STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 2, 2008
v	No. 278877 Washtenaw Circuit Court
GARY O'NEIL HAMILTON, Defendant-Appellant.	LC No. 06-001279-FH

Before: Jansen, P.J., and O'Connell and Owens, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of one count of assault with intent to commit criminal sexual conduct involving sexual penetration, MCL 750.520g(1), and one count of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a) (victim between 13 and 16 years of age). Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to concurrent terms of 12 months' imprisonment and was placed on probation beginning on May 9, 2007, with a discharge date of May 9, 2012. He appeals as of right. We affirm.

This case arises from defendant's improper touching of the 16-year-old complainant in her bedroom. Defendant, a social acquaintance of the complainant's mother, Bernadine Rougeau, and her stepfather, was at Rougeau's home for a social gathering that lasted late in the evening. The complainant went to sleep in her bedroom at approximately 11:00 p.m. Defendant remained at the gathering, socializing and drinking alcohol.

Around the time the gathering disbanded, defendant asked Rougeau if he could stay the night in the home. Rougeau agreed, gave defendant a blanket, and told him to sleep downstairs. Rougeau then went to bed.

Soon thereafter, defendant went upstairs, entered the complainant's room as she slept, and began fondling her and exposing his genitals. The complainant woke up, moved her body against the headboard of her bed, and asked defendant who he was. When defendant gave his nickname, the complainant ordered him out of her room. Defendant left the house, and the complainant, who was crying and upset, immediately told Rougeau that defendant had fondled her.

When Rougeau learned what had happened, she got up and went downstairs in search of defendant. Finding that he had left the house, Rougeau called the police and told a neighbor,

Anglique Townsend, what had happened and asked her to drive down the street to find defendant. Rougeau, Townsend, and two others left in Townsend's car to find defendant. According to Rougeau, the group spotted defendant and immediately saw a sheriff's car nearby. They stopped the sheriff's car and told Deputy McVicker that defendant had fondled the complainant. McVicker found defendant and placed him in his cruiser, and he accompanied the group back to Rougeau's home.

Annette Coppock and Jon McDonagh, officers with the Ypsilanti Police Department, arrived at the house just before 5:00 a.m. in response to a radio dispatch from the Washtenaw County Sheriff's Department. McDonagh testified that he spoke to Rougeau and Townsend while Coppock spoke with the complainant. Coppock and McDonagh then took defendant into custody.

The complainant later talked with Marty Cole, defendant's nephew, about the case. She claimed that he told her not to testify and asked her not to "get my uncle locked up." Chris Tubbs, an acquaintance of the complainant and a close friend of Cole, claimed that he saw the complainant approximately two weeks before trial. At their meeting, Cole claimed the complainant told him that defendant did not touch her and that she would not testify at trial unless her mother made her.

First, defendant argues that he was denied a fair trial and that his constitutional right of confrontation was violated when the trial court improperly admitted hearsay testimony.[1] "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Hearsay is not admissible except as provide by" the rules of evidence. MRE 802. In addressing defendant's hearsay objections, the trial court cited both the present sense impression and excited utterance exceptions to the hearsay rule, which are set forth in MRE 803(1) and (2) respectively.[2]

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[1] We review the trial court's ruling admitting evidence for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). Defendant did not challenge the admission of one piece of testimony now challenged on appeal, and he did not raise the argument predicated on *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Thus, we review these matters for plain error affecting substantial rights. *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007).

[2] MRE 803 states, in pertinent part,

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (1) Present Sense Impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
>
> (2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Defendant contends that he was denied a fair trial because Rougeau vouched for the complainant's credibility in the following exchange:

> *Q.* [W]hy are you getting in [Townsend's] car and why do you want to—
>
> *A.* Because he touched my child. I mean, I—I always taught my children, I don't care if it's an uncle, aunt, cousin, your daddy, my dad, your grandpa, they touch you in the wrong spot, you let somebody know. I was done—it was done to me as a child, and that's why I am so protective of my kids.
>
> [DEFENSE COUNSEL]: Objection, Judge.
>
> [PROSECUTOR] (CONTINUING):
>
> *A.* [Defendant] knew how protective of my children—how protective I was of my kids.

"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." *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). However, "unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Here, Rougeau's testimony does not address the prosecutor's question regarding why she got into Townsend's car. Nothing in the record indicates that the prosecutor knew that Rougeau would respond in the manner she did. Moreover, the trial court properly sustained defense counsel's objection and instructed the jury that it must decide the case based only on the admitted evidence and that it should disregard "excluded stricken testimony, that was heard." "[J]urors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, we assume that the jurors did not take Rougeau's unsolicited statements into consideration when they weighed the evidence and agreed on defendant's guilt.

Defendant also argues that the following exchange between Rougeau and defense counsel constitutes "poisonous hearsay":

> *Q.* Did you see her come out of the house?
>
> *A.* No. Why are you making things so—difficulty [sic]?
>
> *Q.* Well, I—I'm trying not to.
>
> *A.* Yes, you are.
>
> *Q.* I'm trying to make them simple, so let me try again. When—
>
> *A.* You're trying to make it easy on this man and what he did to my child.

However, Rougeau's comments do not recount statements made by another outside of trial; rather, they are simply her opinions. The first two comments address the motives of defense counsel, while the last can be seen as her opinion concerning defendant's guilt. Although Rougeau's remarks are admittedly improper, see *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975) (referencing the "settled and long-established rule that a witness cannot express an opinion concerning the guilt or innocence of a defendant"), the trial court sustained defense counsel's objection and told the jury not to consider the contested statements. *Graves*, *supra* at 486. Further, in light of the other evidence adduced, especially the complainant's testimony, we do not find Rougeau's unsolicited commentary to be outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

We also conclude that defendant's challenges to the admission of Townsend's and McDonagh's testimony lack merit because the contested statements are admissible as excited utterances. Townsend's contested testimony is as follows:

> *Q.* And where did you drive, around the neighborhood?
>
> *A.* We drove [a description of the route taken is testified to] . . . . [S]he say, he right over there hiding behind a tree. So when I did that, the Sheriffs got out and they asked her, what—what was going on, what was the problem? And she told them, you need to stop him right there, and she said he did something to her daughter.

McDonagh testified that after Rougeau returned to her home, she "was yelling out, he touched my daughter's private parts, he touched my daughter's private parts."

A statement may be admitted as an excited utterance if two requirements are met: "1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). "[I]t is the lack of capacity to fabricate, not the lack of time to fabricate, that is the focus of the excited utterance rule. The question is not strictly one of time, but of the possibility for conscious reflection." *Id.* at 551. "The trial court's determination whether the declarant was still under the stress of the event is given wide discretion." *Id.* at 552. "Physical factors, such as shock, unconsciousness, or pain, may prolong the period in which the risk of fabrication is reduced to an acceptable minimum." *Id.* at 551-552, quoting 5 Weinstein, Evidence (2d ed), § 803.04[4], p 803-24. Further, "there is no express time limit for excited utterances." *Id.* at 551.

The complainant's statements to Rougeau regarding defendant's actions, made moments after defendant had left her bedroom, clearly fall under this exception. Similarly, Rougeau was obviously startled to learn that defendant had fondled her daughter. However, defendant argues that Rougeau's statements should not have been admitted because she made the challenged statements 45 minutes to one hour after the alleged event, and therefore had the opportunity to fabricate and embellish her statements.

In this case, Rougeau asked Townsend for a ride and continued to search for defendant for 30 to 45 minutes following the complainant's revelation. While still in the midst of chasing defendant and under the stress of her daughter's declaration, Rougeau made the challenged statement to McVicker, which Townsend then repeated at trial. Similarly, McDonagh stated that

when Rougeau returned to her home, she was "very upset" and that she was "screaming and yelling" with "tears in her eyes." These facts indicate that Rougeau was still under the excitement caused by the event when she spoke to McVicker and McDonagh. Thus, defendant fails to show that the trial court abused its discretion when it admitted the testimony under MRE 803(2).

Next, defendant challenges the admission of Coppock's testimony concerning McVicker's statements to Rougeau after she had located defendant.[3] The challenged testimony is as follows:

> *Q.* And who did you—make contact with you [sic] when you arrived at [Rougeau's home]?
>
> *A.* The Sheriff's Department was actually there—Washtenaw County Sheriff's Department, Deputy McVicker.
>
> *Q.* And what involvement, if any, did he have in the investigation?
>
> *A.* The county stumbled across this incident, but it had occurred in our city so, therefore, we're responsible for taking the call because it happened in our jurisdiction and the deputies got flagged down in their jurisdiction stating that there is a male that was walking down the street that was a suspect in inappropriate touching of a young girl, and they transported that subject from their jurisdiction back to [Rougeau's home], in our city, where the incident happened.

Coppock's statements were not hearsay. "Where a witness testifies that a statement was made, rather than about the truth of the statement itself, the testimony is not hearsay." *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). In *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007), this Court observed, "[A] statement offered to show why police officers acted as they did is not hearsay." Here, the prosecution elicited the challenged testimony to help the jury understand the sequence of events and explain the circumstances under which the Sheriff's Department became involved. The line of questioning was not an attempt to elicit testimony regarding whether the alleged assault had actually occurred. Indeed, Coppock stated that McVicker was investigating a "suspect," not a perpetrator. Accordingly, defendant fails to establish plain error.

Defendant also argues that his constitutional right to confrontation was violated because the statements recounted above were testimonial in nature. However, in *Chambers*, this Court observed that "a statement offered to show the effect of the out-of-court statement on the hearer does not violate the Confrontation Clause." *Id.* In this case, the declarants appeared at trial and were subject to cross-examination. Thus, defendant's right to confrontation was not violated.

[3] Because defendant failed to raise this issue at trial, it is not preserved, and we review it for plain error affecting defendant's substantial rights. *Chambers*, *supra* at 10.

Next, defendant argues that the prosecutor deliberately elicited testimony from Rougeau regarding defendant's alleged refusal to take a polygraph test and testimony that God knew what happened to complainant. Defendant's claim of error arises from the following testimony in which Rougeau discussed her attempts to find police assistance and locate defendant following the inappropriate touching:

> *Q.* But you made contact with the police when you found [defendant]?
>
> *A.* But it wasn't nobody but God that sent the police behind that car, I'm telling you, and I know it wasn't nobody. . . . And I tell you that I didn't see no police nowhere in sight and nobody—was nobody because God knew that man had touched my baby and he hurted (sic) her and something bad was going to happen. When I seen the police, I jumped out the car and I stopped them, and I told them, I said, will you please catch him? 'Cause I say, he just touched my daughter in the wrong spot and he's running from her. So that's when the polices [sic] in the brown and gray car, they stopped him.
>
> *Q.* The Sheriff's Department?
>
> *A.* The Sheriff's Department caught him. Now while I'm standing up there talking, you know, talking to the police, telling then what happened, he's sitting in the car looking dead at me, telling me he's sorry.
>
> *Q.* The Defendant?
>
> *A.* The Defendant. Now, if you sorry—if you didn't do nothing to my child, why are you telling me you're sorry for something you didn't do? If you don't want to take a lie detector test, you didn't—then you ain't got nothing to worry about.
>
> [DEFENSE COUNSEL]: Objection, your Honor. That's a—that's a—
>
> THE COURT: Objection sustained. The jury will disregard that statement.
>
> THE WITNESS: Yeah, I'm—I'm sorry.
>
> THE COURT: There's no evident—no, there's no evidence that there was or wasn't. In any event, a lie detector's not admissible, so it's not an issue.
>
> BY [PROSECUTOR] (CONTINUING):
>
> *Q.* So he says to you—as you're standing, talking to the deputy from the Sheriff's Department, he's telling you, I'm sorry?
>
> *A.* He's telling me, I'm sorry for what I did. Yes, he did. I'll put all—I'll take a lie detector test. I'll put my hand on some Bibles.
>
> [DEFENSE COUNSEL]: Objection, your Honor.

BY [PROSECUTOR] (CONTINUING):

A. He was in the window telling me, I'm sorry for what I did to [the complainant].

THE COURT: Objection sustained.

Initially, defendant challenged the witness's reference to a polygraph test.[4] References to a polygraph test are not admissible in a criminal prosecution. *People v Kahley*, 277 Mich App 182, 183; 744 NW2d 194 (2007). "However, not every reference to a polygraph examination requires reversal." *Id*. at 183-184. We may consider the following factors to determine whether mention of a defendant's failure to take a polygraph examination requires reversal: "(1) whether defendant objected and/or sought a cautionary instruction; (2) whether the reference was inadvertent; (3) whether there were repeated references; (4) whether the reference was an attempt to bolster a witness's credibility; and (5) whether the results of the test were admitted rather than merely the fact that a test had been conducted." *People v Rocha*, 110 Mich App 1, 9; 312 NW2d 657 (1981).

Rougeau twice referred to a polygraph examination, and in context, the first reference can be seen as an attempt to bolster the complainant's credibility.[5] However, although we do not characterize Rougeau's references as inadvertent, they were not responsive to the questions posed by the prosecutor and, therefore, do not justify a mistrial. See *Hackney*, *supra* at 531. Further, the trial court twice sustained defendant's timely objections and told the jury to disregard Rougeau's references to a polygraph, not only because there was no evidence that such a test was administered, but also because "a lie detector's not admissible." Finally, any prejudice resulting from the unresponsive remarks was mitigated; the trial court properly instructed the jury that it must decide the case based only on the admitted evidence and should disregard "excluded stricken testimony, that was heard." Again, juries are presumed to follow the court's instructions. *Graves*, *supra* at 486. Accordingly, Rougeau's statements regarding polygraphs did not deny defendant a fair trial.

Defendant also challenges Rougeau's statement that "God knew that man had touched my baby and he hurted (sic) her and something bad was going to happened" because, he claims, she was improperly vouching for the complainant's credibility.[6] Yet this testimony was also unresponsive to the questions posed. Again, such testimony "does not justify a mistrial unless the prosecutor knew in advance that the witness would give the unresponsive testimony or the prosecutor conspired with or encouraged the witness to give that testimony." *Hackney*, *supra* at

[4] We review this claim of prosecutorial misconduct de novo to determine whether defendant was denied a fair and impartial trial. See *People v Cox*, 268 Mich App 440, 450-451; 709 NW2d 152 (2005).

[5] In the second reference, Rougeau attempts to bolster her own credibility.

[6] At trial, defendant did not challenge Rougeau's testimony concerning God's omniscience, so we review this claim for plain error affecting defendant's substantial rights. See *People v Rodriguez*, 251 Mich App 10, 32; 650 NW2d 96 (2002).

531. There is no indication in the record that the prosecutor knew that Rougeau would respond the way she did. Further, as with the polygraph references, any prejudice resulting from the unresponsive remarks was mitigated when the jury was instructed that it must decide the case based only on the admitted evidence and that it should disregard stricken testimony that it heard. See *Graves*, *supra* at 486.

Finally, defendant argues that the prosecutor's remarks during closing arguments denied him a fair trial. First, defendant challenges the following comments made about Tubbs:

> And with reference to Chris Tubbs, you take his testimony for whatever you want, but I submit to you, ladies and gentlemen, the witness who came in yesterday, brought by the Defendant, came back today with the Defendant's cousin or nephew who he would lie for, is nothing but a thug and a little punk. He's here two days in court and has contact with the deputies out in the hallway yesterday. So you take his testimony for what it's worth. That, ironically, two weeks before the trial, where the Defendant's on trial for assaulting [the complainant], he happened to run into [the complainant] at a party store.

A prosecutor's attack on a defense witness's credibility constitutes grounds for reversal where there is no support on the record. *People v Howard*, 226 Mich App 528, 545-546; 575 NW2d 16 (1997). Further, "[a] prosecutor may not inject unfounded and prejudicial innuendo into a trial." *Dobek*, *supra* at 79, citing *People v Burrell*, 127 Mich App 721, 726; 339 NW2d 239 (1983).

The pertinent section of the prosecutor's closing argument references Tubbs' testimony that he would lie for Cole. The prosecutor was also apparently referring to Tubbs' cross-examination when he noted that Tubbs had contact with court deputies outside the courtroom. The prosecutor asked if Tubbs and Cole were "upstairs checking the doors, trying to get into different offices?" Tubbs had responded that they were not.

Although the prosecutor engaged in improper name-calling by calling Tubbs "a thug and a little punk," which could be characterized as innuendo, defendant has not shown that this unpreserved issue resulted in prejudicial error. Tubbs admitted that he would lie in certain situations and that he had contact with the courthouse deputies, although he denied that he and Cole were trying to get into upstairs courthouse offices. Regardless, the court instructed the jurors that they alone had the responsibility to assess witness credibility. Again, jurors are presumed to follow the court's instructions. *Graves*, *supra* at 486.

Next, defendant challenges the prosecutor's comments concerning defense requests to include an instruction on accidental touching. In particular, defendant challenges the following portion of the prosecutor's closing argument:

> And so the theory that defense counsel called it, that the Defendant has—that he fell into bed with her is the most ridiculous, absurd thing that I have ever heard, and—and they've taken it a step further and they'll have an instruction. They've requested an instruction from this Judge that with regard to Count I, that if you find it was an accident, that you find him not guilty. And so you know what that means, that means they're saying if I touched her, it was an accident. If

> I touched her and moved her panties and poked at her private parts, if I did it, if you believe that I did it, it was an accident. So which is it? He wants it both ways. He wants you to find him not guilty because he didn't touch her, he might have touched her when he yawned; but if you find that he touched her, find that it was an accident and find him not guilty. It makes me think of a saying my mother used to tell me when I was child, if you believe that, I have a bridge to sell you.

Defendant argues that the prosecutor attempted to disparage him and his counsel by suggesting that they were trying to mislead the jury. "A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). In his closing argument, defense counsel emphasized that if defendant touched the complainant, the touching was accidental. This argument reconciled defendant's two statements on the matter: in one statement, he claimed that he never touched her, while in the other statement, he claimed that he touched her by accident. In the disputed portion of the closing argument, the prosecutor was attempting to point out the weaknesses in defense counsel's attempt to reconcile these alternative theories. However, the prosecutor never blatantly characterized defendant's theory as, for example, "'a bunch of lies'" or "'fabrication of evidence.'" See *People v Dalessandro*, 165 Mich App 569, 579; 419 NW2d 609 (1988) (finding that the prosecutor's argument that "the whole defense was a 'pack of lies'" was improper because in making this argument, the prosecutor chastised defense counsel and defendant's entire defense). The prosecutor's remarks treaded close to the line, but they did not cross it. Further, the court instructed the jury to decide the case based on the evidence, which did not include the comments of counsel, so we presume that the jury did not take the prosecutor's comments into consideration when weighing the evidence. See *Graves*, *supra* at 486. Reversal of defendant's conviction is not warranted.

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Donald S. Owens