

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EARNEST JONES,

Defendant-Appellant.

UNPUBLISHED

June 22, 2010

No. 289946

St. Clair Circuit Court

LC No. 08-001476-FH

Before: METER, P.J., and SERVITTO and BECKERING, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c (victim under age 13 or over age 13 with multiple variables), involving his daughter, and sentenced as a second-offense habitual offender, MCL 769.10, to concurrent prison terms of 36 months to 22 years and six months on each count. He now appeals as of right. We affirm.

I

Defendant's first argument on appeal is that his trial counsel was ineffective for failing to object to the testimony of a child protective services worker and a detective. Defendant claims that their testimony constituted opinion testimony on the ultimate issue of his guilt. We disagree.

An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed de novo by this Court. *Id.* Because defendant did not raise this issue in the trial court, and there was no evidentiary hearing held pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), our review is limited to the existing record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005).

Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. The defendant bears a "heavy burden" on these points. Defendant must overcome a strong presumption that counsel's

performance constituted sound trial strategy. “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” [*People v Petri*, 279 Mich App 407, 410-411; 760 NW2d 882 (2008) (citations omitted).]

A witness may not express an opinion regarding the defendant’s guilt or innocence. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). However, we do not find that the challenged testimony constitutes an expression of defendant’s guilt.

Defendant argues that his trial counsel should have objected to the testimony of a child protective services worker who provided an overview of her investigation into the complainant’s allegations against defendant. The witness described having collected information from the complainant and “um, *protocol* after that was that I did contact the courts to ask for a Pick Up Order” (emphasis added). When asked to define a “Pick Up Order” and explain how it is obtained, the witness testified that her agency “contact[s] the court and we inform them of information that we’ve received, um, and let them know that we feel that the child is not safe in the home; that they need to be removed from the home.” Defendant contends that discussion of the Pick Up Order amounts to an improper opinion by the child protective service worker regarding defendant’s guilt. Implicit in this explanation of procedure was that the agency had concluded that the complainant would be safer outside of defendant’s home. However, the jury could reasonably conclude that such a procedure was standard protocol pending further investigation of the claims being made, taken at face value, and not the result of a conclusion that the complainant’s claims were actually true with respect to defendant’s guilt, which was the subject of the trial and left to the jury to consider.¹ The witness’s testimony is somewhat analogous to a police officer testifying that after obtaining statements from various witnesses, a defendant was arrested. Defense counsel was not required to advocate a meritless position and raise an unfounded objection.² *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

The complainant was also interviewed by a sheriff’s department detective pursuant to a referral from Child Protective Services. At trial, the prosecutor asked the detective to describe the complainant’s demeanor during the interview, and the detective described it as “appropriately uncomfortable.” Defendant contends that such phrasing amounts to an improper opinion as to defendant’s guilt. However, the challenged testimony did not address the issue of defendant’s guilt. The witness continued her response by explaining that “[n]obody really wants to sit and talk about that kind of an issue as a teenager with anybody, and particularly a total stranger”

¹ On cross-examination the child protective services worker again mentioned protocols, stating that, “any time there’s allegations of this nature, that’s protocol that we send a referral to law enforcement as well. Um, I—actually in my notes it shows that I got the call from Detective Jacobsen; that she contacted me to inform me that she had been assigned to the case.”

² Further, choosing not to object is consistent with defense counsel’s trial theory, which was that the complainant fabricated the allegations in order to live with her stepmother, defendant’s ex-wife. The witness’s testimony about removing the complainant from defendant’s home was consistent with that alleged motive. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy. *Petri*, 279 Mich App at 411.

The witness was simply expressing her opinion that being uncomfortable is appropriate in that type of situation. Defendant's trial counsel cannot be faulted for failing to raise a meritless objection. *Mack*, 265 Mich App at 130.

II

Defendant next argues that he was denied a fair trial because the trial court admitted evidence that he voluntarily released his parental rights to the complainant. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Silberstein v Pro-Golf of America, Inc.*, 278 Mich App 446, 460; 750 NW2d 615 (2008). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). A preserved evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402. Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more or less probable than it would be without the evidence. MRE 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Rebuttal evidence explains, contradicts, or otherwise refutes an opponent's evidence and tends to weaken or impeach it. *People v Figures*, 451 Mich 390, 399; 547 NW2d 673 (1996). A party may not introduce evidence during rebuttal unless it is properly responsive to evidence introduced or a theory developed by the opponent. *Id.* "The test for error regarding rebuttal evidence is whether it is justified by the evidence it is offered to rebut." *People v Leo*, 188 Mich App 417, 422; 470 NW2d 423 (1991).

Defendant testified in his own defense at trial. On direct examination, defendant testified that after the complainant made allegations against him and was removed from his home, he voluntarily appeared at a Team Decision Meeting at the Department of Human Services—a meeting that he did not have to attend—in order to "find out what—more information on what was going on to make sure that [the complainant] was going to be in a, a decent place to be taken care of." On cross-examination, the prosecutor sought and received defendant's confirmation that he attended the Team Decision Meeting "to find out what was going on and to make sure [the complainant] had a decent place to be taken care of." The prosecutor also elicited from defendant an admission that at the Team Decision Meeting, he declined to allow the complainant to stay with her stepmother because the stepmother would not allow defendant to see his son. Defendant testified that he was concerned about not being able to see the complainant anymore and was upset about that.

During later cross-examination, defendant testified that he had not had contact with the complainant for almost a year. When the prosecutor asked defendant why he had not had contact with the complainant, defendant responded that the complainant was removed from his custody. Then, at a bench conference outside the presence of the jury, the prosecutor sought to admit

rebuttal evidence that defendant had voluntarily terminated his parental rights to the complainant. In a separate record, defendant testified that he voluntarily relinquished his rights because it would be impractical to make the complainant live with him if she did not want to and was willing to make sexual abuse allegations against him. The parties argued at length regarding the admissibility of defendant's voluntary termination. The prosecutor argued that defendant "opened the door" when he testified that he did not want the complainant to live with her stepmother because he was afraid he would never see her and that he attended the Team Decision Meeting and voluntarily participated in the process under the guise of being a good father. According to the prosecutor, it would be unfair to leave out the fact that at the end of or soon after that meeting, defendant announced that he was releasing his rights to the complainant. The prosecutor further argued that defendant's voluntary termination served to rebut defendant's characterization of himself as "such a great and devoted father." Defendant objected, contending that the evidence was not relevant, and any probative value was substantially outweighed by the danger of unfair prejudice under MRE 403. The trial court clearly struggled with discerning the relevance of the evidence, but ultimately ruled that the evidence was admissible, stating:

I have, I've well, I've overruled your objection to the extent that he may testify that he will be—he will testify in response to the question by the Prosecutor that's limited to what he testified to on the separate record.

* * *

It's not all that complicated. The fact of the matter is he, he told me on the separate record he agreed to . . . release the . . . parental rights and the reason for that was because of what he explained to me on the record.

* * *

It was not, it was not because he had the option of a trial or voluntary release, but he had other motives to do that. That's what this is about, which is responsive to the question which may be contrary to what he may have said in his direct examination.

While the trial court's ruling is rather difficult to discern, it appears that the trial court accepted the prosecutor's argument that the information could be used as rebuttal evidence given that defendant may have contradicted himself or opened the door to impeachment regarding his motives at the time of the Team Decision Meeting and whether he was concerned about continuing to see the complainant or looking out for her best interests as he alleged.

The evidence that defendant voluntarily released his parental rights is directly responsive and contradictory to his testimony on direct examination and the answers he gave on cross-examination. Defendant portrayed himself as a good parent who was primarily interested in the complainant's best interests. He indicated that he did not want the complainant to live with her stepmother because he was afraid he would not be able to see her, yet promptly thereafter, he voluntarily terminated his parental rights, which had the effect of the complainant indefinitely residing with her stepmother. Furthermore, on direct, defendant testified that he opposed the complainant's placement with her stepmother at the Team Decision Meeting, but on the separate record, defendant testified that he released his parental rights so that the complainant could live

with her stepmother if that was what she wanted. The voluntary termination evidence was proper rebuttal evidence, as it was relevant to the issue of defendant's credibility and tended to refute defendant's testimony that he was a caring parent who wished to see the complainant. MRE 401; *Figgures*, 451 Mich at 399.

Defendant contends that the evidence was overly prejudicial and likely to lead the jury to conclude that he was guilty because the allegations had been substantiated in another forum. However, defendant testified that he voluntarily released his parental rights, and no reference was made to an involuntary termination proceeding. Additionally, explaining to the jury that defendant voluntarily released his rights out of concern for the complainant's well being, and that he agreed to let her live where she wanted to live, could be viewed as putting her interests above his own.

III

Defendant next argues that the prosecutor engaged in misconduct by disparaging the exercise of his constitutional right to a jury trial and his right to confront witnesses, and that his counsel was ineffective for failing to object. Our review of an unpreserved claim of prosecutorial misconduct is limited to ascertaining whether there was plain error that affected the defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). With respect to defendant's ineffective assistance claim, he must establish that but for defense counsel's error, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *Petri*, 279 Mich App at 410.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Brown*, 279 Mich App at 135.

Read as a whole, we find that while the prosecutor laced her remarks with what could be considered a negative connotation regarding defendant having exposed the complainant to the unpleasantness of a trial, overall, the prosecutor's remarks were made in support of her argument that the complainant was credible and to attack defendant's theory that the complainant fabricated the allegations. The prosecutor pointed out that at least one of the complainant's alleged motives—to make false allegations in order to live with her stepmother—no longer existed, yet the complainant maintained her allegations and endured extensive scrutiny of both herself and her accusations of sexual abuse at trial. A prosecutor may argue from the facts in evidence that the defendant or another witness is or is not credible, *Dobek*, 274 Mich App at 67, and may respond to arguments raised by a defendant, see *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

The trial court also offered the following instructions to the jury: "The lawyers' statements and arguments are not evidence. . . . You should accept only things the lawyers say that are supported by the evidence and your own common sense and general knowledge." In addition, the judge told the jury, "You must not let sympathy or prejudice influence your decision." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476,

486; 581 NW2d 229 (1998). Further, if the prosecutor had committed any misconduct, a timely objection and curative instruction would likely have alleviated any prejudicial affect by explaining to the jury that defendant has a constitutional right to a trial and to confront witnesses. See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

With respect to defendant's ineffective assistance claim, defense counsel was not required to advocate a meritless position and raise an unfounded objection. *Mack*, 265 Mich App at 130. Assuming defense counsel was ineffective for not objecting, review of the record reveals that absent such error, the result of the proceedings would not have been different.

Affirmed.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Jane M. Beckering