STATE OF MICHIGAN

COURT OF APPEALS

In re BRIAN LAMAR BOWEN, II.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

BRIAN LAMAR BOWEN, II,

Respondent-Appellant.

UNPUBLISHED
December 20, 2012

No. 307994
Saginaw Probate Court
Juvenile Division
LC No. 11-033057-DL

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Respondent appeals as of right from an order of disposition entered following delinquency proceedings in which the court determined that respondent committed five instances of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b) (force or coercion). Four of these instances stemmed from one victim's allegations that, while both she and respondent were attending their seventh-grade schooling, respondent pressed her against a locker or wall and rubbed his crotch area against her thigh or crotch area. The fifth instance involved a second victim's account of such conduct upon her by respondent, which the first victim also observed.

Respondent argues that he was denied the effective assistance of counsel and that the trial court committed evidentiary errors, arrived at conclusions that were contrary to the great weight of the evidence, erroneously rejected a recommendation to delay disposition, and erred in determining the amount of restitution. We decline to address respondent's challenge to the amount of restitution because it is not properly before this Court. Because respondent's other arguments lack merit, we affirm.

I. ASSISTANCE OF COUNSEL

Respondent claims that he was denied the effective assistance of counsel at the adjudicative phase of his juvenile proceeding.[1] We disagree.

A claim of ineffective assistance of counsel presents a mixed question of constitutional law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review de novo constitutional issues and for clear error a trial court's findings of fact. See *id.* Furthermore, our review of defendant's unpreserved claim of ineffective assistance of counsel is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

The right to counsel is guaranteed by the United States and Michigan Constitutions. See US Const, Am VI; Const 1963, art 1, § 20. The right to counsel is the right to the *effective* assistance of counsel. *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984). "To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2002). The defendant bears the burden of overcoming the presumption that counsel rendered effective assistance. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). This Court does not substitute its judgment for that of trial counsel regarding matters of trial strategy, even if the strategy was unsuccessful. *Id*. at 715.

Respondent argues that trial counsel was ineffective for failing to object to leading questions that petitioner posed to the first victim. A "leading question" is one "that suggests the answer to the person being interrogated . . . ." Black's Law Dictionary (8th ed), p 906. Generally, leading questions are not permitted on direct examination. See MRE 611(d); *In re Susser Estate*, 254 Mich App 232, 239-240; 657 NW2d 147 (2002); *People v Kosters*, 175 Mich App 748, 759; 438 NW2d 651 (1989). However, a trial court has broad power to control the interrogation of witnesses. *People v Larry*, 162 Mich App 142, 154; 412 NW2d 674 (1987); *Lamson v Martin (After Remand)*, 216 Mich App 452, 458; 549 NW2d 878 (1996). Accordingly, a party may be permitted "a considerable amount of leeway" in asking leading questions of child witnesses. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001) (prosecutor's leading questions of thirteen-year-old victim did not warrant reversal). When a party does not suffer prejudice as a result of leading questions, reversal is not warranted. *Id*. at 587-588.

Having reviewed the record, we conclude that none of the questions identified by respondent was leading because none in fact suggested the answer. The first victim was able to testify from her own memory without assistance from petitioner. It is apparent that the allegedly leading questions were often carefully phrased to incorporate that victim's earlier testimony for ease of examination. Thus, any objection by trial counsel would have been futile, and counsel cannot be deficient for failure to make a futile objection. *People v Ericksen*, 288 Mich App 192,

[1] The adjudicative phase of a juvenile proceeding is the trial phase. See MCR 3.942.

201; 793 NW2d 120 (2010). Further, even if some or all of the questions were fairly characterized as leading, we would not reverse because the trier of fact in a bench trial is presumed to understand the difference between valid evidence and the statements or questions of counsel. See *People v Wofford*, 196 Mich App 275, 282; 492 NW2d 747 (1992).

Respondent argues that trial counsel was ineffective for failing to impeach the first victim with her police statement. Respondent also argues that the trial court erred in ruling that trial counsel was required to show the police statement to the victim before questioning her about it.

MRE 613(a) provides that, "[i]n examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request it shall be shown or disclosed to opposing counsel and the witness." However, "[w]hen a party attempts to impeach a witness or refresh the witness'[s] memory with a prior inconsistent statement made by that witness, a proper foundation must be laid by questioning the witness concerning the time and place of the statement and the person to whom it was allegedly made." *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002).

In this case, respondent properly established a foundation for use of the police statement by questioning the first victim about her conversation with a police officer. We agree with respondent that the trial court's ruling was technically erroneous because MRE 613(a) provides that "the statement need not be shown nor its contents disclosed to the witness at that time[.]" However, we conclude that no prejudice occurred because, although the trial court and the parties did not strictly apply MRE 613(a), the result was no different from what strict application of that rule would have brought. Petitioner's objection that respondent did not initially show the first victim her police statement may be fairly interpreted as a request that respondent do so. And respondent was obligated to cooperate in that regard under either the trial court's ruling or the plain language of MRE 613(a). In other words, the trial court's ruling was different from MRE 613(a) in form but not in substance. Therefore, respondent was not prejudiced by the incorrect application of MRE 613(a).

To the extent that respondent argues that trial counsel should have nevertheless impeached the first victim with her police statement, we are not persuaded because respondent has not shown how the police statement would have impeached the first victim's testimony or otherwise affected the outcome of trial. See *Matuszak*, 263 Mich App at 59 ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . . .") (citation and internal quotation marks omitted).

Respondent argues that trial counsel erred by failing to call as a witness a friend of respondent who was also implicated in the allegations of inappropriate sexual contact. An attorney's decision whether to call a certain witness is a matter of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). In this case, respondent does not explain why testimony from this unnamed fellow accused would have changed the outcome of trial. See

People v Traylor, 245 Mich App 460, 464; 628 NW2d 120 (2001) (this Court will not search for a factual basis to sustain or reject a party's position).[2]

Respondent argues that trial counsel erred in failing to inform the trial court that counsel advised respondent not to testify. We conclude that defendant has abandoned this issue by giving it cursory treatment. See *Matuszak*, 263 Mich App at 59 (explaining that an issue is abandoned when it is given cursory treatment). Moreover, defendant's argument lacks merit. Trial counsel in fact called respondent as a witness, and there is no record support for the assertion that respondent's decision to testify was against counsel's advice. More importantly, respondent stated on the record that he wanted to testify, and this is a decision an accused has the right to make personally, regardless of the advice of counsel. *People v Bonilla-Machado*, 489 Mich 412, 419-420; 803 NW2d 217 (2011).

For the reasons stated above, respondent has failed to show that he was denied the effective assistance of counsel.

II. EVIDENTIARY RULINGS

Respondent claims that the trial court erroneously admitted hearsay testimony and excluded testimony about the first victim's reputation for truthfulness. We review a trial court's decision to admit or exclude evidence for an abuse of discretion. See *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). "Evidentiary error will 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 Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

"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.'" *People v Jackson*, 292 Mich App 583, 595; 808 NW2d 541 (2011), quoting MRE 801(c). Hearsay is generally inadmissible unless otherwise provided by the rules of evidence. MRE 802.

Respondent argues that the trial court abused its discretion by admitting the testimony of a teacher indicating that she was told by the two victims that they were afraid of the repercussions if the sexual contacts they alleged became common knowledge. This witness had earlier testified that she reported the allegations to the principal but asked the principal not to repeat them. The trial court overruled a hearsay objection on the ground that respondent had opened the door to such testimony. Evidence of a witness's prior consistent statements, offered to rebut an actual or implied accusation of recent fabrication on the witness's part, is exempt from the definition of "hearsay." MRE 801(d)(1). In this case, however, respondent did not expressly or impliedly suggest on cross-examination that this teacher had earlier said anything inconsistent with her account regarding the victims' request that she refrain from disclosing the

[2] Given that the others implicated with respondent apparently pleaded to the allegations, it is far from certain that one or more of them would have provided exculpatory testimony for respondent.

sexual contacts. Thus, respondent did not open the door to rehabilitation of the teacher's account of asking the principal not to tell others of the allegations against respondent through resort to testimony about the victims' request that the teacher keep the secret out of their fear of retaliation.

However, this Court will not reverse where the trial court has reached the correct result for the wrong reason. See *People v Bauder*, 269 Mich App 174, 187; 712 NW2d 506 (2005). In this case, the challenged testimony was not hearsay. "[A] statement offered to show the effect of the out-of-court statement on the hearer" is not hearsay. *People v Chambers*, 277 Mich App 1, 10-11; 742 NW2d 610 (2007). The victims' statement that they were "afraid" was offered to show why the teacher asked the principal not disclose the victims' allegations. The victims' statement about being afraid was, thus, offered to explain the teacher's actions, not to prove the truth of the matter asserted.

