STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2012
v	No. 305381 Muskegon Circuit Court
SEAN LEE STRANDBERG, Defendant-Appellant.	LC No. 10-059894-FC

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his convictions for one count of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(b), and three counts of second-degree CSC, MCL 750.520c(1)(b). His convictions arose from his molestation of his 14-year-old daughter. The trial court sentenced defendant to 12 to 30 years' imprisonment for his first-degree CSC conviction and to 4 to 15 years' imprisonment for each of his second-degree CSC convictions. The sentences are to be served concurrently. We affirm.

First, defendant argues the trial court erred in denying his motion for a mistrial after one of the prosecution witnesses made reference to the fact that defendant was offered a polygraph. We disagree. It is plain error to reference a polygraph test or a defendant's refusal to take a polygraph. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005); *People v Kahley*, 277 Mich App 182, 191 n 1; 744 NW2d 194 (2007). However, although reference to a polygraph examination is always error, it is not necessarily error that requires a mistrial. *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* at 514. In deciding whether a mistrial is an appropriate remedy for the mention of a polygraph, we may consider:

> (1) [W]hether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster the witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted. [*Id.*, citing *People v Yatooma*, 85 Mich App 236, 240; 271 NW2d 184 (1978).]

Here, because defendant objected and received a cautionary instruction, the first factor weighs in defendant's favor. *Id.* However, the second factor favors the prosecution because the witness's reference to the polygraph examination was an inadvertent misstep by one witness, unrelated to any efforts by the prosecution to place the information before the jury. The exchange was as follows:

> *Q.* Another interesting point. You didn't do an investigation and talk to the person who is being accused of child abuse and neglect?
>
> *A.* As stated previously, the investigation was coordinated with the Muskegon County Sheriff's Department and as part of the investigation, he absolutely was interviewed. He was offered a polygraph as well.

Having viewed the testimony in its entirety, the trial court determined the answer was responsive to the question posed by defense counsel. A trial court's finding of fact may not be set aside unless "clearly erroneous." MCR 2.613(C). "A finding of fact is clearly erroneous if, after a review of the entire record, an appellate court is left with a definite and firm conviction that a mistake has been made." *People v Antwine*, 293 Mich App 192, 194; 809 NW2d 439 (2011). Given that the witness explained early in her testimony that her investigation was coordinated with law enforcement, defense counsel's questions about the investigation and defendant's opportunity to "talk" could reasonably be taken as inviting commentary on the investigation generally. As such, we cannot conclude that the trial court's finding that her answer was responsive was clearly erroneous. MCR 2.613(C). However, we reject the argument that the questioning by defense counsel was "invited error"" that would waive the issue on appeal. "'Invited error' is typically said to occur when a party's own affirmative conduct directly causes the error." *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003). Where defendant invites the error, he may not seek to have it reviewed on appeal. *Id.* While the trial court did not clearly err in finding that the witness's answer was responsive, that conclusion does not necessitate the conclusion that defendant invited the error.

The third factor also weighs in favor of the prosecution because there was only one, brief reference to the polygraph examination. The fourth factor favors the prosecution because the witness did not mention the polygraph to enhance her credibility but to confirm that defendant had been investigated and provided an opportunity to speak on the allegations. There was no argument made to suggest that the polygraph had any bearing on credibility or truthfulness. Finally, the fifth factor also weighs in favor of the prosecution because the results of a polygraph examination were not introduced into evidence. Indeed, from the witness' statement, it is not even apparent if defendant submitted to a polygraph test. On the whole, it cannot be said the trial court erred in denying defendant's motion for a mistrial. This conclusion is supported by the trial court's thorough curative instructions which informed the jury that polygraphs were unreliable and inadmissible. The jurors were also told they could not consider the polygraph for "any purpose." "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Here, any potential harm to defendant was cured by the court's thorough instructions. *Ortiz-Kehoe*, 237 Mich App at 515.

