STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS RICHARD REITER,

Defendant-Appellant.

UNPUBLISHED
September 25, 1998

No. 201981
Wexford Circuit Court
LC No. 96-004899 FH

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Plaintiff appeals as of right from his jury conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), for which he was sentenced to ten to twenty-five years' imprisonment. We affirm.

Defendant first argues that he received ineffective assistance of counsel. Because defendant failed to preserve this issue by creating a testimonial record through a motion for an evidentiary hearing or a new trial, *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973), any error must be apparent from the trial court record, *People v Nantelle,* 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish a claim of ineffective assistance of counsel, defendant must show: (1) that defense counsel's performance fell below an objective standard of reasonableness measured by professional norms; (2) that but for defense counsel's error, there was a reasonable probability that the result of the proceedings would have concluded differently; and (3) that the result of the proceeding was unreliable or unfair. *People v Mitchell,* 454 Mich 145, 156-158; 560 NW2d 600 (1997). In addition, defendant must overcome the strong presumption of effective assistance, *People v Sardy,* 216 Mich App 111, 116; 549 NW2d 23 (1996), by establishing that defense counsel failed to perform some essential duty that prejudiced him, *Mitchell, supra* at 156, 158, or by illustrating that counsel failed to meet a minimum level of competence, *People v Jenkins,* 99 Mich App 518, 519; 297 NW2d 706 (1980). Further, we review counsel's performance by applying an objective standard of reasonableness without engaging in the benefit of hindsight. *People v LaVearn,* 448 Mich 207, 216; 528 NW2d 721 (1995). Regarding matters of trial strategy, lack of success does not render its use ineffective assistance, *People v Stewart (On Remand),* 219 Mich App 38, 42; 555 NW2d 715

(1996), and we will not substitute our judgment for that of defense counsel, *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant first asserts that his counsel failed to properly prepare for trial by familiarizing himself with defendant's police report and MRE 801(d)(1)(B), that this led to a trial strategy of attacking the victim as being "coached," and that as a result the victim's credibility was bolstered during cross-examination through reference to the police report. The trial record does not establish whether counsel was confused regarding the victim's "prior consistent statement" because of unfamiliarity with the statement or because the prosecution initially misidentified the officer who authored the referenced report. Further, counsel's decisions to engage in a cross-examination that attacked inconsistencies in the victim's testimony regarding her description of defendant's penis, and to later object to the admission of the statement contained within the police report on grounds of hearsay, are matters of defensible trial strategy. This case was basically a credibility contest between defendant and the victim and the victim had stated, at the preliminary examination, that she could not remember what defendant's "privates" felt like. We will not substitute our judgment for that of counsel with the benefit of hindsight, *Barnett, supra* at 338, because defendant has failed to overcome his burden of establishing that it was unsound, *Sardy, supra* at 116.

Defendant also asserts that counsel failed to timely object during the prosecution's cross-examination of defendant regarding character evidence or to references to facts not in evidence during closing argument. Defense counsel may have forestalled an objection while considering whether it would only heighten the jury's attention regarding the allegedly improper matter, *People v Rone (On Second Remand)*, 109 Mich App 702, 717-718; 311 NW2d 835 (1981), or that it would allow the jury to conclude that he was attempting to keep information from them, *People v Reed*, 449 Mich 375, 400; 535 NW2d 496 (1995). This is especially the case, considering the minimal prejudicial impact, if any, that the contested statements might have had on defendant's case. (See discussion below). Again, we will not second guess counsel's trial strategy with the benefit of hindsight, *Barnett, supra* at 338, because defendant has again failed to overcome his burden of establishing it was not sound, *Sardy, supra* at 116.

Finally, defendant asserts that counsel's failure to move for a directed verdict constituted ineffective assistance. We conclude that the victim's testimony that defendant inserted his finger into her vagina when she was five years old, viewed in a light most favorable to the prosecution, *People v Calhoun*, 178 Mich App 517, 524; 444 NW2d 232 (1989), was sufficient to allow a rational trier of fact to find the essential elements of CSC I. *People v Jolly*, 442 Mich 458, 466; 502 NW2d 177 (1993). Therefore, a directed verdict would have been unwarranted and counsel's decision did not constitute ineffective assistance of counsel. *Calhoun, supra* at 524.

