STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN MICHAEL MUSSER,

Defendant-Appellant.

UNPUBLISHED
February 21, 2012

No. 301765
Kent Circuit Court
LC No. 10-005943-FH

Before: SAWYER, P.J., and MURPHY, C.J., and O'CONNELL, J.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (engaging in sexual contact with a person under 13 years of age), and assault and battery, MCL 750.81, as a lesser included offense of the charged crime of assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g. Defendant appeals as of right. We affirm.

On May 11, 2010, Detectives Ed Kolakowski and William Heffron interrogated defendant in an interview room at the Kent County Sheriff's office. The eleven-year-old victim had accused defendant of putting his hand between her thighs, touching her breasts, and placing his thumb under the waistband of her jeans while she was pretending to sleep on a couch at defendant's house. The detectives' interview of defendant was video recorded. Many of the issues on appeal concern the playing of a DVD of the interview and defendant's side of a telephone conversation with his wife.

Defendant argues that the trial court erred in not redacting from the DVD of defendant's interview numerous statements made by Kolakowski and Heffron where they either vouched for the victim's credibility or disparaged his credibility.

We review a trial court's evidentiary decisions for an abuse of discretion. *People v Unger*, 278 Mich App 210, 216; 749 NW2d 272 (2008). An abuse of discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *Id.* at 217. However, defendant's claim of error is unpreserved regarding many of the detectives' statements that defendant identifies as improper on appeal because defendant posed no objection below to those statements. See *People v Bauder*, 269 Mich App 174, 177; 712 NW2d 506 (2005) ("[A]n issue is not properly preserved for appeal if it is not raised before the trial court."). We review

unpreserved claims of evidentiary error for plain error affecting the defendant's substantial rights. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).[1]

"Fundamentally, it is the province of the jury to assess the credibility of witnesses." *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005) (emphasis omitted). Consequently, it is improper for a witness to comment or provide an opinion on the credibility of another witness. *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). We acknowledge that some of the statements made by Kolakowski and Heffron during the interview would not be admissible had they been in the form of testimony by the two detectives at trial. However, we find no abuse of discretion or plain error in the trial court's decision to allow the prosecutor to include the questions and statements of the detectives in the DVD of defendant's interview. We agree with the trial court that the questions and statements of the detectives were "part of the interrogation" of defendant and that they "give meaning or context to the answers or lack of answers" by defendant. The jury needed to hear the entire context in which the answers were made in order to determine the weight to be given to defendant's answers and in order to simply understand and properly evaluate the answers. See *Dubria v Smith*, 224 F3d 995, 1001-1002 (CA 9, 2000) (statements and questions in a pretrial interview that gave context to the defendant's answers did not need to be redacted and, assuming error for failing to redact them, it was cured by giving the jury limiting, cautionary instructions); *State v Boggs*, 218 Ariz 325, 335; 185 P3d 111 (2008) ("Because [detective's] accusations were part of an interrogation technique and were not made for the purpose of giving opinion testimony at trial, we find no fundamental error."); *State v Ferguson*, 581 NW2d 824, 835-836 (Minn, 1998) (reading police interview transcript to the jury that included statements made by interrogating officer did not constitute presentation of improper vouching testimony requiring reversal, where the officer's questions and statements were read to give context to the defendant's answers, and where the court properly instructed the jury that it was not to consider the questions and statements as evidence); *State v O'Brien*, 857 SW2d 212, 221 (Mo, 1993) (statement that the defendant was lying was simply part of the give-and-take of the interrogation); *State v Castaneda*, 715 SE2d 290, 294 (NC App, 2011) ("The majority of appellate courts of other jurisdictions that have considered such statements[, fabrication accusations,] have held them admissible based on the rationale that such 'accusations' by interrogators are an interrogation technique and are not made for the purpose of giving opinion testimony at trial."); *People v Theis*, __ Ill App 3d __; __ NE2d __, issued December 20, 2011 (Docket No. 2-09-1080), slip op at 6 ("Detective['s] . . . statements

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[1] In fact, defendant stated below that he had no objections to anything on more than 35 pages of the interview transcript. Nine of the bulleted quotes set forth in defendant's brief as allegedly constituting improper vouching are found on transcript pages that were essentially approved of by defendant at the hearing on the motion in limine. Defense counsel's express approval of those transcript pages precludes defendant from arguing that anything on those pages was improperly admitted. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). Evidentiary arguments pertaining to those pages were waived. *People v Carter,* 462 Mich 206, 215, 219; 612 NW2d 144 (2000). We also note that defendant claims that Kolakowski's statement on line 6 of page 27 of the transcript was improper vouching. However, this line was ordered redacted by the trial court.

were made in the context of a videotaped interview to explain the logic of the interview and defendant's answers."); *Eugene v State*, 53 So3d 1104, 1112 (Fla App, 2011) (For purposes of giving context to an interview, "a jury may hear an interrogating detective's statements about a crime when they provoke a relevant response from the defendant being questioned.").[2]

The Minnesota Supreme Court in *Ferguson*, 581 NW2d at 835-836, noted that juries are capable of understanding that police "statements about the credibility of [a defendant] and other witnesses [are] a mere attempt to get [the defendant] to confess." In *Lanham v Commonwealth*, 171 SW3d 14, 27 (Ky, 2005), the Kentucky Supreme Court addressed the issue relative to credibility and vouching statements made during interrogation, observing:

> Such comments are not an attempt to describe to the jury the defendant's personality; nor are they statements aimed at impeaching a *witness,* especially when it is unknown whether a criminal defendant will take the stand. By making such comments, the officer is not trying to convince anyone—not the defendant (who knows whether he or she is telling the truth), other officers, a prosecutor, or the jury—that the defendant was lying. Rather, such comments are part of an interrogation technique aimed at showing the defendant that the officer recognizes the holes and contradictions in the defendant's story, thus urging him or her to tell the truth.
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> This last point is perhaps most important, at least for the purpose of developing a rule that will address future instances of similar evidence. Almost all of the courts that have considered the issue recognize that this form of questioning is a legitimate, effective interrogation tool. And because such comments are such an integral part of the interrogation, several courts have noted that they provide a necessary context for the defendant's responses. We agree that such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique, especially when a suspect's story shifts and changes. We also agree that retaining such comments in the version of the interrogation recording played for the jury is necessary to provide a context for the answers given by the suspect.

We agree with the caselaw from other jurisdictions cited above that allows a jury to hear the statements made by interrogating officers for purposes of context. Defendant contends that many of the challenged statements were part of introductory comments that set up particular questions, which questions could stand alone without the need for the prefatory statements; therefore, the statements were unnecessary for purposes of giving context to defendant's answers and should have been redacted. We disagree. The prefatory or introductory statements that led into or set up certain questions during the interrogation provided context for the questions

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[2] But see *State v Elnicki*, 279 Kan 47, 57; 105 P3d 1222 (2005) ("A jury is clearly prohibited from hearing such statements from the witness stand in Kansas and likewise should be prohibited from hearing them in a videotape, even if the statements are recommended and effective police interrogation tactics.").

themselves and defendant's answers. A proper evaluation and understanding of defendant's answers, his demeanor, and any physiological reactions required more than just hearing the questions themselves; the statements often set the tone for the questions.

Furthermore, contrary to defendant's arguments, the trial court's limiting instruction that the questions and statements of the detectives were not evidence and could only be used to provide context to defendant's answers was sufficient to cure any possible prejudice that defendant may have suffered. The instruction was specific to the interview, and it was given before the jury received any further evidence or heard additional testimony. A jury is presumed to follow its instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Finally, to the extent that defendant is also arguing that the statements should have been redacted under MRE 401-403, we find that, even if treated as evidence, the probative value of the statements was not substantially outweighed by the danger of unfair prejudice, where they provided context for defendant's answers and where any reasonable juror certainly understood that the statements were part of an effort to pressure defendant into making a confession, which did not transpire. See *Eugene*, 53 So3d at 1112 ("When placed in 'their proper context,' an interrogating detective's statements to a suspect could be understood by a 'rational jury' to be 'techniques' used by law enforcement officers to secure confessions.").

Defendant also argues that the trial court erred in not redacting from the DVD numerous statements of Kolakowski and Heffron that recounted inadmissible hearsay. According to defendant, the inadmissible hearsay included statements from the victim about when, where, and how defendant touched her.

The issue is generally unpreserved as defendant did not object below to any specific statements of Kolakowski and Heffron on the ground of hearsay. See MRE 103(a) (stating that a party must state a "specific ground" when objecting to the admission of evidence). Moreover, at the hearing on the motion in limine, defendant expressed that he had no objections to any language on certain transcript pages, and a majority of the alleged hearsay statements are found on those pages. Accordingly, those hearsay claims were waived. *People v Carter,* 462 Mich 206, 215, 219; 612 NW2d 144 (2000). In addition to the waiver and preservation problems, the argument also lacks substantive merit.

"'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Out-of-court statements not offered for the truth of their contents are not hearsay. *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009). Hearsay is not admissible except as provided by the rules of evidence. MRE 802. Here, the statements of the victim and others that Kolakowski and Heffron recounted during their interview of defendant were not hearsay. The statements that the two detectives mentioned were not used at trial to prove the truth of the matter asserted. MRE 801(c); *Mesik*, 285 Mich App at 540. Rather, the statements of Kolakowski and Heffron were used for the purpose of putting defendant's answers into context. See *People v Johnson*, 100 Mich App 594, 599; 300 NW2d 332 (1980) (officer's comments on the tape were offered to put the defendant's statements in the proper context, not to

prove the truth of the matter asserted; therefore, they were not hearsay). Accordingly, defendant's argument is without merit.[3]

Defendant next argues that the trial court erred when it allowed the DVD of his interview to be played when exchanges between him and the detectives regarding post-traumatic stress disorder, the taking of a polygraph test, and pornography, that had been ordered redacted, were not redacted from the DVD in the traditional sense. The volume was turned off during the redacted exchanges ordered by the court when the DVD was played, but defendant claims that the jury was able to read his lips. A trial court has discretion regarding the order and mode of presentation of evidence. *People v Stevens*, 230 Mich App 502, 507; 584 NW2d 369 (1998).

Error requiring reversal cannot be error to which the appealing party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999), overruled in part on other grounds *People v Thompson*, 477 Mich 146; 730 NW2d 708 (2007). Defendant negligently contributed, at the very least, to the prosecutor being unable to get a redacted version of the DVD by the start of trial. Defendant did not provide the trial court with a copy of the interview transcript until the Friday before trial started the following Monday. After the trial court decided defendant's motion to exclude irrelevant evidence, the prosecutor only had a few business hours before trial started to get a redacted version of the DVD. Defendant's failure to timely provide a copy of the interview transcript to the trial court precludes him from obtaining relief on this claim of error.

Regardless, defendant's argument that the jury could read his lips is not supported by the record. First, defendant made no objection after the DVD was played for the jury. Second, we have watched the DVD that defendant provided to this Court, and given the distance between the camera and defendant and the angle at which the camera is pointed, it would have been impossible for the jury to read defendant's lips, assuming that the jurors even had the acumen to accurately read lips.

Defendant also claims that the "secret recording" of his side of the telephone conversation with his wife while he was in the interview room at the sheriff's department violated his Fourth Amendment rights against unreasonable searches and seizures.