Next, defendant argues the trial court erred in allowing a police officer and Child Protective Services investigator to read their reports chronicling their interview with the victim. Defendant failed to preserve his claims because, in the trial court, he objected on confrontation clause grounds rather than the evidentiary grounds he now asserts on appeal. MRE 103(a)(1); *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). Evidentiary issues are nonconstitutional, *People v Whittaker*, 465 Mich 422, 427; 635 NW2d 687 (2001), and this Court reviews unpreserved nonconstitutional claims for plain error affecting defendant's substantial rights, *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

We conclude that the trial court did not err in allowing the witnesses to read their reports into the record for the limited purpose of addressing defense counsel's claim that they failed to follow forensic interviewing protocol. One of the basic rules of evidence is that all logically relevant evidence is admissible, unless otherwise prohibited. MRE 402. Relevant evidence is that which has any tendency to make a fact of consequence more or less likely. MRE 401. In this case, the reports read into the record were in fact relevant to an issue of consequence. Throughout his cross-examination of the witnesses in question, defense counsel quizzed them on their understanding of forensic interview protocol[1] and challenged the propriety of the techniques they employed while interviewing the victim. In light of these questions by defense counsel, the reports chronicling the contents of the interview with the victim were relevant, MRE 401, and therefore, admissible unless otherwise excluded, MRE 402. Additionally, defendant had one of the witnesses read from her report during trial, thereby allowing the introduction of the rest of her report under the "rule of completeness." MRE 106. We do, however, emphasize that the better practice would have been to only read the notes on entirety of the questions asked by the examiner's which is the basis of a determination as to whether the examiner's adhered to the forensic protocol rather than the answers offered by the complainant ..

On appeal, defendant challenges the reading of the reports under MRE 801(d)(1)(B), arguing that the prosecution failed to meet the criteria for the introduction of a prior consistent statement. What defendant ignores is that the prosecution did not introduce the reports under MRE 801(d)(1)(B). While the reports may not have been admissible under MRE 801(d)(1)(B), evidence inadmissible for one purpose may nevertheless be admitted for a different purpose. *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). In this case, the reports were offered to explain to the jury how the interview was conducted and not to rehabilitate the victim's credibility. As such, and the prosecution was not required to satisfy the criteria of MRE 801(d)(1)(B). Moreover, insofar as defendant's argument suggests the reports were hearsay, we disagree. Because the reports were not read to the jury to assert the truth of the victim's accusations to the interviewers, they were not hearsay. MRE 801(c). As relevant, non-hearsay evidence, the reports were admissible regardless of whether the prosecution satisfied the criteria of MRE 801(d)(1)(B).

Related to the introduction of the reports, defendant also asserts that the probative value of the reports was substantially outweighed by the prejudicial effect to defendant. Evidence may

[1] The use of specific interview techniques with children is mandated by MRE 722.628(6).

be excluded under MRE 403 when "its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. However, merely being prejudicial does not render evidence inadmissible. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). Evidence is only inadmissible under MRE 403 when it is *unfairly* prejudicial, that is, "when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The trial court is in the best position to weigh prejudice and probative value, and to gauge the effect of proposed evidence. *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003).

In this case, the reports had significant probative value in helping the jury evaluate whether the interview was conducted in accordance with interviewing protocol and whether the victim was induced into making accusations. Moreover, there was no prejudice to defendant because the substance of the reports merely reiterated the victim's testimony. See *People v Rodriquez*, 216 Mich App 329, 332; 549 NW2d 359 (1996). Additionally, any potential prejudice was cured by the court's instruction providing, in part, that the reports were offered for the "limited purpose of explaining how the interview was conducted" and that the jury could "not consider it for the purpose of determining whether what [the victim] said in the interview was true." *People v Pesquera*, 244 Mich App 305, 320; 625 NW2d 407 (2001). Given the probative value of the evidence and the lack of prejudice to defendant, the trial court did not commit plain error by allowing the reports to be read on the record.

In a standard 4 brief, defendant raises several additional arguments for our consideration on appeal. We find these additional claims to be without merit. First, defendant argues the trial court incorrectly instructed the jury relating to first-degree CSC when the court defined "sexual penetration" to include penetration of the labia majora. Defendant waived review of the jury instructions because his trial counsel expressly approved the instructions. *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). Moreover, the instruction was a correct statement of the law as this Court has long recognized that, as used in MCL 750.520b, "sexual penetration" includes penetration of the labia majora. *People v Bristol*, 115 Mich App 236, 238; 320 NW2d 229 (1981).

Second, defendant argues that the trial court erred in allowing the prosecution to play a recording made in defendant's home by a police officer during an interview with defendant. Defendant argues that the conversation was recorded in violation of his constitutional rights to be free from unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. We conclude that defendant waived review of the issue when, rather than objecting to the excerpts the prosecution intended to play, defendant affirmatively asked the trial court to play the entire interview for the jury and then relied on his denials during the conversation as part of his defense. "A defendant will not be heard to introduce and use evidence to sustain his theory at trial and then argue on appeal that the evidence was prejudicial and denied him a fair trial." *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001). Moreover, because the officer in question was a participant in the conversation with defendant, there was no constitutional violation. "Warrantless participant monitoring" does not violate a reasonable expectation of privacy under either the United States or Michigan Constitutions. *United States v White*, 401 US 745, 752; 91 S Ct 1122; 28 L Ed 2d 453 (1971); *People v Collins*, 438 Mich 8, 11, 32-40; 475 NW2d 684 (1991), overruling *People v Beavers*, 393 Mich 554, 566; 227 NW2d 511 (1975).

The fact that the interview occurred in defendant's home is largely irrelevant as it is well recognized that "the Fourth Amendment protects people, not places." *Katz v United States*, 389 US 347, 351; 88 S Ct 507; 19 L Ed 2d 576 (1967). We also note that defendant's reliance on MCL 750.539c is misplaced. In analyzing MCL 750.539c, this Court has concluded that "a participant in a private conversation may record it without 'eavesdropping' because the conversation is not the 'discourse of others.'" *Lewis v LeGrow*, 258 Mich App 175, 185; 670 NW2d 675 (2003). Defendant's argument also ignores MCL 750.539g(1) which specifies that MCL 750.539c does not prohibit "[e]avesdropping or surveillance" by police officers in the performance of their duties. There was no error in the admission of the recording of the police officer's conversation with defendant.

Third, defendant raises numerous claims of prosecutorial misconduct. Defendant's claims are unpreserved because defendant failed to offer timely and specific objections. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *Id.* Prejudice from prosecutorial misconduct that could have been alleviated with a curative instruction does not amount to plain error warranting reversal. *Id.* at 329-330.

Defendant first argues that the prosecutor impermissibly vouched for the victim's credibility. It is well recognized that "the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor may argue, based on the facts and testimony presented, that a witness is worthy of belief. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). A review of the record reveals that the prosecutor did not claim special knowledge of the victim's veracity, instead, based on facts before the jury, the prosecutor argued that the victim was worthy of belief. This was not misconduct. *Id.*

Next, defendant argues that the prosecution argued facts not in evidence. As a matter of law, prosecutor may not "mischaracterize the evidence presented," *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001), or "argue a fact to the jury that is not supported by evidence," *Callon*, 256 Mich App at 330. However, "a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Id.* Defendant presents numerous statements from the prosecution that he claims were not based on the evidence. Having reviewed the record, we conclude the majority of the statements referenced by defendant were correct statements of the evidence or reasonable inferences arising from the evidence. As such, they do not constitute prosecutorial misconduct. *Id.* However, we agree with defendant that the prosecutor misstated testimony by suggesting defendant's wife removed the victim from the home for two or three days after she learned of the abuse and that the victim told a friend about the abuse weeks before she revealed the abuse to anyone else. The record shows that defendant's wife returned to the family home one day after learning of the abuse and that the victim's friend could not remember precisely when the victim disclosed the abuse. However, defendant has not shown how such misstatements (or any of his claimed prosecutorial misstatements) altered the outcome of the proceedings. *Carines*, 460 Mich at 763. Moreover, to the extent the prosecution misstated a fact, the jury was instructed to rely on the evidence and specifically informed that the "the lawyers statements and arguments are evidence." Any

potential prejudice arising from the prosecution's statements was cured by the jury instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

To the extent defendant challenges the prosecutor's references to the labia majora, his claim is also without merit. "A prosecutor's clear misstatement of the law that remains uncorrected may deprive a defendant of a fair trial." *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). However, in this case, the prosecutor did not misstate the law. The prosecutor referenced the same definition read by the trial court: "Genital opening includes the inside of the labia majora." This is an accurate legal definition of genital opening. *Bristol*, 115 Mich App at 238.

Fourth, defendant argues he was denied the effective assistance of counsel. Defendant failed to move the trial court for a new trial or to request an evidentiary hearing, accordingly, his claim is unpreserved and review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658; 620 NW2d 19 (2000). To establish the ineffective assistance of counsel, defendant bears the burden of demonstrating: (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v Meissner*, 294 Mich App 438, 459; 812 NW2d 37 (2011). Defendant has the burden of establishing the factual predicate of his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The effective assistance of counsel is presumed, and "[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).

Defendant argues counsel should have explored several areas during trial. As an initial matter, it should be noted that defendant fails to provide any verification of any of the "facts" he argues counsel should have explored. As such, defendant has failed to meet his burden of establishing the factual predicate of his claim. *Hoag*, 460 Mich at 6. Moreover, it is well recognized that what evidence to present, how to question witnesses and whether to impeach a witness are presumed to be matters of trial strategy. *Rockey*, 237 Mich App at 76; *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008); *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). Counsel's decisions were matters of trial strategy, which will not be second guessed on appeal.

