

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
February 17, 2011

v

HABTAMU NEGASH BEKELE,  
  
Defendant-Appellant.

No. 294592  
Ingham Circuit Court  
LC No. 08-1319-FC

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Before: MURPHY, C.J., and MURRAY and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of three counts of first-degree criminal sexual conduct (CSC 1), MCL 750.520b(1)(a) (person under 13), and three counts of second-degree criminal sexual conduct (CSC 2), MCL 750.520c(1)(a) (person under 13). He was sentenced to 25 to 50 years' imprisonment on each count of CSC 1, to be served consecutively to each other, and to 86 to 180 months' imprisonment for each of the CSC 2 counts, to be served concurrently. We affirm defendant's convictions, but vacate in part the judgment of sentence and remand for resentencing on the CSC 1 convictions.

Defendant's convictions arise out of a series of events occurring between the summer of 2007 and August 2008. The victim is defendant's daughter<sup>1</sup> and was under thirteen years of age at the time of trial. The victim's testimony referred to multiple instances of sexual abuse committed against her by defendant, involving both sexual contact and penetration. In addition to the victim's testimony, the prosecution called multiple witnesses, though her mother was found not competent to testify at trial.

The prosecution called defendant's refugee-services caseworker to testify about her impressions of the victim and defendant. She also testified about the night the victim told her about the sexual abuse. The prosecution further called the detective who received the protective services referral on this case. The detective had worked for the Lansing Police Department for

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<sup>1</sup> It is unclear from the record whether the victim was defendant's biological daughter or his stepdaughter. It ultimately makes no difference for purposes of our analysis.

twenty years and was assigned to the child abuse, neglect, and sexual assault unit when she interviewed the victim. The detective was trained in forensic interview protocol with respect to interviewing children, and the interview techniques are designed to allow children to tell their story without being led in any particular direction by the interviewing officer. The detective testified that, after interviewing the victim, her only suspect was defendant.

The prosecution called and qualified a doctor as an expert witness to testify about the physical evidence. He conducted an interview and a physical examination of the victim after receiving a Child Protective Services referral. During the interview, the doctor explained sexual abuse to the victim and asked if anything like that had happened to her and who did it. She told him that it had and that it was her father, defendant, who did it to her. He testified that during the physical exam he found that the victim's hymen was torn all the way through, that it was an old tear, and that it was caused by something passing through it.

Defendant testified and denied any wrongdoing. He denied all allegations that he touched the victim inappropriately, forced her to touch him inappropriately, or had sex with her.

The jury found defendant guilty on all three counts of CSC 1 and all three counts of CSC 2. Defendant was sentenced to 25 to 50 years' imprisonment on each count of CSC 1, to be served consecutively to each other, and to 86 to 180 months' imprisonment for each of the CSC 2 counts, to be served concurrently.

Defendant argues that he was denied a fair trial because of the cumulative effect of several instances of prosecutorial misconduct: (1) the prosecutor implied that the government had special knowledge of defendant's guilt, (2) the prosecutor bolstered the victim's testimony, (3) the prosecutor invited the jurors to help "protect" the victim by convicting defendant, and (4) the prosecutor elicited juror's sympathy by asserting that the victim, a minor, had no support throughout the trial. Even if a minor error would not warrant reversal, the Court may look at the cumulative effect of multiple, minor errors to determine if the defendant was denied a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). However, none of the alleged instances of misconduct here were improper so there could be no cumulative error requiring reversal.

Defendant failed to preserve this issue for review because he did not object to the alleged instances of misconduct. *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004). Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), overruled in part on other grounds in *Crawford v Washington*, 541 US 36, 64; 124 S Ct 1354; 158 L Ed 2d 177 (2004). A defendant must show (1) that there was an error, (2) that the error was plain (clear or obvious), and (3) that the error affected substantial rights, i.e., that the error was prejudicial, affecting the outcome of the case. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Additionally, appellate courts have discretion in deciding to reverse and should only do so when the plain error resulted in a conviction of an innocent defendant or when the error seriously affected the fairness of judicial proceedings. *Id.* Further, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Schutte*, 240 Mich App at 721.

Defendant first asserts that the prosecutor improperly vouched for the truthfulness of the government's case, implying that the government had special knowledge of the facts as reflected in testimony elicited by the prosecutor from the refugee-services caseworker and the detective assigned to the case. It is improper to use the prestige of the police to show the guilt of a defendant. *People v Lucas*, 138 Mich App 212, 221; 360 NW2d 162 (1984). Additionally, witnesses are not permitted to express an opinion on a defendant's guilt or innocence. *People v Parks*, 57 Mich App 738, 750; 226 NW2d 710 (1975). Also, defendant's argument of misconduct is based on the prosecutor eliciting testimony that allegedly was improper. "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

Defendant argues that the detective's position as a law enforcement officer with special training in forensic interview protocol could have caused the jurors to perceive her testimony as the truth. Defendant maintains that this perceived "expert" testimony may have caused the jurors to adopt the detective's opinion as their own for purposes of the verdict. The detective testified that after interviewing the victim she believed a crime had been committed and that there was a single suspect, defendant. She used her position as a detective and her special training in forensic interview protocol to identify suspects. She was never questioned and did not provide an opinion about the guilt of defendant. Her testimony regarding the format of forensic interview protocol was to explain how she came to her conclusions, not to improperly influence the jury to believe her conclusions or the victim's testimony as the truth. Defendant also argues that the prosecutor elicited prejudicial testimony from the refugee-services caseworker by asking if she had any reason to believe that the victim was not telling the truth. However, she testified during cross-examination that she had not formed an opinion on the case. While it is generally improper for a witness to provide an opinion on another witness's credibility, as credibility determinations are for the jury to make, *People v Smith*, 158 Mich App 220, 230-231; 405 NW2d 156 (1987), the caseworker merely testified on direct examination that she had not seen the victim laughing or joking about the abuse. Her testimony could not have prejudiced the jury. The prosecutor did not improperly vouch for the truthfulness of the government's case or imply that the government had special knowledge of the truth; therefore, there was no misconduct on the part of the prosecutor. Further, nothing in the record suggests that the prosecutor elicited the testimony in bad faith.

Defendant next argues that the prosecutor improperly bolstered the victim's testimony "by eliciting that she had told prior consistent statements to other people over and over." It is generally improper for anyone to bolster a witness's testimony by referring to prior consistent statements of the witness. *People v Rosales*, 160 Mich App 304, 308; 408 NW2d 140 (1987). However, defendant failed to point to any specific instances in the record where this occurs, and the prosecutor, citing *People v Kelly*, 231 Mich App 627, 640-641; 588 N.W.2d 480 (1998), relies on the proposition that an appellant may not make arguments without any basis in the record and that it is not this Court's duty to "discover and rationalize the basis for his claims."

Defendant is likely referring to a portion of the direct examination of the victim. The prosecutor led the victim through a list of people with whom she had discussed the circumstances of the case. She then repeated the list to clarify that she spoke with seven people prior to the trial. She responded "yes" when asked, "And when you talked to these people, did you tell them the truth?" She did not, however, go into detail about what she discussed with

them, nor did she indicate that her trial testimony was the same as the statements that she made to the seven people referenced above. And she did not indicate that the testimony of the others was consistent with what she had told those individuals. Moreover, given that the victim testified at trial and was subject to cross-examination and that there was an implied charge of fabrication on her part,<sup>2</sup> there is an argument that prior consistent statements would have been admissible. See *People v Jones*, 240 Mich App 704, 707; 613 NW2d 411 (2000) (addressing criteria that, if satisfied, permits the admission of prior consistent statements). The prosecutor's questions and the victim's answers did not lead the jury to believe that the government had extrinsic evidence of defendant's guilt. The prosecutor did not improperly bolster the witness's testimony and the questions did not reflect any bad faith on the part of the prosecutor; therefore, there was no misconduct by the prosecutor.

Defendant then argues that the prosecutor improperly made civic duty remarks during closing argument by eliciting the jury's assistance in "protecting" the victim by convicting defendant. The prosecutor stated:

Protection. I talked about it in the beginning of this trial in my opening argument about what it meant to be a refugee, where that word comes from and what it stands for. Over the past several days you've seen a way our country protects people. It affords them the right to a trial, a right to have evidence presented, and to have guilt proven beyond a reasonable doubt. The defendant has been protected by the laws of our country these last few days. The question becomes when will [the victim] be protected by the laws of this country? Isn't she afforded the same opportunity? Doesn't she get the same things that he received that this country has to offer?

Prosecutors may not ask jurors to convict a defendant as part of their civic duty by appealing to fears and prejudices or expressing a personal opinion on guilt. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). However, prosecutors are given great latitude during closing arguments and are allowed to argue the evidence and all reasonable inferences from the evidence. *Id.* at 282. Additionally, allegations of prosecutorial misconduct must be reviewed in context and the comments must be read in relation to the evidence and the defense's arguments. *Ackerman*, 257 Mich App at 451-452. Prosecutors are not required to use the blandest language available. *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996), citing *People v Phillips*, 112 Mich App 98, 114; 315 NW2d 868 (1982). Closing arguments may include emotional language, as it is an important weapon for prosecutors. *Ullah*, 216 Mich App at 679, citing *People v Mischley*, 164 Mich App 478, 483; 417 NW 2d 537 (1987).

Read in context, the prosecutor's statement here was the first paragraph in a 14-page closing argument. The jury was never asked to convict defendant based solely on their civic duty. See *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004) (finding that there

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<sup>2</sup> In defense counsel's opening statement, he maintained that defendant's "position is clear, he simply did not do this." This position clearly implied that the victim was lying.

was no plain error when the prosecution did not ask the jury to convict the defendant regardless of the evidence). Instead, the jury was provided adequate evidence to determine that defendant was guilty beyond a reasonable doubt. The closing argument detailed the required elements of the crimes alleged, the testimony of the witnesses, and the facts of the case as presented by the witnesses. Viewed in context, the prosecutor did not improperly ask the jury to disregard the evidence and convict defendant because it was their civic duty. There was no misconduct.

Defendant last argues that the prosecutor improperly elicited the jurors' sympathy by indicating that the victim had no one to support her at trial and that she needed the jury's protection. It is improper to appeal to a jury to sympathize with a victim. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, a brief comment that a victim has rights is not an error causing prejudicial effect. See *People v Howard*, 226 Mich App 528, 546; 575 NW2d 16 (1997).

The prosecutor, during direct examination of the victim, mentioned only once in passing that the victim did not have a support person with her after the victim expressed that it was difficult to testify. It was an isolated comment that was not a blatant appeal for sympathy and it did not prejudice defendant. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). The remarks made during closing argument regarding protection, read in context, were not an appeal to the jurors' sympathy because they were not a call for the jury to sympathize with or protect the victim, but to review the evidence presented under the applicable burden of proof. Additionally, the jury was instructed not to allow sympathy or prejudice to influence the verdict. Jury instructions are presumed to cure most errors, and jurors are presumed to follow their instructions. *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). The prosecutor did not improperly appeal to the juror's sympathy and there was no error.

Defendant also raises a claim of ineffective assistance of counsel because trial counsel failed to object to the alleged instances of misconduct detailed above. Defendant did not request a *Ginther*<sup>3</sup> hearing so this Court's review is limited to mistakes that are apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To show ineffective assistance of counsel, a "defendant must show that his attorney's performance fell below an objective standard of reasonableness." *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004). A defendant must also show that the performance of trial counsel prejudiced him to the point of depriving him of a fair trial. *Id.* at 486. To do so, there must be a reasonable probability that the outcome of the case would have been different absent the deficient performance of counsel. *Id.* A "reasonable probability" is a probability "sufficient to undermine confidence in the outcome." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1994). There is a presumption that the actions of trial counsel are sound strategy, which presumption the defendant must overcome. *Id.* at 689.

There was no misconduct in this case so trial counsel was not ineffective because counsel need not make futile and meritless objections. *Ackerman*, 257 Mich App at 455. Further,

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<sup>3</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant has not established the requisite prejudice assuming that the failure to object fell below an objective standard of reasonableness. The victim's testimony and the physical evidence described by the expert witness was enough evidence of defendant's guilt that it was unlikely an objection in any of the instances of alleged prosecutorial misconduct would have changed the outcome of the case. The detective's testimony concerning suspects and her perceived expertise would likely not have affected the outcome of the case because her expertise was used to explain her procedure in questioning children, not to influence the jurors. The refugee-services caseworker's testimony that nothing indicated to her that the victim was lying was also unlikely to affect the outcome of the case because she went on to explain that she had not formed an opinion on the case. The prosecutor's closing arguments did not amount to a civic duty argument or an appeal to jury sympathy because read in context it outlined the crime, the facts, and the evidence that supported defendant's guilt beyond a reasonable doubt. And even if the prosecutor's remarks had appealed to the jurors' sympathy they too were unlikely to change the outcome of this case because of the other evidence presented. Additionally, jury instructions are presumed to cure most errors, and jurors are presumed to follow their instructions. *Petri*, 279 Mich App at 414. The jurors were instructed to not allow sympathy to influence their decisions. This instruction would have cured any perceived error by the prosecutor.

Counsel was not ineffective because counsel does not have to make futile or meritless objections and there was no misconduct necessitating an objection. Defendant cannot show that trial counsel's failure to object to any of the alleged instances of misconduct was sufficient to undermine confidence in the outcome of the case or that it was reasonably probable that there would have been a different outcome.

Finally, we raise a sentencing issue *sua sponte*.<sup>4</sup> As indicated above, defendant was sentenced to 25 to 50 years' imprisonment on each of the three counts of CSC 1, and he was ordered to serve those sentences *consecutively*, effectively giving defendant a 75-year minimum sentence. MCL 750.520b(3) provides that "[t]he court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the *same transaction*." (Emphasis added.) We read this

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<sup>4</sup> Addressing a controlling legal issue despite the failure of the parties to raise or frame the issue "is a well understood judicial principle." *Mack v Detroit*, 467 Mich 186, 207; 649 NW2d 47 (2002). The decision to address "an issue not briefed or contested by the parties is left to [the] discretion of the Court." *Id.* (citation omitted). Courts are not constrained from ruling on an issue because of the parties' failure to raise the matter where the parties ignore established precedent, a constitutional mandate, or a statutory commandment. *Id.* at 208. MCL 750.520b(3) does not allow for consecutive sentencing as to the CSC 1 convictions under the circumstances presented, and "[a] consecutive sentence may be imposed only if specifically authorized by statute," *People v Brown*, 220 Mich App 680, 682; 560 NW2d 80 (1996). We deem it appropriate to exercise our discretion and consider the issue *sua sponte* given that the trial court improperly imposed consecutive sentences, as discussed below, especially where the imposition of an invalid criminal sentence would implicate due process concerns.

provision as simply applying to situations in which a defendant commits a CSC 1 and additionally commits another criminal offense during the same transaction, thereby allowing the court to impose a CSC 1 sentence consecutive to the sentence for the other criminal offense.<sup>5</sup> MCL 750.520b(3) was not intended to allow consecutive sentencing on multiple counts of the offense of CSC 1, where the counts concern separate acts of CSC 1 occurring on different occasions and therefore are not part of the *same transaction*.

Instead of merely amending the judgment of sentence to provide for concurrent sentences, we conclude that resentencing is necessary, as there is some indication in the record that the trial court intended to impose a lengthy sentence, accomplishing that goal, mistakenly, through the consecutive sentences. Under MCL 750.520b(2)(b), if a CSC 1 conviction is based on acts against a person under the age of 13, the crime is punishable “by imprisonment for life or any term of years, but not less than 25 years.”<sup>6</sup> If the trial court had correctly concluded that it could not consider consecutive sentencing, the court may indeed have imposed a different sentence. Accordingly, we vacate the judgment of sentence and remand the case for resentencing in order to give the trial court the opportunity on resentencing to, if it wishes, contemplate sentences other than concurrent 25-to-50 year terms on the CSC 1 convictions. The sentences imposed with respect to the CSC 2 convictions are not vacated and remain intact.

We affirm defendant’s convictions, but vacate in part the judgment of sentence in regard to the CSC 1 offenses and remand for resentencing. We do not retain jurisdiction.

/s/ William B. Murphy  
/s/ Christopher M. Murray  
/s/ Douglas B. Shapiro

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<sup>5</sup> On the facts presented here, it is unnecessary to determine whether consecutive sentencing can be imposed where a defendant commits two CSC 1 crimes within a single transaction. Stated otherwise, we need not resolve the question of whether a second CSC 1 offense constitutes “any other criminal offense.”

<sup>6</sup> We note that the minimum sentencing guidelines range on the CSC 1 conviction was set at 108 to 180 months’ imprisonment, and defendant received 300 months (25 years). However, under MCL 769.34(2)(a), “[i]f a statute mandates a minimum sentence for an individual sentenced to the jurisdiction of the department of corrections, the court shall impose sentence in accordance with that statute. Imposing a mandatory minimum sentence is not a departure under this section.”