

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ROY RICHARD ANKLAM, II,

Defendant-Appellee.

UNPUBLISHED

December 19, 2006

No. 268287

Saginaw Circuit Court

LC No. 04-024657-FC

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of eleven counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a),¹ and was sentenced to eleven concurrent terms of 15 to 50 years in prison. He appeals as of right. We affirm.

The instant case arose from allegations that defendant repeatedly sexually assaulted his niece beginning when she was four or five years old and continuing until he moved out of the state in 2002 when the victim was ten years old.

In his first issue on appeal, defendant asserts that the prosecution engaged in misconduct by citing inadmissible evidence during the rebuttal section of its closing argument. Specifically, defendant claims the prosecutor referred to hearsay statements testified to by Detective Thomas McInerney of the Saginaw Township Police Department that improperly bolstered the victim's testimony.

A claim of prosecutorial misconduct is generally reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). But because defendant failed to preserve the issue, we may only review it for plain error affecting his substantial rights. *People v Goodin*, 257 Mich App 425, 431-432; 668 NW2d 392 (2003). His convictions may be reversed only if we determine that, "although defendant was actually innocent, the plain error caused him to be convicted, or if the error 'seriously affected the fairness, integrity, or public reputation of judicial proceedings,' regardless of his innocence." *People v Thomas*, 260 Mich App 450, 454; 678

¹ Penetration of person under thirteen years of age.

NW2d 631 (2004) (citation omitted); see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In the instant case, the trial court allowed the detective to testify concerning the victim's out-of-court statement that many assaults had occurred over several years. Rather than constitute hearsay and improper bolstering of a witness, the trial court properly found the statements to be prior consistent statements admissible under MRE 801(d)(1)(B), where the victim was implicitly accused of fabrication during her cross-examination.² Prosecutors are “free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case.” *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Because the prosecution's rebuttal argument merely referenced testimony properly admitted by the trial court, it did not commit prosecutorial misconduct. Thus, we find no plain error affecting defendant's substantial rights.

Defendant next contends that the prosecution engaged in misconduct by attempting to appeal to the jury's sympathy for the victim during its closing arguments. Because defendant failed to object to the closing arguments at trial, the issue is unpreserved and we review it for plain error. *Goodin*, *supra* at 431-432.

When reviewing claims of prosecutorial misconduct, we examine the pertinent portion of the lower court record and evaluate the alleged misconduct in context to determine “whether the defendant was denied a fair and impartial trial.” *Goodin*, *supra* at 432. An appeal to the jury to sympathize with the victim constitutes an improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). But “[a] prosecutor may argue that a prosecution witness is credible.” *People v McGhee*, 268 Mich App 600, 633; 709 NW2d 595 (2005). And prosecutors are given wide latitude and need not confine their arguments to the “blandest of all possible terms.” *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Here, when examined in the context of the victim's testimony, the prosecution's comments do not appear to be an attempt to elicit sympathy from the jury. The prosecution noted that the descriptions the victim gave of the assaults included details that were beyond what a young girl would ordinarily know. The prosecution also argued that, rather than her gaining anything by accusing defendant, the victim's allegations had damaged her relationship with her grandmother. Rather than an appeal for sympathy, the arguments assert that the victim's testimony is worthy of belief. Although not stated in the blandest of terms, the prosecution's arguments did not constitute misconduct.

Even had the remarks been improper, no error warranting reversal occurred. In *Watson*, *supra* at 592, this Court found that an instruction to the jury that it “not be influenced by sympathy or prejudice” can eliminate the harm resulting from an appeal to the jury's sympathy.

² MRE 801(d)(1)(B) provides that a statement is not hearsay if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement 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 the instant case, the trial court instructed the jury that it “must not let sympathy or prejudice influence [its] decision.” Because defendant cannot establish that plain error occurred, we find that he has forfeited the issue. *Carines, supra* at 763.

In the final issue on appeal, defendant asserts that testimony of the prosecution’s expert on child sexual abuse, Pamela Knight-Mays, improperly invaded the province of the jury by concluding that an assault had occurred and vouching for the credibility of the victim. When questioning her at trial, the prosecution asked Knight-Mays if the victim “gave any indication as to the quantity of assaults” when the expert interviewed her in November of 2003. In response, Knight-Mays testified:

My recollection is that she described a number of assaults, and my recollection is that she couldn’t define a specific number because she was talking about a number of assaults that occurred over a long period of time. As I recall, the molestation began around the age of 5 or 6 and continued to around the age of 9.

She described various locations where things happened and, again, said that it happened repeatedly during that length of time but wasn’t able to quantify with a number as would be typical of a child in that situation.

Generally, we review a trial court’s decision to admit evidence for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). But defendant did not voice an objection regarding the scope of the expert’s testimony at trial. Although he objected to Knight-Mays’ testimony concerning the victim’s statements during the interview on the ground that it was hearsay, an objection based on one ground does not “preserve an appellate attack based on a different ground.” *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Consequently, we may only review the issue for plain error affecting substantial rights. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001).

Defendant correctly asserts that in *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), mod 450 Mich 1212; 548 NW2d 625 (1995), our Supreme Court reaffirmed its holding in *People v Beckley*, 434 Mich 691; 465 NW2d 391 (1990), that expert witnesses in child sexual abuse cases may not (1) testify that the sexual abuse occurred, (2) vouch for the veracity of a victim, or (3) testify as to whether the defendant is guilty. In clarifying *Beckley*, the *Peterson* Court held that

(1) an expert may testify in the prosecution’s case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim’s specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim’s credibility. [*Peterson, supra* at 352-353.]

Contrary to defendant’s assertions, the expert witness in the instant case did not testify that the alleged abuse occurred or state that she found the victim to be truthful. Rather, Knight-

Mays recounted what the victim told her regarding the number of assaults and where they occurred. As with Detective McInerney's testimony, the trial court allowed the prosecution to present this testimony under MRE 801(d)(1)(B) to counter the implied charge that the victim fabricated her allegations. Similarly, Knight-Mays' testimony that the victim's inability to recall the exact number of assaults was typical of a child who had been repeatedly abused is admissible under *Peterson, supra* at 352-353, to rebut an attack on the victim's credibility. Consequently, the trial court did not err in allowing the expert's testimony, and defendant cannot establish the existence of plain error affecting his substantial rights.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly