

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

DOUGLAS D. BRAZIER,

Defendant-Appellant.

UNPUBLISHED
December 4, 2001

No. 221481
Wayne Circuit Court
Criminal Division
LC No. 98-010419

Before: Saad, P.J., Bandstra, C.J., and Whitbeck, J.

PER CURIAM.

Defendant was convicted, following a jury trial, of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b). He was sentenced to four concurrent terms of fifteen to twenty-five years' imprisonment. He appeals as of right. We affirm.

First, relying on *People v Belenor*, 408 Mich 244, 246-247; 289 NW2d 719 (1980), defendant argues that it was improper for the prosecutor to impeach two of her witnesses, namely, the complainant's mother and grandmother. Because defendant failed to object to the impeachment testimony on this basis at trial, this issue is not preserved. Accordingly, we review this issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). The decision in *Belenor* was premised on the former rule that a party may not ordinarily impeach its own witness, absent a recognized exception. However, MCL 767.40a now provides that "[a]ny party may . . . impeach . . . any witness as though the witness had been called by another party." MRE 607 similarly provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." See also *People v Kilbourn*, 454 Mich 677, 682; 563 NW2d 669 (1997) (recognizing that the government can impeach its own witness). Accordingly, no plain error resulted.

Defendant also argues that reversal is required because hearsay testimony was improperly introduced at trial. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion. MRE 801(a).

In this case, defendant did not object to the challenged testimony at trial. Therefore, appellate relief is foreclosed absent a showing of plain error affecting substantial rights. *Carines, supra*. While we agree that the challenged testimony of the complainant's grandmother

violated the hearsay rule, see *People v Lucas*, 138 Mich App 212, 220; 360 NW2d 162 (1994), we conclude that reversal is not required. The effect of the testimony was to show that the complainant had reported sexual abuse four years earlier. However, similar testimony had already been received. Because the evidence was cumulative, we conclude that defendant's substantial rights were not affected.

Contrary to what defendant argues, the complainant's testimony concerning his own statements was not hearsay. MRE 801(d)(2).

While some of the mother's testimony could be characterized as hearsay, in light of the nature of the testimony and the fact that the mother testified at trial and was subject to cross-examination concerning the statements in question, we are not convinced that defendant's substantial rights were affected.

Lastly, the testimony of the officer in charge, who claimed that the mother's testimony was inconsistent with what the mother had previously told him, was not inadmissible hearsay because it was not offered for the truth of the matter asserted, but rather, to challenge the mother's credibility.

Next, defendant contends that misconduct by the prosecutor deprived him of a fair trial. We disagree. Questions of prosecutorial misconduct are decided case by case. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). In this case, however, defendant did not object to most of the alleged errors. Our review of these unpreserved claims is limited to whether a plain error affected defendant's substantial rights. *Carines, supra*; *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant first contends that the prosecutor improperly expressed her personal opinion that defendant was guilty, contrary to *People v Ignofo*, 315 Mich 626, 632; 24 NW2d 514 (1946). There was no objection to the challenged remarks at trial and our review of the remarks fails to disclose that the prosecutor improperly expressed a personal belief that defendant was guilty. Plain error is not apparent.

Defendant once again argues that it was improper for the prosecutor to impeach her own witnesses. As previously discussed, however, the prosecutor was allowed to impeach her own witnesses. Thus, this issue is without merit.

Defendant next argues that the prosecutor improperly appealed to the jury to sympathize with the complainant. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). To the extent the remarks could be viewed as improper, the court's immediate cautionary instruction was sufficient to cure any prejudice. Thus, reversal is not warranted.

Next, while we agree that the prosecutor inaccurately stated that the sexual abuse began when the complainant was 13 years old (the complainant actually testified that it began when she was 14), we further agree that defendant's substantial rights were not affected by this minor misstatement.

