STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICHARD ROOSEVELT SUTTLES,

Defendant-Appellant.

UNPUBLISHED
December 16, 2021

No. 350744
Ingham Circuit Court
LC No. 18-000930-FH

Before: CAVANAGH, P.J., and SERVITTO and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of third-degree child abuse, MCL 750.136b(6).[1] Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to serve one year in jail and 18 months' probation. We affirm.

I. BACKGROUND

On October 4, 2019, defendant went to the house where his 12-year-old daughter, SP, lived with her mother and her mother's boyfriend to talk to SP about trouble she got in at school. SP sat in the front passenger seat of defendant's car, and defendant instructed her to put on her seatbelt. SP refused to put on her seatbelt because she did not want to leave with defendant. It is undisputed that SP's nose then began to bleed, but the cause of her nosebleed was the central dispute at defendant's trial. After her nose began bleeding, SP ran inside the house and told her mother that defendant had punched her in the face. The police were contacted, and SP told the police that defendant had punched her face a total of six times. The body camera video of SP's interview with police was played at trial, and blood was visible on SP's clothing during this interview. SP told a Child Protective Services (CPS) investigator a day or two later that defendant had punched her, and SP had bruising on her cheekbone at the time of this interview.

[1] Defendant was found not guilty of a related charge of witness intimidation, MCL 750.122(7)(a).

CPS investigated this matter and initiated family division proceedings. At the initial date for the jurisdictional trial, multiple witnesses saw defendant having a conversation with SP and her mother, in violation of a no-contact order. Defendant asked the assistant prosecuting attorney (APA) if SP could invoke her Fifth Amendment rights to avoid testifying against him, and he suggested that this could be necessary to prevent SP from committing perjury. After this incident, SP and her mother ceased cooperating with the authorities. The trial in the family division matter was adjourned multiple times, and SP and her mother repeatedly failed to appear. SP's mother also failed to appear at the criminal preliminary examination. SP's mother and SP's mother's boyfriend testified at the trial, but stated that they were not doing so voluntarily. SP testified at trial that, while she did get into defendant's car and refuse to wear a seatbelt, she lied about having been punched by defendant. SP claimed that her nosebleed was natural and not the result of having been struck. However, SP admitted that her jaw was swollen that day and did not offer an explanation for this. Defendant was found guilty of child abuse and not guilty of witness intimidation.

II. DISCUSSION

A. RIGHT TO REMAIN SILENT

Defendant argues that his due-process and Fifth Amendment rights were violated because the prosecution made repeated references to his post-arrest and post-*Miranda* silence. We disagree.

"Constitutional challenges must be raised in the trial court; otherwise, those challenges are not properly preserved for appellate review." *People v Green*, 322 Mich App 676, 681; 913 NW2d 385 (2018) (quotation marks and citation omitted). Defendant did not raise this issue in the trial court.[2] Unpreserved constitutional issues are reviewed for plain error affecting substantial rights. *People v Stokes*, 333 Mich App 304, 307; 963 NW2d 643 (2020). A plain error occurs if three requirements are "met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (internal citation omitted).

"A criminal defendant enjoys safeguards against involuntary self-incrimination during custodial interrogations." *People v Henry (After Remand)*, 305 Mich App 127, 145; 854 NW2d 114 (2014). "[E]very person subject to interrogation while in police custody must be warned, among other things, that the person may choose to remain silent in response to police questioning." *People v Shafier*, 483 Mich 205, 212; 768 NW2d 305 (2009). "Once a suspect invokes his right to remain silent . . . , police questioning must cease unless the suspect affirmatively reinitiates contact." *People v Tanner*, 496 Mich 199, 208; 853 NW2d 653 (2014). The right to remain silent can be asserted at any time, but the assertion of this right "must be unequivocal." *Henry*, 305 Mich

[2] Defendant did raise an objection while the arresting officer was being questioned about defendant's silence; however, this objection was based on hearsay grounds.

App at 145. After the right has been asserted, "the police must 'scrupulously honor' the defendant's request." *Id*. (citation omitted). The *Miranda*[3] "warnings provide an implicit promise that a defendant will not be punished for remaining silent. Once the government has assured a person of his right to remain silent, breaching the implied assurance of the *Miranda* warnings is an affront to the fundamental fairness that the Due Process Clause requires." *Shafier*, 483 Mich at 213 (quotation marks and citations omitted).

The dashboard camera footage of defendant's arrest shows that defendant was silent when initially told that he was being detained for domestic assault, and this silence clearly occurred before and was not reliant upon the *Miranda* warnings. Accordingly, the following testimony from the arresting officer was admissible:

> *Q*. When you put the handcuffs on him, you said to him that you were doing that because of a domestic assault?
>
> *A*. Yeah.
>
> *Q*. Did he ask you a domestic assault of who?
>
> *A*. No.
>
> *Q*. So at that point he did not ask: Wait a minute, who is it I was supposed to have assaulted?
>
> *A*. Never.

However, the rest of the relevant testimony pertained to the conversation that the officer had with defendant in the patrol car. Immediately after putting defendant in the car, the officer attempted to read defendant his rights:

> *Officer*: I'm going to read you your rights, okay? You're under arrest. [Long pause.] Alright, I would like for you to say "yes" to each of the things I'm about to say to you. Alright, you have the right to remain silent.
>
> *Defendant*: Uh because she about to come to the house, and she don't have a house key. So is it possible for me to leave a house key with the neighbor?
>
> *Officer*: Uh, probably not. So, I'm gonna read you your rights. And you have the—
>
> *Defendant*: (undecipherable)
>
> *Officer*: Well, I'm gonna read them to you anyway.

[3] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Defendant: Well, I'm not gonna respond.

Officer: Okay. You're not gonna answer anything even if I read them to ya? You gotta help yourself man, because right now you're in the hole. I'm gonna be real with you, okay?

Defendant: (undecipherable)

Officer: What?

Defendant: (undecipherable)

Officer: Yeah.

Defendant: So what would they know?

Officer: Alright, you don't want a statement for the courts at all to know your side of the story?

Defendant: Statement for what?

Officer: Uh, an assault, sir.

Defendant: An assault on who?

Officer: Your daughter! She has blood all over her face from you. Do you want to say anything? I have to read you your rights. Alright, and you have the right to remain silent.

Defendant: (undecipherable)

Officer: Do you want to answer any questions?

Defendant: No, sir.

Officer: Alright. You have that right.

Defendant began to interrupt the officer *after* he had clearly stated that defendant had the right to remain silent. While the officer did not complete the recitation of the *Miranda* rights, at this point defendant *could* have relied on an "implicit promise that" he would "not be punished for remaining silent" because that right had been read to him. *Shafier*, 483 Mich at 213. However, a criminal defendant must unambiguously and unequivocally invoke his right to remain silent, *Berghuis v Thompkins*, 560 US 370, 380-382; 130 S Ct 2250; 176 L Ed 2d 1098 (2010), and defendant failed to do so.

Defendant did not unambiguously invoke his right to remain silent until the officer asked, "Do you want to answer any questions?" and defendant responded, "No, sir." Defendant argues that he unambiguously invoked his right to remain silent when he said, "Well, I'm not gonna

respond." At the outset, it is important to note that defendant was being belligerent during this interaction. In context, defendant could have been attempting to communicate that he would not respond to the officer as he was reading his rights because the officer had asked defendant to say "yes" as he read the rights to defendant, and at that point he had not asked defendant any questions about what happened.

The officer then attempted to clarify whether defendant was telling him that he did not want to make a statement, and defendant said, "Statement for what?" The officer told defendant that he was referring to a possible statement about "an assault," and defendant then asked whom he was supposed to have assaulted. The officer then told defendant that he was referring to defendant's daughter and mentioned that she had blood on her face. At this point, defendant still had not unambiguously invoked his right to remain silent, so it was appropriate for the prosecution to elicit testimony pertaining to the fact that defendant neither asked which daughter he was referring to nor stated that the blood on his daughter's face was the result of a naturally occurring nosebleed. Defendant was then asked if he intended to answer any questions. When defendant said that he did not, the questioning concluded. The evidence elicited by the prosecution and the arguments made by the prosecution did not pertain to anything defendant did or did not say after he unequivocally invoked the right to remain silent. Accordingly, defendant's argument that his constitutional rights were violated by the admission of evidence about his silence is without merit.

B. INEFFECTIVE ASSISTANCE OF COUNSEL AND PLAIN ERROR

Defendant has raised two claims of error, and for each one he argues both that the trial court committed plain error and that his trial counsel's failure to object constituted ineffective assistance of counsel. We disagree.

"A trial court's decision to admit evidence will not be disturbed absent an abuse of discretion. A trial court abuses its discretion when it chooses an outcome that falls outside the range of principled outcomes." *People v Musser*, 494 Mich 337, 348; 835 NW2d 319 (2013) (quotation marks, citation, and alteration omitted). Unpreserved issues are reviewed for plain error that affected substantial rights. *Carines*, 460 Mich at 763.

Claims of ineffective assistance of counsel present mixed questions of fact and law. *People v Head*, 323 Mich App 526, 539; 917 NW2d 752 (2018). Factual findings are reviewed for clear error and legal conclusions are reviewed de novo. *Id*. Because an evidentiary hearing was not held, our review is limited to mistakes apparent on the record. See *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003). "To prevail on a claim of ineffective assistance, a defendant must, at a minimum, show that (1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome of the proceeding would have been different but for trial counsel's errors." *Head*, 323 Mich App at 539 (quotation marks and citation omitted; alteration removed). "The standards for 'plain error' review and ineffective assistance of counsel are distinct, and therefore, a defendant can obtain relief for ineffective assistance of counsel even if he or she cannot demonstrate plain error." *People v Hughes*, 506 Mich 512, 523; 958 NW2d 98 (2020), citing *People v Randolph*, 502 Mich 1; 917 NW2d 249 (2018).

1. TESTIMONY VOUCHING FOR CREDIBILITY OF SP'S INITIAL STATEMENTS

Defendant argues that the testimony of three witnesses improperly bolstered the credibility of SP's initial statements. Defendant's argument pertains to the testimony of three witnesses who were involved with the family court proceedings against defendant. The APA testified that "CPS deemed that [SP] was at risk of harm if in the care of Richard Suttles. That's why the Court was seeking jurisdiction over her." The CPS caseworker testified that the allegation that defendant assaulted SP was "substantiated" in the family court. The testimony of a different CPS investigator implied that CPS had determined by a preponderance of the evidence that defendant assaulted SP.

The prosecution argues that this testimony added necessary context for the witness intimidation charge. That is, to prove this charge, the prosecution needed to establish that defendant threatened or intimidated SP or her mother; that defendant did so to prevent SP or her mother from testifying at an official proceeding, to influence their testimony, or to make them offer false testimony; and that defendant knew or had reason to know that SP or her mother could be a witness at an official proceeding. See MCL 750.122. While we agree that proof of these elements did require evidence that there was a family court case pertaining to this matter, proof of these elements did not require testimony that CPS had substantiated SP's allegations that defendant had hit her. However, this alone is insufficient to establish that the testimony improperly bolstered SP's credibility.

"Because it is the province of the jury to determine whether a particular witness spoke the truth or fabricated a cock-and-bull story, it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial." *Musser*, 494 Mich at 349 (quotation marks and citations omitted). Such comments "do nothing to assist the jury in assessing witness credibility in its fact-finding mission and in determining the ultimate issue of guilt or innocence." *Id*. (quotation marks and citation omitted). In *People v Douglas*, 496 Mich 557; 852 NW2d 587 (2014), a CPS worker testified, without objection from defense counsel, that the child-victim's allegations made against the defendant, the child's parent, "had been substantiated" and that "there was no indication that [the child] was coached or being untruthful." *Id*. at 570 (quotation marks and alteration omitted). Our Supreme Court held that "this testimony violated the well-established principle that it is improper for a witness or an expert to comment or provide an opinion on the credibility of another person while testifying at trial." *Id*. at 583 (quotation marks and citation omitted). The Supreme Court held that defense counsel's unreasonable failure to object to this and other inadmissible testimony warranted reversal because the prosecution's case depended entirely on the credibility of the child's allegations. *Id*. at 586-587.

In this case, it is clear that the testimony of the APA and the CPS workers suggested that CPS was involved with the matter and seeking court intervention because CPS believed that SP's initial allegations were truthful; this is exactly what was disallowed by the Supreme Court when it decided *Douglas*. Because this was an obvious violation of established law, the error was plain. Additionally, there could be no valid strategic reason for counsel's failure to object to allowing three seemingly objective and authoritative witnesses to vouch for the credibility of SP's statement.

Nevertheless, we conclude that reversal is not warranted because this case did not involve a pure credibility contest, and there was persuasive evidence corroborating SP's initial statements. Blood was visible on SP's clothing in the body camera video. SP admitted at trial that her jaw was swollen, the police officer testified that she appeared to have injuries on her face, and the CPS investigator testified that SP had bruising on her cheekbone. Finally, SP's testimony at trial largely corroborated her previous statement, and she admitted that she had defied defendant's instruction to put on her seatbelt; the only difference was that she testified at trial that her nose spontaneously started to bleed and that defendant did not actually hit her. These facts support a conclusion that the errors did not affect defendant's substantial rights and that counsel's failure to object was not outcome-determinative.

2. INADMISSIBLE INFORMATION REVEALED IN BODY CAMERA FOOTAGE

Defendant argues that reversal is warranted because inadmissible information was contained in the unredacted body camera video that was provided to the jury during deliberations. We disagree.

At defendant's jury trial, the prosecution presented body camera footage from the arresting officer's response to the scene and his interview with SP. Near the end of the video, SP's mother told the officer that she previously received a call from CPS pertaining to one of defendant's other children but that this involved a "more verbal" issue. This portion of the video was not played for the jury during the presentation of the evidence or otherwise referenced by the parties; however, the entire video, including this portion, was made available to the jury during its deliberations. It is undisputed that this portion of the video was not admissible and that an objection would have been sustained. There was clearly no valid strategic reason to allow this video to be given to the jury. Therefore, the dipositive issue is whether the nature of this error was such that it warrants reversal under either the plain error standard or ineffective assistance of counsel standard.

To warrant reversal on an ineffective assistance of counsel claim, defendant must show that there is a reasonable probability that the error affected the outcome of the proceeding, *Head*, 323 Mich App at 539, and to warrant reversal under the plain error standard, defendant must show that he was prejudiced, *Carines*, 460 Mich at 763. These two standards are distinct; however, in this particular case, the same facts demonstrate that defendant is not entitled to relief under either standard. First, the evidence against defendant was overwhelming. In addition to SP's initial statement and the corroboration discussed above, including SP's injuries, there was testimony that defendant attempted to prevent SP from testifying against him. Moreover, it appears unlikely that the jury even watched this portion of the video. Nothing in the trial transcript suggests that the jury requested to view any exhibits. The inadmissible information was revealed at the very end of the video and a couple minutes after the officer had completed his interview with SP. This portion of the video was neither played nor discussed during the trial. And finally, the inadmissible

information consisted of a very brief comment and was not particularly inflammatory. Accordingly, appellate relief is not warranted.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Deborah A. Servitto
/s/ Michael J. Kelly