

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
April 25, 2017

v

SCOTT EDWARD FREDERICK,
Defendant-Appellant.

No. 330610
Oakland Circuit Court
LC No. 2015-254500-FC

Before: MURPHY, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

In this case, a jury convicted defendant of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b); second-degree criminal sexual conduct (CSC-II), MCL 750.520c(2)(b); and aggravated indecent exposure, MCL 750.335a(2)(b). The trial court sentenced defendant to 25 to 50 years' imprisonment for the CSC I conviction, 10 to 15 years' imprisonment for the CSC-II conviction, and one to two years' imprisonment for the aggravated indecent exposure conviction. Defendant appeals his convictions by right. We affirm.

Defendant first argues¹ that the prosecutor committed error when she elicited allegedly improper testimony from the investigating detective and from the prosecution's expert witness. The test for prosecutorial error² is whether defendant was denied a fair and impartial trial.

¹ Defendant did not preserve any of the issues presented for appeal. Therefore, our review of all issues, except for ineffective assistance of counsel, is for plain error affecting defendant's substantial rights. See *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant's claim of ineffective assistance of counsel is reviewed for mistakes apparent on the record. See *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

² Although this type of claim is generally referred to as "prosecutorial misconduct," this Court has stated that "the term 'misconduct' is more appropriately applied to those extreme . . . instances where a prosecutor's conduct violates the rules of professional conduct or constitutes illegal conduct," but that claims "premised on the contention that the prosecutor made a technical or inadvertent error at trial" are "more fairly presented as claims of 'prosecutorial error[.]'" *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015) (citation omitted).

People v Dobek, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial error issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor’s remarks in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). “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). “A prosecutor’s good-faith effort to admit evidence does not constitute [error].” *Dobek*, 274 Mich App at 70.

Defendant first argues that the prosecutor committed error when she elicited testimony from Detective Bender regarding defendant describing his children as “beautiful” when they were half-clothed, because such testimony was misleading, irrelevant, and prejudicial. To the extent that defendant argues that any of the testimony was misleading, defense counsel was able to diffuse the issue on cross-examination:

Q. Okay. You indicated that—(indiscernible) jump back a little bit. During the course of the first interview, he described his children as beautiful. Am I correct?

A. Yes.

Q. And the prosecutor had asked you that he had—he had only made this statement when describing them as they were dressed in the morning or during the course of the day. Am I correct?

A. Yes.

Q. But it was a general statement that he made in reference to his children?

A. It was.

We likewise reject defendant’s argument that the “beautiful children” testimony was irrelevant. Relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401. Here, the facts that were of consequence to the determination of the action were whether defendant masturbated in front of his child, whether defendant made sexual contact with the victim, and whether the defendant forced the victim and his brother and sister to inappropriately touch each other. Evidence that defendant described his children as beautiful when they were half-clothed had a tendency to make those facts more probable than they would be without the evidence. Although it is not inherently sexual for a parent to describe their children as beautiful while half-clothed, the prosecution had to prove that

Nevertheless, regardless of “what operative phrase is used, [this Court] must look to see whether the prosecutor committed errors during the course of trial that deprived defendant of a fair and impartial trial.” *Id.* at 88, citing *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Here, we will refer to defendant’s claim as prosecutorial error, as the argument is limited to technical errors by the prosecutor.

defendant committed the acts for a sexual purpose. The jury could infer from defendant's statements that he did in fact commit the acts for a sexual purpose. See *People v Vandervliet*, 444 Mich 52, 85; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994) (discussing that evidence is relevant to show intent when the issue involves the actor's state of mind and the only means of ascertaining that mental state is by drawing inferences from conduct). And since defense counsel attempted to diffuse the testimony on cross-examination, it was up to the jury to weigh the competing evidence and determine how much weight to give Detective Bender's testimony. See *People v Unger*, 278 Mich App 210, 228-229; 749 NW2d 272 (2008) (finding that the credibility of a witness and the weight to give his testimony were solely for the jury to determine).

Additionally, defendant argues that Detective Bender's testimony was prejudicial. But whether the testimony was merely prejudicial is not the standard. The correct standard for admissible evidence to be excluded is that the evidence's probative value must be "substantially outweighed by the danger of *unfair* prejudice . . ." MRE 403 (emphasis added). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ackerman*, 257 Mich App 434, 442; 669 NW2d 818 (2003) (quotation marks and citations omitted). All prosecution evidence against a defendant is inherently prejudicial. *People v Smith*, 282 Mich App 191, 198; 772 NW2d 428 (2009). However, in this context, Detective Bender's testimony, although prejudicial, was not *unfairly* prejudicial.

Assessing probative value against prejudicial effect requires a balancing of several factors, including the time necessary to present the evidence and the potential for delay; whether the evidence is cumulative; how directly the evidence tends to prove the fact in support of which it is offered; how important the fact sought to be proved is; the potential for confusion; and whether the fact can be proved another way with fewer harmful collateral effects. [*Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 553 NW2d 373 (1995), citing *People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976).]

In this case, it did not take much time to present the evidence, as it was a short line of questioning; the evidence was not cumulative because no other witness could testify to it; the evidence did not directly prove the fact in support, but as the caselaw states, sometimes the only way to determine an actor's state of mind is to draw inferences from conduct; the fact sought to be proved was very important, as it was an element of the crimes; there was very low potential for confusion; and the fact cannot be proven in a less harmful way. There was no danger that the jury would have given undue or preemptive weight to Detective Bender's testimony, especially considering that defense counsel alleviated some of the issue on cross-examination. Moreover, "unfair prejudice refers to the tendency of the proposed evidence to adversely affect the objecting party's position by injecting considerations extraneous to the merits of the lawsuit, e.g., the jury's bias, sympathy, anger, or shock." *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994) (quotation marks and citation omitted). Here, the disputed evidence was relevant to the issues, and therefore was not submitted to elicit the jury's bias, sympathy, anger, or shock. Thus, the evidence was not unfairly prejudicial, and it was not plain error affecting defendant's substantial rights for the prosecutor to elicit the testimony from Detective Bender regarding defendant describing his children as beautiful.

Defendant next argues that the prosecutor committed error when she elicited the testimony from Detective Bender regarding defendant having watched pornography on Netflix because such testimony was irrelevant. Recall, relevant evidence is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401.

At trial, a fact that was of consequence to the determination of the action was whether defendant masturbated in front of the victim. The victim testified that defendant did so while watching a show that portrayed three people having sex. Defendant stated during his interview with Detective Bender that he did watch pornography on Netflix, or at the very least, watched R-rated films that portrayed sexually explicit actions. Detective Bender’s testimony that defendant told him that he watched pornography and R-rated, sexually explicit films makes the fact that he masturbated in front of the victim more probable, and therefore relevant, as it confirms both the victim’s testimony and defendant’s own statements during the interview. Therefore, it was not plain error for the prosecution to elicit the testimony regarding defendant watching pornography or sexually explicit films on Netflix.

Defendant next argues that the prosecutor committed error by eliciting testimony from Killips that was outside the scope of her expertise, such as the nature and purpose of forensic interviews, the protocol of forensic interviews, and her opinion that the victim’s interview followed proper forensic interview protocols. In order to testify as an expert, the witness must be qualified as such by the trial court based on the witness’s knowledge, skill, experience, training, or education. MRE 702; see also *People v Peterson*, 450 Mich 349, 361-362; 537 NW2d 857 (1995). Killips testified to her extensive education and practical experience in the area of forensic interviewing. The court then admitted Killips’s curriculum vitae (CV) as a prosecution exhibit. On the prosecutor’s request, the trial court admitted Killips as an expert in the area of “behavioral patterns of child sexual assault victims.” After being admitted as an expert, Killips testified regarding the protocols of forensic interviewing and that the victim’s interview adhered to those protocols.

Defendant’s argument lacks merit. Although the prosecution did not admit Killips as an expert in the area of forensic interviewing, Killips’s CV and testimony regarding her extensive education and experience in the area of forensic interviewing clearly showed that she could have been admitted as such an expert if challenged and, therefore, her testimony was not outside the scope of her expertise. Moreover, the prosecutor acted in good faith in eliciting testimony that she believed was within Killips’s scope of expertise and that she believed the trial court would accept. See *Dobek*, 274 Mich App at 70. Accordingly, it was not plain error for the prosecutor to elicit testimony from Killips regarding the nature and protocol of forensic interviews. See, e.g., *id.* at 79 (finding that the prosecutor did not commit error when eliciting testimony regarding delayed disclosures even though the witness was not qualified as an expert, stating, “Assuming that expert testimony was required, [the witness] was more than qualified to give an expert opinion on delayed disclosure to the extent of the testimony actually presented”). See also *People v Petri*, 279 Mich App 407, 416; 760 NW2d 882 (2008) (holding that the police detective who testified regarding the “grooming” behavior of child sex abusers would have qualified as an expert based on his training and experience and, therefore, any error was harmless).

We also reject defendant’s argument that the prosecutor committed error when she elicited statements from Killips that had the effect of vouching for the forensic interview, and

thus, vouching for the victim's testimony. Michigan caselaw treats vouching as "claiming some special knowledge with respect to [a witness's] truthfulness." See *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005); see also *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Killips's testimony that the victim's forensic interview followed the proper protocols was not specifically elicited by the prosecutor. "Unresponsive answers from witnesses are generally not prosecutorial error." *People v Jackson (On Reconsideration)*, 313 Mich App 409, 427; 884 NW2d 297 (2015) (citation omitted).

Moreover, nowhere in the transcripts is there any testimony where Killips says that she believed that the victim was telling the truth or that the victim's story should be believed. Therefore, defendant's argument that Killips vouched for the reliability of the victim's testimony is completely without merit. After examination of the record and evaluation of the prosecutor's remarks in context, we conclude that defendant was not denied a fair and impartial trial. *Dobek*, 274 Mich App at 63.

Defendant next asserts that the trial court erred in three ways when allowing certain portions of Killips's testimony. First, he argues that Killips's testimony contained multiple levels of hearsay. In Michigan, hearsay is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). However, statements that are offered for reasons other than for the truth of the matter asserted are, by definition, not hearsay. See *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993) (finding that, where a witness testifies that an out-of-court statement was made, rather than about the truth of the statement, the testimony is not hearsay). See also *People v Mesik (On Reconsideration)*, 285 Mich App 535, 540; 775 NW2d 857 (2009) (finding that the challenged statement was not hearsay because it was not offered for the "truth of its contents").

At trial, Killips testified that she reviewed the records of the victim's forensic interview. She testified that she was aware of the progressive disclosures that the victim made, and that it was not uncommon for children of sexual abuse to make disclosures over a period of time and that get increasingly worse. Killips did not testify as to what specifically the victim said during the forensic interview, much less that whatever the victim said was the truth. Rather, Killips was testifying regarding progressive disclosures made by children generally. Because her testimony was not offered for the truth of the matter asserted, it was not hearsay. MRE 801(c).

Next, defendant argues that the trial court erred by allowing Killips to testify outside of the scope of her expertise. Defendant did not object to Killips's area of expertise or to her testimony, even though the prosecutor provided notice before trial that it might seek to admit Killips as an expert in the area of forensic interviewing. And, Killips's testimony and CV demonstrated that she was capable of being qualified as an expert in the area of forensic interviewing, but defendant never objected to the testimony so as to provide the prosecutor with the chance to lay the foundation. The trial court did not plainly err in allowing Killips to testify regarding forensic interviewing.

Lastly, defendant argues that the trial court erred by allowing Killips's testimony because her testimony effectively vouched for the forensic interview itself, and by implication, vouched for the veracity and accuracy of the victim's testimony. As discussed above, Killips did not vouch for the interview itself. Even assuming that Killips's testimony vouched for the forensic

interview, it cannot be implied that her testimony vouched for the accuracy of the victim's testimony. At no time did Killips opine that the victim was being truthful or that his allegations appeared to be accurate. Rather, she merely testified, in a general manner, that the victim disclosing the various incidents over a period of time was not unusual for sexually abused children generally. Therefore, the trial court did not plainly err by allowing Killips to testify as she did.

Defendant also argues that he received the ineffective assistance of trial counsel. In order to find merit in a defendant's claim of ineffective assistance of counsel, the defendant must prove: (1) that the attorney made an error, and (2) that the error was prejudicial to defendant. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Pickens*, 446 Mich at 311, 314. That is, first, defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *People v Russell*, 297 Mich App 707, 715-716; 825 NW2d 623 (2012). This Court must analyze the issue with a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. This requires that the defendant overcome the presumption that the challenged action or inaction might be considered sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Decisions about whether to call or question a witness are presumed to be matters of trial strategy. *Russell*, 297 Mich App at 716. Failing to call a witness only rises to the level of ineffective assistance of counsel if it deprives the defendant of a substantial defense. *Id.* Second, defendant must show that, but for trial counsel's deficient performance, a different result would have been reasonably probable. *Id.* at 715-716.

For his first argument, defendant asserts that defense counsel was ineffective because he failed to articulate and develop a defense theory. However, defense counsel cross-examined the victim's mother and grandparents, and emphasized the inconsistencies in their testimonies regarding how and when the victim disclosed the incidents. Counsel also argued in closing that there were inconsistencies and time gaps in the victim's disclosures, and that these inconsistencies in the victim's disclosures and the piecemeal way in which they were made demonstrated that the victim was not telling the truth. Counsel also attempted to develop a defense theory when he reminded the jury that the victim's mother told the victim that he no longer had a father. Counsel's cross-examinations and arguments demonstrate that he did in fact attempt to develop a defense theory, and defendant has not shown that counsel's behavior fell below an objective standard of reasonableness. Moreover, defendant has not stated what information defense counsel failed to additionally elicit or argue and how such information would have changed the outcome of the trial. Therefore, defendant has not rebutted the presumption that counsel acted effectively. See *Pickens*, 446 Mich at 328.

Defendant next argues that counsel was ineffective for failing to call an expert witness. "An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy." *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). "In general, the failure to call a witness can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense." *Id.* (quotation marks and citation omitted). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009) (quotation marks and citation omitted).

According to defendant, counsel should have called an expert in the area of parental alienation, the ability of children to believe in events that did not occur, or a child's ability to lie.

However, defendant has not provided a name or any other identifying information of who counsel should have called. Moreover, defendant has not provided what testimony any proposed expert would have given or how that testimony would have potentially altered the outcome of the trial. Therefore, defendant has failed to establish the factual predicate of his claim. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Accordingly, defendant has not rebutted the presumption that counsel acted effectively. See, e.g., *Payne*, 285 Mich App at 190.

Defendant also argues that counsel was ineffective for failing to object to the testimony of Detective Bender regarding defendant describing his children as beautiful and regarding the conversation about pornography on Netflix. Failing to raise a meritless argument or futile objection does not equate with ineffective assistance of counsel. *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010). As discussed above, the colloquy between the prosecutor and Detective Bender regarding defendant describing his children as beautiful was relevant evidence, as was the colloquy regarding pornography on Netflix. Therefore, any objection on the ground of relevancy would have been futile. Rather than object, defense counsel sought to curb any improper inferences that could be made from Detective Bender's testimony by engaging in effective cross-examination. Defendant has not shown that counsel fell below an objective standard of reasonableness, or that any objection would have changed the outcome at trial.

Finally, we likewise reject defendant's argument that counsel was ineffective for failing to object to Killips's testimony regarding forensic interviews. As discussed above, although Killips was not admitted as an expert in forensic interviewing, she clearly could have been, and would have been, if defendant had objected. Therefore, any objection to Killips's testimony and the scope thereof would have been futile.

Affirmed.

/s/ William B. Murphy
/s/ Christopher M. Murray
/s/ Michael J. Kelly