Next, the prosecutor's references to entries in the complainant's diary and letters was supported by the complainant's own testimony at trial and, therefore, was not improper. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

Defendant also contends that the prosecutor improperly reduced her burden of proof. Viewed in context, however, the prosecutor was merely stating the obvious, that the case turned upon the credibility of the complainant. Further, the court properly instructed the jury on the burden of proof. Thus, we find no plain error affecting defendant's substantial rights.

We reject defendant's contention that the prosecutor improperly argued facts not in evidence. The challenged comments were properly based on the evidence admitted at trial and reasonable inferences drawn therefrom. *Bahoda, supra* at 282.

Defendant also contends that the prosecutor improperly misrepresented the mother's testimony. However, we find that the challenged remarks were based on the evidence and were not improper.

Defendant also argues that the prosecutor improperly injected her own personal opinion, contrary to *People v Slater*, 21 Mich App 561, 566; 175 NW2d 786 (1970). A review of the record indicates that the challenged remarks were not made in reference to matters within the prosecutor's personal knowledge. The prosecutor merely argued that the victim had suffered consequences from coming forward with the allegations, a fact that reflected on her credibility. The remarks were not improper.

Defendant also argues that the prosecutor improperly vouched for his guilt. We disagree. Viewed in context, the prosecutor did not suggest that she possessed some specialized knowledge that defendant was guilty. Rather, the prosecutor merely argued what the evidence established. There was no plain error. *Bahoda, supra* at 276.

Defendant also argues that the prosecutor made an improper civic duty argument. See *Bahoda, supra* at 282; *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). We disagree with defendant's contention that the prosecutor suggested that the jury could eliminate sexual abuse of children by convicting defendant. Rather, the prosecutor's arguments were focused on this victim and this defendant. They did not amount to an improper civic duty argument.

Lastly, defendant contends that the prosecutor improperly referred to certain statements that he allegedly made. However, because defendant does not indicate how and why the remarks were improper, or cite any authority in support of his claim, we deem this issue abandoned. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999).

Next, defendant argues that reversal is required because the prosecutor referred to other incidents of alleged sexual abuse, which were not charged in the information. Because defendant did not object to the challenged evidence at trial, we review this issue for plain error affecting substantial rights. *Carines, supra*.

MRE 404(b) governs the admission of evidence of other bad acts. It provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by the potential for unfair prejudice. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).

Here, the evidence was properly admitted to corroborate the victim's testimony, and to rebut defendant's claim that the charges were fabricated. *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973); *People v Layher*, 238 Mich App 573, 586; 607 NW2d 91 (1999), affirmed 464 Mich 756 (2001). Thus, the evidence was offered for a proper purpose and was relevant to an issue of consequence at trial. *Layher*, *supra* at 586. Moreover, the probative value of the evidence was not substantially outweighed by the danger of unfair prejudice, particularly considering that the jury received an appropriate cautionary instruction concerning the limited use of the evidence. *Id.*

Finally, we conclude that defendant has failed to establish that defense counsel was ineffective.

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal, defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668, 104 SCt 2052, 80 LEd2d 674 (1984). First, defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the 'counsel' guaranteed by the Sixth Amendment. Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, defendant must show that the deficient performance prejudiced the defense. To demonstrate prejudice, defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because defendant bears the burden of demonstrating both deficient performance and prejudice, defendant necessarily bears the burden of establishing the factual predicate for his claim. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 889 (2001).

Here, the alleged deficiencies pertain to counsel's failure to properly object or otherwise challenge the matters previously discussed in this opinion. For the reasons previously discussed, we conclude that defendant has failed to establish ineffective assistance of counsel. Most of the matters raised were not objectionable. Counsel is not required to make a meritless objection. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). While counsel may have erred in allowing some hearsay evidence to be received, defendant has not

demonstrated that there is a reasonable likelihood that the result would have been different had an objection been made.

Affirmed.

/s/ Henry William Saad
/s/ Richard A. Bandstra
/s/ William C. Whitbeck