On appeal, defendant also argues counsel was ineffective for failing to object to the admission of the recorded conversation between defendant and the police. As discussed, under the concept of participant monitoring, it was not a violation of defendant's rights for a police officer to record her conversation with defendant. *Collins*, 438 Mich at 32-40. As such, the recorded conversation was admissible and defense counsel's objection would have failed. *Id.* Because counsel is not required to advocate a meritless position, or make a futile objection, defense counsel was not ineffective for failing to object to the recording. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000); *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Defendant also argues that counsel was ineffective for failing to object to statements made by the prosecution during closing arguments. As discussed, the majority of the

prosecution's statements were proper argument that the victim was worthy of belief, *Dobek*, 274 Mich App at 66, permissible arguments or reasonable inferences arising from the evidence, *Callon*, 256 Mich App at 330. Similarly, the prosecution's definition of genital opening to include the labia majora was a correct statement of the law. *Bristol*, 115 Mich App at 238. Objection to these proper statements would have been futile, and defense counsel was not ineffective for failing to raise such meritless objections. *Snider*, 239 Mich App at 425; *Thomas*, 260 Mich App at 457. To the extent the prosecutor misstated facts by suggesting defendant's wife took the children away from the home for two or three days or that the victim's friend knew of the abuse before anyone else, any error was cured by the court's instruction that "[t]he lawyers statements and arguments are not evidence," and that "you should only accept things the lawyers say that are supported by the evidence, or your own common sense and general knowledge." Jury instructions can cure inappropriate prosecutorial statements and jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235. Because any error was cured by the jury instructions, defendant cannot establish that counsel's failure to object prejudiced him in anyway. *Meissner*, 294 Mich App at 459.

Finally, defendant argues there was not probable cause to bind him over to trial on a charge of first-degree CSC. Because defendant did not file a motion to quash, his claim is unpreserved for review. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). Because defendant's claim is unpreserved it is reviewed for plain error affecting his substantial rights. *Id.* at 658, citing *Carines*, 460 Mich at 763. Additionally, "[t]he decision whether alleged conduct falls within the statutory scope of a criminal law involves a question of law, which this Court reviews de novo." *Id.* As defendant argues, first-degree CSC requires "sexual penetration." MCL 750.520b. As discussed, "sexual penetration" of a genital opening includes penetration of the "labia majora." *Bristol*, 115 Mich App at 238. The victim's testimony at the preliminary hearing, that defendant put "his private part in the - - in between the vagina cheeks," established penetration of the labia majora and provided probable cause to bind defendant over for trial on a charge of first-degree CSC. There was no error. Moreover, any potential error was harmless because the prosecution presented sufficient evidence at trial to convict defendant of first-degree CSC. *People v Bennett*, 290 Mich App 465, 481; 802 NW2d 627 (2010).

Under his claim relating to his bindover, defendant argues the decision to include a charge of first-degree CSC was an act of prosecutorial vindictiveness. Defendant failed to raise this claim in his questions presented, it is therefore improperly presented and we need not consider the issue. MCL 7.212(C)(5). Nevertheless, we note that there is no evidence of prosecutorial vindictiveness. Defendant attempts to prove his claim by indicating that the prosecutor indicated he would add additional charges if defendant did not agree to plead guilty to second-degree CSC. However, prosecutorial vindictiveness will not be presumed merely because "defendant refuses to plead guilty and forces the government to prove its case." *People v Jones*, 252 Mich App 1, 8; 650 NW2d 717 (2002). Accordingly, in this case, defendant bears the burden of establishing actual prosecutorial vindictiveness. *People v Ryan*, 451 Mich 30, 35; 545 NW2d 612 (1996). Defendant failed to meet this burden as he has not shown any evidence of hostility or threat. *Id.* "The mere threat of additional charges during plea negotiations does not amount to actual vindictiveness where bringing the additional charges is within the prosecutor's charging discretion." *Id.* at 36. Defendant has not established that the prosecutor's charging decision was in violation of the law or constitution. *People v Barksdale*, 219 Mich App

484, 488; 556 NW2d 521 (1996). Instead, as discussed, the first-degree CSC charge was warranted in light of the victim's preliminary examination testimony. *Ryan*, 451 Mich at 35.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens