STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 16, 2012
v	No. 306271 Mackinac Circuit Court
ROBERT THOMAS SAWYER, Defendant-Appellant.	LC No. 2011-003340-FH

Before: SAAD, P.J., and WHITBECK and M. J. KELLY, JJ.

PER CURIAM.

A jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c (multiple variables), and two counts of accosting a child for immoral purposes, MCL 750.145a. The complaining witness was defendant's daughter. The trial court sentenced defendant to serve concurrent terms of imprisonment of 57 to 180 months for the CSC conviction and one year for each accosting conviction, with credit for 158 days' served. For the reasons set forth below, we affirm.

I. EVIDENTIARY ISSUES

Defendant argues that the trial court admitted evidence that denied him a fair trial. We hold that defendant's arguments largely lack merit, and where error did occur, it was harmless.

"The decision whether to admit evidence is within the trial court's discretion, which will be reversed only where there is an abuse of discretion." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). An abuse of discretion occurs where the trial court's decision falls outside the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "However, decisions regarding the admission of evidence frequently involve preliminary questions of law, such as whether a rule of evidence or statute precludes admitting of the evidence." *Gursky*, 486 Mich at 606. Questions of law are subject to review de novo. *Id.*

Evidence must be relevant in order to be admissible. MRE 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. See also *People v Small*, 467 Mich 259, 264; 650 NW2d 328 (2002). Even where relevant, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." MRE 403. For purposes of the latter rule, evidence should be excluded

where "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; 596 NW2d 607 (1999).

Defendant argues that the trial court abused its discretion in admitting testimony based upon the victim's school attendance records, on the ground that the records in question were never provided to the defense. However, the purported testimony about which defendant complains was never actually admitted. A review of the dialogue cited by defendant shows that no error occurred:

> *Prosecutor*: Was she out on December 15th?
>
> *Defense counsel*: I object.
>
> *The court*: Nature of the objection . . . ?
>
> *Defense counsel*: Well, I was provided with an attendance records [sic] that [the prosecuting attorney] had provided me, but they start in January. So whether she was gone in December, I didn't have any record of that.
>
> *The court*: Well, it limits it to the reference point of the exhibit. It sounds like February, March; but if [defense counsel] doesn't have the same exhibit that's being referenced here, try to curtail your testimony to the same time that's consistent with the exhibit.

Following this exchange, the prosecutor asked a question unrelated to attendance dates, and did not at any time attempt to revisit the question of whether the victim was in school on December 15. After defense counsel's successful objection, the testimony was not admitted, and therefore, there is no error to review on appeal.

Defendant contends that the trial court abused its discretion by allowing the victim's high school principal to give her opinion concerning the victim's psychological state. The disputed exchange was as follows:

> *Prosecutor*: Were there times when [the victim] would have come into your office crying?
>
> *Witness*: Yes.
>
> *Prosecutor*: Would she tell you why?
>
> *Witness*: [The victim] was very depressed. She had very low self-esteem. If she got into any kind of—
>
> *Defense counsel*: I'm going to object here. What do you mean? I mean, is this clinical evaluation that she's depressed?
>
> *The court*: This witness hasn't been sworn as an expert, so any testimony she would be providing would be that of a lay person and general impression.

> And that is—that is a fair statement. But having not had her sworn as anything other than a lay person, then it's only lay opinion.

Pursuant to MRE 701, "[i]f the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Here, the witness was not qualified as an expert, but testified regarding what she observed of the victim's emotional state.

Because of the witness's familiarity with the victim, including firsthand experience meeting with, and consoling her during the period in which the incidents occurred, her opinions that the victim was "depressed" and "had very low self-esteem" were reasonably based on her own perception, and were helpful in understanding the victim's emotional state during the time in question. Contrary to defendant's assertion, the witness's opinion was not offered as an expert diagnosis of any psychological or medical condition. A lay witness may testify regarding medical questions if the matter involves something the witness knows and if it does not require expertise. See *Gibson v Traver*, 328 Mich 698, 702; 44 NW2d 834 (1950). As one example, this Court has held that a lay witness may express an opinion concerning the mental condition of the accused at the time of the charged offense. *People v Drossart*, 99 Mich App 66, 73; 297 NW2d 863 (1980). The trial court did not abuse its discretion in allowing the victim's school principal to give her lay opinion of the victim's mental or emotional condition.

Defendant claims that the trial court abused its discretion in allowing the victim's mother to testify that the victim was not "some sort of little girl trying to get revenge against her dad." Defense counsel objected, arguing that the prosecutor was eliciting irrelevant speculation. The court agreed that the testimony sought was speculative, but stated that it also was a present-sense impression, and overruled the objection.

Among the exceptions to the general prohibition of hearsay is "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1). But nothing about the witness's characterization of the victim constituted a present-sense impression. Indeed, the proffered testimony did not even constitute hearsay, because it was not recitation of an unsworn statement offered to prove the truth of the matter asserted. See MRE 801.

The challenged testimony was relevant, however, because it sought to refute defendant's characterization of the motivation behind the victim's allegations as retaliation for an argument, and his disapproval of her choice to undertake a home-based learning program. See MRE 402.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403. This Court has held that "a trial court may exclude evidence as speculative." *Harrison v Grand Trunk Western R Co*, 162 Mich App 464, 469; 413 NW2d 429 (1987), citing MRE 403.

Here, victim's mother's testimony concerning the victim's state of mind was by its very nature somewhat speculative; the witness could not definitively know her daughter's state of mind or motivations in bringing allegations of abuse by defendant to light. But she could form reasonable opinions on the basis of her observations of her daughter and her daughter's relationship with defendant. Further, the challenged testimony regarding the victim's relationship with defendant and her possible motivations for bringing the allegations to light was brief, straightforward, and relevant to the issue of the victim's credibility. Thus, although the challenged testimony consisted of the witness's subjective opinions based on the victim's behavior and relationship to defendant, the trial court did not abuse its discretion in admitting the evidence, because its probative value was not substantially outweighed by the risk of unfair prejudice to defendant.

Defendant further asserts that a deputy sheriff's testimony regarding defendant's prior arrest was irrelevant and should have been excluded. The prosecutor asked the deputy if he had met with the victim before interviewing her in connection with this case, which prompted the following exchange:

> *The witness*: Another incident, yes, which I can't recall. It was probably August to October some time. I believe the year before, if I'm not mistaken. Myself and [an undersheriff] went to actually arrest [defendant] on a—
>
> *Defense counsel*: Objection. Prior act evidence.
>
> *Prosecutor*: The testimony as far as what the police contact, none of those are necessarily relevant. And it's not even for a criminal matter. However, the—
>
> *The court*: Had nothing to do with a criminal matter?
>
> *Prosecutor*: Correct. I believe the criminal matters are basically civil.
>
> *The court*: So you are talking Family Court support issue?
>
> *Prosecutor*: Correct.
>
> *The court*: Limited. Continue, but limited.

The deputy went on to testify that he had to pick up defendant for a matter relating to child support. We agree with defendant, and apparently the prosecutor as stated above, that testimony relating to defendant's earlier arrest was irrelevant, because it had no bearing on any fact of consequence to the determination of any matter at issue. See MRE 401. Consequently, any evidence relating to defendant's arrest stemming from failure to pay child support should have been excluded.

However, the testimony elicited as a result of questioning over defendant's earlier arrest was actually favorable to defendant, and therefore any error in admitting the evidence was harmless. The deputy went on to testify regarding the victim's attitude when defendant was arrested, stating that she did not respond very well, "had a few choice words" for him and the

undersheriff, and was extremely upset. The witness further opined that the victim was supportive of defendant, and did not "have it in" for him.

"Evidentiary error does not merit reversal unless it involves a substantial right, and after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative." *People v Moorer*, 262 Mich App 64, 74; 683 NW2d 736 (2004). Defendant does not set forth any colorable argument that admission of challenged testimony may have been outcome determinative. Indeed, when viewed as a whole, his testimony may have actually been beneficial to defendant, because it showed that the victim was a supportive and loving daughter in the face of defendant's arrest. For these reasons, the trial court's error in admitting evidence of defendant's prior arrest was harmless, and thus does not warrant reversal.

Defendant also argues that the trial court erred in allowing the prosecutor to question defendant regarding his teardrop tattoos, on the grounds that the evidence was irrelevant, highly prejudicial, and inflammatory. After establishing that defendant had three permanent teardrop tattoos that he had given himself, the prosecutor continued, "[h]omemade tattoos, and that's what, to say your children are dead to you?" Defense counsel objected on grounds of relevancy, to which the prosecutor replied, "it's a form of verbal communication of [defendant's] going out and getting those, explaining the significance of those." The trial court overruled the objection, allowing further inquiry. When pressed as to the significance of the tattoos, defendant responded, "It's one for all three of my kids because I care about my kids. I love my kids."

We conclude that the trial court erred in admitting evidence related to defendant's tattoos. The evidence had no bearing on any fact of consequence, in other words wholly unrelated to the charges brought against defendant. The prosecutor's questioning of defendant concerning whether his children were "dead to him" was also inflammatory and prejudicial. However, given the larger context of the question, in which defendant explained that he loved his children and that the teardrop tattoos were meant to symbolize that love and concern, it is unlikely that the error was outcome determinative. The victim gave extensive, detailed testimony of the incidents involving defendant. Therefore, it is highly unlikely that the result would have been different had there been no discussion of defendant's tattoos. Accordingly, despite the trial court's error in admitting this evidence, reversal is not warranted because it was not outcome determinative. See *Moorer*, 262 Mich App at 74.

Finally, defendant asserts evidentiary error with respect to the admission of the Friend of the Court's testimony regarding defendant's payment of child support in person on January 11, 2011. Defendant's argument that the testimony was irrelevant lacks merit. The Friend of the Court testified that according to her records, defendant made a payment in person on a certain date. Defense counsel objected on grounds of relevancy, but the court overruled the objection and allowed the testimony. We hold that the evidence was relevant, because it provided support for the victim's allegations that she accompanied defendant to the courthouse in St. Ignace when absent from school, on an occasion where the victim further alleged that defendant solicited sex from her on the return trip. According to the prosecutor, the date of the payment was consistent with the victim's school attendance records showing an absence that day. However, we recognize the risk of unfair prejudice, because the prosecutor insinuated that the payment was made to cancel an outstanding bench warrant against defendant. However, we hold that the

single mention that the payment was made to cancel a bench warrant was not so prejudicial that it substantially outweighed the probative value of the challenged evidence.

In sum, the only evidentiary errors cited were harmless. A criminal defendant is entitled to a fair trial, not a perfect one. *People v Mosko*, 441 Mich 496, 503; 495 NW2d 534 (1992). Reversal is not warranted.

II. DIRECTED VERDICT

Defendant maintains that the trial court erred in failing to rule immediately on his motion for directed verdict. However, the issue whether the trial court followed proper procedure in responding to defendant's motion was not raised before, or decided by, the trial court, and so it has not been preserved for appellate review. See *People v Pipes*, 475 Mich 267, 277; 715 NW2d 290 (2006). This Court reviews unpreserved claims of error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where plain error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

When defendant moved the trial court for a directed verdict at the close of the prosecution's case-in-chief, the court took the motion under advisement, stating that it would issue a ruling before final instructions. This ran afoul of the requirement that a court entertaining a motion for a directed verdict at the close of the prosecutor's proofs "not reserve decision on the defendant's motion." MCR 6.419(A). Therefore, we agree that plain error occurred. However, reversal is not required, because defendant fails to show that his substantial rights were affected.

Defendant offers the bare assertion that a motion for directed verdict "provides the accused with an opportunity to evaluate the accuracy of the trial court's view of the prosecution's evidence," but fails to explain how having such an understanding of the trial court's view of the evidence would have affected defendant's tactical decisions in this case. The prosecution presented evidence sufficient to prove defendant's guilt beyond a reasonable doubt with respect to the charged crimes, especially the extensive testimony by the victim detailing various incidents involving defendant. Thus, defendant has failed to carry his burden of persuasion by showing that the error in any way affected the outcome of the proceedings below. See *Carines*, 460 Mich at 763.

III. JURY INSTRUCTIONS

Defendant argues that the trial court failed to instruct the jury properly with respect to the counts of accosting a child for immoral purposes, and that as a result, he was denied a fair trial. We disagree.

Jury instructions that involve questions of law are reviewed de novo, but a trial court's determination whether an instruction is applicable to the facts of the case is reviewed for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, defendant did not object to the jury instructions as given, thus leaving this issue unpreserved. See *Pipes*, 475 Mich at 277. Our review is therefore for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763.

"A criminal defendant has a constitutional right to have a jury determine his or her guilt from its consideration of every essential element of the charged offense." *Kowalski*, 489 Mich at 501. However, "[i]nstructional errors that omit an element of an offense, or otherwise misinform the jury of an offense's elements, do 'not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.'" *Id.*, quoting *Neder v United States*, 527 US 1, 9; 119 S Ct 1827; 144 L Ed 2d 35 (1999) (italics in original). "Accordingly, an imperfect instruction is not grounds for setting aside a conviction if the instruction fairly presented the issues to be tried and adequately protected the defendant's rights." *Kowalski*, 489 Mich at 501-502.

The statute in question reads, in pertinent part, as follows:

> A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual who he or she believes is a child less than 16 years of age with intent to induce or force that child to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony . . . . [MCL 750.145a.]

Our Supreme Court has identified the elements of the offense:

> Because the Legislature used the disjunctive term "or," it is clear that there are two ways to commit the crime of accosting a minor. A defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) accosted, enticed, or solicited (2) a child (or an individual whom the defendant believed to be a child) (3) with the intent to induce or force that child to commit (4) a proscribed act. Alternatively, a defendant is guilty of accosting a minor if the prosecution proves beyond a reasonable doubt that the defendant (1) encouraged (2) a child (or an individual whom the defendant believed to be a child) (3) to commit (4) a proscribed act. [*Kowalski*, 489 Mich at 499.]

Here, the trial court gave the jury the following instruction:

> Accosting or enticing or soliciting a child for immoral purposes. . . .
>
> To prove this charge the Prosecutor must prove each of the following elements beyond a reasonable doubt:
>
> First, that the Defendant believed he was engaging with a child under the age of 16 years;
>
> Second, that the . . . Defendant's intent was to induce the child to commit an immoral act or an act of sexual intercourse or an act of gross indecency or

> other acts of depravity or delinquency or did encourage said person to engage in one of those acts;
>
> Third, that the Defendant actually accosted, enticed, solicited [the complainant] to engage in an immoral act or act of sexual intercourse or an act of gross indecency or other acts of depravity or delinquency.

Defendant argues that the instructions failed to include some elements of the charged offense, pointing out that the instruction, although stating that the prosecutor must prove that defendant's intent was to induce the child to commit an immoral act, failed to mention that defendant could also be convicted if defendant intended to force the child to commit either an immoral act or to submit to a proscribed act. Defendant additionally argues that the age requirement should have been repeated following the portion of instruction regarding "encouraging" and that "said person" was an inadequate substitute. We disagree with both contentions.

Regarding the purported age omission, the instruction began by stating that defendant had to believe that he was engaging with a child under sixteen years old. The portion of the instruction cited by defendant as improper referred to the child/victim as "said person." In context, it is clear that "said person" reiterated the reference to a child under sixteen years old. Accordingly, that word choice did not render the instruction deficient.

Defendant's contention that the trial court erred in failing to include the terms "force" or "submit" is also unavailing. *Kowalski* identified alternative bases for conviction under the applicable statute. 489 Mich at 499, citing MCL 750.145a. The instructions given identified all elements for one of the two possible bases for conviction under the applicable statute. Accordingly, the instruction included all elements of the charged offense, fairly presented the issues to be tried, and adequately protected defendant's rights.

IV. PROSECUTORIAL MISCONDUCT

Defendant asserts that several alleged occurrences of prosecutorial misconduct denied him a fair trial. Defendant argues this issue by recasting his evidentiary issues, as discussed above, under the rubric of prosecutorial misconduct. This strategy is unavailing. "A finding of prosecutorial misconduct may not be based on a prosecutor's good-faith effort to admit evidence." *People v Abraham*, 256 Mich App 265, 278; 662 NW2d 836 (2003).

We rejected above defendant's demand for a new trial based on his evidentiary issues, concluding that most appellate objections lacked merit, and that the few that did have merit nonetheless resulted in harmless error. And defendant offers no reason why we should doubt the prosecutor's good faith in seeking to have any of the challenged evidence admitted. Further, no prosecutorial misconduct objections were raised at trial. See *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Moreover, any impropriety in anything the prosecutor said at trial should have been cured by the trial court's instruction to the jury to decide the case solely on the basis of the evidence, and that the statements, arguments, or questions of the attorneys were not evidence. "Jurors are presumed to follow instructions, and instructions are presumed to cure most errors." *Petri*, 279 Mich App at 414. For these reasons, we reject this claim of error.

V. ASSISTANCE OF COUNSEL

Defendant also argues that he was denied effective assistance of counsel through a variety of purported errors. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because no evidentiary hearing was held on the question of counsel's effectiveness, this Court's review is limited to mistakes apparent on the record. See *People Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

Both the United States and the Michigan Constitutions guarantee a defendant the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. This right to counsel includes the right to effective assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Our Supreme Court has held that the Michigan Constitution guarantees a defendant the same right to counsel as the United States Constitution, and Michigan has adopted the standard for evaluating the effectiveness of counsel set out by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 318; 521 NW2d 797 (1994).

Defense counsel is presumed to be effective. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). To prevail, a defendant must overcome the strong presumption that counsel employed prudent trial strategy. *Id*. The defendant "must show that counsel's performance was deficient," which "requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment." *Strickland*, 466 US at 687. The defendant must show that counsel's "representation fell below an objective standard of reasonableness." *Id.* at 688. A reviewing court should not substitute its judgment on trial strategy for that of counsel. *People v Cline*, 276 Mich App 634, 637; 741 NW2d 563 (2007). The defendant must also show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Strickland*, 466 US at 694.

Defendant argues that trial counsel was ineffective for declining to question defendant concerning the truth of the victim's allegations against him. Defendant suggests that the failure to give him an opportunity to expressly deny all charges meant that the defense conceded the truth behind the criminal charges. However, "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Here, trial counsel did elicit from defendant his denial of any involvement of drugs in his relationship with the victim, that defendant had a good relationship with the victim, and that she was mad at him for once sneaking out with a friend and for disapproving of her choice to take a home-based learning course. This falls within the presumption that counsel employed a prudent strategy, refraining from asking questions of defendant that might elicit incriminating testimony from him, or damaging cross-examination from the prosecutor. Further, other than defendant's highly speculative assertion that not directly inviting defendant to deny each allegation against him constituted a confession of guilt, defendant has failed to suggest how the result would have been different if trial counsel had employed a different strategy in this regard.

Defendant also argues that counsel was ineffective for failing to object to the jury instructions regarding the offense of accosting a child for immoral purposes. However, as discussed above, the instructions as given included all elements of the charged offense, fairly presented the issues to be tried, and adequately protected defendant's rights. Because there was no error in the jury instruction given by the trial court, trial counsel was not ineffective for failing to object to the instructions. An attorney's decision not to make a meritless objection cannot support a claim of ineffective assistance of counsel. See *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

Defendant asserts that trial counsel was ineffective for failing to move the trial court for a mistrial on the basis of improper admission of the evidence has challenged on appeal, as discussed above. However, counsel did raise each of those challenges below. Again, defendant's evidentiary challenges were mostly without merit, and what little error defendant has brought to light was harmless. Consequently, it would have been futile for trial counsel to move for a mistrial on the basis of the evidence of which defendant makes issue. *Fonville*, 291 Mich App at 384. There was no error on counsel's part in this regard.

Defendant argues that trial counsel was ineffective in failing to investigate the school records listed as an exhibit by the prosecution. See *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005) (failure to investigate can constitute ineffective assistance of counsel). However, it is clear from the record that there was no such failure on trial counsel's part. When the prosecutor questioned the victim's principal regarding the victim's attendance on a certain date, trial counsel immediately and successfully objected, arguing that he had not received any records for the date in question. The trial court then limited testimony concerning the victim's school attendance to the period for which the defense received records. This shows that trial counsel was familiar with this case, and well prepared for trial. Defendant has thus failed to show that counsel's assistance was ineffective in this respect.

Defendant asserts that trial counsel was ineffective in failing to challenge, outside the presence of the jury, the admissibility of testimony of the Friend of the Court regarding a child support payment made by defendant. Defendant suggests that, because trial counsel objected to the testimony repeatedly, and also argued the matter, in the presence of the jury, that counsel's performance thereby left the jury tainted. However, defendant offers no authority in support of the proposition that allowing argument in the presence of the jury with respect to a routine evidentiary objection could constitute ineffective assistance of counsel. Plaintiff persuasively argues that to find deficient performance in such an instance would be nonsensical, because removing the jury from the courtroom every time an evidentiary objection is raised would be cumbersome, or all but impossible to accomplish. Further, defendant has failed to show any resulting prejudice. Moreover, the trial court provided instructions that the lawyers' statements and arguments were not evidence, and, again, jurors are presumed to follow their instructions. *Petri*, 279 Mich App at 414.

Defendant contends that trial counsel was ineffective for failing to object to much of the rebuttal testimony of the Friend of the Court, who testified regarding defendant's child support file, including his presence for a certain hearing. Trial counsel in fact successfully objected to testimony related to audio recordings of the hearing on grounds of lack of personal knowledge, but did not object when the Friend of the Court subsequently testified on the basis of the court

file itself. The witness revealed that defendant was present on the day in question for a hearing, and that because defendant was present, a bench warrant was not issued for him. Defendant argues that trial counsel was ineffective in failing to register more objections to the witness's rebuttal testimony, but fails to explain how he was prejudiced in any way as a result of trial counsel's conduct. We note that trial counsel raised numerous objections throughout the proceedings where he felt appropriate, and do not regard counsel's stopping short of maintaining a constant drumbeat of objections as deficient performance. "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Matuszak*, 263 Mich App at 61.

Further, defendant recites a litany of specific examples in which he argues that trial counsel was ineffective for failing to discredit the victim's, and other witnesses', testimony. Defendant prefaces this argument by urging this Court to note that trial counsel has a high attorney-registration number, and asserts that this was counsel's first trial. Such argument is not persuasive. "Inexperience alone is not enough to conclude that a defense counsel acted deficiently or in a manner that prejudiced the defendant." *People v Kevorkian*, 248 Mich App 373, 415; 639 NW2d 291 (2001).

Defendant's specific examples of missed opportunities to cross-examine, and thus potentially discredit, witnesses are similarly unavailing. "Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy, as is a decision concerning what evidence to highlight during closing argument." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008) (citations omitted). The questioning of witnesses, including cross-examination, is likewise a matter of trial strategy. *Petri*, 279 Mich App at 413. Further, this Court "will not second-guess counsel on matters of trial strategy, nor . . . assess counsel's competence with the benefit of hindsight." *Horn*, 279 Mich App at 39.

