STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 28, 2017
v	No. 335505 Kalamazoo Circuit Court
SAAD ARBABE, Defendant-Appellant.	LC No. 2016-000012-FC

Before: SWARTZLE, P.J., and SAWYER and MARKEY, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b), and three counts of second-degree criminal sexual conduct (CSC-II), MCL 750.520c(2)(b).[1] The trial court sentenced defendant to two concurrent terms of 25 to 50 years' imprisonment for the CSC-I convictions and three concurrent terms of 5 to 15 years' imprisonment for the CSC-II convictions. The CSC-II sentences were to run consecutive to the CSC-I sentences. Defendant now appeals. We affirm.

This case involves defendant's sexually abusing two boys under the age of 10, HA and JA. At the time of trial, JA was 11 years old, and HA was 6 years old. Defendant is from Morocco, Africa; he is not a United States citizen. In 2007, defendant met his now ex-wife, TraVivra Arbabe, online while TraVivra lived in the United States. In 2008, TraVivra traveled to Morocco and married defendant. On January 1, 2009, defendant entered the United States and lived with TraVivra. Defendant and TraVivra's marriage became strained, and they divorced in December 2014.

The jury convicted defendant of all five counts. At sentencing, the trial court stated that defendant's sentencing guidelines range was 108 to 180 months' imprisonment. But the trial court sentenced defendant to the mandatory minimum of 25 years under MCL 750.520b(2)(b) for each of the CSC-I convictions. The trial court otherwise sentenced defendant as noted above. After sentencing, defendant filed a motion for new trial or *Ginther* hearing, which the trial court denied.

[1] All five counts involved a victim under the age of 13 and a perpetrator over the age of 17.

Defendant's first argument on appeal is that the prosecutor committed misconduct during his closing argument by shifting the burden of proof to defendant, appealing to the jury's emotions, and dwelling on defendant's national origin and immigration status. We disagree. We note that defendant did not preserve any of the alleged instances of prosecutorial misconduct by contemporaneously objecting and requesting a curative instruction. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Therefore, the issue is reviewed for plain error affecting defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008); *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Plain error requires showing that (1) error occurred, (2) the error was clear or obvious, and (3) the error affected defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *Carines*, 460 Mich at 763. The third requirement generally requires showing that the error affected the outcome of the lower court proceedings. *Carines*, 460 Mich at 763. Reversal is warranted only when the plain error "resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence." *Id*. (quotation marks and citation omitted).

The United States and Michigan Constitutions guarantee defendant's right to a fair trial. US Const, Am XIV; Const 1963, art 1, § 17. The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Prosecutorial misconduct 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). "[T]his Court cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *People v Bennett*, 290 Mich App 465, 476; 802 NW2d 627 (2010). "Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) (citations omitted). Prosecutors are generally afforded great latitude with their arguments and conduct and are free to argue the evidence and all reasonable inferences from the evidence as it relates to the theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

This Court, while discussing prosecutorial misconduct in *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996), stated:

> A trial court has the duty to limit the arguments of counsel to relevant and material matters. Prosecutors also have a duty to see that defendants receive a fair trial while attempting to convict those guilty of crimes. Nevertheless, prosecutors may use hard language when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms. Emotional language may be used during closing argument and is an important weapon in counsel's forensic arsenal. [Quotation marks and citations omitted.]

The Michigan Supreme Court, while discussing prosecutorial misconduct in *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995), stated:

> [W]here a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof.

Our Supreme Court in *Fields* continued, "The nature and type of comment allowed is dictated by the defense asserted, and the defendant's decision regarding whether to testify. When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *Id*. at 116. "It is not error to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely." *People v McGhee*, 268 Mich App 600, 634; 709 NW2d 595 (2005).

However, this Court in *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010), stated:

> A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof. Also, a prosecutor may not comment on the defendant's failure to present evidence because it is an attempt to shift the burden of proof.