We need not decide this issue because, assuming that the issue was properly preserved and assuming that a constitutional violation occurred, admission of the evidence was harmless beyond a reasonable doubt; there was no prejudice. MCL 769.26; *People v Lukity,* 460 Mich 484, 495; 596 NW2d 607 (1999); *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). While we understand that the prosecutor has the burden to show that the presumed error was harmless beyond a reasonable doubt, we note that defendant provides no argument regarding

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[3] In his questions presented, defendant presents the argument that the trial court erred when it failed to redact from the DVD statements of Kolakowski and Heffron in which they evaluated the evidence. However, because no portion of defendant's brief on appeal corresponds to this question presented, defendant has abandoned the issue. *People v Knapp*, 244 Mich App 361, 374 n 4; 624 NW2d 227 (2001).

how the playing of the telephone conversation affected the verdict. In the telephone conversation, defendant did not admit to any of the victim's accusations. In addition, although the outcome of the trial rested on the jury's credibility determinations, the prosecutor never presented any argument that defendant was not credible based on anything that he said or did not say to his wife. Defendant's comments made during the phone conversation were not incriminating in any form or manner but were instead consistent with statements that would be made by an innocent person. Under these circumstances, we conclude that any presumed preserved error was harmless beyond a reasonable doubt. Accordingly, reversal is unwarranted.

Defendant next argues that, because a prosecutor may not appeal to the jury to sympathize with the victim or ask the jury to convict as part of its civic duty, the prosecutor committed misconduct when he placed before the jury the detectives' pleas to defendant that he sympathize with the victim and let the victim learn that adults make mistakes.

A prosecutor may not appeal to the jury to sympathize with the victim. *Unger*, 278 Mich App at 237. A prosecutor also may not urge the jury to convict the defendant as part of its civic duty. *People v Cox*, 268 Mich App 440, 452; 709 NW2d 152 (2005). Defendant concedes that the prosecutor did not ask for sympathy for the victim or for a conviction to teach certain lessons to the victim. He claims that the prosecutor cannot avoid responsibility for injecting those issues into trial when the prosecutor insisted that the jury hearing the statements of the detectives.

"A finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence." *Abraham*, 256 Mich App at 278. The prosecutor claimed below that the jury needed to hear the questions and statements of Kolakowski and Heffron in order to evaluate defendant's answers in context. There is nothing in the record to indicate that the prosecutor wanted the jury to hear any questions or statements of Kolakowski and Heffron so that he could place arguments before the jury that he himself could not make. In fact, the prosecutor did not object to the limiting instruction that the questions and statements of Kolakowski and Heffron could only be considered for the purpose of placing defendant's answers in context. There was no bad faith on the part of the prosecutor. Accordingly, we find no merit to defendant's claim of prosecutorial misconduct.

Finally, defendant argues that the trial court erred when it allowed Kolakowski to testify to what the victim told him during her interview. According to defendant, the victim's statements were not admissible under MRE 801(d)(1)(B) as prior consistent statements because the victim's motive to fabricate, avoiding discipline from her mother, arose before the victim was interviewed by Kolakowski.

Contrary to defendant's assertion, the victim's statements to Kolakowski were not admitted under MRE 801(d)(1)(B). Rather, as is clear from the trial court's response to defendant's hearsay objection, the victim's statements came in under "the 612, 613 series."[4] Because defendant fails to dispute the trial court's basis for allowing admission of the victim's statements to Kolakowski, we need not consider granting relief to defendant. See *Derderian v*

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[4] We assume that the trial court was referring to MRE 612 and 613.

Genesys Health Care Sys, 263 Mich App 364, 381; 689 NW2d 145 (2004) (When an appellant fails to dispute the basis of the trial court's ruling, this Court need not even consider granting plaintiffs the relief they seek.).

Moreover, the record establishes that defendant expressly consented to the prosecutor questioning Kolakowski about what the victim told him during the interview. In discussing the sidebar that occurred during cross-examination of Kolakowski, defense counsel stated that it was not "a big deal" and "that's fine" to let the prosecutor ask Kolakowski what the victim told him. "A defendant should not be allowed to assign error on appeal to something his own counsel deemed proper at trial. To do so would allow a defendant to harbor error as an appellate parachute." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998) (citation omitted). Accordingly, defendant cannot argue on appeal that the trial court erred when it allowed Kolakowski to testify to what the victim told him during the interview.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Peter D. O'Connell