

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN COLBERT,

Defendant-Appellant.

UNPUBLISHED

May 18, 2004

No. 246811

Wayne Circuit Court

LC No. 02-009364-01

Before: Owens, P.J., and Kelly and R. S. Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under thirteen years of age). Defendant was sentenced to six to ten years in prison. We affirm.

Defendant raises several allegations of prosecutorial misconduct. Defendant failed to preserve most of the alleged prosecutorial misconduct by objection below. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Therefore, this Court's review is for plain error that affected substantial rights. Reversal is only warranted if this Court determines that the plain error actually caused an innocent defendant to be convicted or if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Thomas*, __ Mich App __; __ NW2d __ (Docket No. 243817, issued 2/3/04), slip op, p 2.

First, defendant claims the prosecution vouched for and bolstered the victim's credibility. We find no plain error requiring reversal. A prosecutor cannot vouch for the credibility of his witness by implying that he has some special knowledge of the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). But a prosecutor may comment on his own witness' credibility during closing, especially when there is conflicting evidence and the question of defendant's guilt turns on which witness the jury believes. *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992). The record must be read as a whole and the allegedly impermissible statements judged in the context they were made. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995).

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Most of the comments pointed to by defendant in the prosecution's opening statement and closing argument deal with the victim's naïveté and the lack of contradictions between her testimony on direct and cross-examination. These comments do not imply a special knowledge of the victim's truthfulness. The prosecution's statements were a fair comment on the witness' credibility. *Bahoda, supra*, 448 Mich 276. This was especially important given defendant's statements and questioning implying that the victim was lying and framing defendant at the behest of her mother. Reading the record as a whole, and considering the defense statements and questions, the prosecution's statements in this regard did not constitute misconduct. We do find objectionable, however, the prosecutor's comments regarding the fact that the victim did not contradict her testimony in statements. The prosecutor implied that she knew all of the victim's previous statements and knew that they did not contradict her testimony. A prosecutor cannot vouch for the credibility of her witness by implying that she has some special knowledge of the witness' truthfulness. *Bahoda, supra*, 448 Mich 276. The prosecution's statements implying special knowledge of the victim's truthfulness constitutes error. *Id.*

But error alone is not sufficient to require reversal in an unpreserved instance of prosecutorial misconduct. Reversal is only warranted if this Court determines that the plain error actually caused an innocent defendant to be convicted or if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Thomas, supra*, slip op, p 2. The prosecution's misconduct does not rise to the level of a plain error requiring reversal. *Id.*

Next, defendant claims the prosecution committed misconduct by denigrating a defense witness by calling the witness "shady." A prosecutor may argue, from the facts, that a witness is not worthy of belief by the jury. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In making this argument, the prosecution is not required to use only the blandest terms available. *Id.* at 361. We find no reversible error.

Defendant also claims that the prosecutor committed misconduct by impeaching a witness with out-of-court statements made to the prosecutor, where defendant had no opportunity to examine the prosecutor regarding the alleged statements. Defendant objected when the prosecutor first referred to her conversation with the witness. The objection was "improper question." A bench conference ensued and the questioning continued without a ruling or further objection on the record. We will treat the issue as preserved, and review it to determine if defendant was denied a fair trial. *Thomas, supra*, slip op, p 2.

MRE 613(a) allows the questioning of a witness concerning a prior written or oral statement made by that witness. It does not require that statement be introduced into evidence or that the hearer first testify regarding the contents of the statement. *People v Avant*, 235 Mich App 499, 509-511; 597 NW2d 864 (1999). MRE 613(a) allows the prosecutor to ask the impeaching question after a proper foundation is laid. *People v Rodriguez*, 251 Mich App 10, 34; 650 NW2d 96 (2002). The witness then either affirms or denies the question. The impeaching party then may offer extrinsic evidence to prove the truth of the impeaching statement. MRE 613(b). No requirement exists that a party must present extrinsic evidence to verify the truth of the impeaching statement. MRE 613(b); *People v White*, 139 Mich App 484, 488-489; 363 NW2d 702 (1984). The prosecution laid a proper foundation in questioning the witness regarding the prior statement. Although it would have been preferable for the identification of the conversation for foundation purposes to have excluded references to the prosecutor herself, we find no reversible error. Defendant complains that the questioning was

improper because he could not cross-examine the prosecutor regarding the statements. It is unclear whether this was the basis of his objection. In any event, we find no unfair prejudice. The witness handled the questioning effectively. Further, the jury was instructed that the lawyers' questions to the witnesses are not evidence and should be considered only as they give meaning to the answers.