First, defendant argues that the prosecutor improperly shifted the burden of proof to defendant when he stated:

> I first want to start with the defense's part of the case and what they offered to show or to prove to you. Somehow this case evolved, based upon listening to the defendant, all upon one weekend, one weekend and a slap on [BA]. The defendant wanted to talk about him working on one day but this crime occurred between 2014 and 2015. The defendant had every opportunity to explain why this was wrong for August of 2014, September, October, November, December, why this couldn't have happened in January of 2015, February of 2015, he had every opportunity of telling you who would have been in the home to say this couldn't have occurred, in March of 2015, April of 2015. He had every opportunity to say why these children are lying and chose not to do that in June of 2015, July of 2015, and focused in on one date for some unknown odd reason. He had every opportunity to deny and tell you I did not kiss my children with an open mouth. His only statement was I did not abuse them. He did not try to show or say why anything that the kids said is false
>
> There has been balloons floated by questioning about whether or not things were suggested to the kids but there's been nothing proven. And your instruction is solely to decide this case based upon the evidence that's been presented, not our questions but on what the witnesses testified to.

Defendant sought to rely on a defense wherein it was impossible, impractical, or unreasonable to believe that he committed the crimes because he did not have the opportunity to do so because he was at work. He attempted to support this by calling his employer to testify. We conclude that when reviewing the prosecutor's remarks in context, based upon the facts of the case, the prosecutor did not improperly shift the burden of proof when he commented on defendant's failure to produce evidence of the defense upon which he relied or by reminding the jury that the questions the lawyers ask are not evidence and that the jury needed to decide the case based on the evidence. *McGhee*, 268 Mich App at 634. Moreover, even assuming arguendo that the prosecutor's comments were plainly erroneous, a curative instruction could have alleviated any prejudice, and we cannot find error when such a situation is present. *Bennett*, 290 Mich App 476. In fact, the trial court's jury instructions that defendant was presumed innocent, that the prosecutor must prove each element of the crime beyond a reasonable doubt, that defendant was not required to prove his innocence, and that the lawyers' statements were not evidence cured any potential prejudicial effect. Therefore, we conclude that the prosecutor did not shift the burden of proof to defendant and thus, did not commit misconduct.

Defendant next argues that the prosecutor committed misconduct by appealing to the emotions and sympathy of the jury. We disagree.

Defendant's argument is premised on the prosecutor's language used to describe the sexual abuse. The prosecutor's words were no doubt "hard language." *Ullah*, 216 Mich App at 678-679. However, the prosecutor's language was supported by the evidence. In fact, much of his language was either verbatim statements from the victims' trial testimonies or close paraphrases. We conclude that the prosecutor did not improperly appeal to the sympathy or emotions of the jury, and defendant has not demonstrated plain error.

Even assuming arguendo that defendant has demonstrated plain error, we conclude that any prejudicial effect could have been cured by a jury instruction, had defendant requested one. In fact, we conclude that the trial court did cure any prejudice when it instructed the jury that it must make its decision based only on the evidence and that it must not let sympathy or prejudice influence its decision. Therefore, defendant cannot demonstrate that any potentially plain error affected his substantial rights.

Defendant's last argument regarding prosecutorial misconduct is that the prosecutor committed misconduct when he referred to defendant's national origin. Defendant claims that the prosecutor committed misconduct when he stated during his closing argument, "The person who got the free ticket to America but then well I don't want to work, I don't want to take care of my family, I don't want to have responsibility . . . ." Defendant argues that the statement was used to portray selfishness and narcissism and to portray defendant as a lazy immigrant. We disagree.

Defendant and TraVivra both testified that defendant was not a United States citizen and that he moved to the United States soon after marrying TraVivra. Defendant testified that his marriage and relationship with TraVivra deteriorated because she wanted him to exclusively work, whereas he wanted to work part-time and go to school. He also stated that he stayed with TraVivra for the sake of their unborn child. The jury could have reasonably inferred from that

testimony that defendant was willing to sacrifice his own wants and desires for those of his family. The prosecutor attempted to counter that narrative by arguing that, even though defendant claimed to put his family first, his actions showed otherwise. That is, by his own testimony, defendant made the issue of his commitment to his family legally relevant. Accordingly, the prosecutor was not prohibited from commenting on the improbability of that evidence or defense. *Fields*, 450 Mich at 116. Therefore, we conclude that defendant has not demonstrated plain error.

Even assuming that defendant has demonstrated plain error, we conclude that the trial court's jury instructions cured any prejudicial effect. The trial court instructed the jury, stating, "However, in deciding whether you believe a witness's testimony, you must set aside any bias or prejudice you may have based on the race, gender or national origin of the witness." Accordingly, defendant has not demonstrated that any potentially plain error affected his substantial rights.

Defendant next argues that the trial court abused its discretion in denying defendant's motion for new trial or *Ginther* hearing. We disagree.

A trial court's decision to grant or deny a motion for new trial is reviewed for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion exists if the results are outside the range of reasoned and principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). "A trial court's factual findings are reviewed for clear error." *Cress*, 468 Mich at 691. Defendant's argument regarding this issue is premised on the same arguments he presented for alleging prosecutorial misconduct. Because the prosecutor did not commit misconduct, defendant's arguments in this regard are similarly unavailing. Accordingly, we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial or *Ginther* hearing.

Defendant next argues that defense counsel was ineffective for failing to object to the prosecutor's statements during closing arguments. We disagree.

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); *People v Pickens*, 446 Mich 298, 311, 314; 521 NW2d 797 (1994). 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). The Court must analyze the issue with a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance, and 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. "Failing to advance a meritless argument or raise a futile objection does not constitute

ineffective assistance of counsel." *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) (citation omitted).

As discussed, we conclude that the prosecutor's comments were proper. Moreover, in its written opinion denying defendant's motion for new trial, the trial court stated, "Because this court has determined that the above instances of alleged misconduct were not, in fact, misconduct, any objection that would have been made would have lacked merit." Because the trial court apparently would have overruled any objection that defendant made regarding the prosecutor's statements during closing argument, and because we have determined that the prosecution's statements were in fact proper, we conclude that any objection to the prosecution's statements would have been futile. Because failing to raise a futile objection does not constitute ineffective assistance of counsel, *Ericksen*, 288 Mich App at 201, we conclude that defendant did not receive ineffective assistance of counsel.

Defendant next argues that the 25-year mandatory minimum sentencing provision of MCL 750.520b(2)(b) unconstitutionally violates the separation of powers doctrine. We disagree. Whether a statute violates the separation of powers doctrine is a constitutional question that we review de novo. *People v Garza*, 469 Mich 431, 433; 670 NW2d 662 (2003).

MCL 750.520b(2)(b) provides the 25-year mandatory minimum sentence that the trial court imposed on defendant, and which defendant now argues violates the separation of powers doctrine. MCL 750.520b(2)(b) states:

> (2) Criminal sexual conduct in the first degree is a felony punishable as follows:
>
> * * *
>
> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.

"Statutes enjoy the presumption of constitutionality. The courts have a duty to construe a statute as constitutional unless its unconstitutionality is clearly apparent." *People v Trinity*, 189 Mich App 19, 21; 471 NW2d 626 (1991) (citations omitted).

Unlike the United States Constitution, the Michigan Constitution expressly includes a separation of powers doctrine. The Michigan Constitution states, "The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution." Const 1963, art 3, § 2; *Garza*, 469 Mich at 433.

"The separation of powers doctrine has never been interpreted in Michigan as meaning there can never be any overlapping of functions between branches or no control by one branch of the acts of another. Some overlapping is permissible provided the area of one branch's exercise of another branch's power is very limited and specific." *Trinity*, 189 Mich App at 22-23.

"The ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature. The authority to impose sentences and to administer the sentencing statutes *enacted by the Legislature* lies with the judiciary." *Garza*, 469 Mich at 434 (citation omitted; emphasis in original).

Relevant to this case, the Legislature provided a penalty for the criminal offense of a person 17 years of age or older committing CSC-I against a person 13 years old or younger—that the offender be sentenced to a mandatory minimum term of 25 years' imprisonment. MCL 750.520b(2)(b). Defendant was convicted of that criminal offense. The trial court, relying on the statute enacted by the Legislature, sentenced defendant to the mandatory minimum term of 25 years' imprisonment.

We conclude that any overlap in the Legislature's and judiciary's powers was limited and specific. *Trinity*, 189 Mich App at 22-23. The overlap was limited to sentencing, and it was specific to the crime of CSC-I by an offender over the age of 17 against a victim under the age of 13. MCL 750.520b(2)(b). Moreover, we conclude that any alleged unconstitutionality of the statute is not clearly apparent. *Id*. at 21. Accordingly, we conclude that the 25-year mandatory minimum sentence under MCL 750.520b(2)(b) was not a violation of the separation of powers doctrine.