Alternatively, if the challenged statement is deemed hearsay, it was nonetheless admissible under the exception for statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition." MRE 803(3). In this case, the victims' statement that they were "afraid" was a statement of then-existing emotion and, therefore, admissible even if hearsay.

Respondent also argues that the trial court abused its discretion in excluding testimony from a classmate about the first victim's reputation for truthfulness. MRE 608(a) provides in relevant part that a witness's credibility may be attacked or supported by opinion or reputation evidence so long as the evidence refers "only to character for truthfulness or untruthfulness."[3] Indeed, a witness's credibility is always relevant so that the witness's character for truthfulness can be attacked by reputation evidence. *People v Whitfield*, 425 Mich 116, 131 n 11; 388 NW2d 206 (1986). "The admissibility of such evidence is limited and the testimony of a character witness must be based upon what he has heard other people in the subject's residential or business community say about the subject's reputation." *People v Bieri*, 153 Mich App 696, 712; 396 NW2d 506 (1986). To establish a foundation for testimony about a witness's reputation for truthfulness, the character witness must have communicated with other people in the relevant community about the witness's truthfulness. See *People v Schultz*, 316 Mich 106, 109; 25 NW2d 128 (1946); 29 Am Jur 2d Evidence § 381 ("An adequate foundation must be laid for the introduction of reputation evidence, through a showing that the character witness is sufficiently familiar with the defendant's reputation and is competent to speak for the community.").

The classmate testified that she was a student in the seventh grade during the school year at issue and that she was able to observe and interact with the first victim on a daily basis because they were in the same class. Thus, it is reasonable to infer that the witness was able to observe and interact with the other students in the seventh grade as well. However, the witness

[3] See also MRE 405(a) ("In all cases in which evidence of character or a trait of character of a person is admissible, proof may be by testimony as to reputation or by testimony in the form of an opinion.").

did not testify that she had personal knowledge of the first victim's reputation for truthfulness in the school community. Thus, the trial court was correct in ruling that respondent had failed to establish a proper foundation for the classmate's testimony.

Of course, respondent could have attempted to lay a better foundation by questioning the witness further. But, having declined any such attempt at trial, respondent may not now claim error in that regard on appeal. See *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004) ("[A] party waives the right to seek appellate review when the party's own conduct directly causes the error.").[4]

Respondent also characterizes the trial court's ruling in this regard as a violation of his constitutional right to present a defense. We review this unpreserved issue for plain error affecting substantial rights. See *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to present a defense. *People v Orlewicz*, 293 Mich App 96, 101; 809 NW2d 194 (2011).[5] But that right is subject to evidentiary rules "designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984) (internal quotation marks and citations omitted). "[A] rule of evidence contravenes the due process right to present a defense if it infringes on a defendant's substantial interest or significantly undermines a fundamental element of his or her defense." *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005).

Respondent's argument is defeated by our conclusion above that the trial court properly disallowed the testimony in question for lack of foundation. Evidence that lacks foundation is irrelevant, see *Royal Mink Ranch v Ralston Purina Co*, 18 Mich App 695, 701; 172 NW2d 43 (1969), and a defendant has no constitutional right to present irrelevant evidence, see *People v McFall*, 224 Mich App 403, 407-408; 569 NW2d 828 (1997); *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008). Thus, respondent's argument that he was denied his constitutional right to present a defense must fail because the trial court did not commit any error, much less plain error, by excluding the classmate's testimony concerning the first victim's reputation for truthfulness.

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[4] Even assuming that the trial court erred in sustaining the prosecutor's objection to the witness giving reputation testimony, respondent failed to provide an offer of proof regarding the substance of the witness's testimony on the matter. Furthermore, assuming the witness's testimony would have been favorable to respondent, respondent has not shown that the outcome of the proceedings would more probably than not have been different because the second victim, whose reputation for truthfulness was not challenged, testified to similar conduct by respondent. See *Coy*, 258 Mich App at 12.

[5] See also *People v Aspy*, 292 Mich App 36, 48-49; 808 NW2d 569 (2011) (right to present a defense guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution).