Defendant next claims that he is entitled to a new trial because the court allowed impermissible hearsay statements. We disagree. Defendant did not object to the admission of the challenged evidence in this case, therefore he must demonstrate plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Hearsay is an out of court statement offered for the truth of the matter asserted. *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997). Generally, hearsay is not admissible unless it falls within an exception articulated in the rules of evidence. *Id.* at 629. Defendant first argues that a witness' testimony regarding the victim's account of the assault to her immediately after leaving defendant's presence was hearsay and not admissible under any exception. We disagree.

MRE 803(2) allows the admission of a hearsay statement as evidence because the person is still under the sway of excitement precipitated by an external startling event, and she will not have the reflective capacity essential for fabrication. Therefore, any utterance will be spontaneous and trustworthy. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). The two primary requirements for an excited utterance are: 1) the startling event occurred; 2) the resulting statement is made while the person is still under the influence of the event. *Id.* at 550.

The victim's statement falls within this exception. There is no question that a sexual assault qualifies as a startling event. *Smith, supra*, 456 Mich 552. Further, independent evidence exists to corroborate the statement in the victim's testimony at trial. This leaves the question whether the victim remained under the influence of the startling event when she made her statement. Defendant was with the victim during the entire intervening time between the assault and her statement to the testifying witness. But as soon as the victim was sure defendant had left, she made the statement in question. Under the circumstances, it appears that the victim remained under the influence of the startling assault when she made the statements. MRE 803(2); *Smith, supra*, 456 Mich 552-554. Since an exception applies, it was not error to admit the evidence. *Tanner, supra*, 222 Mich App 629. Because the statement was properly admitted, it was not unfairly prejudicial for the prosecution to refer to it in closing argument.

Next, defendant argues that admission of the victim's mother's testimony was reversible error. We disagree. The prosecutor asked the victim's mother if the victim had told her something had happened to her. When the mother said yes, the prosecutor asked: "As a result of what she told you, what did you do?" The mother responded: "I started hugging her and was crying and asking her did it really happen and she said, yeah, it happened." To the extent this testimony was inadmissible hearsay, defendant has not shown plain error requiring reversal. It is highly unlikely that this testimony affected the outcome of the trial.

Defendant claims that the trial court abused its discretion in not excluding his statement made to a police investigator because the prosecutor failed to turn the statement over to defendant during discovery and only gave it to defendant two days before trial. We disagree.

This Court reviews a trial court's decision regarding discovery for an abuse of discretion. *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003).

The trial court's exercise of discretion in deciding the appropriate remedy for noncompliance with discovery involves a balancing of the interests of the court, the parties, and the public. *People v Davie (After Rem)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). Exercise of this discretion requires inquiry into the relevant circumstances including the reason the compliance was delayed or missing. Also, the objecting party must show actual prejudice. *Id.* at 598. The trial court made such inquiries and found no bad faith on the part of the prosecution. Further, there is very little prejudice to defendant. The statement was not a confession. Although the statement corroborated some of the victim's testimony, it also corroborated some of the defense witnesses' testimony. Also, this was defendant's own statement. A defendant is not prejudiced by the failure or untimely release of his own statement during discovery, because he has independent knowledge of its existence. *People v Taylor*, 159 Mich App 468, 487-488; 406 NW2d 859 (1987). Under the circumstances, the trial court did not abuse its discretion in not excluding the statement.

Finally, defendant claims he received ineffective assistance of counsel. We disagree. Defendant did not move for a *Ginther*¹ hearing nor did he move for a new trial based on ineffective assistance of counsel. Claims of ineffective assistance of counsel are reviewed de novo. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). Because defendant did not move for a *Ginther* hearing or a new trial, review is limited to mistakes apparent in the record. *People v McCrady*, 213 Mich App 474, 478-479; 540 NW2d 718 (1995).

Defendant first points to the incidents of prosecutorial misconduct stemming from the prosecution's opening and closing statements. We found no misconduct in most of these comments. Any objection to these proper comments and arguments would have been unnecessary and futile. It is not ineffective assistance to refuse to make meritless or futile objections. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

As to those statements that we have found improper, we observe that the decision to object during closing arguments is a matter of trial strategy. *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996). "Certainly there are times when it is better not to object and draw attention to an improper comment." *Bahoda, supra*, 448 Mich 287 n 54. Further, the trial court's careful and explicit instructions to the jury that it was required to decide the case only on the evidence and that the lawyers' arguments were not evidence cured any prejudicial effect potentially arising from prosecutorial misconduct in closing arguments. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Therefore, defendant has failed to demonstrate that the failure to object was outcome determinative as is his burden. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).

Defendant also claims counsel was ineffective for not objecting to the prosecution's references to the alleged hearsay statements during closing arguments. However, we have

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

concluded that one statement was admissible, and the other was an implied reference to a hearsay statement adding little to the evidence properly admitted.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Roman S. Gibbs