STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RUSH W. WILSON,

Defendant-Appellant.

UNPUBLISHED
July 16, 2002

No. 228263
Wayne Circuit Court
LC No. 99-010539

Before: Jansen, P.J., and Holbrook, Jr., and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a). Defendant was sentenced to concurrent terms of five to fifteen years' imprisonment on each count. We affirm defendant's conviction and sentence but remand to the circuit court to correct defendant's presentence report.

Defendant first argues that trial counsel was ineffective for failing to object while the prosecutor elicited evidence that defendant failed to pay child support. We disagree. "To prove a claim of ineffective assistance of counsel . . . , a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant must overcome the presumption that the challenged action constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Because defendant failed to move for either a new trial or a *Ginther*[1] hearing, our review of his claim of ineffective assistance of counsel is limited to the existing record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

We find that defense counsel opened the door regarding defendant's non-payment of child support in her opening statement when counsel argued that the charges were fabricated in retaliation for defendant's failure to pay child support. Accordingly, it was proper for the prosecutor to ask the victim's guardian about child support during direct examination. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). Additionally, because defendant's non-payment of child support was relevant to defendant's theory of the case, the prosecutor's use of it

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

did not prejudice defendant or inflame the jury. Therefore, there was no miscarriage of justice and defendant was not denied his due process rights through the presentation of this evidence.

Defendant next argues that during closing rebuttal argument, the prosecutor made an inappropriate comment that was clearly calculated to inflame the jury and invoke sympathy for the alleged victim. We disagree. The test for determining prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). "Where impermissible comments are made by a prosecutor in response to arguments previously raised by defense counsel, reversal is not mandated." *People v Vaughn*, 200 Mich App 32, 39; 504 NW2d 2 (1993). Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *Id*. Further, the record indicates that the trial court instructed the jury that the arguments of the attorneys were not evidence.

We find no error requiring reversal. While the language of the prosecutor's comment was arguably intemperate, there is no evidence that the comment was made "with no apparent justification except to arouse prejudice." *People v Bahoda*, 448 Mich. 261, 266; 531 NW2d 659 (1995). Rather, it is clear that the comment was made in response to a questionable implication raised about the victim in defendant's closing argument. Further, the trial court immediately sustained defendant's objection to the comment. Under the circumstances, we do not believe that defendant was denied a fair trial by this brief comment; we do not believe that the comment was so inflammatory and harmful as to divert the jury's attention from deciding the case on the merits. *Id.* at 266-267.

We also reject defendant's assertion that he was denied his state and federal constitutional right to be tried by an impartial jury because the trial court coerced a hasty verdict by telling the jury that deliberations would continue at a later date even though that would disrupt some jurors' vacation plans and that if they did not return, the sheriff would lock them up. A criminal defendant has a right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, art 1, § 20; *People v Daoust*, 228 Mich App 1, 7; 577 NW2d 179 (1998). Claims of coerced verdicts are reviewed case by case, and all the facts and circumstances, as well as the particular language used by the trial court, must be considered. *People v Pizzino*, 313 Mich 97, 103; 20 NW2d 824 (1945); *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989).

The alleged coercion came when the court was discussing with the jury the schedule for deliberations. The court indicated that the jury would be called to deliberate on June 12, 2000. When one juror indicated that it would be a hardship for her to come back that day, the court responded: "Ma'am, if I say you do, you're going to come back or if you don't these Wayne County Sheriffs will be out to your house and put you in lock up to bring you back." Because defendant failed to raise an objection to the court's comments, we review for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain . . . , 3) and the plain error affected substantial rights. . . . The third requirement generally requires a showing of prejudice . . . ." *Id*. at 763. Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error '"seriously affect[ed] the fairness,

integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Id.*, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]).

While we agree that there was no pressing need for the court to tell the juror involved that she would be locked up if she did not show up on June 12, we do not believe that this singular comment coerced the jury into arriving at a guilty verdict. The record does not show that the court's comments were strategically intended to coerce the jury to reach a hasty verdict or discouraged further deliberations. *Malone, supra*; *People v London*, 40 Mich App 124; 198 NW2d 723 (1972). Further, regardless of their propriety, defendant has failed to establish the requisite prejudice for this unpreserved error. The record shows that the jury returned the next day, and after being given a transcript of requested testimony (see discussion *infra* p __), reached a verdict. Additionally, the record does not establish that defendant was actually innocent or that the alleged error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" independent of the defendant's innocence.'" *Carines, supra* at 763-764, quoting *Olano, supra* at 736-737 (quoting *Atkinson, supra* at 160).

In his pro per brief on appeal, defendant argues that the jurors denied him his state and federal due process right to a fair trial by deliberating on hearsay evidence the trial court instructed them not to consider. After deliberations began, the jury sent the court a note with the following request: "Is it possible to have clarification from the doctor's testimony of where the grandmother, [the victim] indicated to her she had spent the previous ten days, with Rush Wilson or with the mother, with Felicia or Althea." The court reminded the jury that what the grandmother may have said about the victim's whereabouts during this ten-day period was inadmissible hearsay that they are not to consider. The court also reminded the jury that a stipulation had been entered that the grandmother had no information about if and when the alleged sexual abuse occurred.

The jury then asked for the treating physician's testimony, with one juror indicating "that what we're looking for might be better answered by the doctor's testimony." During the doctor's testimony, reference was made to a note in the treatment report indicating when the abuse occurred. A hearsay objection was immediately raised by defendants and sustained by the trial court. When the prosecution later tried to get the doctor to again testify about what the treatment report indicated about the time frame of abuse, the court instructed the prosecution that the information was not obtained from the victim and was thus inadmissible. Throughout her testimony, the doctor indicated that she had not written down any information about when the abuse occurred.

It is unclear from the record why the jury wanted the doctor's testimony for review. It seems that the jury was initially trying to pinpoint where the victim was prior to being examined by the doctor. However, it is clear from the testimony that the doctor had no admissible information on this matter. If the jury was seeking what the grandmother had said about the victim's whereabouts, then they either misunderstood or disregarded the court's instructions on hearsay. There is not, however, conclusive proof that this information was what they were seeking. If they were seeking information that the doctor had received from the victim, then there is no hearsay problem.

We hold that defendant has failed to establish an error requiring reversal. First, defendant fails to establish that the jury did consider improper evidence. Second, assuming that the jury did consider evidence it was instructed not to, we conclude that this error was harmless. After reviewing the record, we conclude that the weight of the admissible evidence outweighed any reasonable probability that the allegedly inadmissible evidence affected the outcome of the trial. See *People v Sykes*, 229 Mich App 254, 273-274; 582 NW2d 197 (1998).

Defendant also argues in pro per that trial counsel was ineffective for allegedly not investigating the victim's whereabouts during the ten days preceding her visit to the hospital. Specifically, defendant alleges that counsel failed to discover and present evidence that the victim was with her grandmother for one of the days in the week immediately before the abuse was discovered by the emergency room physician. Again, because defendant failed to move for either a new trial or a *Ginther* hearing, our review of his claim is limited to the existing record. *Nantelle, supra* at 87.

Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). A criminal defendant is denied the effective assistance of counsel by his attorney's failure to investigate and present a meritorious defense. See *People v Newton (After Remand)*, 179 Mich App 484, 491; 446 NW 487 (1989). A substantial defense is one that might have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The fact that a strategy does not work does not render its use ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant has failed to show that the alleged information about the victim's whereabouts for one day would have provided him with a substantial defense that might have made a difference in the outcome of the trial. The doctor who treated the victim testified that the victim indicated that there had been approximately ten incidents of abuse. The doctor could not testify about when the abuse occurred. Assuming that the victim was with her grandmother for the day asserted does not preclude the occurrence of abuse during the other days of the week.

Finally, we agree with defendant that he is entitled to have his presentence report corrected and sent to the Department of Corrections. Because the trial court determined that the challenged information was inaccurate, defendant is entitled to have the inaccurate information stricken from the report. MCL 771.14(6); MCR 6.425(D)(3)(a); *People v Hoyt*, 185 Mich App 531, 534; 462 NW2d 793 (1990).

Affirmed and remanded to the circuit court to correct defendant's presentence report. We do not retain jurisdiction.

/s/ Kathleen Jansen
/s/ Donald E. Holbrook, Jr.
/s/ Richard Allen Griffin