Our review of the record shows that trial counsel did present questions to the victim seeking to undermine her credibility, and questioned her regarding Facebook posts that indicated she may have been using marijuana through the trial, despite her testimony at the preliminary examination that she had stopped using the drug. Further, the victim addressed a major inconsistency in her testimony regarding the incident that occurred between her and defendant as they drove home, stating that she was not good with places and could not remember where they were returning from. Defendant has failed to overcome his heavy burden of proof to show that counsel's questioning of witnesses and presentation of evidence were not matters of sound trial strategy. Counsel may have chosen not to question the victim over every small inconsistency between her preliminary examination testimony and her trial testimony because trivial impeachment might be viewed negatively by the jury. Trial counsel highlighted credibility issues where he thought appropriate, and we again decline to substitute our judgment for that of trial counsel with the benefit of hindsight. See *Horn*, 279 Mich App at 39.

Defendant similarly argues that trial counsel was ineffective for failing to seek to admit an exhibit that consisted of the victim's Facebook feed that purportedly showed that the victim was still smoking marijuana around the time of the preliminary examination. Again, defendant has failed to overcome the strong presumption that choosing not to introduce the exhibit was sound trial strategy. Counsel questioned the victim extensively regarding the information

contained on the Facebook feed in question, which showed that the victim had talked to her aunt around the time of the preliminary examination and wanted her to bring marijuana when she came to visit, and elicited an admission that the victim had lied regarding her marijuana use when she testified at the preliminary examination. Defendant argues that admission of the exhibit would have been potentially "game changing." However, trial counsel effectively brought to light the most damaging statements in the Facebook feed, raising questions concerning the victim's credibility without bringing the exhibit in. Defendant does not specify what further benefit admission of such an exhibit itself would have brought to the defense. Further, counsel may have chosen not to seek admission of the exhibit because it would draw further attention to the victim's marijuana use. Given that the allegations involved defendant's giving marijuana to the victim in exchange for sexual favors, this may have been prudent trial strategy.

Finally, defendant argues that trial counsel was ineffective for failing to properly challenge a juror, by using a peremptory challenge on a juror who could have been removed for cause. "[A]n attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, which we normally decline to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001) (internal citations omitted). Further, there is a presumption that jurors are impartial, and the burden is on the defendant to show that a juror was not impartial or that the juror's impartiality is in reasonable doubt. *People v Miller*, 482 Mich 540, 550; 759 NW2d 850 (2008).

Trial counsel used his last peremptory challenge to excuse a juror who stated that she had previously been on a jury in a molestation case in 1987, and that her brother-in-law was a county sheriff in Indiana. However, that juror indicated that she could be fair and impartial. Because this juror had previously served on a jury in a molestation case, counsel could have sought her removal for cause pursuant to MCR 2.511(D)(6), rather than resort to his final peremptory challenge. Defendant's argues that this cost the defense the opportunity to use a peremptory challenge on another juror, pointing to one whose daughter was sexually abused. However, the latter was questioned extensively as to her ability to be impartial and answered that she believed she could be fair.

Nothing in the record shows any hint of partiality that could challenge the presumption of juror impartiality with regard the latter juror. See *Miller*, 482 Mich at 550. Defendant has failed to show that he was prejudiced in any way as a result of trial counsel's use of his peremptory challenges.

VI. CUMULATIVE ERROR

Finally, defendant argues that the cumulative effect of errors in the trial court warrants reversal. We disagree.

"The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *People v Brown*, 279 Mich App 116, 146; 755 NW2d 664 (2008). Here,

defendant has identified some harmless errors but, even when considered together, the errors in no way undermined confidence in the reliability of the verdict.

Affirmed.

/s/ Henry William Saad
/s/ William C. Whitbeck
/s/ Michael J. Kelly