STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 18, 2007
v	No. 269628 Muskegon Circuit Court
BILLY EMMET BRANDOW, Defendant-Appellant.	LC No. 05-052046-FC

Before: Sawyer, P.J., and White and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(a) (person under the age of 13), and two counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(1)(a) (person under the age of 13). The trial court sentenced defendant, as an habitual offender, third offense, MCL 769.12, to 32 to 57 years' imprisonment for his CSC-I conviction, and to concurrent terms of 15 to 35 years' imprisonment for each of his CSC-II convictions. Defendant now appeals his convictions as of right. We affirm.

Defendant's convictions stemmed from allegations that he engaged in sexual contact with his girlfriend's ten-year-old daughter, and that he engaged in sexual contact and digital vaginal penetration with his cousin's eight-year-old daughter. The evidence reveals that the criminal sexual conduct occurred at the home of defendant's cousin and that defendant was intoxicated at the time. Defendant's aunt testified at trial that defendant admitted to her that he engaged in criminal sexual conduct with the victims. During a police interrogation, defendant stated several times that it was "very possible" that he committed the offenses, and that it was "unlikely" that anyone else committed the offenses. He said that he was remorseful "[b]ecause all this happened, you know, it's my fault." He stated that "[i]f it happened, it's a one time thing." He admitted, however, that he had a problem with alcohol, that he may have a sexual problem, and that he may need "[h]elp with the little girls."

Defendant first contends that the trial court erred in denying his motion for a mistrial. Defendant preserved this issue by moving for a mistrial below, after a witness made a reference to defendant's prior incarceration at trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). We review a trial court's decision to deny a motion for a mistrial for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). "A trial court should grant a mistrial 'only for an irregularity that is prejudicial to the rights of the defendant

and impairs his ability to get a fair trial.' " *Id.* at 195, quoting *People v Ortiz-Kehoe*, 237 Mich App 508, 514; 603 NW2d 802 (1999).

References to a defendant's prior incarceration are generally inadmissible. *People v Hatt*, 384 Mich 302, 307; 181 NW2d 912 (1970); *People v Fleish*, 321 Mich 443, 461; 32 NW2d 700 (1948). "It is well settled that evidence of a prior conviction may be prejudicial to the accused, the danger being that the jury 'will misuse prior conviction evidence by focusing on the defendant's general bad character . . . .'" *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999), quoting *People v Allen*, 429 Mich 558, 569; 420 NW2d 499 (1988). "However, not every instance of mention before a jury of some inappropriate subject matter warrants a mistrial." *Griffin, supra.* "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

At trial, defendant's cousin testified that defendant and his girlfriend consumed alcohol at her house on the night that the criminal sexual conduct occurred. She testified that they "had wanted to go to the bar but [she] didn't want them to leave because they had already been drinking and [she] didn't want him to go back to prison." Defendant moved for a mistrial, arguing that, even if the reference to his prior incarceration was inadvertent, it impermissibly suggested that his character was reprehensible and, thus, it "contaminated the jury." The trial court denied defendant's motion and instructed the jury as follows:

> Ladies and gentlemen, witnesses sometimes say things which are not admissible as evidence. Any prior record is not admissible in these proceedings because it is not relevant to the proceedings. For this reason I'm striking the last answer and ordering you not to consider it as evidence. Can you all promise me that you'll do that? All right. Very well.

The improper comment by the witness was not grounds for a mistrial. Defendant conceded at trial that the mention of defendant's prior incarceration was inadvertent and was not elicited by the prosecutor's questioning. Nothing in the record indicates that the prosecutor "clearly anticipated or hoped for" the answer, or that the answer was "calculated to prejudice the minds of the jurors against the defendant." Cf. *People v Greenway*, 365 Mich 547, 551; 114 NW2d 188 (1962). The record reflects that the reference to defendant's prior incarceration was volunteered by the witness in response to a proper question. Moreover, the witness did not know, and was not in a position to know, that her testimony was improper. *Haywood, supra* at 228.

Furthermore, defendant failed to establish that he was prejudiced by the witness's improper comment. After the trial court instructed the jury to disregard the witness's reference to defendant's prior incarceration, the prosecutor did not pursue the matter further. Moreover, the trial court directed the jury, in its final instructions, not to consider any excluded evidence or stricken testimony, and to decide the case based only on the properly admitted evidence. "Jurors are presumed to follow their instructions and instructions are presumed to cure most errors." *Bauder, supra* at 195 (citations omitted).

> "[W]e normally presume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an

> 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." [*People v Dennis*, 464 Mich 567, 581; 628 NW2d 502 (2001), quoting *Greer v Miller*, 483 US 756; 107 S Ct 3102; 97 L Ed 2d 618 (1987).]

In this case, defendant failed to establish that there was an overwhelming probability that the jury would be unable to follow the trial court's instructions, or that there was a strong likelihood that the evidence would have a devastating effect on defendant. And, on the record before us, we do not find that defendant was prejudiced by the brief, incidental comment such that a mistrial was warranted. Thus, the trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Defendant next argues that he was denied a fair trial because of prosecutorial misconduct. We disagree.

Defendant did not raise the issue of prosecutorial misconduct below. Thus, this issue is unpreserved. We review unpreserved issues of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). "Reversal is warranted only when the error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). "Thus, where a curative instruction could have alleviated any prejudicial effect we will not find error requiring reversal." *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

At trial, defendant's girlfriend testified that, initially, she was unsure whether her daughter's allegations against defendant were true because she "didn't think he was like that." The prosecutor asked her, "At some point in time did you kind of think that perhaps what [your daughter] told you was true?" She responded, "Yes." Defense counsel objected on relevance grounds and the trial court sustained the objection. Defendant now argues that the prosecutor engaged in misconduct when he elicited the testimony because it is impermissible for a witness to testify concerning the credibility of another witness. This issue is as much an evidentiary issue as it is a prosecutorial misconduct issue; therefore, we focus our review on whether the prosecutor elicited the testimony in good faith. *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007). A prosecutor's good-faith effort to admit evidence does not constitute misconduct. *Id.* at 70.

We agree that, arguably, the prosecutor's question was improper. "It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury." *Id.* at 71. See also *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). However, we do not agree that the error resulted in unfair prejudice to defendant. In light of the other evidence introduced at trial, particularly defendant's own statements, neither the question posed by the prosecutor, nor the witness's response to the question, were "of a character likely to have prejudiced defendant's rights, or to have influenced the jury improperly." *People v Morehouse*, 328 Mich 689, 693; 44 NW2d 830 (1950). Furthermore, the trial court instructed the jurors that they were to decide which witnesses to believe, and that they were free to believe all, none or part of any person's

testimony. "It is well established that jurors are presumed to follow their instructions." *People v Graves,* 458 Mich 476, 486; 581 NW2d 229 (1998). And, we find that the trial court's instruction was sufficient to eliminate any prejudice that might have resulted from the prosecutor's question. See *Buckey, supra* at 17-18. Reversal based on prosecutorial misconduct is not warranted. *Ackerman, supra* at 449.

Defendant next argues that he was denied effective assistance of counsel below. "Because no *Ginther* hearing was held, *People v Ginther,* 390 Mich 436, 442-443; 212 NW2d 922 (1973), review is limited to errors apparent on the record." *People v Jordan,* 275 Mich App ____; ____ NW2d ____ (Docket No. 267152, issued April 19, 2007), slip op at 5.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc,* 465 Mich 575, 579; 640 NW2d 246 (2002).

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway,* 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens,* 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino,* 187 Mich App 14, 17; 466 NW2 315 (1991), citing *Strickland v Washington,* 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). [*People v Knapp,* 244 Mich App 361, 385-386; 624 NW2d 227 (2001).]

"Effective assistance of counsel is presumed" and "[t]he defendant bears a heavy burden of proving otherwise." *People v Rockey,* 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant first argues that defense counsel was ineffective for failing to advise him of the implications of rejecting his plea offer and proceeding to trial. However, defense counsel assured the trial court that he had so advised defendant, and that defendant still wanted to proceed to trial. Nothing in the record suggests that trial counsel failed to properly explain to defendant the possible consequences of either accepting the offer or going to trial. Because the record does not support defendant's allegation, defendant failed to establish that defense counsel was ineffective. See *People v McCrady,* 213 Mich App 474, 479-480; 540 NW2d 718 (1995).

Defendant next argues that trial counsel was ineffective for failing to present an opening statement at trial. The decision to waive an opening statement is a matter of trial strategy, *People v Calhoun,* 178 Mich App 517, 524; 444 NW2d 232 (1989), and "can rarely, if ever, be the basis for a successful claim of ineffective assistance of counsel," *People v Pawelczak,* 125 Mich App 231, 242; 336 NW2d 453 (1983). Defendant failed to overcome the presumption that counsel's decision not to present an opening statement constituted sound trial strategy. *Rockey, supra.*

Defendant next contends that defense counsel was ineffective because he was unprepared for trial and because he failed to investigate or interview any witnesses. A defendant has the

burden of establishing the factual predicate for her claim of ineffective assistance of counsel. *People v Hoag,* 460 Mich 1, 6; 594 NW2d 57 (1999). Defendant has failed to present any facts to support this claim of ineffective assistance of counsel. Moreover, he has failed to establish any prejudice resulting from the alleged lack of preparation. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero,* 184 Mich App 636, 640; 459 NW2d 80 (1990).

Defendant additionally claims that trial counsel was ineffective for failing to call defendant's cousin, Alan Brandow, to testify at trial. Alan was present when defendant was confronted by the victims' parents regarding the allegations of sexual abuse. The record reflects that defense counsel did not subpoena Alan before trial because he was named on the prosecutor's witness list. At trial, the prosecutor indicated that a detective attempted to interview Alan but that Alan was mentally challenged and "he didn't offer really anything." The trial court ordered that Alan be produced before the end of the trial so defense counsel could make an independent judgment whether to call Alan as a witness at trial. The record is silent regarding any conversation that may have occurred between defense counsel and Alan; however, nothing indicates that defense counsel was deprived of the opportunity to speak with Alan. The simple fact that defense counsel did not call Alan to testify at trial is insufficient to establish that defense counsel was ineffective. It is well established that "[d]ecisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). Moreover, other than the defendant's statements in his brief on appeal, nothing before this Court suggests that Alan's testimony would have benefited defendant had he been called to testify at trial. There is no error apparent on the record with respect to defense counsel's decision not to call Alan as a witness at trial. See *People v Pratt*, 254 Mich App 425, 426-427, 430; 656 NW2d 866 (2002).

Defendant also argues that trial counsel was ineffective for failing to call an expert witness to testify that the eight-year-old victim experienced redness and irritation in her vaginal area because of a bedwetting problem. However, the decision not to present expert testimony at trial "is presumed to be a permissible exercise of trial strategy." *People v Cooper,* 236 Mich App 643, 658; 601 NW2d 409 (1999). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). On the record before us, there is no evidence to support that the decision not to call an expert was anything but sound trial strategy. We note that, on appeal, defendant offers no proof that an expert witness would have testified favorably if called by the defense. Accordingly, defendant has not established the factual predicate for his claim, *Hoag, supra.* Moreover, he has failed to establish a reasonable probability that, but for counsel's alleged error, the result of the proceedings would have been different. *Ackerman, supra* at 455-456.

Defendant next argues that defense counsel was ineffective for failing to object to testimony concerning statements that defendant made when he was confronted with the victims' allegations of sexual abuse. Defendant has failed to cite any authority to support his conclusion that the challenged testimony was inadmissible, and thus, necessarily subject to a valid objection. "This Court will not search for authority to support a party's position." *People v Smielewski,* 214 Mich App 55, 64 n 10; 542 NW2d 293 (1995). Further, defendant carries the burden to affirmatively demonstrate that counsel's performance was objectively unreasonable. *Knapp,*

supra. It is well established that defense counsel is not ineffective for failing to make a futile objection. *McGhee, supra* at 627. Defendant has not established that any proposed objection to the challenged testimony would have been valid. Thus, he has not met his burden of demonstrating that counsel's performance fell below an objective standard of reasonableness.

Defendant next argues that defense counsel was ineffective for failing to move to suppress the statements that he made to police detectives concerning the allegations of sexual abuse. He also argues that defense counsel was ineffective for failing to object to the detectives' testimony at trial concerning the statements that defendant made during the interrogation. Statements of an accused made during a custodial interrogation are admissible if the prosecution can show, by a preponderance of the evidence, that the statements were made voluntarily, knowingly, and intelligently. *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005), citing *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966). Several factors are to be considered when evaluating a statement for voluntariness. See *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988); *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003). Nothing in the record supports a finding that defendant's statements to police in this case were involuntary or otherwise subject to suppression. The record revealed that defendant was provided with his *Miranda* rights, and nothing supports that he did not fully understand those rights and freely choose to waive them. On the record before us, the statements were therefore properly admitted at trial. Because a motion to suppress would have been futile, defense counsel was not ineffective for failing to pursue such a motion. *People v Snider,* 239 Mich App 393, 425; 608 NW2d 502 (2000). "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *People v Riley (After Remand),* 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant next argues that defense counsel was ineffective for failing to request a jury instruction "which pertained to the reasonable doubt of the [victims'] credibility [sic], as to their allegations [sic]." However, the trial court instructed the jury both with regard to reasonable doubt and with regard to the credibility of witnesses. Moreover, throughout defense counsel's closing argument, he questioned the credibility of the prosecution witnesses, and argued that there was reasonable doubt regarding defendant's guilt. Defendant cannot overcome the presumption that defense counsel's decision not to request an additional instruction was sound trial strategy. See *People v Rice (On Remand),* 235 Mich App 429, 444-445; 597 NW2d 843 (1999) (Defendant did not overcome the presumption that the failure to request a certain instruction was not trial strategy and thus, defendant was not denied the effective assistance of counsel). Further, defendant failed to show the existence of a reasonable probability that, had counsel requested the instruction, the result of the proceeding would have been different. *Knapp, supra.*

Finally, defendant argues that defense counsel was ineffective for failing to object to defendant's appearance at trial in jail clothing. A defendant has a due process right to be dressed in civilian clothing at trial. *People v Harris,* 201 Mich App 147, 151-152; 505 NW2d 889 (1993). Where a defendant makes a timely request to wear civilian clothing, the trial court must grant the request. *Id.* at 151. Before the jury was impaneled in this case, defendant advised the court that he was expecting his uncle to bring a shirt for him to wear during the trial and that the clothing was "on the way." The record indicates that defendant's property at the jail consisted of one pair of shorts and that no other clothing was available to defendant when the trial began.

The trial court noted that efforts were made "to get him dressed out today" and that the sheriff did not decline to allow defendant to wear civilian clothes. Defense counsel's reason not to pursue defendant's right to be tried in civilian clothing is unclear from the record. Even if counsel should have pursued this issue, defendant has failed to show a reasonable probability that the result of trial would have been different if defense counsel pursued this issue and secured civilian clothes. *Knapp, supra.* Accordingly, defendant's ineffective assistance of counsel claim must fail. *Id.*

Affirmed.

/s/ David H. Sawyer
/s/ Helene N. White
/s/ Michael J. Talbot