STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2016
v	No. 325118 Jackson Circuit Court
THOMAS DAVID FLEMING, Defendant-Appellant.	LC No. 13-004698-FC

Before: SERVITTO, P.J., and GADOLA and O'BRIEN, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of Criminal Sexual Conduct in the First Degree (CSC 1), MCL 750.520b, and three counts of Criminal Sexual Conduct in the Second Degree (CSC 2), MCL 750.520c. The trial court sentenced defendant to serve concurrent terms of 10 to 30 years in prison on each CSC 1 count and 7 to 15 years' on each CSC 2 count. We affirm.

Defendant was charged with first- and second-degree CSC stemming from allegations of ongoing sexual abuse against his 21-year-old stepdaughter from the time she was ten years old until 2012, when she would have been 18 or 19 years old. The victim testified that defendant had touched her genitals and her breasts hundreds of times and that he had forced her to perform oral sex on him. After defendant and the victim's mother were divorced in 2012, the victim disclosed the abuse to her fiancé, then to her mother, and finally to the police in 2013.

Defendant first argues that the prosecutor committed misconduct requiring reversal when, during rebuttal argument, he referred to statements made by two potential jurors during voir dire. According to defendant, the prosecutor relied on statements that were not evidence (the statements of dismissed potential jurors) to support a theory discussed by the prosecution's expert witness, which served to deprive him of a fair trial. We disagree.

Because the defense did not raise a contemporaneous objection to the allegedly improper statements,[1] the issue is not preserved for appellate review, *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008), and we therefore review for plain error affecting substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Unger*, 278 Mich App at 235.

"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." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007) (citations omitted). Prosecutorial comments must be read as a whole, in context, and evaluated in the light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

At trial, the prosecution's expert witness, Thomas Cottrell (a counselor with the Grand Rapids YWCA), testified that delayed disclosure is common in child sex abuse cases and provided testimony concerning some of the psychological reasons why disclosure is often delayed. During closing argument, defense counsel made several comments concerning the failure to report the abuse for many years. During rebuttal, the prosecutor then said the following:

> There's all kinds of reasons that people delay disclosures. We had two people on the initial jury panel that had dealt with delayed disclosures. The only two people that had, had any dealings with a child molestation or a sexual abuse case, both of them had indicated some type of delayed disclosure. The one lady had indicated that she had been abused forty some years ago and she didn't disclose for twenty years. The one gentleman indicated that his sister had been abused by her uncle and he didn't find out about it until just five years ago and it got swept under the rug.

While the prosecutor may have been attempting to respond to the defense counsel's closing argument regarding the late reporting of the incidents, the prosecutor nevertheless committed an error. He used statements that were decidedly not in evidence—those made during voir dire--to bolster the testimony of his expert witness. The prosecutor's remarks bolstered this expert testimony by providing specific factual examples of people who had experienced sexual abuse as a child and who had delayed disclosure. It was not witnesses who had testified about their experiences with delayed disclosure, but potential jurors during the voir dire process. Facts must be proven by exhibits or witness testimony. "A prosecutor may not make a statement of

[1] Defense counsel later expressed concern with the statements on the record outside of the presence of the jury. The trial court asked defense counsel whether he was moving for a mistrial and he said "no."

fact to the jury that is not supported by evidence presented at trial and may not argue the effect of testimony that was not entered into evidence." *Unger*, 278 Mich App at 241.

That being said, the statement was not overly prejudicial and likely did not affect the outcome of the trial. Although the statements made during voir dire were not evidence, the jury had already heard them, having been part of the jury pool, and the prosecutor merely referred to them to support his argument. Further, "even if th[e] comment[s] had been improper, any prejudicial effect could have been dispelled by a timely objection and curative instruction." *Unger*, 278 Mich App at 241. In this case, the jury was instructed that they were only to consider the facts proved by "direct evidence from a witness or an exhibit." Had the judge reminded the jury that the statements made by the potential jurors were not evidence, there is no reason to believe the jury would not have followed that instruction. "Jurors are presumed to follow their instructions, and it is presumed that instructions cure most errors." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011).

Defendant next argues that defense counsel was constitutionally ineffective for failing to timely object to the prosecutor's statements and move for a mistrial. Again, we disagree.

Without the benefit of an evidentiary hearing below[2] our review of this issue is limited to facts in the record. *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996). "A claim of ineffective assistance of counsel is a mixed question of law and fact. A trial court's findings of fact, if any, are reviewed for clear error, and this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). "Clear error exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake." *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). Questions of constitutional law are reviewed de novo. *Id.*

Under both the Constitution of the United States and the Michigan Constitution, a criminal defendant has a right to the effective assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20; *Strickland v Washington*, 466 US 668, 690; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To succeed on a claim that trial counsel was constitutionally ineffective, a defendant must show two things: (1) that trial counsel's performance was deficient, and (2) that counsel's deficient performance prejudiced the defendant. *Strickland*, 466 US at 687; *Pickens*, 446 Mich at 303. Deficient performance means that "counsel made errors so serious that counsel was not acting as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 US at 687. Counsel's performance is deficient when it "[falls] below an objective standard of reasonableness."

[2] Defendant filed a motion to remand for an evidentiary hearing on August 9, 2015. In the motion, defendant offered to prove that defense counsel did not move for a mistrial because he felt confident with the jury. Defendant argued that this was not a sound reason for failing to so move. This Court denied the motion without prejudice to defendant arguing the issue before the panel. *People v Fleming*, unpublished order of the Court of Appeals, entered September 29, 2015 (Docket No. 325118).

Pickens, 446 Mich at 303. To prove prejudice, the defendant must show that there was a "reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Strickland*, 466 US at 687. "Effective counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Eloby*, 215 Mich App 472, 476; 547 NW2d 48 (1996). "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice*, 235 Mich App 429, 445; 597 NW2d 843(1999).

In this case, objecting to the challenged statements made by the prosecutor during closing argument would not be without risk to defendant. Counsel may have decided not to object in an effort not to call further attention to the objectionable statements, given that they tended to bolster the prosecution expert's position. Indeed, this appears to be the case, as counsel did take issue with the statements before the court outside of the presence of the jury. The choice of whether to move for a mistrial is also a strategic choice. Counsel may have believed that he had a better chance at an acquittal with the jury in front of him than he would have with a potential future jury during a re-trial. That he was ultimately mistaken does not render his performance constitutionally deficient.

Further, defendant cannot show prejudice. Had counsel objected, the remedy would have been for the trial judge to give a curative instruction on the matter. Because a curative instruction would have been the remedy, a motion for a mistrial would have been futile. Moreover, as discussed above, "Jurors are presumed to follow their instructions, and it is presumed that instructions cure most errors." *Mahone*, 294 Mich App 212. Because a curative instruction could have cured the error, there was no prosecutorial error requiring reversal. It is highly unlikely that the curative instruction would have had an impact on the outcome of the case. The objectionable statements served only to slightly bolster the testimony of the prosecutor's expert and the case itself turned on whether the jury believed the complainant's testimony. Accordingly, defendant cannot show that the outcome of the trial would have been different if counsel had objected or moved for a mistrial.

In a Standard 4 brief[3], defendant raises several additional arguments, each of which will be addressed in turn. First, defendant argues that the victim's statements to police and her testimony was "prevaricated" and "perjured" and that his convictions are thus in violation of Due Process and invalid. We disagree.

In support of his position, defendant references the victim's written statement to the police in which she allegedly said the touching began in the summer of 2003 in a pool, and her trial testimony in which she said that the touching began in 2003 when they got a pool. Defendant argues that this was perjury and attaches aerial photographs to his brief that he maintains show there was no pool or hot tub on the property until 2005.

