

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS JOSEPH BEDO,

Defendant-Appellant.

UNPUBLISHED

October 19, 2010

No. 292532

Macomb Circuit Court

LC No. 2008-000491-FC

Before: WILDER, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MCL 750.520b(2)(b), and three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced to 25 to 40 years' imprisonment for the first-degree criminal sexual conduct convictions, and 10 to 15 years' imprisonment for the second-degree criminal sexual conduct convictions. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair and impartial trial due to misconduct by the prosecutor in eliciting testimony from the ten-year-old complainant, KS, regarding her six-year-old sister, OS's, veracity in accusing defendant. We disagree.

Generally, appellate review of improper prosecutor remarks is precluded absent an objection by trial counsel, because it deprives the trial court of the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In this case, defense counsel did not object to the alleged improper statements, thus, the issue is not preserved for appeal. This Court reviews unpreserved claims of prosecutorial misconduct for "plain error affecting the defendant's substantial rights." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003). A defendant must show that an error occurred, the error was plain, and the plain error affected the defendant's rights, i.e., caused prejudice that must have affected the outcome of the proceedings. *Id.*

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A defendant's opportunity for a fair trial can be jeopardized when the prosecutor interjects issues broader than the guilt or innocence of the accused. *Id.* at 63-64. Issues of prosecutorial misconduct are

considered on a case-by-case basis, with this Court must examine the entire record and evaluating the prosecutor's remarks in context. *Id.* at 71. Generally, curative instructions "are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

It is improper for a prosecutor to ask a witness to comment on the truthfulness of other witnesses' testimony because the jury decides questions of credibility. *Dobek*, 274 Mich App at 71. In this case, the prosecutor asked KS if OS was lying about what defendant did to her, and KS replied, "no." Under normal circumstances, this would have been improper. However, "[a] prosecutor's comments must be considered in light of defense arguments." *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Under the invited response doctrine, an instance of prosecutorial misconduct which might otherwise require reversal may not require reversal if it occurred in response to conduct of the defendant which invited the response. *People v Jones*, 468 Mich 345, 352-353; 662 NW2d 376 (2003). Whether the invited response requires reversal depends on the nature of the defendant's initiating conduct and the proportionality of the response. *Id.* at 353.

The testimony regarding KS's opinion of OS's veracity was elicited only after defense counsel asked KS whether she thought that OS "kind of stretches the truth and lies." Furthermore, defense counsel's opening statement largely focused on the girls' veracity. The prosecutor's question on redirect was brief, isolated, and focused on clarifying that KS thought OS lied during games of charades, but not about what defendant did to her. It was, therefore, a proportional and justified response to defense counsel's own line of questioning.

Furthermore, the testimony was permissible under MRE 608(a). Opinion or reputation testimony concerning the credibility of a witness is permissible "after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." MRE 608(a). Thus, where defense counsel attacks a witness's character for truthfulness, the prosecution may present evidence that supports the witness's character for truthfulness. *People v Lukity*, 460 Mich 484, 489; 596 NW2d 607 (1999). Defense counsel elicited testimony from KS regarding OS's character for truthfulness and, thus, opened the door to opinion testimony on the subject. Finally, reversal is unwarranted because the trial court properly instructed the jury that it was the sole judge of witness credibility, thus curing any possible prejudicial effect of the prosecutor's line of questioning. See *Unger*, 278 Mich App at 235. Accordingly, defendant has failed to demonstrate plain error affecting his substantial rights as a result of the prosecutor's conduct.

Next, defendant argues that his trial counsel was ineffective for having failed to object to KS's testimony regarding her sister's veracity. We disagree. An ineffective assistance of counsel claim is established only where a defendant is able to demonstrate that trial counsel's performance fell below an objective standard of reasonableness and was so prejudicial that defendant was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). To show prejudice, a defendant must demonstrate a reasonable probability that the result of the proceedings would have been different but for the counsel's errors. *Id.* at 302-303. Also, a defendant must overcome a strong presumption that sound trial strategy motivated trial counsel's conduct. *Id.* at 302.

Because there was no impropriety in the prosecutor's questioning of KS in regard to her sister's veracity, the trial court would have been compelled to overrule any objection raised in

this regard. Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).¹ Defendant has failed to show that his counsel's performance fell below an objective standard of reasonableness.

Defendant next claims that there was insufficient evidence of the necessary element of penetration presented at trial, requiring that his convictions for first-degree criminal sexual conduct be vacated. We disagree.

In reviewing the sufficiency of the evidence in a criminal case, this Court reviews the record, viewing both direct and circumstantial evidence in a light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997). Circumstantial evidence and reasonable inferences drawn from the evidence are sufficient to prove the elements of a crime. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). "It is for the trier of fact . . . to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences." *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Any conflicts in the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997).

A person commits first-degree criminal sexual conduct when "he or she engages in sexual penetration with another person and . . . that other person is under 13 years of age." MCL 750.520b(1)(a). The Legislature has defined sexual penetration as "any . . . intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body" MCL 750.520a(r).

OS testified that on at least one occasion, defendant had touched her "monkey," which she uses "to pee." She stated that she was on the couch when defendant rubbed her monkey inside her underwear with his hand. When prompted to explain how defendant touched her monkey, OS put her index and middle finger together and then put her other finger in between. She stated that incidents like this happened more than one time, although she could not recall specific details at trial. The parties stipulated to OS's preliminary examination testimony being read into the record in lieu of defense counsel's cross-examination. During that testimony, OS recounted one incident where defendant touched the "inside" of her monkey during the daytime and another similar occurrence at night when she was in her pajamas. In addition to OS's testimony, the jury heard Detective Wiley of the New Baltimore Police Department testify that defendant admitted that he had touched OS's vaginal area and that his knuckle might have gone

¹ While not specifically raised as error on appeal, there is also no merit to the suggestion that defense counsel was deficient for having opened the door to the opinion testimony at trial, as such tactic could have constituted sound trial strategy. Defense counsel may have felt that KS's preliminary examination testimony that OS often lied or stretched the truth was capable of introducing reasonable doubt. This Court will neither substitute its judgment for that of counsel regarding matters of trial strategy, nor make an assessment of counsel's competence with the benefit of hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

into her vagina. Although defendant argues that this statement was exculpatory, as it described an unintentional action, the jury, having heard the girl's testimony, could reasonably conclude that defendant's claim that the penetration was accidental was false. OS's testimony, along with defendant's statements to the police, were sufficient to satisfy the elements of two counts of first-degree criminal sexual conduct because they described two instances of sexual penetration of person under the age of 13.

Finally, defendant asserts that the verdicts of guilty on two counts of first-degree criminal sexual conduct are against the great weight of the evidence. Again, we disagree. Whether a verdict is against the great weight of the evidence is a matter committed to the trial court's discretion. *People v Roper*, 286 Mich App 77, 83-84; 777 NW2d 483 (2009). Accordingly, we review for an abuse of discretion a trial court's decision on a motion for a new trial based on the great weight of the evidence. *Id.* at 84.

Where the verdict is against the great weight of the evidence, a new trial may be granted on some or all of the issues. MCR 2.611(A)(1)(e). 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 it to stand. *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). "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), quoting *Nagi v Detroit United Rwy*, 231 Mich 452, 457; 204 NW 126 (1925). When evaluating a great weight of the evidence claim, a reviewing court may not act as a "thirteenth juror" or attempt to resolve credibility questions anew. *People v Gadowski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Defendant claims two bases for reversal in this regard: the lack of physical evidence of penetration and the OS's lack of credibility. Neither claim has merit. First, the lack of physical evidence in this case does not cause the evidence to preponderate so heavily against the conviction as to require reversal. It is well established that physical evidence of penetration is not necessary for a conviction of criminal sexual conduct. A complainant's testimony alone is sufficient for a reasonable jury to infer that the act occurred. *People v Szalma*, ___ Mich ___; ___ NW2d ___ (Docket No. 140021, issued August 26, 2010), slip op at 24.

Second, issues with respect to witness credibility are generally insufficient grounds for granting a new trial. *People v Lemmon*, 456 Mich 625, 646-647; 576 NW2d 129 (1998). Rather, a new trial may be granted on the basis of questions of witness credibility only in narrow circumstances, such as when the testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it. *Id.* at 643-644. OS's testimony, if believed, established that defendant digitally penetrated her. Her testimony neither defied any unquestionable physical realities, nor was it implausible in any way.

Accordingly, defendant has failed to establish that the verdicts of guilty of two counts of first-degree criminal sexual conduct were against the great weight of the evidence.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Deborah A. Servitto
/s/ Douglas B. Shapiro