

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL WILLIAM STAMPER,

Defendant-Appellant.

UNPUBLISHED

November 16, 2006

No. 263436

Wayne Circuit Court

LC No. 04-010809-01

Before: Servitto, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

A jury convicted defendant of felony-murder, MCL 750.316(1)(b), second-degree murder, ML 750.317, first-degree child abuse, MCL 750.136b(2), and first-degree criminal sexual conduct (engaging in sexual penetration with a person under the age of 13), MCL 750.520b(1)(a). The trial court vacated the second-degree murder and first-degree child abuse convictions, and sentenced defendant to life in prison without parole for the felony-murder conviction and to a term of 225 months to 80 years for the first-degree criminal sexual conduct conviction. Defendant appeals as of right. We affirm.

The victim in this case is Jake Logan, the son of defendant's girlfriend, Gloria Ann Logan, who is also the mother of defendant's child. During the late afternoon or evening of September 8, 2004, defendant gave the victim a bath. Gloria heard the victim crying during the bath. After the bath, the victim was "passing out," and defendant put him in the bathtub to revive him. The victim later lay on the bed with Gloria. When Gloria asked him to open his eyes, he responded, "Mom, I can't, I'm dead." Defendant's daughter, Jamie, indicated that the victim stated, "don't bother me, I'm already dead." Gloria called her father, who came over and eventually called 911.

The victim was admitted to the hospital that evening with bruises on his neck, arms, chest, abdomen, groin, testicles, and legs. Nurse Hillary Hart asked the victim how he got his bruises, and the victim responded, "from 'Mike.'" Nurse Lisa Blanchette asked the victim who Mike was, and the victim responded, "Mom's wife." The victim died shortly thereafter.

According to Dr. Leigh Hlavaty, an expert in forensic pathology, the victim had 88 bruises on his body as well as anal injuries. Hlavaty testified that the anal injuries were consistent with anal penetration. Hlavaty opined that all of the victim's bruises and injuries were sustained within twenty-four hours of his death and that the victim's internal injuries were likely

sustained within the two to six hours preceding the victim's admission into the hospital. He stated that an adult male fist or being struck with a blunt object in the abdomen likely caused the victim's injuries.

Defendant first argues that the prosecutor violated his constitutional right to remain silent by soliciting testimony from Gloria that defendant remained silent when she asked him questions about the victim's death, as well as by suggesting during closing argument that his silence was evidence of guilt. We disagree. Because the referenced silence did not pertain to defendant remaining silent in the face of police interrogation or his invoking his right to remain silent in reliance on *Miranda*¹ warnings, the silence is not constitutionally protected. *People v Schollaert*, 194 Mich App 158, 166-167; 486 NW2d 312 (1992).

Defendant also contends that he was denied a fair and impartial trial when the prosecutor improperly vouched for the credibility of nurses Hart and Blanchette. Defendant did not object to the allegedly improper arguments and, therefore, we review this issue for plain error affecting substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Here, in relevant part, during the prosecutor's closing argument, she stated:

Now I want to talk about the witnesses who have no reason to change their story, no reason to protect anybody, no reason to lie. The first witness is nurse Hillary Hart. Hillary Hart told us to this day she doesn't know Michael Stamper. She doesn't know Jamie. She doesn't know [Logan] and she didn't know [the victim]. . . . [Blanchette] also has no reason to lie about what she heard.

A prosecutor may not vouch for the credibility of her witnesses by implying that she has some special knowledge of their truthfulness, but she may comment on her own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes. *Thomas, supra* at 455. A prosecutor may also argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

The prosecutor's closing argument comments do not amount to vouching for her witnesses. The comments do not suggest that the prosecutor had special knowledge but, rather, merely used the established facts that the nurses had no connection to anyone in the case to suggest that they had no reason to lie and, in turn, should be believed by the jury. Thus, the prosecutor's comments do not amount to improper vouching. *Thomas, supra* at 455; *Howard, supra* at 548. Additionally, the trial court instructed the jury that it was the jury's job to determine the credibility of the witnesses. Accordingly, the prosecutor's comments did not deny defendant of his right to a fair and impartial trial, let alone amount to plain error affecting his substantial rights. *Thomas, supra* at 455.

¹ *Miranda v Arizona*, 384 US 436 ; 86 S Ct 1602 ; 16 L Ed 2d 694 (1966).

Defendant next argues that the trial court abused its discretion when it denied his motion for a mistrial. We review the denial of a motion for a mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). An abuse of discretion exists if an unprejudiced person would find no justification for the ruling made. *People v Geno*, 261 Mich App 624, 631-632; 683 NW2d 687 (2004).

A mistrial should be granted only because of an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial. *Alter, supra* at 205. As discussed, *supra*, the prosecutor did not act improperly when she solicited testimony from Gloria that defendant remained silent and did not answer her questions when she asked him about the victim's death. Thus, we find no abuse of discretion in the trial court's denial of defendant's motion for a mistrial. *Id.*

Defendant also contends that the trial court abused its discretion when it admitted the victim's statements to nurses Hart and Blanchette under the dying declaration exception to the hearsay rule. We review a trial court's decision whether to admit evidence under a hearsay exception for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Hearsay is defined as a statement, other than one made by the declarant while testifying at a trial or hearing, which is offered in evidence to prove the truth of the matter asserted. *People v Tanner*, 222 Mich App 626, 629; 564 NW2d 197 (1997); MRE 801(c). Hearsay is generally not admissible as substantive evidence unless it is offered under one of the exceptions to the hearsay rule. *Id.*; MRE 802. In a prosecution for homicide, if a declarant is unavailable as a witness, a statement made by the unavailable declarant "while believing that his death was imminent, concerning the cause of circumstances of what he believed to be his impending death," is admissible under the dying declaration hearsay exception. *People v Siler*, 171 Mich App 246, 251; 429 NW2d 865 (1988); MRE 804(b)(2). For a statement to be admitted as a dying declaration, (1) the declarant must have been conscious of impending death, (2) death must have ensued, (3) admission of the statement must be sought in a criminal proceeding against the alleged perpetrator, and (4) the statement must relate to the killing. *Id.*

Gloria testified that the victim drifted in and out of consciousness before being taken to the hospital and that the victim told her, "I'm already dead." When the victim was admitted to the hospital, nurses Hart and Blanchette noticed various bruises on the victim's body. Hart asked the victim how he got his bruises. The victim replied that he got his bruises from "Mike." When Blanchette asked whom "Mike" was, the victim replied, "mom's wife." The victim died shortly after he made the statements. A doctor qualified as an expert in forensic pathology observed 88 bruises on the victim's body that he opined were inflicted within 24 hours of the victim's death. The doctor testified that the victim was an abused child and the cause of the victim's death was "blunt force trauma to the abdomen." The victim's statements implied that defendant beat him and that he was aware of his impending death. The trial court did not abuse its discretion by admitting the victim's statements as a dying declaration.

Defendant next maintains that he was denied his constitutional right to the effective assistance of counsel. Defendant failed to properly preserve this issue for appeal by bringing a motion for a new trial or an evidentiary hearing. *People v Westman*, 262 Mich App 184, 192; 685 NW2d 423 (2004), overruled on other grounds 474 Mich 48 (2006). Our review is therefore

limited to the facts contained on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness, 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 Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). To show that counsel's performance was below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances. *Id.* at 302. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, which a court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to present additional evidence only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense that would have affected the outcome of the proceedings. *Id.* Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). Counsel does not render ineffective assistance by failing to raise futile objections. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant's argument that he was denied his right to the effective assistance of counsel by defense counsel's failure to object to the prosecutor's alleged improper vouching comments made during her closing argument is without merit. As previously discussed, the prosecutor did not improperly vouch for the nurses' testimony, so any objection to the prosecutor's alleged vouching during her closing argument would have been futile.

Defendant also argues that he was denied his right to the effective assistance of counsel when defense counsel failed to subpoena Nick Wilson. The record establishes that the victim spent September 5 to the afternoon of September 7 with Wilson, that the victim referred to Wilson as "Dad," that Gloria called Wilson to inquire about the bruises she noticed on the victim on September 8, and that detectives Wosanne Wooliver and John Doyle both interviewed Wilson. But defendant has failed to provide details of what Wilson would have testified to that would have affected the outcome of the proceedings. Therefore, defendant's claim that he was denied the effective assistance of counsel by defendant's counsel's failure to subpoena must fail. *Toma, supra* at 302-303; *Dixon, supra* at 398.

Lastly, defendant argues that his convictions of both first-degree child abuse and first-degree criminal sexual conduct violate his protections against double jeopardy. This argument is misplaced in light of the fact that the trial court vacated the first-degree child abuse conviction on the ground that the conviction was the predicate offense of the felony murder conviction.

Affirmed.

/s/ Deborah A. Servitto
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot