STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 14, 2011
v	No. 298695 Emmet Circuit Court
NICK E. VANWAGONER, Defendant-Appellant.	LC No. 09-003192-FH

Before: SAAD, P.J., and JANSEN and DONOFRIO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under 13). Because the trial court properly admitted challenged evidence, the prosecutor did not commit misconduct at trial, defendant received the effective assistance of counsel at trial, and defendant was not denied his right to a fair and impartial jury, we affirm.

I

Lloyd Swadling is a child protective services worker who testified that on September 17, 2009, he received a complaint that originated from foster parent Lisa Powell concerning foster child Julie Petrowski, born May 4, 1995. Because the complaint concerned an allegation of sexual assault, child protective services reported the allegation to law enforcement. Julie entered child protective services' custody on May 8, 2009.

Joy Petrowski, age 31, and defendant have been in a relationship for 15 years. They moved in together when she was just about to turn 18, and they have two children, John VanWagoner, age 10, and Rachel VanWagoner, age 4. Joy's parents are Rosita Lesher and Fred Petrowski, with whom she currently has no contact. Joy's first contact with her father was when she was 15 and she has seen him on and off since then. Fred is also the father of the victim, Julie, and two other children, Russell Petrowski, and April Petrowski. According to Joy, neither Russell, nor April have relationships with their father. With regard to Julie, Joy stated that she and Julie had maintained contact "on and off," but after the allegations with regard to defendant arose, she has not spoken with Julie.

Joy has no personal recollection of when the incident occurred, but did admit that Julie has spent overnight visits at her and defendant's home. Julie would sleep in the kids' room on a

comforter on the floor between the playpen and single bed. Joy stated that Julie would sleep in her clothes when she spent the night because she would never bring much of anything. Joy stated that Julie would spend the night about three to four times a year beginning in 2006 through the Christmas/New Year season 2007-2008 which was her last visit.

Joy stated that Julie spent the night in her home one night shortly after Christmas of 2007. Joy stated that defendant did not get out of bed the night Julie spent the night. Joy testified that she did not notice anything out of the ordinary or unusual about Julie's behavior that following day. According to Joy, Julie was supposed to stay two nights but Joy could not stand the fighting between her son and Julie. Joy called Fred and asked if he could come pick her up because they did not have the gas to drop her off. Fred stated that he would give them the gas money if they dropped her off, so they took Julie home. Joy drove Julie home because defendant had a knee brace on his leg as a result of an injury he received "wrestling around with our neighbor." Joy stated that defendant was pretty much stationary as a result of the injury and spent the whole time Julie visited on the couch watching television. No one told her about the allegations against defendant at that time.

Joy learned of the allegations when Fred, his girlfriend Charlene Cochran, Charlene's son Dylan, and Julie, showed up at her house sometime in summer 2008. Joy had no had contact with her father since the previous Christmas and when they drove up Charlene started yelling that they had not told her they moved because defendant "touched Julie." Joy stated that she was shocked because she did not know anything about it. Joy went to get defendant and Charlene continued yelling and called defendant a child molester. Charlene also threatened to have Joy's children taken away from her. According to Joy, defendant responded to Charlene's yelling by spitting in her face. Joy stated that at two points during the confrontation Fred and Charlene asked for money from her and defendant, inquiring if defendant had received his Social Security settlement. Joy stated that it was Charlene who made the accusations during the confrontation. Fred did not say anything about the accusations. Julie was in the back seat of the car and heard the entire argument.

According to Joy, after the confrontation in the driveway, Fred drove defendant to a Social Security Hearing in Traverse City and Fred did not say anything about the accusations to defendant at that time. When Julie went into foster care in May 2009, Joy volunteered to have Julie live in her home with defendant and her family. Joy has spoken with defendant about the allegations and he said that they were not true. Joy would not stay with defendant if she believed the allegations were true.

Tina Boughner is a foster care specialist with Child and Family Services. Boughner testified that Julie came into foster care in early May 2009 because her father, Fred, and her mother, Gwen Petrowski, were unable to care for her and provide for her and those circumstances have not changed. Julie was removed from her mother's care, and after an initial placement for the remainder of the school year in Petosky, Boughner placed Julie with Lisa Powell. Julie stayed with Powell from June 2009 until February 2010. Boughner stated that Joy had volunteered as a placement for Julie on September 9, 2009. Boughner did not tell Julie about a possible placement with Joy but asked Julie on September 15, 2009 if she would like to begin visits with Joy. Julie said no. While Boughner investigated the placement, she learned on September 16, 2009 that neither Julie's parents, nor Julie would support the placement when she

became aware that Julie had made an allegation that defendant touched her. Boughner learned the information in a telephone call with Powell. During the call, Boughner told Powell to be alert for any further disclosures but not to question Julie about the incident at all. Boughner also did not question Julie about the incident, but noted that after the disclosure Julie became more depressed, withdrawn, and anxious.

Julie is currently in the 9th grade and receives special education services for two hours a day and receives support for the rest of her classes throughout the day. In Boughner's opinion, although Julie reads at a 3rd or 4th grade level, she generally functions day-to-day socially at her age as a 14-year-old child. She is placed with the Goldsmith family and has weekly visits with her father. Julie is more open with her father than her mother, with whom she is much more reserved. Julie maintains hope that she can return home to her father.

Powell testified that after Boughner told her that she had located Julie's half sister, Joy. Powell asked Julie if she knew she had a half sister and Julie said yes but shut down and did not want to talk about it anymore. Later that day, Julie told Powell that she had been inappropriately touched and she was specific with regard to what happened to her. Julie cried and Powell held her and hugged her. Powell testified that Julie had never mentioned anything about the incident before and she was certain that Julie's disclosure was as a result of discussing Joy. Powell stated that Julie attempted to discuss it again with her but Powell told her they were not allowed to discuss it because of fostering rules. At that point, Powell and Boughner arranged for Julie to attend counseling. Julie saw Tom West once a week and also counseled with Community Mental Health. Powell testified that after the disclosure, Julie changed. According to Powell, Julie began dressing in layers of clothes, felt disgusted with herself, showered many times a day, and took long baths.

Powell testified that in her opinion Julie's level of function was that of an eight to nine year old girl. Powell did not believe Julie acted like a teenager, rather her behavior was more consistent with that of a little girl. Powell stated that she's met with Julie's teachers and they reported that she was functioning at school at third to fourth grade level.

Fred testified that both Julie and Joy are his daughters. Fred stated that Julie lived with him until February 2009 when he sent her to live with her mother, Gwen, because he moved in with his girlfriend, Charlene Cochran. While Julie lived with him, Julie would have overnight visits from time to time, likely about four times between 2006 and 2008. Fred testified that he always dropped off Julie and picked her up. He does not remember a time when Joy dropped off Julie. Fred testified that the last time Julie spent the night at Joy's house was on December 25, 2007. He stated that they were all at Joy's celebrating Christmas when defendant said she could spend the night if she wanted to because she enjoyed playing with Joy's son Nick. Fred did not recall defendant being injured or anyone saying he was injured and did not see any evidence that he had been injured. According to Fred, Julie called him the following day, December 26, 2007, and told him to come pick her up. When he picked up Julie, she was waiting for him in the house and really wanted to leave as soon as possible. Fred stated that he remembers the specific date and that he picked her up himself because when he picked up Julie on December 26, 2007, they were not too far down the road from Joy's house when Julie told him that defendant touched her.

According to Fred, Julie had stated that defendant "tried to mess with her and that he was trying to get her belt off her pants and get her pants down, and then she kind of rolled over like she was trying to wake up, and then he left the room." Fred could not recall if Julie had said defendant had actually put his hand on Julie's vagina. Fred testified that he took Julie home and talked with her about it all afternoon and told her that it was not her fault. He stated that he was upset and sick over it but Julie begged him not to call the police or anyone. Fred did not call the police or tell Julie's mother Gwen but eventually Fred and Julie did tell Charlene.

Charlene testified that she learned about the incident shortly after it occurred but she could not remember who initially told her, Julie or Fred. Charlene stated that Julie did tell her the story of what happened. Charlene never told anyone about the allegations. Charlene testified that she and Fred believed that the police would not do anything about it and never considered going to the police. Charlene believed that Julie was very leery of men after the incident and she was not as friendly and outgoing as she was before the incident. According to both Fred and Charlene, Julie never went to Joy's house or even called Joy or her children again.

Fred did not speak with Joy again. Fred stated that he had contact with defendant one more time when defendant called him and asked for a ride to Traverse City for a hearing on his settlement sometime that winter. Fred testified that defendant paid for gas and bought him lunch. While Fred felt odd about driving defendant, he stated that he was trying to help out Joy and her children. Fred did not say anything about the incident or the allegations in conversation during the ride.

According to Fred, over time he thought more and more about what happened and was concerned for the safety of Joy's daughter so he, Charlene, Julie, and Charlene's son Dylan went to Joy's house to tell Joy and confront defendant in July 2008. Charlene also testified that she had also thought about it over time and thought Joy should know what defendant was being accused of because Joy and defendant had a daughter. When they pulled up in the driveway, Fred yelled for Joy who was in the back of the house by the pool. Joy walked around to the front of the car and spoke to Fred through the window. Fred stated that he told Joy about Julie's accusations. Charlene stated that Joy responded to the news that Julie might have been touched by defendant by stating, "So? It's happened to me before, too." In her testimony, Joy denied making that statement though she admitted at trial that she had been molested as a child.

According to Fred, Joy went into the house and got defendant who also walked out to the car. Charlene testified that defendant just walked out of the house and Joy told defendant that he was being accused of molesting her sister. Fred stated that defendant went over to Charlene's window and was hostile. Fred also stated that Charlene confronted defendant about the accusations and called him a molester. Defendant denied the allegations. Charlene denied calling defendant a molester and denied confronting defendant. Defendant yelled at Charlene, called her a liar, and then spit in her face. According to Fred, defendant then came around to Fred's window and told him to, "Get that bitch out of here." And Joy also told them to, "Get the hell out of here." So they never got out of the car and just drove away. Both Fred and Charlene denied that they asked for money or talked about defendant's settlement during the confrontation.

Julie testified that on the date of trial she was 14 years old attending Petosky High School. Julie stated that she was living in foster care because Charlene did not want her and so her father gave her to her mother. Julie testified that when she was living with her father she would visit Joy sometimes on the weekend but it was not very often that she spent the night. When she stayed overnight she would sleep on the floor in the children's room in the middle of a crib and a bed. Julie stated that most times she did not know that she was going to spend the night so she would sleep in her clothes. The last time she spent the night was on Christmas day in 2007. She and her father had gone to Joy's for Christmas dinner. Julie stated that they did not get to go sledding on Christmas so she wanted to stay the night so she could go sledding the following day.

Julie testified that Joy's children were in bed before she went to bed. When she went to bed, the bedroom door was open and Joy and defendant were still awake and the house was lit up. Julie testified that the next thing she remembers after she fell asleep was that "somebody was tugging on my belt, and it woke me up" and that the house was now dark. Julie could tell it was defendant tugging on her belt because of his height and size and because he is "the only one that breathes heavy." Julie was certain it was defendant. Julie stated that she was under the covers and she was fully dressed. According to Julie, she was lying on her back and defendant was lying to her side. Julie stated that when defendant was tugging on her belt he was actually tightening it rather than loosening it. Julie testified that defendant had his hand under the covers and was able to loosen the belt, then he undid the belt, unbuttoned her pants, unzipped her pants, and then he "put his hand in under [her] underwear and started rubbing." Julie stated that defendant touched her vagina with his hand. Julie pretended to wake up and then turned or rolled over and then defendant ran out of the room in a hurry. Julie believed the incident lasted about 20 seconds at the most. Julie testified that the experience bothered her a lot and she was barely able to go back to sleep.

The next morning when Julie and the kids woke up, Joy and defendant were still sleeping. Julie and the kids ate breakfast and then Joy woke up. Julie stated that she did not say anything to her sister about what happened because she was too scared. Julie testified that defendant scared her. Julie and the kids played videogames and went sledding. Julie testified that she did not see defendant until later that day in the afternoon, when defendant, Joy, and the children dropped her off at her father's house. Julie testified that defendant drove and she was certain of it. Julie did not recall seeing a leg brace on defendant and he did not have any trouble moving around.

Julie stated that she told her father exactly what happened with all the details right after she arrived home. According to Julie, her father immediately said that they should call the police. Julie testified that she told her father not to call the police "because last time it happened, nothing ever happened." At trial, Julie testified that several years before something had happened to her, but it was not with defendant. Initially, Julie did not tell anyone else about what happened with defendant. Julie stated that she stopped seeing and talking to Joy and her family after the incident because of what happened.

Julie testified that one day the following summer she was in a car with her father, Charlene, and Dylan when her father and Charlene decided that Joy should know about what happened. According to Julie, after they arrived, Joy came over to the car and began speaking

with her father at the driver's side window. Julie heard her father tell Joy exactly what happened. Julie stated that Joy responded by saying that she did not care and that it had happened to her in the past. Joy then yelled to defendant that her father was here. Julie stated that when defendant made it to the car, her father confronted him about what happened. According to Julie, defendant had an "attitude," and denied doing it. Defendant then walked around to the other side of the car as they were about to leave and spit in Charlene's face. Julie testified that Charlene had not been part of the argument and had not said anything to defendant. Julie testified that she did not hear her father or Charlene ask Joy or defendant for money during the confrontation.

Julie admitted to telling Powell, her foster mother, about the incident because she wanted to confide in her. Initially, Julie did not think Powell was going to say anything about what happened. But at trial Julie stated that she is not sorry that Powell reported the incident because she wanted defendant to get in trouble for what he did to her.

Trooper Brett Gooding of the Michigan State Police testified that as a result of the report he received about the allegations involved in this case he interviewed Julie, Joy, defendant, Fred, and Charlene. Gooding testified that it is very common in a sexual abuse case with a young victim for the police to receive a late report. And it is also common in those cases for families not to report the incident. Gooding stated that in his interviews with Julie, as she was explaining what happened she got more and more upset, her eyes welled up, she withdrew into herself, was not quite as vocal, and became embarrassed. According to Gooding, Julie's statement remained consistent throughout the interview process. Gooding stated that when he interviewed Joy, her statement changed with regard to defendant's access to the children's bedroom. With regard to defendant's interview, Gooding stated that defendant was "defensive," and "barely cooperative."

Corinna Berden, is a family service worker at Head Start and worked with Joy and defendant's family providing parenting resources and doing home visits between June 2005 and June 2008 as part of a voluntary program. Berden testified that she was familiar with Joy's home and that there was enough room on the floor in the children's room between the crib and the bed for a person to lay down. Berden testified that she remembered defendant wearing a knee brace around New year's but she did not remember which year. Nicole Lynn Fenstermaker also testified that she provided voluntary family empowerment services through the Department of Human Services to Joy and defendant's family from February 2009 until October 2009.

At trial, defendant testified in his own defense. Defendant testified that he did not touch Julie, did nothing similar to what was alleged, and did not enter the children's bedroom at night when Julie was there. Defendant testified that he has no reason to go into the children's bedroom at night because he does not tuck his kids in and Joy tends to the baby. Defendant stated that he rarely gets up at night because he sleeps with a CPAP machine. With regard to Julie, defendant stated that while Julie was over visiting he would never interact with her at all or even have a conversation with Julie. Defendant testified that prior to 2005 he disciplined Julie once or twice for beating up his son by making her wait for Fred to pick her up outside the house on the porch. Defendant stated that Julie was shy and acted like she did not like defendant. Defendant testified that he never touched Julie in any way including never shaking her hand, patting her on the back, or giving her a high five in the seven years he has known Julie. Defendant testified that he is ambidextrous.

According to defendant on Christmas day in 2007, Fred and Julie did not come over to their house. Defendant stated that Julie came over and New Year's day 2008. Defendant testified that he and Julie and the kids drove over to Fred's house to ask him for a ride to defendant's Social Security disability case. Because Julie wanted to come over to go sledding with their son John, Julie ended up coming home with them. Defendant pointed out that Joy was driving because he had just gotten out of the emergency room at the hospital that morning after blowing his knee out on New Year's Eve wrestling with a neighbor. Defendant testified that the children went sledding at the church next door and played videogames. Julie's visit turned into an overnight visit because when Julie called Fred, he did not answer his phone. Julie did not have pajamas because it was not the plan for her to stay the night. Defendant slept in the back bedroom with Julie. Defendant did not enter the children's room that night. Julie went home the following afternoon.

Defendant testified that he saw Fred on January 15, 2008 when Fred took him to his Social Security appointment. Because they left and from, and returned to, Fred's house, defendant states that he saw Julie that day. Defendant could not drive himself to the hearing because he was still wearing a leg brace and was on crutches as a result of his knee injury. He did not ask Joy to drive him because Fred had a more reliable vehicle for the longer drive.

Defendant first learned of the allegations when Fred, Charlene, and the children drove up to his house in August 2008. Defendant testified that he was sitting on a rocking chair by the front door of the house when they arrived. According to defendant, when he walked out to the car he spoke with Fred who accused him, of "unzipping [his] pants and asking his daughter if she wanted to play with [him]." Defendant stated that he responded by saying that was "bullshit," and that he is "like that," and would "never be like that." According to defendant, Fred never accused defendant of touching Julie. Defendant testified that as he was walking away from the car he walked around the car and Charlene called him a child molester and a pervert and stated that she had looked up his record. Defendant initially testified that he has no record, but then later testified that he does not have a record of being a child molester. Defendant said he was hurt and embarrassed by the accusations and he started yelling back at Charlene and then spit in her face and walked away. Defendant stated that Charlene also asked him about his Social Security money and whether he had any left. Though Fred never asked about the money, defendant assumed that Charlene's question about the money was an attempt to blackmail him and not go to the police with the charges. Defendant did not call the police because he figured they were going to call the police. Defendant did not hear about the accusations again until September 2009.

After the close of testimony, the matter went to the jury. The jury found defendant guilty as charged and convicted him of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a).

II

Defendant first argues on appeal that the trial court abused its discretion when it overruled defendant's relevancy objection to Charlene's testimony that Julie's behavior toward men changed after the claimed sexual contact. At trial, Charlene testified that Julie was very leery of men after the incident and she was not as friendly and outgoing as she was before the

incident. Defense counsel objected on the basis of relevance and the trial court overruled the objection. On appeal, defendant asserts that there was an insufficient foundation for Charlene's testimony because Charlene did not provide information that she had observed Julie interact with men other than her father and because Charlene had insufficient experience with Julie to determine whether her behavior changed. Defendant's claim is not preserved for our review because defendant objected on a different basis at trial than he asserts now as error on appeal. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). We review unpreserved errors for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

The record belies defendant's claim of error. Charlene met Fred and Julie during the summer of 2007. Charlene was living in the same apartment building as Fred and Julie when they met. Charlene spent time with Fred and Julie when Fred and Charlene became involved in a relationship. Both Fred and Charlene testified that the families spent Christmas morning together exchanging gifts before Fred and Julie left for Joy's house that day. Later when Charlene bought a trailer, Fred and Julie moved out of their apartment and into the trailer with Charlene and her son Dylan. Julie lived with Charlene and Fred until she went to live with her mother in February 2009 and then went into foster care in May 2009.

The incident at issue occurred on Christmas night in 2007. Charlene became aware of the allegations not long after the touching occurred. Charlene testified that Julie told her the story of what happened to her shortly after the incident. Julie told Charlene about the incident even though she did not want anyone to know about it which is an indication of the relationship the two shared. At that point Julie had only confided in her father and Charlene. Charlene had known Julie for approximately six months which apparently was enough time for the two of them to develop a close enough relationship where Julie felt comfortable disclosing the sexual assault to Charlene. Charlene spent even more time with Julie after the assault occurred because Fred and Julie moved in with Charlene for a period of time before Julie went to live with her mother in February 2009, over a year after the incident. Charlene observed Julie for six months before the assault while living in the same apartment building and then another 13 months after the assault some portion of which in the same trailer. Based on these facts, defendant has not shown foundational error.

In any event, there was similar testimony on the record from three other witnesses. Fred testified that Julie was quiet after the incident. Boughner testified that after Julie disclosed the sexual assault she became more depressed, withdrawn, and anxious. Powell testified that after Julie confided in her about the allegations, Julie began dressing in layers of clothes, felt disgusted with herself, showered many times a day, and took long baths. Defendant did not object at trial to any of this testimony and does not assign error to it on appeal. After reviewing this similar testimony, we conclude that if any error occurred in admitting Charlene's brief comment on this point it was harmless.

III

Defendant next argues that he was deprived of a fair and impartial trial by the prosecutor's misconduct in asking Trooper Gooding how he became assured that Julie was telling the truth. At trial, during the prosecutor's questioning of Gooding, the prosecutor asked

Gooding "What are some of the things that during the interviews led you to become assured that Julie was telling the truth?" Defense counsel immediately objected and the trial court sustained the objection. Gooding did not respond to the question. Defendant now asserts that although the trial court sustained defendant's objection to the prosecutor's question, the damage was done and in effect denied defendant a fair trial. Because defendant did not provide a basis for his objection at trial and defense counsel did not request a mistrial or other relief on this basis, we review defendant's unpreserved claim of prosecutorial misconduct for plain error that affected his substantial rights. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). Reversal is warranted only when plain error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity or public reputation of the proceedings. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Mesik (On Recon)*, 285 Mich App 535, 541; 775 NW2d 857 (2009). Claims of prosecutorial misconduct are reviewed on a case-by-case basis, evaluating the prosecutor's conduct in context of the entire record. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Because the credibility of the witnesses is a determination for the fact-finder, it is improper for a witness to comment on or provide an opinion of the credibility of another witness. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

While defendant assigns error to the prosecutor's conduct, when reviewing the record, we find no error. The prosecutor asked a single question about Julie's truthfulness to Trooper Gooding, however, defense counsel immediately objected to the question, the trial court sustained the objection, and the witness did not answer the question. With regard to any import defendant assigns to the mere asking of the unanswered question regarding the victim's truthfulness, the trial court instructed the jurors that they were the sole judges of witness credibility. The trial court also instructed the jurors that the lawyers' questions, statements, and arguments are not evidence. The trial court continued as follows:

> You should consider the questions only as they give meaning to the witnesses' answers, and you should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

"Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Under these circumstances, the prosecutor's asking of this single question did not deny defendant a fair and impartial trial. *Mesik (On Recon)*, 285 Mich App at 541. On this basis, defendant cannot establish plain error that resulted in the conviction of an innocent defendant or plain error that seriously affected the fairness, integrity or public reputation of the proceedings. *Ackerman*, 257 Mich App at 448.

IV

Defendant also raises several issues in a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, none of which have merit.

Defendant asserts that his trial counsel was ineffective for: failing to call Joy as a defense witness, failing to impeach Julie with a prior sexual assault allegation, and failing to disqualify himself for the reason that he had a conflict of interest. We will examine each assertion of ineffective assistance of counsel in turn. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law. A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *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 this Court reviews the ultimate constitutional issue arising from an ineffective assistance of counsel claim de novo." *People v Petri*, 279 Mich App 407, 410; 760 NW2d 882, (2008). In this case, because defendant did not move for a new trial or a *Ginther*[1] hearing below, our review of the claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). "Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

A

First, defendant argues that he was denied his right to present a defense as a result of his counsel's decision not to call and question his girlfriend of 15 years, Joy, at trial. Defendant contends in particular that Joy would have given testimony on behalf of defendant that Julie was at their home on January 1, 2008 rather than December 25, 2007. Defendant maintains that the one week difference is key because on New Year's Eve, defendant had blown out his knee and was in an immobilizer leg brace from hip to ankle incapacitating him. Defendant asserts that Joy would have provided testimony that defendant had been treated and released from the hospital before Julie visited their home.

Decisions on whether to call or question witnesses are presumed to be matters of trial strategy that will not be second-guessed on appeal. *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Thus, the failure to call witnesses constitutes ineffective assistance of counsel only when it deprives defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Likewise, the failure to present evidence only rises to ineffective assistance if the defense is deprived of a substantial defense. *People v Hoyt*, 185

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Mich App 531, 537-538; 462 NW2d 793 (1990). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

What defendant does not point out in his Standard 4 brief on appeal is that Joy indeed was a witness at trial called by the prosecutor and cross-examined at length by defense counsel. Joy testified that she was with defendant, the father of her two children, for many years and that she supported defendant. When questioned by the prosecutor about the date Julie spent the night, Joy stated that Julie spent the night in her home one night shortly after Christmas of 2007 but could not identify an exact date. On cross examination, defense counsel asked a series of questions in the exact vein defendant now asserts he should have asked but did not because Joy was never called. In response to defense counsel questioning, Joy stated that defendant got his leg brace, "shortly after Christmas, about New Year's, because he was wrestling around with our neighbor." And the follow-up question defense counsel asked Joy was, "And he was wearing a knee brace during the time that Julie was overnight?" Joy responded, "Yes." In response to additional defense counsel questions, Joy stated that defendant did not get out of bed the night Julie spent the night. Joy also stated that defendant was pretty much stationary as a result of the injury and spent the whole time Julie visited on the couch watching television. Defense counsel also questioned Joy about driving Julie home. Joy testified specifically that she drove Julie home because defendant had the knee brace on his leg.

Certainly the record is clear that defense counsel did not himself call Joy as a witness for the defense at trial, but it is equally clear that while Joy was on the stand called by the prosecutor, defense counsel asked Joy a series of questions focusing on the exact areas defendant now argues should have been covered. In fact, Joy's testimony corroborated defendant's version of the events being that she testified that Julie spent the night shortly after Christmas and that defendant was wearing the leg brace at the time and was "pretty much stationary" as a result of the injury and could not drive. On this record, where Joy's testimony corroborated defendant's version of the events, defendant has not shown that he was deprived of a substantial defense. *Dixon*, 263 Mich App at 398.

Defendant also seems to intimate in his Standard 4 brief that defense counsel failed to investigate and interview Joy. Although a failure to reasonably investigate could violate a defendant's right to the effective assistance of counsel, deference is given to defense counsel's strategic decisions. *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Defendant presents no evidence to support the assertion that his counsel never interviewed Joy. In any event, this claim is refuted by the record. Joy testified on the record at trial that she had previously talked to defense counsel about the case and she specifically mentioned defendant's leg brace as one of the matters discussed. Defendant has not shown error.

B

Next, defendant asserts that his counsel was ineffective for failing to impeach Julie by questioning her about past alleged molestation accusations that she later recanted after police questioning. Whether a defendant's Sixth Amendment right of confrontation was violated is a question of constitutional law that we review de novo. *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000). We also review de novo whether a defendant was denied his

constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

Testimony concerning prior false allegations does not implicate the rape shield statute. *People v Jackson*, 477 Mich 1019; 726 NW2d 727 (2007). The Michigan Supreme Court held in *People v Hackett*, 421 Mich 338, 348-349; 365 NW2d 120 (1984):

> We recognize that in certain limited situations, such evidence [of past sexual conduct] may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past. [(Internal citations omitted.)]

At trial, during the prosecutor's redirect examination, Joy volunteered that shortly after Christmas Julie had asked her if she could spend the night but Joy "really . . . didn't want her to because she's made this accusation before with her mom's boyfriend." The prosecutor immediately objected on the bases of not having received the required notice and being non-responsive. Defense counsel agreed stating "I agree, never heard that before." The trial court granted the objection, struck the testimony, and ordered Joy to listen carefully and just answer the questions asked. During Julie's testimony she stated that she told her father not to call the police "because last time it happened, nothing ever happened." Julie then testified that several years before something had happened to her, but it was not with defendant.

Defendant asserts that his trial counsel was ineffective for failing to impeach Julie by questioning her about this past alleged molestation accusation. It is true that a defendant is permitted to show that the complainant has made false accusations of rape in the past. *Hackett*, 421 Mich 348-349. But there is no evidence on the record that establishes the falsity of the victim's past accusations. Consequently, defendant has failed to prove the factual predicate of the claim. *Carbin*, 463 Mich at 600. And, there is absolutely no evidence that the victim ever recanted her allegations. In fact, at trial she reaffirmed her prior allegations stating that something had happened to her "years ago" and that the "last time it happened, nothing ever happened" because she "[m]oved away, and then that was it." Because there was no evidence that the prior allegations were false, defendant would not have been entitled to present evidence that Julie made false accusations of rape in the past. This ineffective assistance of counsel claim cannot succeed because counsel is not required to advocate a meritless or futile position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

C

Defendant argues that defense counsel was ineffective for failing to disqualify himself as counsel as a result of a conflict of interest. A lawyer acting with a conflict of interest denies a defendant the effective assistance of counsel by breaching "the duty of loyalty, perhaps the most

basic of counsel's duties." *People v Smith*, 456 Mich 543, 557; 581 NW2d 654 (1998), citing *Strickland*, 466 US at 692. However, to establish that a lawyer's conflict of interest has violated a defendant's right to the effective assistance of counsel and presume prejudice, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *Smith*, 456 Mich at 557. Where an attorney has an actual conflict of interest that affects his or her ability to advocate on behalf of a defendant and that conflict actually causes the attorney to take an action that was not in the defendant's best interest, the defendant is entitled to a new trial without a further showing of prejudice. See *Mickens v Taylor*, 535 US 162, 168; 122 S Ct 1237; 152 L Ed 2d 291 (2002).

Defendant asserts, without proof, in his Standard 4 brief on appeal that a conflict of interest existed because defense counsel was married to Julie and Joy's cousin Sarah Petrowski during defense counsel's representation of defendant. The prosecutor, in her brief on appeal concedes that defense counsel and Sarah had been married in the past but that they had in fact divorced four months before defendant was charged in this case. Thus, the prosecutor alleges no conflict existed throughout defense counsel's entire representation of defendant. Defendant asserts that defense counsel should have discovered the personal conflict and in order to eliminate any reasonable possibility of bias, defense counsel should have removed himself as counsel for defendant. Defendant also asserts that defense counsel was appointed counsel. The prosecutor alleges that defense counsel was not appointed counsel but rather was actually retained by defendant. The prosecutor points us to the Presentence Investigation Report to confirm this but it is not a part of the lower court record before us. The record before us does reveal however that defense counsel was not the initial attorney that was appointed for defendant. And, there is also a note in the trial court docket entries on October 29, 2009 stating, "defendant to retain own attorney??" Defense counsel was substituted a few days later on November 6, 2009 but there is no specification regarding whether defense counsel was retained or appointed. We cannot resolve these factual disputes on the record before us. But they are of no consequence in our decision with regard to the effectiveness of defendant's trial counsel because defendant never asserts in his Standard 4 brief that any alleged conflict actually adversely affected his lawyer's performance or caused him to take an action that was not in the defendant's best interest. *Mickens*, 535 US at 168; *Smith*, 456 Mich at 557. As such, once again, defendant has failed to establish the factual predicate for his claim. *Carbin*, 463 Mich at 600.

Even if there was a conflict of interest, defendant has not shown that the conflict of interest adversely affected defense counsel's performance at trial. A party seeking disqualification of counsel based on a conflict of interest "bears the burden of demonstrating specifically how and as to what issues in the case the likelihood of prejudice will result." *Rymal v Baergen*, 262 Mich App 274, 319; 686 NW2d 241 (2004). Defendant has failed to both allege and actually show how his trial counsel's representation was affected by any alleged conflict of interest. To the contrary, our review of the record reveals that defense counsel was a vigorous advocate for defendant. Defense counsel thoroughly cross-examined all of the prosecution's witnesses and presented evidence from defendant. Defense counsel ardently advanced defendant's theories of the case that: 1) defendant was not physically able to sexually assault Julie on the floor of the small room because he was incapacitated at the time, and 2) that Fred and Charlene knew about defendant's settlement money because Fred drove him to the hearing and they were attempting to blackmail defendant with false allegations in an attempt to get money. In our opinion, defense counsel performed commendably at trial. Defendant has not

shown that the alleged conflict of interest affected defense counsel's performance at trial, that it deprived him of a defense, or that the outcome of the case would have been different.

V

Finally, in his Standard 4 brief, defendant argues that he was denied his right to a fair and impartial jury at trial because Juror 13 was also related to the Petrowski family and "[a]t no time during trial was this fact divulged to the defense or court." A criminal defendant has a constitutional right to be tried by a fair and impartial jury. US Const, Am VI; Const 1963, Art 1, § 20; *People v Miller*, 482 Mich 540, 547; 759 NW2d 850 (2008). However, a party must exhaust all peremptory challenges or refuse to express satisfaction with the jury in order to preserve an issue related to jury selection. *People v Taylor*, 195 Mich App 57, 59-60; 489 NW2d 99 (1992). Because defendant did not object to the issue during jury selection, thus issue is not preserved. We review unpreserved claims for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764; see also *People v Miller*, 482 Mich 540, 558-559; 759 NW2d 850 (2008) (an unpreserved jury irregularity does not entitle a defendant to a new trial unless the defendant was denied his right to an impartial jury).

Indeed, defense counsel expressed satisfaction with the jury as seated, and accordingly, we could simply conclude that this argument has been waived because there is no "error" to review. *People v Carter*, 462 Mich 206, 219; 612 NW2d 144 (2000). But, because defendant has raised the issued in his Standard 4 brief pro se, we will review the issue on the merits as well. At trial during voir dire, the trial court asked the potential jurors if they knew any of the potential witnesses. Juror 13 identified himself and stated that he knows "[a]lmost every one of the Petrowskis" because "Fred is [his] brother-in-law." The trial court asked Juror 13 if he was "particularly close with any one or more of these folks" and Juror 13 responded that he sees them occasionally at "[f]amily outings and things." So the record clearly belies defendant's claim that at no time during trial was the fact that Juror 13 was related to the Petrowski family divulged to the defense or the trial court.

After Juror 13 revealed his relationship with Fred and the Petrowski family, the following exchange occurred on the record:

> *The Court:* It's not at all unusual, in the small community that we have, that jurors will know one or more of the people who will testify as witnesses in a case. And the fact that you know somebody doesn't disqualify you from serving. The issue is whether you know them in such a way that you would not be able to judge them with an open mind.
>
> In other words, sometimes, after you know someone over a period of time, you come to a firm conclusion about their character, their credibility, in other words, are they honest, do they remember things accurately, things like that. And sometimes you may know someone for quite a while, but never have an experience that causes you to say, yup, that person is honest as the day is long or you can't believe a word that person says or some variation of that that says that you've got an opinion about their character and their credibility.

> And sometimes you can reach an opinion like that about someone's character or credibility the first time you meet them, too, you know. So, really, that's the issue here. Have you had any sort of interaction with any one of more of these Petrowskis . . . such that when they came to the witness stand, you'd have a preconceived notion about whether you'd believe them or not?
>
> *Juror 13*: No.
>
> *The Court*: You've not had any experience of that nature?
>
> *Juror 13*: No.
>
> *The Court*: And you would then be able to judge any one or--one of the Petrowskis, if they testify, the same way you would judge any other witness who testifies?
>
> *Juror 13*: Correct.
>
> *The Court*: And you wouldn't start off either tending to believe or disbelieve them based on prior experience?
>
> *Juror 13*: No.
>
> *The Court*: Okay . . . .

Again, an unpreserved jury irregularity does not entitle a defendant to a new trial unless the defendant was denied his right to an impartial jury. *Miller*, 482 Mich at 558-559. There is no indication in the trial court's lengthy inquiry of Juror 13 that he would not be impartial. There was nothing to indicate that Juror 13 was somehow biased, had preconceptions about any of the Petrowski family witnesses including defendant, or simply could not be impartial because of his relationship by marriage to Fred. Indeed, it may have been a strategic move not to object to Juror 13 because defendant could have thought his presence on the jury was a positive for him being that he is also a member of the Petrowski family since he has been involved with Joy, Fred's daughter, for 15 years and is the father of her two children. Because Juror 13 confirmed that he would be impartial and judge the Petrowskis' like any other witnesses, there was no basis to challenge him for cause. Defendant has not shown he was denied his right to a fair and impartial jury at trial.

VI

In sum, the trial court properly admitted the challenged evidence, the prosecutor did not commit misconduct at trial, defendant received the effective assistance of counsel at trial, and

defendant was not denied his right to a fair and impartial jury. We therefore affirm.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Pat M. Donofrio