Defendant lastly argues that the 25-year mandatory minimum sentence under MCL 750.520b(2)(b) was cruel or unusual punishment as applied to him, even if the statute itself if facially constitutional. We disagree. The constitutionality of a statute is a question of law that this Court reviews de novo. *People v Roberts*, 292 Mich App 492, 496; 808 NW2d 290 (2011).

A statute may be unconstitutional as applied to the challenger regardless of whether the statute itself may be constitutionally sound. *People v Bosca*, 310 Mich App 1, 74; 871 NW2d 307 (2015), citing *Troxel v Granville*, 530 US 57, 73; 120 S Ct 2054; 147 L Ed 2d 49 (2000). "When faced with a claim that application of a statute renders it unconstitutional, the [reviewing court] must analyze the statute as applied to the particular case." *Keenan v Dawson*, 275 Mich App 671, 680; 739 NW2d 681 (2007).

The Eighth Amendment to the United States Constitution states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel *and* unusual punishments inflicted." US Const, Am VIII; *People v Bullock*, 440 Mich 15, 27 n 8; 485 NW2d 866 (1992). The Michigan Constitution states, "Excessive bail shall not be required; excessive fines shall not be imposed; cruel *or* unusual punishment shall not be inflicted; nor shall witnesses be unreasonably detained." Const 1963, art 1, § 16; *Bullock*, 440 Mich at 27 n 8.

Our Supreme Court in *Bullock* discussed a four-part test for determining whether a sentence was cruel or unusual under Michigan's Constitution: this Court must (1) weigh the gravity of the offense with the harshness of the penalty; (2) compare sentences imposed on other offenders in the same jurisdiction; (3) compare the sentences imposed for commission of the same crime in other jurisdictions; and (4) determine whether the sentence imposed furthers the goal of rehabilitation. *Id*. at 33. "If a punishment passes muster under the state constitution, then it necessarily passes muster under the federal constitution." *People v Benton*, 294 Mich App 191, 204; 817 NW2d 599 (2011) (quotation marks and citation omitted).

This Court in *Benton* analyzed whether the 25-year mandatory minimum sentencing provision under MCL 750.520b(2)(b) was cruel or unusual punishment, and it determined that it was not. *Id*. at 207. In this case, defendant admits that *Benton* is controlling Michigan caselaw, and thus, he is left with only an "as applied" argument. We use the same four-part test used to analyze challenges to the facial unconstitutionality as outlined in *Bullock*, 440 Mich at 33, to analyze whether a statute is unconstitutional as applied to a particular defendant.

First, the CSC-I offenses committed by defendant were undeniably grave. The gravity of the offense is evidenced by our discussion in *Benton*, 294 Mich App at 205, that as a matter of public policy, the State has a "'need to protect children below a specific age from sexual intercourse. The public policy has its basis in the presumption that the children's immaturity and innocence prevents them from appreciating the full magnitude and consequences of their conduct.'" *Id*., quoting *In re Hildebrandt*, 216 Mich App 384, 386; 548 NW2d 715 (1996). Both children were less than 10 years old when defendant repeatedly sexually abused them over multiple years. We have determined that the 25-year mandatory minimum sentence is not overly severe compared to the gravity of committing a sexual crime against a child. *Benton*, 294 Mich App at 205-206. Regarding the second factor, we have determined that the mandatory sentence is not unduly harsh compared to penalties for other violent offenses in Michigan. *Id*. at 206. Regarding the third factor, we have determined that at least 18 other states imposed the same penalty for the same offense. *Id*. at 206-207 n 1. Regarding the fourth factor, sex offenders are more likely than other offenders to reoffend upon release from prison. *People v Hallak*, 310 Mich App 555, 573-574; 873 NW2d 811 (2015). A 25-year mandatory minimum sentence does not thwart defendant's rehabilitative potential and contributes toward society's efforts to deter others from engaging in similar prohibited behavior. *Coles*, 417 Mich at 530.

Accordingly, we conclude that the 25-year minimum sentencing provision was not unconstitutionally cruel or unusual punishment as applied to defendant.

Affirmed.

/s/ Brock A. Swartzle
/s/ David H. Sawyer
/s/ Jane E. Markey