STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 29, 2009
v	No. 280417 Kent Circuit Court
DONALD ALLEN LUCAS, Defendant-Appellant.	LC No. 06-009403-FH

Before: Beckering, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of child sexually abusive activity, MCL 750.145c(2), possession of child sexually abusive material, MCL 750.145c(4), and two counts of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a) (sexual contact with a person under the age of 13). The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent prison terms of 217 months to 40 years for each child sexually abusive activity conviction, five to eight years for the possession of child sexually abusive material conviction, and 217 months to 30 years for each second-degree CSC conviction. Because we conclude that there were no errors warranting relief, we affirm.

In August 2006, a former boyfriend of one of defendant's daughters was at defendant's home to borrow some money and discovered video recording equipment and videotapes in a bedroom. He removed some videotapes from the home because he was concerned that the videotapes might involve children. After viewing the videotapes, he contacted defendant's former wife, who in turn contacted the police. The videotapes intertwined images of defendant masturbating and performing other acts with images of defendant's granddaughter and other young girls. The police seized additional videotapes and other items during a search of defendant's home. The prosecution charged defendant with two counts of second-degree CSC based on images in the videotapes that depicted defendant exposing the vaginal area of his granddaughter. The charges of child sexually abuse activity were based on defendant's conduct toward his granddaughter and another young girl, as depicted in the videotapes.

On appeal, defendant argues that it was improper to admit the videotape evidence at trial without redacting portions that showed him masturbating—alone or with objects, defecating and engaging in other physical acts, which included smearing feces on his body. At trial, defendant's trial counsel conducted a voir dire of Kentwood Police Detective Michelle Clark regarding the videotapes and a digital DVD. After this, he informed the trial court that there was "[n]o

objection to admission" of the evidence. Because defendant's trial counsel affirmatively approved the admission of the videotape evidence, he waived any claim of error in its admission. *People v Carter,* 462 Mich 206, 215; 612 NW2d 144 (2000).

Defendant next argues that the prosecutor deprived him of a fair trial by commenting on the contents of the videotapes during jury voir dire. Specifically, defendant contends that it was error for the prosecutor to tell the prospective jurors that they would not want to watch the disgusting activities on the videotapes, but that he would have to "play some of them in order to prove my elements." Because defendant did not object to the prosecutor's comments, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

To avoid forfeiture under the plain error rule, defendant must show a clear or obvious error that affected his substantial rights. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). "To establish that a plain error affected substantial rights, there must be a showing of prejudice, i.e., that the error affected the outcome of the lower-court proceedings." *Id.* at 356. If this burden is satisfied, the reviewing court may reverse when "the plain, unpreserved error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *Id.* at 355.

"Issues of prosecutorial misconduct are decided case by case, and this Court must examine a prosecutor's remarks in context." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* at 63. Contrary to defendant's argument on appeal, the prosecutor's challenged comments cannot be characterized as evidence. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (Mallett, J.); see also MCR 6.412(C)(1). It is apparent that the challenged remarks were made for the purpose of determining whether the prospective jurors could view the type of evidence that was to be introduced at trial. After commenting on the videotapes, the prosecutor asked the prospective jurors, "Who feels they cannot possibly in any way sit on that kind of a case?" Viewed in context, the prosecutor's comments were not inappropriate.

Moreover, before the prosecutor made his remarks, the trial court instructed the prospective jurors that the purpose of the lawyers' questions was to choose a fair and impartial jury. After a jury selection, the trial court also instructed the jurors that their verdict must be based on the evidence at trial and that statements made by the prosecutor and defense counsel are not evidence. Jurors are presumed to follow their instructions and instructions are presumed to cure most errors. *People v Bauder,* 269 Mich App 174, 195; 712 NW2d 506 (2005). Further, we find no basis for concluding that the prosecutor unfairly characterized the evidence as "disgusting." The prosecutor's remarks when addressing jurors need not be confined to the blandest of terms. *People v Williams,* 265 Mich App 68, 71; 692 NW2d 722 (2005). In light of

this record, we conclude that the prosecutor's remarks did not prejudice defendant. *Jones*, *supra* at 356.

Defendant also argues that it was plain error for his former wife to describe what she saw on the videotapes and to characterize the activities as disgusting.[1] Defendant argues that this testimony was not relevant. Relevant evidence means "evidence that is material (related to any fact that is of consequence to the action) and has probative force (any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence)." *People v Sabin (After Remand)*, 463 Mich 43, 57; 614 NW2d 888 (2000). Even if relevant, evidence may be excluded if the probative force is substantially outweighed by the danger of unfair prejudice. MRE 403.

Initially, defendant has not shown that it was improper for the prosecutor to ask his former wife to describe what she viewed on the videotapes. The witness testified that she observed images of both children and defendant's activities toward himself on the videotapes. The images of defendant's activities toward himself linked him to the videotapes and supported an inference that he purposely placed the images around the images of children for a sexual purpose. Therefore, the testimony was relevant. Regardless of the legality of some of the activities depicted on the videotapes, a jury is generally entitled to hear the complete story of what occurred. "The more the jurors knew about the full transaction, the better equipped they were to perform their sworn duty." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996). For these reasons, it was not plain error for the prosecutor to ask the witness to describe the activities.

To the extent that the witness also offered her opinion when she described defendant's activities as "disgusting" and stated she had "never seen anything like this before" and that "this is not normal for a person to do this to your body," her testimony may be considered unresponsive. And a witness' unresponsive answer, which was in response to a proper question, is generally not grounds for relief, *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995), unless the prosecutor knew that the witness would give unresponsive testimony or conspired with or encouraged the witness's testimony, *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). To warrant relief, the error must be so egregious that the prejudicial effect could not be removed in any other way. *Bauder supra* at 195. In this case, there was no objection to the witness' testimony, so the trial court was not called upon to take any corrective action. More significantly, we find no basis for concluding that the witness's unsolicited opinion caused any prejudice. Defendant has not demonstrated an outcome-determinative plain error. *Jones*, *supra* at 356.

Defendant also argues that it was plain error for his former wife to voice her opinion that defendant was sick and abnormal when she was describing a 1981 incident in which defendant admitted to her that he took pictures of their son and a neighborhood girl and that defendant penetrated the girl with his fingers. The record does not support defendant's claim that his

[1] Defendant's wife testified that she saw him insert a coke bottle in his rectum and smear feces on his body.

former wife offered an opinion to describe defendant's past conduct. Rather, she testified about a statement that she made to defendant in response to his admission that he had penetrated the young victim with his fingers, as well as her later statements to the police when reporting the incident. The later statements were arguably unresponsive because the prosecutor only asked the witness, "What happened as a result of that? Did you go to the police at all?" Further, because any minimal prejudice was not outcome-determinative, it does not warrant relief. *Jones, supra* at 356.

We also reject defendant's argument that his former wife's opinion that the police detective involved in the 1981 incident was a "sweetheart" constituted outcome-determinative plain error. Further, the witness's testimony that defendant's probationary sentence for his prior conviction was a "slap on the wrist" was given in response to defense counsel's question regarding the sentence. Similarly, her testimony that she was "very angry" and "hurt that he could hurt so many people and children, you know, little kids," was given in response to defense counsel's questions regarding her current relationship with defendant and whether she was angry with him. To the extent that the answers were responsive to defense counsel's questions, they do not provide any basis for relief, inasmuch as a "[d]efendant should not be allowed to assign error on appeal to something which his own counsel deemed proper at trial." *People v Roberson,* 167 Mich App 501, 517; 423 NW2d 245 (1988). To the extent that the answers were unresponsive, relief is not warranted because there was no objection and the testimony did not prejudice defendant. *Jones, supra* at 356.

Defendant also argues that plain error occurred when Detective Clark was allowed to express her disgust and contempt of him during direct examination. The record does not support defendant's claim. Rather, the challenged testimony was offered to explain why Clark did not view more of the videotapes seized during the search of defendant's home. She testified that she did not view all of the videotapes because to do so would be "extremely time consuming" and "I had troubling sitting through the tapes that I did, let alone to sit there and watch four hundred tapes with such disturbing material on them." Examined in context, defendant has failed to establish error, plain or otherwise. *Jones, supra* at 355.

Next, defendant argues that the prosecutor made an improper appeal for sympathy and improperly asked the jury to convict based on defendant's unsavory character, rather than the evidence, during closing argument. Specifically, the prosecutor stated, "What we have here is an individual that doesn't bear describing" and "It doesn't take a rocket scientist, folks, to figure out what Mr. Lucas is." Because defendant did not object to the prosecutor's remarks, he bears the burden of showing plain error affecting his substantial rights. *Carines*, *supra* at 763.

A prosecutor may not comment on evidence for an improper character purpose, *People v McGhee*, 268 Mich App 600, 635-636; 709 NW2d 595 (2005), or appeal to the jury's sympathy for a victim, *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). But a prosecutor may argue reasonable inferences from the evidence as they relate to his theory of the case. *Dobek, supra* at 66.

Examined in context, the prosecutor was not attacking defendant's character, but rather arguing that defendant's conduct, as depicted by the videotapes and his similar past behavior, was part of a pattern of deliberate criminal conduct. In addition to the 1981 incident, the prosecutor introduced evidence that defendant was also convicted of second-degree criminal

sexual conduct for a 1994 incident. Evidence of past criminal sexual conduct "may be considered for its bearing on any matter to which it is relevant." MCL 768.27a; see also *People v Watkins*, 277 Mich App 358, 364, 745 NW2d 149 (2007). Further, the trial court's instruction to the jury that it was "not to let sympathy or prejudice influence your decision" was sufficient to dispel any prejudice. *Watson, supra* at 592.

We also reject defendant's argument that the prosecutor made an impermissible appeal to the jury's civic duty by commenting in rebuttal that the children "cry out for justice." "Civic duty arguments are generally condemned because they inject issues into the trial that are broader than a defendant's guilt or innocence and because they encourage the jurors to suspend their own powers of judgment." *People v Potra*, 191 Mich App 503, 512; 479 NW2d 707 (1991). Here, the gravamen of the prosecutor's argument was not that the jury should convict defendant out of a sense of civic duty, but rather that it could convict on the weight of the evidence even without the testimony of the children depicted in the videotapes. Because a review of the prosecutor's remarks in context indicates that the jury was asked to find defendant guilty based on the evidence, defendant has not established a plain error. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). Further, any possible prejudice was dispelled by the trial court's instruction that the jury was to decide the case on the basis of the evidence and that the lawyers' statements are not evidence. *Bauder, supra* at 174.

Next, defendant argues that defense counsel was ineffective for failing to object to the admission of the videotape evidence without redacting the portions that showed him masturbating, and by failing to object at trial to the other matters presented on appeal concerning his former wife's testimony, Clark's testimony, and the prosecutor's remarks. Defendant argues that the trial court erred by rejecting his motion for new trial on this ground, without conducting an evidentiary hearing to determine whether defense counsel's failure to object was strategic.

An evidentiary hearing is only necessary to the extent that a defendant's claim depends on facts not of record. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). A defendant seeking a remand for an evidentiary hearing is generally required to support his claim with an affidavit or offer of proof of the facts to be established at a hearing. MCR 7.211(C)(1)(a). Because defendant has not made an offer of proof that would advance his position in the trial court or in this appeal, we find no basis for a remand. Accordingly, we limit our review to mistakes apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish ineffective assistance of counsel, defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel's performance is evaluated under an objective standard of reasonableness based on prevailing professional norms. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). And defendant must overcome a strong presumption that counsel's performance was sound trial strategy. *Carbin, supra* at 600. "To demonstrate prejudice, the defendant must show the existence of reasonable probably that, but for counsel's error, the result of the proceeding would have been different." *Id.*

Defendant's inability to show that he was prejudiced by defense counsel's failure to object to the testimony of his former wife and Detective Clark, or to the prosecutor's remarks, precludes him from establishing that he was deprived of the effective assistance of counsel.

With respect to defense counsel's waiver of any challenge to the videotape evidence, defendant's failure to show that defense counsel could have successfully moved to present only redacted versions of the videotapes is fatal to his claim. As previously indicated, a jury is generally entitled to hear the complete story of what occurred. *Sholl, supra* at 730. Because defense counsel's strategy was to argue to the jury that defendant did not intend to exploit the children sexually, the prosecutor had to admit the unredacted videotapes to demonstrate the exploitative nature of the content. In their unredacted form, the videotapes clearly suggest that defendant compiled the images in the manner depicted for a sexual purpose. And because the videotape evidence was crucial to the prosecutor's case, its probative value was not substantially outweighed by the danger of unfair prejudice. MRE 403. Defendant's trial counsel cannot be faulted for not making a futile objection. *Rodgers, supra* at 715.

Next, defendant argues that the state and federal constitutional prohibitions against ex post facto laws preclude reliance on MCL 768.27a, which took effect January 1, 2006, as authority for admitting his prior convictions for second-degree CSC, inasmuch as the newly charged second-degree CSC offenses were alleged to have been committed between August 2003 and August 2006. As defendant acknowledges, his legal argument was rejected in *People v Pattison*, 276 Mich App 613; 741 NW2d 558 (2007). Because we our bound by that decision, see MCR 7.215(C)(2), we must reject defendant's argument.

Next, defendant seeks resentencing, arguing that there was no evidence to support the trial court's score of ten points for offense variable (OV) 4. See MCL 777.34. "We review a trial court's scoring decision for an abuse of discretion to determine whether the evidence adequately supports a particular score." *People v Apgar*, 264 Mich App 321, 329; 690 NW2d 312 (2004).

Offense variable 4 is scored at ten points if serious psychological injury occurred to the victim, which "may require professional treatment." MCL 777.34(2). A ten-point score has been upheld where a teenaged victim testified that she was fearful during a sexual offense. *Apgar, supra* at 329. Further, the score has been upheld where a female victim did not testify, but a videotape of the sexual offense depicted her anxiety sufficient to support a finding of serious psychological injury. *People v Wilkens*, 267 Mich App 728, 740-741; 705 NW2d 728 (2005).

In this case, neither child victim testified at trial. One victim was 13 years old at the time of trial. Her father testified that she would have been seven or eight years old when the offense occurred and, based on his conversation with her, she did not remember them. The other victim, defendant's granddaughter, was six years old at the time of the trial. At sentencing, the prosecutor asserted that he had received information from detectives and family members that defendant's granddaughter received treatment at the Assessment Center and the YMCA. The trial court also commented on the images that were presented at trial, stating, "I don't for a minute believe that there won't be far-reaching psychological and physical effects upon these victims and family members for years to come."

As in *Wilkens, supra*, the actions depicted on the videotapes support the trial court's determination that each victim suffered serious psychological harm that may require professional treatment. Therefore, we uphold the trial court's scoring decision. Furthermore, as the trial court observed, any error in the scoring of OV 4 was harmless because it did not affect the

guidelines range. A ten-point reduction to defendant's total offense variable score of 70 points would not affect his placement in OV level V of the sentencing grid for a class B offense. MCL 777.63. Resentencing is not required where a scoring error does not affect the appropriate guidelines range. *People v Francisco,* 474 Mich 82, 89 n 8; 711 NW2d 44 (2006).

Finally, relying on *Blakely v Washington,* 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), defendant argues that resentencing is required because the trial court relied on facts not found by the jury to score the offense variables. Our Supreme Court has determined that Michigan's indeterminate sentencing scheme does not violate the rule stated in *Blakely* because a defendant's maximum sentence is set by statute and the sentencing guidelines affect only the minimum sentence. *People v Drohan,* 475 Mich 140; 715 NW2d 778 (2006). Consequently, defendant's argument is without merit.

There were no errors warranting relief.

Affirmed.

/s/ Jane M. Beckering
/s/ William C. Whitbeck
/s/ Michael J. Kelly