother planted the allegations in the victim's mind because of these custody issues. The prosecutor's argument that the custody issue was not increasing and was "handled" was essentially an assertion that the custody issue with the victim's father was nothing new or concerning and would not be an adequate motivation for the victim to lie. This argument was based on record evidence that the

victim was in her mother's custody at the time, both the mother and the victim indicated that the custody issue was "nothing new," the victim was not worried about custody being transferred to her father, and both the mother and the victim denied that they fabricated the sexual abuse allegations because of the custody issue. The prosecutor's argument was a permissible response to defendant's theory of the case. *Fields*, 450 Mich at 115; *Duncan*, 402 Mich at 16.

Defendant next contends that the prosecutor argued facts not in evidence when she stated that the victim came forward with the report of abuse because she felt safe after defendant left the home. Although the prosecutor's argument was not directly supported by the victim's testimony, we conclude that the prosecutor's argument was nonetheless based on reasonable inferences drawn from the evidence. *Bahoda*, 448 Mich at 282. The prosecutor inferred that, based on the fact that the victim did not disclose the abuse until defendant had permanently left the home, the victim purposely waited to disclose until he was gone. This was a reasonable inference based on the timing of the disclosure and the victim's testimony that defendant would "get meaner" and treat her mother poorly when the victim avoided the sexual encounters.

Defendant next argues that the prosecutor erroneously argued that both the victim and her sister were removed from their mother's custody because of the victim's disclosure of the abuse.[2] We disagree that the prosecutor argued facts not in evidence in making this statement. The prosecutor's statement was supported by testimony from the victim and her mother.

Next, defendant contends that the prosecutor argued without evidentiary support that the victim knew that her mother could get in trouble for failing to report the abuse allegations. This line of argument was a response to defendant's argument that the victim and her mother fabricated the abuse because of custody concerns. The prosecutor argued, in part:

> If this is some plan, some plot, some scheme, this is all a lie, she's a pretty smart girl. Pretty smart girl to come up with these allegations over a custody issue. If she's so smart, so scheming, couldn't she have come up with a better story? If this is about custody, why would you say there was this delay in disclosure? Why would you say mom knew about it a year ago[?] If she's so smart, she could have thought about all of those things in advance. Why would you tell something that I told mom a year before knowing that mom could possibly get in trouble for that, for not reporting it[?] Why would she say, not say that the defendant use[d] to force himself on her, force these acts on her?

We find that the prosecutor's argument was a proper argument based on the evidence and reasonable inferences, considering the prosecutor's wide latitude in making arguments and considering the defense theory of the case. *Id.*; *Callon*, 256 Mich App at 330. The prosecutor was essentially stating that if the victim was so smart, as evidenced by her alleged "scheme," she would have known that it would have shown her mother in a bad light for the mother to have known about the sexual abuse for a year without having reported it. Even if this argument were to be deemed improper, a curative instruction could have cured any prejudice resulting from it,

[2] The removal was evidently based on concerns over a failure to protect the victim.

and we find that the brief statement did not affect the outcome of the case. *Callon*, 256 Mich App 329-330.

Lastly, defendant complains that the prosecutor's cumulative acts of misconduct denied him a fair trial. While the cumulative effect of instances of prosecutorial misconduct can result in reversal, defendant's claim in this case must fail because there were no errors in this case to accumulate. Even assuming that there was some impropriety, "the effect of [any] errors was [not] so seriously prejudicial that the defendant was denied a fair trial." *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

In defendant's final issue on appeal, he argues that defense counsel rendered ineffective assistance in failing to investigate certain issues and present other witnesses. We disagree. To prevail with respect to this issue, defendant must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that, absent trial counsel's error or errors, there is a reasonable probability that the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Defendant must also show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

Decisions regarding what evidence or defenses to present are presumed to be matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Failure to call a witness or present evidence constitutes ineffective assistance when it deprives the defendant of a substantial defense that would have affected the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

Defendant has failed to establish that counsel rendered ineffective assistance when she failed to present certain evidence about the victim's and the mother's statements regarding the custody issue. Defense counsel presented the defense that the mother and the victim fabricated the allegations because of custody issues, cross-examined both witnesses extensively about their motivation to fabricate the allegations because of custody issues, and emphasized the custody issue in closing arguments. Defendant was not deprived of an opportunity to present a substantial defense. *Id*. We defer to trial counsel's decision regarding what evidence to present in support of the defense. *Davis*, 250 Mich App at 368. Moreover, defendant has insufficiently proven the existence of the additional evidence that he apparently wished to present at trial. Defendant bears the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Defendant argues that defense counsel should have called defendant's brother to testify that defendant lived with him during time the sexual abuse occurred as indicated by the victim. Defendant contends that he informed counsel about his brother and that the fact that his brother was not called reflects counsel's choice not to call this witness. Defendant has failed to overcome the presumption that counsel's decision was a matter of sound trial strategy. *Davis*, 250 Mich App at 368. Notably, defendant also offers no proof that his brother would have testified as now claimed on appeal, and, again, defendant bears the burden of establishing the factual predicate for his claim. *Hoag*, 460 Mich at 6. Further, because defense counsel elicited from the victim and her mother that defendant did not stay at their house throughout the entire period in question, defendant was not deprived of a substantial defense.

Defendant next argues that counsel rendered deficient performance by failing to conduct a proper investigation regarding the mother's therapist and regarding a note that was taped to the victim's school locker. Defendant fails to indicate what further information such investigations would have revealed or what prospective testimony the school officials or the therapist would have provided that would have benefited the defense. Thus, defendant has failed to establish that further investigation and presentation of further witnesses would have created a reasonable probability of a different verdict. *Carbin*, 463 Mich at 600. Defendant has not shown that he was deprived of a substantial defense or that counsel was ignorant of valuable evidence. *Daniel*, 207 Mich App at 58; *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80 (1990). Defendant bears the burden of establishing the factual predicate for his claim. *Hoag*, 460 Mich at 6.

Defendant also asserts that counsel should have cross-examined the victim regarding unique, identifying marks on defendant's thigh and testicles. We decline, however, to second-guess defense counsel's decision not to delve into whether the victim could identify a tattoo and distinguishing mark located on intimate areas of defendant's body during the victim's testimony at trial. *Davis*, 250 Mich App at 368. We additionally note that the record contains no evidence that such identifying marks on defendant actually are present. *Hoag*, 460 Mich at 6.

Defendant lastly argues that he wanted to testify at trial. His waiver of his right to testify was not required to be placed on the record. *People v Harris*, 190 Mich App 652, 661-662; 476 NW2d 767 (1991). Defendant has failed to establish that defense counsel's performance was defective because there is no indication that counsel failed to advise defendant of his right or prevented him from testifying.

Finally, we note that the judgment of sentence contains an error. At sentencing, the trial court sentenced defendant to 285 months' to 50 years' imprisonment for each of the five CSC I convictions. The parties' briefs on appeal are in agreement concerning the sentences imposed. However, the judgment of sentence erroneously indicates that defendant received a sentence of 10 to 15 years' imprisonment for two of the CSC I convictions. We remand this case for a correction of the judgment of sentence.

Affirmed, but remanded for correction of the judgment of sentence. We do not retain jurisdiction.

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