STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMIE MICHAEL FISHER,

Defendant-Appellant.

UNPUBLISHED
November 16, 2004

No. 250700
Monroe Circuit Court
LC No. 02-032085-FH

Before: Cavanagh, P.J., and Kelly and H. Hood*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b)(i) (sexual penetration of thirteen-year-old member of household). We affirm.

I

Defendant was convicted of sexually abusing his adopted daughter, NF, when she was thirteen years old. Defendant married NF's mother, Kimberly Fisher, in 1992, when NF was five years old. He adopted NF the following year. Defendant and Kimberly established their own home in Alpena after they were married, and had two daughters of their own. NF lived with her maternal grandparents, but spent weekends and several evenings with defendant and Kimberly in their home. In early 2001, defendant and Kimberly moved to Dundee Township in Monroe County. NF left her grandparents' home in Alpena to join her parents around Easter 2001, when she was thirteen years old. NF wanted to move in with her parents because she felt her grandparents were too strict.

Defendant's family did not have their own home when they first moved to Dundee, so they shared a mobile home with defendant's friend, Jim Sylvester, and Sylvester's wife and mother. NF stayed with her family in the Sylvesters' home from Easter until June 12, 2001, when she returned to Alpena to spend the summer with her grandparents. She returned to Dundee on August 18, 2001. At this time, defendant's family was living in their own mobile home.

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

NF became friends with a group of young adults and older teenagers who lived in the mobile home park and who congregated at the mobile home of twenty-three-year-old Chris Stamper. She acquired a seventeen-year-old boyfriend, Eric Barton, who belonged to Stamper's group. The police received several complaints about criminal behavior at Stamper's mobile home. He and his companions frequently used alcohol, marijuana, and Ecstasy.

Defendant and Kimberly opposed NF's association with the group and with Barton. They forbade her from going to Stamper's house or from seeing Barton, but she flouted the prohibition by sneaking out of her window at night or skipping school to go there. On September 4, 2001, defendant and NF had an emotional argument after defendant caught her hiding in Stamper's home. For the next two weeks, NF continued to fight with her parents and to defy their ban on her contact with Stamper's group. During this time, NF confided in her friends at Stamper's house that defendant had been sexually abusing her for many years.

NF's struggle with her parents culminated on September 27, 2001, when she confronted defendant and Kimberly with her sexual abuse accusations. Defendant denied the accusations, Kimberly believed defendant, and NF ran from the home. Kimberly went to work, leaving defendant, who was sick, home with the two younger daughters. NF called the police from her friend's home and reported her accusations against defendant. Monroe County Sheriff's Deputy Todd Opperman came to take her statement.

Later that same day (September 27, 2001), Opperman went to defendant's house to interview him. Defendant admitted to Opperman that he had sexually abused NF, and Opperman arrested him.

At the county jail, defendant gave a tape-recorded interview with Opperman, in which he admitted sexually abusing NF since she was eight or nine, beginning with hand-genital contact and digital penetration, and progressing to oral sex and genital intercourse. He blamed NF for arousing him and demanding sex from him. He stated that the sexual involvement had ended two months earlier, when NF finally agreed to leave him alone. Subsequently, defendant moved to suppress his statements on the ground that they were given involuntarily. Following a *Walker*[1] hearing, the trial court denied the motion.

On September 28, 2001, following a discussion with defendant's friend, Jim Sylvester, NF told Detective Charlotte Reaume that she had falsely accused defendant because her friends told her that she could then become emancipated. Reaume told NF that she could be placed in juvenile detention for making a false police report, and she played defendant's taped confession for NF. When NF heard the confession, she told Reaume that her original accusations were truthful.

While the criminal charges were pending in the trial court, the Family Independence Agency ("FIA") initiated child protective proceedings against defendant and Kimberly. Kimberly filed for divorce from defendant, and defendant's parental rights to NF and the two

[1] *People v Walker* (*On Rehearing*), 374 Mich 331; 132 NW2d 87 (1965).

younger children were terminated before the trial. NF was a ward of the court at the time of trial, but the FIA apparently was no longer pursuing termination of Kimberly's parental rights.

Without objection from defendant, NF testified that defendant first began to sexually abuse her when the family lived in Alpena. She did not recall specific incidents, but recalled that the earliest incidents involved defendant caressing her legs and touching her genitals both under and over her clothes. When she was ten or eleven, and still living in Alpena, defendant began to have intercourse and oral sex with her. NF testified that the earliest incidents occurred when Kimberly was not at home, but defendant later began to approach her when Kimberly was asleep or in the shower. NF testified that her sisters were very young at this time, so defendant was not very concerned about getting caught. He simply put a chair in front of the door, or told the sisters to go away because he was busy.

NF testified that when she first joined defendant at the Sylvesters' home in Dundee, she, defendant, Kimberly, and one sister all slept in the same bedroom. NF estimated that defendant had intercourse with her ten times in the Sylvesters' home, usually around midnight, while Kimberly was working an afternoon shift. The intercourse took place in the bedroom, with the door closed, while the younger sister was asleep and the Sylvesters were either asleep or in the living room. NF also testified regarding a specific incident that occurred in the Sylvesters' home during the period between Easter and June 12, 2001. She was watching television in the living room while two children who were related to the Sylvesters were asleep in the same room. NF pretended to be asleep when defendant approached her for sex, but she gave in after he repeatedly pestered her. She did not recall how long the entire incident lasted. NF testified that when the family had their own home in August and September 2001, she had her own bedroom. Defendant had sex with her in one of their bedrooms or in defendant's bathroom, while Kimberly was working or running errands. Defendant locked the door so they would not get caught.

NF estimated that defendant had intercourse with her more than ten times between August 18 and September 28, 2001, at the family's own home in Dundee. The intercourse occurred both before and after September 4, 2001, a date NF recalled because she and defendant had an emotional argument that day. NF did not know how many times defendant had sex with her after September 4, but estimated that it was less than ten. On cross-examination, defense counsel elicited that NF had told Opperman that the last incident occurred approximately one month before she made her statement, but at trial, NF stated that the last incident occurred two weeks before the statement, or around September 13, 2001. NF testified that she could not remember any particular dates because she did not keep a record and because there were too many incidents.

During direct examination, NF admitted that she was rebellious and disobedient with her grandparents. She admitted that, on one occasion, her grandfather was so provoked by her behavior that he said he would hit her if she did not behave. NF threatened to report him to the police for abusing her. NF testified that she thought she was being "smart and funny," and she did not think she actually would have made the report. She did not recall when this occurred within the chronology of her moves to and from Dundee.

The prosecutor questioned NF about defendant's attempts to stop her from associating with Stamper and his friends at the mobile home park. NF agreed that Stamper's group was the "wrong crowd," and that she should not have been using drugs and alcohol with them, but she

also stated that her experiences with them helped her understand the wrongfulness of defendant's behavior. She testified that defendant acted like a jealous boyfriend when he tried to stop her from seeing Barton, and that he played with her emotions by accusing her of being selfish and not loving him.

NF explained that she kept defendant's conduct a secret partly because she was afraid of breaking up the family, partly because she was afraid that defendant would abuse her sisters if he did not receive sex from her, and partly because he gave her money and let her get away with breaking Kimberly's rules. She agreed that she had been spoiled at home. NF testified that she had been in foster care since September 28, 2001. She hated being separated from Kimberly, and hated all the restrictions imposed in foster care and residential care.

Kimberly testified that, during the months in question, she worked twelve-hour shifts from 3:00 p.m. to 3:00 a.m. Defendant worked during the day, and he arrived home between 5:00 and 6:00 p.m. Defendant was home with the children during the evenings when Kimberly was at work. Jim Sylvester corroborated Kimberly's testimony that defendant was home in the evenings while Kimberly was at work. He testified that defendant went to bed around 9:00 or 10:00 p.m., and NF sometimes went to bed at the same time in the same room with defendant.

Testifying on his own behalf, defendant denied abusing NF. Defendant acknowledged that he was home in the evening while Kimberly was at work. He testified that he usually went to bed around 10:00 p.m. when he lived with the Sylvesters, and that one of his younger daughters went to bed in that room at the same time. He claimed that he was rarely at home alone with his daughters when he lived in Alpena. He reiterated his testimony from the *Walker* hearing that Opperman bullied and prodded him into making a false confession with threats of FIA action and promises of leniency. The jury convicted defendant of all four counts.

II

Defendant contends that he was denied due process because the prosecutor did not allege particular dates for the alleged offenses. Defendant contends that the lack of specificity denied him the opportunity to raise a viable defense. He maintains that if he had known the specific dates, he could have shown that he was either at work or out of town.

MCL 767.45(1)(b) provides that the information shall contain "[t]he time of the offense as near as may be," but that "[no] variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.51 further provides that a trial court may, on a party's motion, require the prosecution to state the time of the offense as nearly as the circumstances permit to enable the accused to meet the charge.

Defendant raised this issue below at the preliminary examination. The prosecutor subsequently filed a new complaint alleging the offense dates with greater specificity, which the district court found sufficient to adequately inform defendant of the offense dates and times. We review the court's decision for an abuse of discretion. *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986).

In *Naugle*, *supra*, the defendant argued that his multiple convictions of CSC should be reversed because the information failed to specify the dates of the alleged offenses, thus denying

him due process and precluding him from preparing an alibi defense. This Court identified the following factors to be considered in determining whether the information contains sufficient specificity:

> (1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense. [*Id*. at 233-234.]

The Court concluded that the prosecutor had specified the dates to the best of his knowledge after reasonable investigation. *Id*. at 235. The Court found it "conceivable that specific dates would not stick out in [the victim's] mind" because she was thirteen years old when the offenses occurred, and because the defendant had been molesting her since she was eight years old. *Id*. The Court held that the defendant's intent to assert an alibi defense was entitled to consideration, but should not "necessarily militate in favor of either requiring specificity or dismissing the charges against a defendant." *Id*. at 234. The Court also commented that "creating a viable alibi defense was not a realistic option" where the alleged assaults covered a ten-month period. *Id*. at 234-235.

Applying these factors to the instant case, we find sufficient particularity. The nature of the offenses charged hindered the prosecutor's ability to pinpoint specific dates. Although defendant was charged with four discrete criminal acts, NF claimed that they were part of a long pattern of frequent and recurring abuse. The prosecutor was able to use NF's moves to and from Dundee, and a memorable argument on September 4, 2001, to establish a reasonably narrow time frame for each charged count.[2] Similar to the victim in *Naugle*, NF stated that she had difficulty pinpointing dates because there were so many incidents of sexual abuse.

Further, the estimated time frames were not prejudicial to defendant. Despite the lack of greater specificity, defendant was able to raise a defense that the events could not have occurred as NF described because there were always other persons in the house when he and NF were at home at the same time. Defendant has not shown that he was out of town during the months in question, and a plausible alibi defense was unlikely where the prosecution showed that defendant used his and Kimberly's dovetailing work schedules to abuse NF in the late evening hours. Therefore, defendant has not shown that he was deprived of the opportunity to present a viable defense. For these reasons, we reject this claim of error.

III

Defendant argues that the trial court erred in denying his motion to suppress his statement. He claims that the statement was given involuntarily because he did not understand his rights, because Opperman used threats and promises of leniency to induce him to confess, and because Opperman ignored his demand for an attorney.

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[2] Counts I and II were alleged to have been committed within a two-month period between approximately April 15 and June 12, 2001, count III within a 2-1/2-week period between August 18 and September 4, 2001, and count IV within a 3-1/2-week period between September 4 and September 28, 2001.

The Due Process Clause of the Fourteenth Amendment prohibits use of an involuntary statement coerced by police conduct. US Const, Am XIV; *People v Wells*, 238 Mich App 383, 386; 605 NW2d 374 (1999). The question of whether a statement was made voluntarily is generally determined by an examination of police conduct. *People v Howard*, 226 Mich App 528, 538; 575 NW2d 16 (1997). When this Court reviews a trial court's determination of voluntariness, it is required to examine the entire record and make an independent determination of the issue as a question of law. *Wells*, *supra*. However, this Court will affirm the trial court's decision unless it is left with a definite and firm conviction that the trial court erred. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). If the question of voluntariness rests on a disputed factual question that turns on the credibility of witnesses or the weight of the evidence, this Court will defer to the trial court, given its superior opportunity to evaluate these matters. *Id*.

In evaluating police conduct, the factors a trial court should consider include

> [t]he age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. [*Id*. at 753.]

The absence or presence of any one factor is not conclusive of the issue of voluntariness. The ultimate test is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. *Id*.

Defendant contends that his statement was not voluntary because he was too sick to understand that he was waiving his rights, because he was intimidated by Opperman's authority as a law enforcement officer, because Opperman repeatedly and aggressively threatened to remove his children unless he did not confess, because he was extremely upset by this threat, and because Opperman led him to believe that he would fare better in court if he confessed.

At the *Walker* hearing, defendant testified that he was sick with a sinus infection and bronchitis, and had severe pressure in his ear at the time of his interviews. He was on an oral antibiotic and had received a shot. He could not think clearly. He had to take the day off from his job as a computer programmer because he could not work.

With regard to the interview at defendant's home, defendant claimed that Opperman became loud and intimidating when he tried to profess his innocence and demand an attorney. He felt intimidated by Opperman's uniform and gun, and did not feel free to leave. According to defendant, Opperman accused him of lying, warned him that there was a lot of evidence against him, and threatened to have the FIA remove the children unless defendant confessed. Defendant claimed that, after he confessed and was arrested, Opperman said he could see an attorney at the jail, but when they arrived at the jail, Opperman told him that he could see an attorney after he

tape-recorded the confession. Defendant said he decided to go along with the tape recording in hopes that he would be reunited with his family if he said what Opperman told him to say. He incorporated the details according to Opperman's instructions, but said nothing on the tape to suggest that Opperman fed him the details because he wanted to sound remorseful.

Defendant claimed that he was too sick and upset to understand what he was doing, and that he made a false confession because he was afraid his children would be removed.

Kimberly substantially corroborated defendant's testimony. Although she claimed that Opperman ordered her out of the room during the home interview, and believed from the tone of Opperman's voice that she had no choice but to leave, she said she overheard defendant deny the allegations several times and ask for an attorney. Kimberly also said that she heard Opperman tell defendant repeatedly that a judge would be more lenient if he admitted the allegations, and heard Opperman threaten to have the two younger children removed. She claimed that when defendant left with Opperman, he asked for an attorney, but Opperman did not respond.

Opperman testified that defendant was not under arrest or obligated to stay in the room when Opperman came to defendant's home to interview him. Opperman acknowledged that he asked Kimberly to leave the room during the interview. Opperman said he advised defendant of his *Miranda*[3] rights, and defendant acknowledged that he understood his rights and signed a waiver of rights form. According to Opperman, defendant did not request an attorney. Opperman testified that defendant did not appear too sick to understand what was happening. Opperman denied assuring defendant that he would be treated more leniently or would be better off if he confessed. Opperman also denied telling defendant that the FIA would remove the children that night if defendant did not confess, or making other threats or promises about what would happen if defendant confessed or did not confess.

In resolving the question of voluntariness, the trial court gave credence to Opperman's testimony, stating that it believed his version of what happened. The court did not believe that either defendant or Kimberly were "so afraid of the police that they believed they were cowed by them." The trial court also found that defendant was too mature and educated not to understand his rights, and noted that he seemed clear-minded and gave "crisp and clear" answers on the audiotape. Because the question of voluntariness ultimately turns on the credibility of the witnesses, we defer to the trial court's findings in this regard. See *Sexton*, *supra*. A review of those findings reveals that defendant's statements were voluntarily given.

Defendant also contends that Opperman violated his rights by continuing to question him after he asserted his right to an attorney. When a defendant claims that his statement should have been suppressed because the police did not honor his request for counsel, this Court reviews the record de novo, but reviews the trial court's factual findings under the clearly erroneous standard. *People v Adams*, 245 Mich App 226, 230, 235; 627 NW2d 623 (2001).

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Both the United States and Michigan Constitutions guarantee the right against compelled self-incrimination. US Const Am V; Const 1963, art 1, § 17. This right encompasses an accused person's right to cease a custodial police interrogation by asserting his right to counsel. *Adams, supra* at 230-231. When an accused invokes the right to have counsel present during a custodial interrogation, the accused cannot be subjected to further police questioning until counsel has been made available, unless the accused initiates further communication. *Id*. at 237, citing *Edwards v Arizona*, 451 US 477, 484-485; 101 S Ct 1880; 68 L Ed 2d 378 (1981). The accused must express a present desire for counsel, and ambiguous and equivocal references to an attorney do not require the police to cease questioning. *People v Granderson*, 212 Mich App 673, 677; 538 NW2d 471 (1995).

Defendant and Kimberly both testified that defendant requested an attorney during the home interview, and again as he was leaving with Opperman. Defendant also testified that Opperman assured him that he could see an attorney at the jail after he gave a taped confession. In contrast, Opperman denied that defendant requested an attorney. Once again, the trial court resolved this credibility contest in the prosecution's favor, giving credence to Opperman's version of events. Although the court found that defendant "was interested" at some point in consulting with an attorney, it found that defendant never clearly expressed this interest at either the home interview or before the taped statement. The court also found that defendant was able to understand his rights despite his illness and his perception of Opperman's authority. Deferring to the trial court's superior opportunity to evaluate the credibility of the witnesses, we find no clear error in the court's decision.

Defendant argues that this Court should not defer to the trial court's findings because a substantial body of research shows that many persons, including intelligent and educated persons, have been induced into making false incriminating statements. Limiting our review to the case before us, however, we are not left with a definite and firm conviction that the trial court erred.

IV

Defendant claims that the trial court erred in allowing NF to testify that he had abused her repeatedly during the years before the family moved to Dundee. Because defendant did not preserve this issue by objecting to NF's testimony at trial, MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001), our review is limited to plain error affecting defendant's substantial rights. *People v Herndon*, 246 Mich App 371, 404; 633 NW2d 376 (2001).

A prosecutor may not introduce evidence of other crimes, wrongs, or acts in order to prove a defendant's character or propensity for criminal behavior. MRE 404(b); *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973); *People v Layher*, 238 Mich App 573, 585; 607 NW2d 91 (1999). However, in *DerMartzex*, *supra* at 415, our Supreme Court held that evidence of other sexual acts between a defendant and his victim may be admissible if the defendant and the victim live in the same household and if, without such evidence, the victim's testimony would seem incredible. The Court commented that evidence of prior sexual acts would not always be admissible, and could be excluded if the prejudicial effect outweighed the probative value. *Id*.

Here, NF's testimony about the history of sexual abuse was admissible under *DerMartzex*. Testimony that defendant suddenly began to have sexual relations with NF after she moved to Dundee would have seemed incredible without the testimony that the abuse began three or four years earlier, beginning with manual and oral sex and progressing to intercourse. Additionally, testimony that defendant had found ways to perpetrate the sexual abuse despite living in small homes where other persons lived gave credence to NF's testimony that the abuse occurred in the Sylvesters' mobile home. We therefore conclude that the evidence was relevant to the factual controversies of this case, and that the probative value did not outweigh the potential for unfair prejudice. MRE 403. Consequently, defendant has failed to establish that admission of the testimony constituted plain error.

Defendant cites *People v Goddard*, 429 Mich 505; 418 NW2d 881 (1988), and *People v McKinney*, 410 Mich 413; 301 NW2d 824 (1981), in support of his argument that the evidence should have been excluded. But these cases do not provide exceptions to the holding in *DerMartzex*, as neither involved sexual abuse.

V

Defendant challenges the following paragraph from the trial court's jury instructions:

> When you discuss the case, that is each count of the case, you must first consider the more serious charge, that is first degree criminal sexual conduct. If in that count you all agree that the Defendant is guilty of that crime, you may stop your discussions on that count and return your verdict and continue the next count and so on. If you believe that the Defendant is not guilty of first degree criminal sexual conduct or if you cannot agree about that crime, you should consider the less [sic] crime of second degree criminal sexual conduct. Members of the jury, you decide how long to spend on the principal or more serious charge before you discuss a less serious charge. And you can come back to the more serious charge of criminal sexual conduct first degree after discussing criminal sexual conduct second degree if you want to do that.

Defendant claims that this instruction was erroneous, because it suggested that the jury's only option was to convict him of either the greater or lesser offense, and that acquittal was not an option.

Defendant not only failed to object to the above instruction, he expressed his satisfaction with the instructions given. In *People v Carter*, 462 Mich 206, 216; 612 NW2d 144 (2000), our Supreme Court held that a defense counsel's express approval of the trial court's jury instruction, as opposed to a mere failure to object, "constitutes a waiver that *extinguishes* any error" (emphasis in original). Consequently, this issue is waived. In any event, defendant's argument is without merit because the trial court repeatedly referred to the three possible verdicts listed on the verdict form for each of the four counts.

VI

Defendant contends that the evidence was insufficient to support his convictions because NF's testimony was wholly incredible. He maintains that NF's testimony cannot be given

credence because she recanted her story, she was an incorrigible youth seeking emancipation from her parents, she previously threatened her grandfather with a false allegation of abuse, she changed allegations to make them less incredible, and the incidents could not have occurred in the family's cramped living quarters. Defendant also maintains that his self-incriminating statement does not corroborate NF's testimony, because it was made under duress.

Although defendant frames this issue as one challenging the sufficiency of the evidence, in substance it challenges the verdict as being contrary to the great weight of the evidence. Defendant does not contend that the prosecutor failed to establish any of the elements of first-degree CSC, as would be required in a successful challenge to the sufficiency of the evidence. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000). Rather, he argues that the jury's verdict cannot stand because NF's accusations cannot reasonably be believed. Lack of witness credibility does not establish insufficiency of the evidence, because this Court defers to the jury's assessment of the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). Furthermore, under MCL 750.526h, "[i]t is a well established rule that a jury may convict on the uncorroborated evidence of a CSC victim." *Lemmon*, *supra* at 643 n 22.

To the extent that defendant's argument is based on the great weight of the evidence, the issue is not preserved because defendant did not raise it in a motion for a new trial pursuant to MCR 2.611(A)(1)(e). *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). We therefore review the issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In reviewing a claim that a verdict is against the great weight of the evidence, the appropriate test "is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). A court may not act as a "thirteenth juror" when deciding a motion for a new trial, and this Court "may not attempt to resolve credibility questions anew." *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). In *Lemmon*, *supra* at 625, our Supreme Court recognized only narrow exceptions to the general principle against granting a new trial based on questions of witness credibility, e.g., when witness testimony contradicts indisputable physical facts or laws, when it is patently incredible or defies physical realities, or when it is so inherently implausible that a reasonable juror could not believe it. *Id*. at 643-644. "If 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury." *Id*. at 643, quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942).

Here, NF's testimony was not inherently implausible or patently incredible. Therefore, defendant has not demonstrated plain error with respect to this unpreserved issue.

VII

Defendant argues that the prosecutor's conduct denied him a fair trial. Defendant failed to object to the prosecutor's conduct at trial. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Defendant contends that the prosecutor misstated the law on reasonable doubt. During voir dire of prospective jurors, the prosecutor analogized to an incomplete puzzle, in which the entire picture can be visualized even if a few pieces are missing. The prosecutor then stated:

> The Judge is going to instruct you on exactly what the elements are at the close of the case, but inevitably, in any case, there are going to be things that you're left wondering about because there are limitations on evidence that we can present from the rules of evidence. There are time limitations so I can practically guarantee that you are going to have some questions that are unanswered. Is there anybody who would refuse to convict because of those other things that you're curious about, if we've shown the elements of the crime beyond a reasonable doubt?

Defendant contends that this statement improperly lowered the standard of reasonable doubt and instructed jurors to convict him based on incomplete and unpersuasive evidence.

A prosecutor's clear misstatement of the law, if uncorrected, can deprive a defendant of a fair trial. *People v Grayer*, 252 Mich App 349, 357; 651 NW2d 818 (2002). However, if the trial court correctly instructs the jury on the law, the prosecutor's error is cured. *Id*. Here, the prosecutor's abstract analogy cannot be considered a "clear misstatement of the law." It did not convey that a jury can convict a defendant on less than evidence beyond a reasonable doubt. Moreover, the analogy was given in the context of jury voir dire, when the prosecutor was discerning whether prospective jurors might refuse to convict based on unreasonable doubts. The prosecutor did not present the analogy to the jurors as a definitive statement of the law. In any event, the trial court subsequently properly instructed the jury on reasonable doubt, thus curing any perceived error.

Defendant claims that the prosecutor made improper appeals to the jury's sympathy and argued facts not in evidence when he stated in his opening remarks that defendant "took [NF's] innocence" and "damaged her beyond repair." This Court has held that "[a]ppeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001), quoting *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). However, this Court will not reverse where the prosecutor makes only an isolated comment, and where the appeal is not blatant or inflammatory. In *Watson*, the prosecutor stated that the defendant "attacked his stepdaughter . . . and he did something to her that no one should do to any other human being. He treated her in a way that no animal should be treated." *Watson*, *supra* at 591. This Court held that the remark was isolated, and not blatant or inflammatory, and therefore did not require reversal. *Id*. at 591-592. The Court further held that the trial court corrected the potential error by instructing the jury that it could not decide the case on sympathy. *Id*. at 592. The prosecutor's comments here are similar to the comments in *Watson*. The comments were isolated, and not maudlin or inflammatory. The prosecutor did not urge the jury to convict defendant out of sympathy or outrage irrespective of the evidence. Finally, the trial court instructed the jury that it could not decide the case on sympathy. We also reject defendant's claim that the prosecutor improperly argued facts not in evidence. The references to lost innocence and a damaged life were clearly based on defendant's history of abusing NF.

Finally, defendant claims that the cumulative effect of the prosecutor's misconduct deprived him of a fair trial. Because defendant has not established any occurrence of prejudicial misconduct, there is no merit to this argument.