III. GREAT WEIGHT OF THE EVIDENCE

Respondent claims that the trial court's finding that he committed all five charged offenses was against the great weight of the evidence. We disagree. "The test to determine whether a verdict is against the great weight of the evidence is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser*, 259 Mich App 215, 218-219; 673 NW2d 800 (2003). Conflicting testimony and questions of a witness's credibility are generally insufficient to warrant a new trial. *Id*. at 219; *Unger*, 278 Mich App at 232.

MCL 750.520e(1)(b) reads in relevant part as follows:

> (1) A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person and if any of the following circumstances exist:
>
> * * *
>
> (b) Force or coercion is used to accomplish the sexual contact. Force or coercion includes, but is not limited to, any of the following circumstances:
>
> (*i*) When the actor overcomes the victim through the actual application of physical force or physical violence.
>
> (*ii*) When the actor coerces the victim to submit by threatening to use force or violence on the victim, and the victim believes that the actor has the present ability to execute that threat.

MCL 750.520a(q) defines "sexual contact" as follows:

> "Sexual contact" includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:
>
> (*i*) Revenge.
>
> (*ii*) To inflict humiliation.
>
> (*iii*) Out of anger.

The first victim testified that on four occasions respondent pressed her against a nearby wall or locker and rubbed his "crotch area" against her thigh or "crotch area." Similarly, the second victim testified that on one occasion respondent pressed her against a locker and rubbed his "groin" against her "behind." This testimony shows that respondent intentionally touched the victims' "intimate parts" in the form of their genital area or buttock. See MCL 750.520a(q); MCL 750.520a(e) (defining "intimate parts" to include the primary genital area, groin, inner

thigh, and buttock of a human being). Moreover, respondent's use of his "groin" or "crotch" shows that the intentional touching could reasonably be construed as being for the purpose of respondent's sexual gratification or done in a sexual manner to humiliate the victims. See MCL 750.520a(q). Accordingly, the victims' testimony was evidence of "sexual contact."

Further, the victims testified that they were unable to avoid the contact with respondent because he held them against a wall or locker, which constitutes an "actual application of physical force" that was "used to accomplish the sexual contact." MCL 750.520e(1)(b)(*i*). Therefore, the victims' testimony was evidence of "force or coercion." The testimony of a victim of criminal sexual conduct, without more, is adequate evidence to support a conviction of criminal sexual conduct. See MCL 750.520h; *People v Drohan*, 264 Mich App 77, 89; 689 NW2d 750 (2004). For these reasons, the victims' testimony was adequate evidence to establish respondent's five violations of MCL 750.520e(1)(b).

Respondent argues that the victims' testimony was not corroborated and emphasizes that teachers, students, and recess monitors were generally able to view the students' activities.[6] But, again, a victim's testimony need not be corroborated in a criminal sexual conduct case. MCL 750.520h. Additionally, our Supreme Court has observed that cases involving criminal sexual conduct are often credibility contests between the victim and the defendant, and the Court has emphasized that the rule that a new trial should not be granted on the basis of witness credibility applies with equal force to criminal sexual conduct cases. *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998).

Also, the students called to testify on respondent's behalf admitted on cross-examination that they were generally more focused on their own actions than the actions of respondent or the victims, which is consistent with what one would expect of ordinary twelve-year-olds. Accordingly, that these students did not observe respondent's sexual contacts does not "preponderate[] so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Musser*, 259 Mich App at 218-219.

Respondent argues that the second victim's testimony lacked credibility because she was unable to state consistently whether her incident with respondent occurred before or after Christmas break. However, this Court has recognized that a child victim's inability to identify the precise date of a criminal sexual conduct offense is not necessarily fatal to the prosecution. See *People v Dobek*, 274 Mich App 58, 82-84; 732 NW2d 546 (2007).

For these reasons, respondent has failed to show that the trial court's conclusions were contrary to the great weight of the evidence.

[6] There was testimony from teachers of having observed respondent harassing or otherwise acting inappropriately toward the first victim on two occasions. While the teachers did not actually observe sexual contacts, they did corroborate the first victim's testimony to some extent.

IV. ORDER OF DISPOSITION

Respondent claims that the trial court erroneously entered its order of disposition. We disagree. We review the trial court's findings of fact at a juvenile dispositional hearing for clear error. *People v Brown*, 205 Mich App 503, 504-505; 517 NW2d 806 (1994). We review the order of disposition itself for an abuse of discretion. See *id*. at 505; see also *In re Ricks*, 167 Mich App 285, 295; 421 NW2d 667 (1988).

MCR 3.943(A) provides that "[a] dispositional hearing is conducted to determine what measures the court will take with respect to a juvenile and, when applicable, any other person, once the court has determined following trial or plea that the juvenile has committed an offense." The trial court has the discretion to enter an order of disposition that is "appropriate for the welfare of the juvenile and society in view of the facts proven and ascertained . . . ." MCL 712A.18(1). When entering an order of disposition, the trial court must "articulate on the record the reasons for [its] disposition of the case." *In re Chapel*, 134 Mich App 308, 315; 350 NW2d 871 (1984). This Court has analogized juvenile dispositions to criminal sentences. *Id*. at 314.

Here, the trial court determined from the evidence presented at trial, including respondent's testimony denying that anything ever happened, that respondent lacked remorse and failed to have any substantial appreciation for "what has happened to those young ladies and how it felt for them." The court also observed that it was not dealing with one or two incidents that might be chalked up to innocent horsing round; rather, respondent engaged in five incidents of inappropriate conduct, indicating that he knew what he was doing. The order of disposition imposed several relatively minor conditions of probation, including maintaining a regular curfew, attending school on a regular basis, and performing 100 hours of community service. The order was not so extreme or harsh as to call the trial court's exercise of discretion into doubt. Although respondent's compliance with the terms of probation at the time of disposition was commendable, the trial court reasonably concluded that the lack of remorse and the repeated nature of the offenses warranted pressing ahead with its order of disposition. Lack of remorse and patterns of criminal behavior are valid sentencing considerations. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *People v Petri*, 279 Mich App 407, 421-422; 760 NW2d 882 (2008). Therefore, we conclude that the order of disposition reasonably accounted for the circumstances of the offenses and offender.

Respondent argues that his disposition was an abuse of discretion because the others who were accused with him and pleaded to the allegations received less severe dispositions, which indicates that respondent was penalized for exercising his constitutional right to trial. "However, it is not per se unconstitutional for a defendant to receive a higher sentence following a [trial] than he would have received had he pleaded guilty." *People v Brown*, 294 Mich App 377, 389; 811 NW2d 531 (2011). Moreover, respondent provides no factual support for his assertion that he received a more severe disposition than those unidentified others accused with him.

Respondent argues that the trial court failed to consider that juveniles have less moral culpability for crimes than adults. But this consideration is institutionally recognized by the existence of separate proceedings for juveniles and adults. Further, the trial court explicitly recognized that juvenile crime records often have a disproportionately heavy impact when the juveniles become adults, which suggests that the court was aware of the reduced moral

culpability of juveniles. Moreover, the trial court's disposition was significantly more lenient than the sentence one would expect an adult first-time offender to receive for five convictions of fourth-degree criminal sexual conduct.[7] The trial court did not fail to consider that this case involved a juvenile respondent as opposed to an adult defendant.

V. CUMULATIVE ERROR

Respondent claims that the cumulative effect of multiple errors warrants a new trial. 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. Absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. [*Dobek*, 274 Mich App at 106 (internal citations omitted).]

As previously explained, respondent was not denied the effective assistance of counsel, and the trial court did not commit any prejudicial error. Respondent has not demonstrated errors undermining the confidence in the reliability of the verdict. Therefore, his claim of cumulative error fails.

VI. RESTITUTION

Respondent's final argument is that the trial court erred in determining restitution. We decline to address this argument. An appeal of a restitution order must be by leave granted. See MCR 3.993(A)-(B). Respondent has not sought leave to appeal the restitution order. Further, this Court, in an unpublished order entered July 19, 2012, denied respondent's motion to file a transcript of the restitution proceeding on the ground that "issues relating to the February 15, 2012, restitution hearing are beyond the scope of this appeal of right from the December 1, 2011, order of disposition."

Affirmed.

/s/ William C. Whitbeck
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering

[7] Fourth-degree criminal sexual conduct is a misdemeanor that may be punished by a maximum of twenty-four months' imprisonment. MCL 750.520e(2). In this case, the trial court included no incarceration with its order of disposition.