Preliminarily, Exhibit A, a photograph that purportedly shows there was no pool or hot tub in July 2005, does not identify the property photographed and, given the tree cover, does not

[3] Michigan Supreme Court Administrative Order 2004-6, Standard 4.

clearly show that there was no pool or hot tub. Regardless, exhibits not offered below cannot be considered by this Court on appeal. See *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004). Notably, this Court would have no way to determine the authenticity of the exhibits or derive any meaningful facts from them. Further, that the house in question did not have a pool until 2005 (if this were true) is irrelevant. The victim testified to acts of sexual abuse up until August of 2012. Whether the acts in the pool took place in 2003 or 2005 would not affect the propriety of the charge of CSC 2.

Defendant essentially asserts that the victim was lying and that he is innocent. "It is the province of the jury to determine questions of fact and assess the credibility of witnesses." *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). The jury determined that the victim was credible and found defendant guilty of the charged offenses. Defendant offers no compelling reason why such a determination should be disregarded. Merely pointing out inconsistencies and accusing the victim of perjury does not create an issue for appellate review.

Defendant's next argument is unclear. He cites *People v Serra*, 301 Mich 124; 3 NW2d 35(1942), for the proposition that res gestae witnesses must be endorsed on the information. However, *Serra* dealt with a res gestae witness who was endorsed on the information but was out of state, and addressed whether the prosecution had a duty to procure his attendance at trial. While known res gestae witnesses must be endorsed on the information, MCL 767.40a(1), defendant notes that Cottrell was not a res gestae witness. He appears to argue that he should not have been allowed to testify because he was not a res gestae witness and did not have personal knowledge, MRE 602, and because he was a "hired gun," as evidenced by the fact that he never spoke with the defense, and was therefore not a proper expert witness.

Cottrell was a proper expert witness. "Tom Cottrell" appears as a name on the prosecutor's witness list. Moreover, the rules of evidence clearly contemplate the use of expert witnesses. See MRE 702, 705. That the witness favored or was disposed towards favoring the prosecution would be a proper subject for cross-examination to establish bias, compare *Wilson v Stilwell*, 411 Mich 587; 309 NW2d 898 (1981), but so long as his testimony would satisfy the requirements of MRE 702, potential bias would not bar the testimony.

Defendant makes a conclusory statement that "Mr. Cottrell's testimony was a hearsay character attack on [defendant]." No hearsay objection was raised during Mr. Cottrell's testimony. It is clear from the record that none of his testimony was inadmissible as hearsay. It is unclear what defendant means when he says that Mr. Cottrell's testimony was a "character attack," other than that his opinion was unfavorable to the defense. That the prosecution's expert witness helped the prosecution does not transform the testimony into any kind of inadmissible character evidence.

Defendant next argues in his Standard 4 brief that the prosecutor intentionally avoided a potentially exculpatory line of questioning. Defendant couches his argument in terms of a prosecutor's duty to "seek justice" and "not merely convict," relying on ABA standard 3-1.2(c). However, ABA standard 3-1.1 establishes that the standards "are not intended to be used as criteria for the judicial evaluation of alleged misconduct of the prosecutor [or] to determine the validity of a conviction." Defendant cites no controlling authority for the proposition that a

prosecutor's duty to seek justice means that he or she must ask specific questions in pursuit of seeking the truth.

Defendant argues that the prosecution should have questioned the victim and her mother regarding the testimony of the detective, implying that there would have been inconsistencies between the victim's statements and those of the detective. However, the prosecutor determined what was relevant to his case-in-chief and to the extent defendant thought other matters should be brought to the jury's attention, defense counsel had adequate opportunity to cross-examine the witnesses. If defense counsel had become aware of an inconsistency, he could have asked about it during his cross-examination. Similarly, if counsel believed it was necessary for the jury to know of an incident involving the victim's nipple that could have been explained in a way that would suggest defendant had a medical and not a sexual purpose for touching it, he could have asked about it during cross-examination. The prosecutor did not commit error by asking fair questions and leaving it to the defense to address any inconsistencies on cross-examination.

Defendant next argues that his counsel was ineffective for failing to call certain witnesses and for counseling him not to testify. This claim is unpreserved and not supported by any record evidence and fails on that basis alone. However, we note that defendant attaches an email to his Standard 4 brief that was allegedly sent to the trial court judge in which defendant's proposed witness describes her former friendship with the victim and portrays the victim's mother as the problem in her life and defendant as a positive presence. Defendant suggests this would have damaged the victim's credibility. However, counsel could have legitimately determined as a matter of trial strategy that this was not significantly probative on that issue and that there was little if nothing to be gained by calling this person as a witness.

Defendant also argues that a "naturism" expert and a psychological expert should have been called to rebut Mr. Cottrell's testimony. However, defendant has not established that a credible psychology expert exists who would have a different opinion regarding the dynamics of child sexual abuse or that a "naturism" expert would have debunked the notion that his frequent nudity around the victim was a form of "grooming." Accordingly, he has not established that his counsel provided deficient performance by failing to call them as witnesses.

Regarding defendant's claim that he was provided ineffective assistance when counsel allegedly decided he should not testify because the prosecutor allegedly threatened to introduce an email from the victim to defendant if he did testify, the allegations are not of record. Defendant suggests that the prosecutor's actions were misconduct. However, if what defendant asserts is true, had defendant taken the stand, the prosecutor would have had the right to cross-examine him. If, in fact, the prosecutor did have a late-discovered incriminating document, he would have been at liberty to ask about it during cross-examination and use it for impeachment. Bringing the email to the attention of defense counsel was not misconduct.

Moreover, there is no indication that defense counsel provided deficient representation if he in fact counseled defendant not to testify. Even if defendant's testimony could have highlighted a possible motive for the victim to lie, as he asserts, there would have been a great risk that defendant would say something damaging to his own defense. Given that defendant had earlier made incriminating statements to a detective, it was likely a sound trial strategy not to

subject him to cross-examination. Accordingly, defendant has failed to establish ineffective assistance of counsel.

Defendant next argues, in essence, that the victim was lying and that the prosecutor committed an error by repeating her lies and repeating the charges against defendant. This argument has no merit. It appears that the prosecutor simply presented a theory of the case, called witnesses to support the theory, spoke of the elements of the crimes charged, and argued that the evidence presented at trial showed that the elements had been met. There is simply no basis to argue that this conduct constitutes error.

Next, defendant challenges the subject matter jurisdiction of the trial court because some of the sexual acts described by the victim took place out of state. Although defendant did not raise this issue below, "a challenge to subject-matter jurisdiction may not be waived and may be raised at any time." See *People v Richards*, 205 Mich App 438, 444; 517 NW2d 823 (1994). Whether a court has subject-matter jurisdiction is a question of law reviewed de novo. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

MCL 762.2 provides in relevant part:

> (1) A person may be prosecuted for a criminal offense he or she commits while he or she is physically located within this state or outside of this state if any of the following circumstances exist:
>
> (a) He or she commits a criminal offense wholly or partly within this state.
>
> * * *
>
> (d) A victim of the offense . . . resides in this state or is located in this state at the time the criminal offense is committed.
>
> (e) The criminal offense produces substantial and detrimental effects within this state.

Even if some of the events for which defendant was charged occurred in a hotel room outside of Michigan, MCL 762.2(1)(d) applies because the victim resided in Michigan at the time of the offense. Because the victim is a Michigan resident, the detrimental effects of defendant's criminal acts were also within the state of Michigan for the purpose of MCL 762.2(1)(e). Accordingly, there was no jurisdictional problem.

Finally, defendant argues that he was not provided with a requested transcript of the "Swear To and Issuance of the Complaint and Warrant," which was presided over by 12th District Court Judge Joseph Filip. Defendant addressed the request to a different judge, perhaps explaining the alleged failure to provide a transcript. Regardless, if defendant believed there was information pertinent to any issue on appeal in the transcript, the proper avenue would have been to order it immediately and possibly file a motion to extend time so that it could be considered by this Court. See MCR 7.211(B)(3). That the transcript is not before this Court is not, however, error requiring this Court to set aside the conviction.

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael F. Gadola
/s/ Colleen A. O'Brien