

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY JAMES SOLOMON,

Defendant-Appellant.

UNPUBLISHED
February 26, 2002

No. 225041
Oakland Circuit Court
LC Nos. 98-159373-FC
98-159374-FC
98-159375-FC
98-159383-FC

Before: Talbot, P.J., and Gage and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of six counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b)(ii) (at least thirteen years of age but less than sixteen years of age, related by blood or affinity to the fourth degree). Defendant was sentenced to concurrent terms of fifteen to thirty years' imprisonment for each count. We affirm.

I

Defendant claims that he received ineffective assistance of counsel. To establish ineffective assistance of counsel, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). A defendant must overcome the presumption that the challenged action was trial strategy. *Id.* This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will this Court assess counsel's competence with the benefit of hindsight. *People v Pickens*, 446 Mich 298, 344; 521 NW2d 797 (1994).

Defendant first argues that he was denied the effective assistance of counsel because his trial counsel failed to object to other bad acts testimony related to defendant's temper and his striking of the complainant's mother and brother. We disagree.

Defendant's theory throughout the trial was that he was a strict stepfather who treated the complainant and her brother as his own children, but that the complainant lied about the alleged sexual abuse because she hated defendant, she wanted to move back to Canada, and defendant

did not give her free reign. Defense counsel offered testimony to show defendant's moral character and upstanding citizenship. Defendant's strategy necessarily placed defendant's character in issue. Once a defendant places his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as he claims. *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). Any testimony elicited by the prosecutor to rebut defendant's evidence of good moral character was relevant to the issues raised by defendant. *People v Knapp*, 244 Mich App 361, 377-378; 624 NW2d 227 (2001). Thus, defense counsel did not improperly fail to object to this evidence.

Next, defendant argues that his attorney was ineffective for failing to object to the admission of the complainant's prior consistent statements accusing defendant of the crime. Defendant raises eight instances of the complainant's prior consistent statements to her social worker, and argues that the statements are inadmissible hearsay and that the hearsay exclusion under MRE 801(d)(1)(B)¹ does not apply because they were made when a motive to fabricate already existed.

Prior consistent statements of a witness are generally not admissible as substantive evidence. *People v Stricklin*, 162 Mich App 623, 627; 413 NW2d 457 (1987). The exceptions to this rule are: (1) where a statement is used to rebut a charge of recent influence, (2) where there is a question whether a prior inconsistent statement was made, and (3) where a witness has been impeached with a charge of recent fabrication. *Id.*

Even if the complainant had a motive to fabricate at the time she made the statements, it may have been a matter of strategy to refrain from objecting to their admission. Defense counsel pursued a strategy of undermining the complainant's credibility to advance the defense's theory that the complainant had lied in accusing defendant of the crime. Defense counsel attempted to impeach the complainant's credibility by introducing portions of her prior consistent statements to her social worker and to a police officer to show how they differed from her trial testimony. Under these circumstances, the prosecution must be allowed to show that those same statements were actually consistent with the complainant's trial testimony. *People v Sayles*, 200 Mich App 594, 595; 504 NW2d 738 (1993). If a witness is offering relevant testimony, whether that witness is truthfully and accurately testifying is itself relevant because it affects the probability of the existence of a consequential fact. *People v Mills*, 450 Mich 61, 73; 537 NW2d 909, mod 450 Mich 1212 (1995). Defendant's challenge to the complainant's credibility made the rehabilitative testimony of the social worker relevant. We conclude that defendant has not overcome the presumption that the challenged action was trial strategy. *Hoag, supra* at 6.

II

Defendant next contends that during rebuttal argument, the prosecution improperly commented about the typical behavior of pedophiles, when no expert testimony to that effect was

¹ MRE 801(d)(1)(B) provides that a witness' prior statement is not hearsay if it is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive."

in evidence. Defendant argues that he is entitled to a new trial because of a real likelihood that the jury considered the prosecutor's argument as testimony. We disagree.

This issue is not preserved because defendant failed to object to the alleged prosecutorial misconduct at trial. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). Where a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Thus, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings. *Carines*, *supra* at 763-764; *Schutte*, *supra* at 720. This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

Prosecutors may not make statements of fact which are not supported by the evidence, but remain free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *Schutte*, *supra* at 721. Our review of the record reveals that although the issue of pedophiles and their behavior were not in evidence, this was not the first time the word "pedophile" was used on the record. Indeed, it was defense counsel who first used the word in her opening statement. Further, although the prosecution admits error in the choice of the word "pedophile," a review of the remarks, in context, suggests that the prosecution was rebutting defense counsel's closing argument where she stated that "sexual abuse is a somewhat clandestine type of offense," and pointedly argued that defendant was not secretive, but made himself and the children accessible to the outside world.

Even if the prosecution's remarks were improper, defendant failed to challenge the remarks and failed to request a timely cautionary instruction. *Schutte*, *supra* at 720. Nor does defendant support his claim on appeal with any reference to the record or any supporting authority. Because our review of the record shows that the disputed prosecutorial remarks could have been cured by a timely instruction, defendant has not established error requiring reversal. *Schutte*, *supra* at 721. Further, we conclude that the trial court sufficiently cured any prejudice by instructing the jury to consider only properly admitted evidence and that the arguments of counsel are not evidence. *Id.* at 721-722.

III

Defendant next asserts that he is entitled to resentencing because the trial court improperly considered the fact that defendant maintained his innocence. We disagree.

Because this issue implicates defendant's constitutional rights, we review it de novo. *People v Levandoski*, 237 Mich App 612, 619; 603 NW2d 831 (1999). In passing sentence, a court may not consider factors that violate a defendant's constitutional rights. *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). A trial court may not base its sentence, in whole or in part, on a defendant's refusal to admit guilt. *People v Yennior*, 399 Mich 892; 282 NW2d 920 (1977). Resentencing is required if it is apparent that the court erroneously considered the defendant's failure to admit guilt, as indicated by such action as asking the defendant to admit his guilt or offering him a lesser sentence if he would do so. *People v Wesley*, 428 Mich 708, 713, 716; 411 NW2d 159 (1987). But, a court may rely on a lack of remorse as it bears upon defendant's prospects for rehabilitation. *Wesley*, *supra* at 711.

Here, the trial court indicated its consideration of defendant's potential for rehabilitation. *Wesley, supra* at 714-715, 718-719. Although the court mentioned defendant's refusal to acknowledge the incidents and his refusal to display remorse in open court, the court did not ask defendant to admit his guilt and there was no suggestion by the court that an admission of guilt would have reduced defendant's sentence. On the contrary, the court made it clear that it was taking into consideration legislative intent in imposing harsh punishment in an effort to deter crimes of sexual conduct. It appears that the court's comments were clearly directed toward defendant's lack of remorse, which is proper under *Wesley*, rather than toward a failure to admit guilt. The Court in *Wesley* stated that "[i]f [] the record shows that the court did no more than address the factor of remorsefulness as it bore upon defendant's rehabilitation, then the court's reference to a defendant's persistent claim of innocence will not amount to error requiring reversal." *Wesley, supra* at 713.

We conclude from our review of the record that the court did not base defendant's sentence on his refusal to admit his guilt. Accordingly, defendant is not entitled to resentencing.

Affirmed.

/s/ Michael J. Talbot

/s/ Hilda R. Gage

/s/ Kurtis T. Wilder