VIII

Defendant contends that he was denied his constitutional right to present a defense because the pending child protective proceeding prevented Kimberly from testifying favorably on his behalf. At the *Walker* hearing, Kimberly learned that an FIA representative had been present during her testimony, and that the FIA had decided to seek termination of her parental rights based on her support of defendant during the *Walker* hearing. Subsequently, defendant's parental rights to the three children were terminated, but Kimberly's parental rights remained intact at the time of trial. On cross-examination at trial, Kimberly testified that she was currently allowed to visit NF and attend therapy with her, and that she had filed for divorce from defendant. Defendant questioned her further:

> *Q*. Can you tell the ladies and gentlemen of the jury why it is that you filed for divorce, initially?
>
> *A*. Initially, I filed because it was my husband or my children, and my children come first.
>
> *Q*. Meaning that if you would stay married to him, you were going to lose your kids?
>
> *A*. That's my assumption.
>
> *Q*. Who told you that?
>
> *A*. Nobody actually told me that, that was what I assumed. Nobody forced me to do it.
>
> *Q*. Okay. Are you still in love with Jamie Fisher?
>
> *A*. Am I still in love with him?
>
> *Q*. Right.
>
> *A*. No.

Defendant now argues that Kimberly would have been a supportive witness but for the FIA's threats to terminate her parental rights. He characterizes the FIA's actions as government action designed to thwart his constitutional right to present a defense. Defendant failed to raise this issue in the trial court, so we review the issue for plain error affecting defendant's substantial rights. *Carines*, *supra* at 763.

Our Supreme Court has cautioned that constitutional issues should not be addressed where a case may be decided on nonconstitutional grounds. *People v Riley*, 465 Mich 442, 447; 636 NW2d 514 (2001). This admonishment is especially pertinent here, where defendant attempts to raise a constitutional issue with potential applicability whenever a criminal defendant's spouse is a respondent in a child protective proceeding arising from the same conduct that led to the criminal charges against the defendant. Additionally, defendant fails to cite any authority in support of his constitutional argument, thus further militating against consideration of the constitutional question. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994).

It is unnecessary to address the constitutional issue suggested here because the facts do not establish that defendant was deprived of a defense. A limitation on a defendant's ability to present a defense may, under some circumstances, violate his constitutional right to due process. US Const, Am XIV; Const 1963, art 1, § 17; *People v Carpenter*, 464 Mich 223, 242; 627 NW2d 276 (2001). In this case, however, Kimberly was a competent witness with respect to the history of the family's living arrangements and work schedules, the general relationship between defendant and NF, NF's rebellious behavior during the weeks and months leading up to her accusations, and Opperman's conduct during the September 27, 2001, interview in defendant's home. Her most incriminating testimony was that their work schedules placed defendant at home with the children in the evening while she was at work, but this was cumulative of NF's and Jim Sylvester's testimony, and defendant himself agreed that this was the schedule. Kimberly's testimony about NF's rebellious behavior was cumulative to the other witnesses' testimony; it also was consistent with the defense theory that NF fabricated her allegations to liberate herself from defendant's parental authority. Kimberly's testimony about Opperman was favorable to defendant. Kimberly corroborated defendant's testimony that he twice asked Opperman for an attorney. Her trial testimony regarding the interview with Opperman was substantially the same as her testimony at the *Walker* hearing. When she deviated from the *Walker* hearing testimony, defense counsel impeached her with her prior testimony. Finally, defense counsel elicited Kimberly's admission that she assumed that she had to divorce defendant in order to choose her children, thereby revealing to the jury a possible ulterior motive for her lack of support for defendant. Under these circumstances, there is no factual basis for defendant's claim that he was deprived of a viable defense. Accordingly, it is unnecessary to address the merits of defendant's constitutional claim.

IX

Defendant contends that trial counsel was ineffective to the extent that he failed to preserve for appellate review issues previously addressed in this opinion.

To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001); *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001). As discussed previously, there was no erroneous admission of evidence under MRE 404(b), no error in the court's jury instructions, and no prejudicial misconduct by the prosecutor. Additionally, defendant has not established any basis for concluding that the jury's verdict was against the great weight of the evidence, or that he was deprived of a viable defense. Trial counsel is not required to advocate a meritless

position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Accordingly, we reject this claim of error.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly
/s/ Harold Hood