Defendant next argues that the prosecutor improperly elicited inadmissible character evidence from defendant during his cross-examination, improperly referenced facts not in evidence during closing argument, and improperly requested the jury to place themselves in the role of the victim during closing argument, all of which effectively denied him his right to a fair and impartial trial. We review allegations of prosecutorial misconduct by evaluating the prosecutor's comments in context, *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995), with reference to defense arguments and the nature

of the evidence admitted at trial, *People v Lawton*, 196 Mich App 341, 353-354; 492 NW2d 810 (1992), to determine whether defendant was denied a fair and impartial trial, *Paquette*, *supra* at 342. Prosecutors are afforded great latitude when making arguments based on the evidence and when extrapolating inferences to support their theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). They are not required to use the blandest language or least prejudicial evidence available. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Regarding the prosecutor's cross-examination of defendant, we first note that during direct examination, defense counsel made inquiries regarding defendant's relationship with the victim's sister and indicated her presence in the courtroom, allowing the jury to observe her pregnancy. Therefore, the prosecutor's inquiries regarding defendant's relationship with the victim's sister and her pregnancy were not improper because a prosecutor is permitted to cross-examine a witness regarding matters initially brought forth during direct examination. *People v Verburg*, 170 Mich App 490, 499; 430 NW2d 775 (1988). In addition, we do not conclude that any prejudice resulted from these inquiries, nor from the single inquiry regarding the substance of their dispute on the evening of the alleged sexual abuse (which was not referenced during closing argument), precluding the need for reversal. *People v Buckey*, 424 Mich 1, 18; 378 NW2d 432 (1985).

Regarding the prosecutor's alleged introduction of facts not in evidence during closing argument, we recognize that a prosecutor is prohibited from making statements of fact to the jury that are unsupported by the evidence. *People v Stanaway*, 446 Mich 643, 686-687; 521 NW2d 557 (1994). However, comments representing nothing more than prefatory remarks that lead into the prosecutor's comments regarding the victim's credibility are not improper. *People v Vaughn*, 186 Mich App 376, 385; 465 NW2d 365 (1990). Reviewing the prosecutor's closing argument as a whole, *Lawton*, *supra* at 353, we find that the prosecutor's general reference to the nature of sexual abuse victims and their perpetrators represented a prefatory remark intended to lead into comments regarding the victim's credibility, *Vaughn*, *supra* at 385. Given the prosecutor's immediate correction after defense counsel's objection, *People v Coddington*, 188 Mich App 584, 602-603; 470 NW2d 478 (1991), and the trial court's instruction regarding attorney's comments not constituting evidence, *Ullah*, *supra* at 682-683, we conclude that defendant was not prejudiced by these comments, *Buckey*, *supra* at 18.

Although the prosecution is permitted to argue that the victim should be believed, it is not permitted to appeal to the jurors to sympathize with the victim by placing themselves in the victim's role. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, review of the prosecutor's closing as a whole, *Lawton*, *supra* at 353, reveals that the prosecutor's inquiry regarding whether jurors could verbalize their thoughts under a vigorous cross-examination represented a comment on the victim's credibility. In addition, the prosecutor's comment was responsive and induced by defense counsel's cross-examination, which implied that someone assisted the victim with her memory. *People v Hart*, 161 Mich App 630, 638; 411 NW2d 803 (1987). Given the instruction regarding attorney's comments, we conclude that defendant was not denied a fair and impartial trial as to this issue.

Defendant next argues that the cumulative effect of all these alleged errors deprived him of his right to a fair trial. Given that defendant has identified only one possible error, the prosecutor's general

references to sexual abuse victims and their perpetrators that was corrected after an objection, we are incapable of finding a cumulative effect of several errors. Because the test for reversal is whether defendant was denied a fair trial, and not whether there were some irregularities, we conclude that reversal is not required. *People v Duff*, 165 Mich App 530, 539; 419 NW2d 600 (1987).

Defendant's final argument is that the trial court abused its discretion when it sentenced him to ten to twenty-five years' imprisonment for his CSC I conviction. The sentencing court does not abuse its discretion unless it violates the "principle of proportionality," which requires that an offender's sentence be proportionate to the circumstances surrounding the immediate offense and his prior criminal behavior. *People v Milbourn*, 435 Mich 630, 635-636; 461 NW2d 1 (1990).

Because defendant's ten year minimum sentence is within the minimum guidelines range of eight to twenty years' imprisonment, it is presumed to be neither unfairly disparate nor excessively severe. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Further, the trial court properly considered defendant's "alarming act of hostility" (severity of crime) toward a five-year-old victim (nature of crime). *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985). Given defendant's failure to advance any unusual circumstances warranting mitigation of this offense, we conclude that defendant's sentence was neither disproportionate, *People v Cotton*, 209 Mich App 82, 85; 530 NW2d 495 (1995), nor an abuse of discretion, *Milbourn*, *supra* at 636. In addition, the trial court's reliance on the minimum guidelines range was a sufficient articulation of its reasons for the sentence imposed. *People v Lawson*, 195 Mich App 76, 77; 489 NW2d 147 (1992). Finally, because defendant's sentence is not disproportionate, it does not constitute "cruel or unusual" punishment. *People v Love (After Remand)*, 214 Mich App 296, 303; 542 NW2d 374 (1995).

We affirm.

/s/ Barbara B. MacKenzie
/s/ Richard A. Bandstra
/s/ Stephen J. Markman