STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v JOSE CASANOVA, Defendant-Appellant.	UNPUBLISHED December 19, 2017 No. 334904 Clinton Circuit Court LC No. 16-009590-FH

Before: MURPHY, P.J., and KELLY and SWARTZLE, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (sexual contact with a victim under 13). The trial court sentenced defendant to serve concurrent terms of imprisonment of four years and six months to 15 years for each conviction, and to register as a sex offender and submit to GPS monitoring for the remainder of his life. Defendant appeals as of right. We affirm.

I. BACKGROUND

Defendant lived in a house with its owner, along with the owner's daughter and granddaughter (Victim A). The homeowner's daughter's niece (Victim B) was a frequent visitor. Both victims were under the age of 13 at the time of the incidents.

Victim A testified that, on one occasion, she entered defendant's room to retrieve her younger sister, upon which defendant grabbed Victim A and touched her genital area and buttocks. According to Victim A, defendant tried to put his hands under her clothes during this encounter. Victim A further testified that, on another occasion, during a drive to a restaurant, defendant touched her leg and she "scooched away" from him. Defendant was not charged with any crime regarding the incident in the car.

Victim B testified that, on a different occasion, she entered defendant's room and defendant grabbed her and touched her vaginal area and buttocks for five to six minutes. The touching occurred outside of Victim B's clothes. Victim B later told her mother about the incident, who spoke to Victim A's mother about it. The latter then asked Victim A if the same had happened to her, and the girl confirmed that defendant had indeed touched her. On direct examination, Victim A's mother testified that, after learning that both girls had been molested,

she contacted police. On cross-examination, defense counsel attempted to elicit from Victim A's mother that Victim A never showed the usual signs of molestation. On redirect, Victim A's mother reiterated that Victim A told her that she had been molested by defendant.

Testifying in his own defense, defendant denied any wrongdoing. Defendant testified that after he became aware of the accusations, he immediately packed and left the home on his own volition. The prosecuting attorney called the homeowner as a rebuttal witness. The homeowner testified that defendant did not leave her home voluntarily and that she told defendant to leave after she learned of the incidents with the two victims.

A second rebuttal witness testified regarding the above-mentioned car ride to the restaurant. This witness testified that she was in the car on the way to the restaurant on the day defendant allegedly touched the first victim's leg, and that she saw defendant try to touch that child's genitals. Following this testimony, the Court gave the following limiting instruction:

> [M]embers of the jury, you just heard testimony from our last witness regarding an incident that allegedly happened on the road to [the restaurant]. That is not an incident for which the Defendant has been charged. He cannot be convicted based upon . . . any testimony related to that incident. That testimony was only offered as a rebuttal by the people to the Defendant's testimony that he had not engaged in any improper conduct at any time with any of the grandchildren.

While giving jury instructions after closing arguments, the court added, "You may only use that testimony to determine whether or not you believe the Defendant's testimony and give his testimony credibility or not." The court asked the defense if it was satisfied with both instructions, and defense counsel stated that he was.

The jury found defendant guilty of two counts of second-degree criminal sexual conduct, MCL 750.529c(1)(a), and the trial court sentenced defendant to serve concurrent terms of four years and six months to 15 years' imprisonment for each conviction. Defendant was also ordered to register as a sex offender and to submit to GPS monitoring for the remainder of his life. Defendant now appeals as of right.

II. ANALYSIS

Defendant Was Not Denied the Effective Assistance of Counsel. Defendant argues that he was denied effective assistance of counsel because his trial counsel did not object to the admission of certain hearsay statements, thus denying him a fair trial. Because defendant failed to preserve this issue, our review is limited to mistakes apparent from the record. See *People v Sabin*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

A defendant alleging ineffective assistance of counsel must establish that "the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms." *Id.* "In attempting to persuade a reviewing court that counsel was ineffective, a defendant must also overcome the presumption that the challenged action was trial strategy, and must establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different " *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999) (internal quotation marks and citation omitted). Where counsel declines to raise a meritless

objection, this Court does not entertain a claim of ineffective assistance in connection with such inaction. *People v Torres*, 222 Mich App 411, 425; 564 NW2d 149 (1997).

" 'Hearsay' is 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). Hearsay is generally inadmissible, subject to several exemptions and exceptions as provided by the rules of evidence. MRE 801-805. An out-of-court statement used to show its effect on a listener does not constitute hearsay under MRE 801(c). *People v Eggleston*, 148 Mich App 494, 502; 384 NW 811 (1986).

Defendant first takes issue with Victim A's mother's statement that Victim A and Victim B's mother told her that defendant molested Victim A. In substance, this testimony was elicited on both direct and redirect examination. On direct examination, the testimony was not hearsay because it was not offered to prove the truth of the matter asserted. Rather, the testimony was offered to show why Victim A's mother contacted the police. As elicited on redirect examination, however, the testimony was offered to prove that Victim A was, in fact, molested, in response to defense counsel's cross-examination that Victim A showed none of the usual signs of molestation. Accordingly, as elicited on redirect examination, the testimony was offered to prove the truth of the matter asserted and was therefore hearsay. Thus, if defense counsel had objected to the testimony on redirect, it likely would have been inadmissible.

Nonetheless, defense counsel's failure to object to that hearsay likely did not affect the outcome of the trial and therefore does not warrant relief. See *Hoag*, 460 Mich at 6. The prosecuting attorney stated during closing argument that Victim A's mother's testimony was "not the most important testimony." Moreover, the statement was cumulative because it corroborated Victim A's testimony, and the prosecution's case was already strong because there were two victims who told similar stories.

Further, the prosecuting attorney conceded during opening statements that this case was a credibility contest. Hearsay may work against a defendant in a credibility contest, but where, as in this case, the declarant testifies and is subject to cross-examination, "the hearsay testimony is of less importance and less prejudicial" as the reliability of the out-of-court statement can be tested on cross-examination. *People v Gursky*, 486 Mich 596, 620-621; 786 NW2d 579 (2010).

Defendant also makes issue of the homeowner's statement that she was told someone inappropriately touched the two victims, but that testimony was not hearsay because it was offered to show its effect on the witness, not to prove the truth of the matter asserted. See *Eggleston*, 148 Mich App at 502. The homeowner was explaining why she insisted that defendant leave her home, in order to contradict defendant's testimony that he left voluntarily, not to establish that defendant touched the victims. Because an objection to the homeowner's testimony would thus have been futile, that inaction will not support a claim of ineffective assistance of counsel. See *Torres*, 222 Mich App at 425.

Because the one instance of inadmissible hearsay defendant has brought to light was not outcome determinative, defendant is not entitled to relief on his unpreserved claim of ineffective counsel. See *Hoag*, 460 Mich at 6.

The Rebuttal Testimony Concerning the Car Ride Was Proper. Next, defendant argues that the court should not have admitted rebuttal testimony regarding defendant's touching Victim A's genital area on the way to the restaurant. We review this unpreserved claim of evidentiary error to determine if plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). A plain error affects a defendant's substantial rights where it results in the conviction of an actually innocent defendant or seriously affects the fairness, integrity, or public reputation of the judicial proceedings. *Id*.

"Rebuttal testimony may be used to contradict, repel, explain, or disprove evidence produced by the other party and tending directly to weaken or impeach the same." *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985) (internal citations and quotation marks omitted). "[T]he test of whether rebuttal evidence was properly admitted is . . . whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). The prosecution may not bring evidence to rebut a statement or theory it obtained on cross-examination. *Id*. at 401.

Defendant correctly asserts that the challenged rebuttal testimony would not have been proper to contradict defendant's specific statement, elicited by the prosecution, that he did not touch Victim A on the way to the restaurant. See *id*. The challenged testimony, however, was not offered for that purpose. Rather, the challenged testimony was offered to contradict defendant's statement on direct examination that he never touched the victims. The challenged evidence was therefore properly offered to rebut a matter placed in evidence by the defense in the first instance. See *id*. at 399.

In any event, the trial court instructed the jury not to use the evidence as a basis for conviction but only to help assess defendant's credibility. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Defendant challenges on appeal the adequacy of the instruction to prevent the jury's use of the challenged testimony as substantive evidence of his guilty, but because defense counsel approved of the challenged instruction on two separate occasions, defendant has waived that argument. See *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

Defendant also argues in passing that his trial counsel did not receive notice under MCL 768.27a that the challenged rebuttal witness would testify. Defendant, however, did not properly raise that issue for our consideration in his statement of questions for appeal. See MCR 7.212(C)(5). In any event, we note that the prosecution's witness list included the name of the challenged witness.

Affirmed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Brock A. Swartzle