STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE ANTONIO ARCIA-PIERDA,

Defendant-Appellant.

UNPUBLISHED
May 20, 2021

No. 352312
Ingham Circuit Court
LC No. 17-000433-FH

Before: CAMERON, P.J., and BORRELLO and REDFORD, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of six counts of third-degree criminal sexual conduct (CSC-III), MCL 750.520d(1)(a) (sexual penetration involving victim at least 13 years of age and under 16 years of age). The trial court sentenced defendant to serve six concurrent prison terms of 85 to 180 months. We affirm.

I. FACTUAL BACKGROUND

This case began when the 14-year-old victim, YF, visited a hospital with complaints of pain around her genital area. YF had significant developmental delays and required help from her family, particularly her older sister, with everyday tasks. Hospital staff discovered that YF had contracted a sexually transmitted disease. YF initially denied having been the victim of any sort of sexual abuse; however, eventually she revealed that she frequently visited her aunt's home and that her aunt's boyfriend, defendant, routinely subjected her to sexual abuse during the visits.

II. ANALYSIS

A. SUFFICIENCY OF EVIDENCE

Defendant first argues that the prosecution failed to present sufficient evidence to prove the sixth count of CSC beyond a reasonable doubt. We disagree.

We review de novo challenges to the sufficiency of the evidence. *People v Savage*, 327 Mich App 604, 613; 935 NW2d 69 (2019). To decide "whether sufficient evidence has been

presented to sustain a conviction, a court must view the evidence in a light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt." *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

CSC-III is governed by MCL 750.520d(1)(a), which provides in relevant part:

> (1) A person is guilty of criminal sexual conduct in the third degree if the person engages in sexual penetration with another person and if any of the following circumstances exist:
>
> (a) That other person is at least 13 years of age and under 16 years of age.

In count six the prosecution charged defendant of engaging in "tongue/vagina" penetration with YF. Defendant argues that the record is bereft of evidence that defendant orally penetrated YF's vagina. This is not true. Dr. Guertin, a child physical and sexual abuse expert who performed a forensic medical examination of YF, testified that while obtaining her medical history for treatment and diagnostic purposes he asked YF if defendant "did anything to her that he should not have with his mouth," to which YF responded, " 'Yes. My vagina and my boobs.' " If the jury believed Dr. Guertin's testimony, then it could have rationally found that this testimony proved beyond a reasonable doubt that defendant had orally penetrated YF.

Defendant further argues that the purpose of sufficiency challenges is to guard against irrational jury verdicts, and that it was irrational for the jury to find defendant guilty after YF testified that this crime did not occur. Defendant, however, mischaracterizes YF's testimony. Regardless, even if YF had specifically testified that defendant did not orally penetrate her, the jury was "free to believe or disbelieve, in whole or in part, any of the evidence presented." *People v Russell*, 297 Mich App 707, 721; 825 NW2d 623 (2012). In this case, the prosecution presented sufficient evidence from which the jury could find beyond a reasonable doubt that defendant orally penetrated YF.

B. HEARSAY

Defendant next argues that the trial court erred by admitting hearsay evidence from Dr. Guertin concerning disclosures that YF made to him during the examination. We disagree.

Evidentiary challenges are reviewed for abuse of discretion. *People v Thorpe*, 504 Mich 230, 251; 934 NW2d 693 (2019). "The decision to admit evidence is within the trial court's discretion and will not be disturbed unless that decision falls 'outside the range of principled outcomes.' A decision on a close evidentiary question ordinarily cannot be an abuse of discretion." *Id*. at 251-252 (quotation marks and citation omitted).

" '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). MRE 803(4) provides for the admission of "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment." The rationale behind

this exception is "the existence of (1) the self-interested motivation to speak the truth to treating physicians in order to receive proper medical care, and (2) the reasonable necessity of the statement to the diagnosis and treatment of the patient." *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992).

Our Supreme Court has articulated 10 factors to consider when evaluating the reliability of a child's statement under MRE 803(4). *Id*. at 324-325. However, this Court has held that the *Meeboer* factors do not apply if "the complainant is over the age of ten and is therefore not of tender years . . . ." *People v Van Tassel*, 197 Mich App 653, 662; 496 NW2d 388 (1992) (quotation marks omitted). It is undisputed that YF was over 14 years old when she disclosed to Dr. Guertin the nature and extent of the sexual abuse perpetrated against her. Therefore, we must rebuttably presume that the statements were truthful. *People v Garland*, 286 Mich App 1, 9; 777 NW2d 732 (2009). Defendant has failed to address this presumption and has likewise failed to attempt to rebut it. Defendant attacks YF's credibility more generally by arguing that her developmental delays and memory problems made her an incredible witness. However, the record does not contain any evidence that YF did not understand the importance of being truthful with Dr. Guertin. Therefore, defendant has failed to rebut the presumption.

Defendant argues that YF's statements to Dr. Guertin were not admissible under MRE 803(4) because the purpose of the examination was to assist the police with their investigation rather than medical treatment and diagnosis. To support this argument, defendant relies on *People v Shaw*, 315 Mich App 668; 892 NW2d 15 (2016), another case challenging the admissibility of Dr. Guertin's testimony. In *Shaw*, Dr. Guertin testified about statements that a child sexual assault victim made to him and this Court considered whether those statements were admissible pursuant to MRE 803(4). *Id*. at 674-674. However, in *Shaw* the victim did not see Dr. Guertin until seven years after the abuse had ceased, the victim saw a different doctor (who did not testify) for medical care during that seven-year period, and nothing indicated that the victim received any medical treatment from Dr. Guertin. *Id*. at 675. In this case, however, YF saw Dr. Guertin within a month of the discovery of her sexually transmitted disease, YF did not see another doctor between her visit to the hospital and her visit with Dr. Guertin, Dr. Guertin performed a thorough forensic physical examination and treated YF by ordering testing based upon YF's medical history. Dr. Guertin testified that YF's statements were critical to her diagnosis and treatment. The record establishes that medical diagnosis and treatment served the primary purposes of Dr. Guertin's examination of and conversation with YF. Defendant's argument, therefore, lacks merit.

C. PROSECUTORIAL MISCONDUCT

Defendant also argues that he is entitled to a new trial as a result of misconduct by the prosecutor during closing arguments and rebuttal. We disagree.

Claims of prosecutorial misconduct are reviewed de novo. *People v Dunigan*, 299 Mich App 579, 588; 831 NW2d 243 (2013) Claims of prosecutorial misconduct are preserved by making a contemporaneous objection and requesting curative jury instructions. *People v Mullins*, 322 Mich App 151, 172; 911 NW2d 201 (2017). Defendant did not raise any objections during closing arguments, and this issue is therefore unpreserved. Unpreserved claims of prosecutorial misconduct are reviewed for plain error. *People v Evans*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 343544); slip op at 6. 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) (citation omitted).

We review "claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citation omitted). "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). Unpreserved claims of prosecutorial misconduct will not warrant reversal unless a curative instruction would have been insufficient to alleviate the harm caused by the misconduct. *Id*.

The prosecutor opened his closing arguments by describing how YF needed to carry the secret of the sexual abuse, describing how carrying this secret made her a "prisoner," and referring to YF as "a young, isolated, woefully naive child." Defendant argues that these comments were improper appeals for sympathy for YF.

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Unger*, 278 Mich App at 236 (citation omitted). However, "[a] prosecutor may not appeal to the jury to sympathize with the victim." *Id*. at 237. Close analysis of the record reveals that the prosecution based its closing argument on facts in the record regarding the victim. We are not convinced that the prosecution strayed over the line and improperly appealed for sympathy for YF. Even if we concluded that the prosecutor engaged in inappropriate appeals for sympathy, defendant has failed to establish that the conduct rose to the level of error requiring reversal, especially in light of the fact that this issue is unpreserved. Moreover, the trial court instructed the jury not to "let sympathy" influence its deliberations, and "jurors are presumed to follow their instructions." *Unger*, 278 Mich App at 235. Defendant has presented this Court nothing upon which to conclude that the jurors in this case failed to follow the trial court's instructions.

During rebuttal, the prosecution referred to defendant's witnesses as "liars" which defendant argues constituted misconduct. We disagree.

It is permissible for the prosecution to make arguments relating to the credibility of a defendant's witnesses. *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007). However, "a prosecutor may not suggest that he or she has some special knowledge that [a] witness is testifying untruthfully." *People v Roscoe*, 303 Mich App 633, 649; 846 NW2d 402 (2014). "Furthermore, otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense." *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). In this case, the prosecution referred to defendant's witnesses as "liars" during rebuttal and in direct response to defense counsel's argument that YF lied. Moreover, after referring to the witnesses as "liars," the prosecution discussed the specific instances of testimony that called the credibility of these witnesses into question. The prosecution made legitimate arguments

concerning credibility that were based on properly admitted evidence. Therefore, the prosecution did not commit misconduct by referring to defendant's witnesses as "liars."

The prosecution ended its closing arguments by asking the jury to "hold the Defendant responsible for what he did to [YF]." Defendant contends that this statement constituted an improper "civic duty" argument.

"The prosecutor may not inject issues into a trial that are broader than the defendant's guilt or innocence. The prosecutor commits misconduct when he or she invites jurors to suspend their powers of judgment and decide the case on the basis of sympathy or civic duty." *People v Lane*, 308 Mich App 38, 66; 862 NW2d 446 (2014). In this case, the prosecution asked the jury to hold defendant responsible immediately after he told the jury to consider all of the evidence and immediately before he asked the jury to find defendant guilty based on that evidence. The record reflects that the prosecution did "not inject issues into a trial that are broader than the defendant's guilt or innocence." *Id*. The prosecution also did not invite the "jurors to suspend their powers of judgment and decide the case on the basis of sympathy or civic duty." *Id*. On the contrary, the prosecution asked the jury to hold defendant responsible only after a careful review of the evidence. Defendant's argument in this regard, therefore, lacks merit.

During rebuttal, the prosecution referred to defense counsel's closing arguments as "cute," accused defense counsel of submitting "half-truths" to the jury, and argued that defense counsel attempted to direct the jury not to follow the evidence or the law. Defendant argues that these attacks against defense counsel deprived him of a fair trial. We disagree.

"A prosecutor is afforded great latitude regarding his or her arguments and conduct at trial"; however, "the prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury." *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). Moreover, "[a] prosecutor cannot personally attack the defendant's trial attorney . . . ." *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). Such arguments tend to undermine the presumption of innocence. *Fyda*, 288 Mich App at 461. However, "a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. Furthermore, otherwise improper remarks by the prosecutor might not require reversal if they respond to issues raised by the defense." *Callon*, 256 Mich App at 330 (citation omitted).

The comments identified by defendant, if viewed out of context and alone, appear to be direct attacks against defense counsel that questioned his truthfulness. All of these comments, however, were made by the prosecution in response to unsupported arguments made by defense counsel. For example, defense counsel argued that YF may have gotten a sexually transmitted disease from a towel despite the fact that no evidence had been presented that such would even be remotely possible. Defense counsel also argued that YF's hymenal opening may have been severely dilated as a result of a gymnastics accident. No evidence, however, established that YF ever participated in gymnastics. The evidence instead indicated that sexual abuse served as the only explanation for the condition of her hymen. Defense counsel also argued that YF's testimony may have been "coached" despite no evidence supporting such an accusation. Defense counsel argued further that "the People did not present any evidence that [defendant] had a sexually transmitted infection." The record, however, reflects that defendant's girlfriend told a detective

that defendant had a sexually transmitted disease. When viewed in context, one readily discerns that the prosecution's statement that defense counsel's presentation was "cute" attacked defense counsel's unsupported arguments rather than defense counsel himself or defense counsel's veracity. Viewing the prosecution's comments in light of defense counsel's specious arguments establishes that defendant's argument in this regard lacks merit.

During closing arguments, the prosecution referred to defendant as "a wolf in sheep's clothing," a "predator," and as YF's "attacker." During rebuttal, the prosecution referred to defendant as a "pedophile." Defendant argues that the prosecution engaged in misconduct by making these statements.

When viewed in context, however, these arguments were proper and reasonably based on the evidence admitted at trial. To reiterate, "[t]he prosecution has wide latitude in arguing the facts and reasonable inferences, and need not confine argument to the blandest possible terms." *Dobek*, 274 Mich App at 66. Based upon the substantial evidence presented at trial, the prosecution did not commit prosecutorial misconduct by describing defendant as a "pedophile" and as YF's "attacker." The evidence established that defendant repeatedly sexually abused YF when she was 14 years old. Evidence established that defendant acted as a "predator" and the prosecution's characterization of defendant as a "wolf in sheep's clothing" reasonably described his conduct in light of the evidence that defendant exploited a vulnerable victim's relationship with her aunt in order to satisfy his sexual desires. The prosecution's remarks in closing argument, therefore, did not deprive defendant of a fair trial.

During closing argument, the prosecution stated that YF had testified that defendant had been "putting his mouth on her vagina." Because the record indicates that YF never testified that defendant put his mouth on her vagina, defendant argues that the prosecution committed reversible error by arguing to the contrary.

"A prosecutor may not make a factual statement to the jury that is not supported by the evidence, but he or she is free to argue the evidence and all reasonable inferences arising from it as they relate to his or her theory of the case." *Dobek*, 274 Mich App at 66 (citations omitted). However, reversal is not warranted if misstatements were minor and no instance was so prejudicial to the defendant that it was not cured by the trial court's instruction that the prosecution's argument was not evidence. *Id*. The prosecution's statement came in the middle of a sentence in which he listed the various forms of abuse about which YF testified. Although YF did not testify regarding defendant having mouth to vagina contact, the record reflects that Dr. Guertin testified that YF told him that she had been orally penetrated by defendant. Therefore, although the prosecution incorrectly described YF's *testimony*, record evidence supported a finding that YF had made that statement. The record reflects that the trial court instructed the jury that the attorneys' arguments were not evidence and to base its decision upon the evidence admitted at trial alone. Jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235. The prosecution, therefore, did not commit reversible error.

Defendant argues that even if no individual mistake by the prosecutor was sufficiently egregious to warrant reversal, the cumulative effect of all of the prosecutorial misconduct deprived defendant of his right to a fair trial. We disagree.

"The cumulative effect of several errors can constitute sufficient prejudice to warrant reversal even when any one of the errors alone would not merit reversal, but the cumulative effect of the errors must undermine the confidence in the reliability of the verdict before a new trial is granted." *Dobek*, 274 Mich App at 106. However, "[a]bsent the establishment of errors, there can be no cumulative effect of errors meriting reversal." *Id*. As discussed above, defendant's arguments concerning prosecutorial misconduct lack merit. Even if we were to find that the prosecution inappropriately appealed for sympathy and misstated YF's testimony, both errors were cured by jury instructions, and both of these errors were far too minor to have deprived defendant of his right to a fair trial, even when considered together.[1]

D. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that defense counsel provided him ineffective assistance of counsel. We disagree.

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*. These claims are preserved for appellate review by moving for a *Ginther*[2] hearing. *People v Acumby-Blair*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8. Defendant has not moved for a *Ginther* hearing; therefore, review is limited to mistakes that are apparent from the record. *Id*.

The Sixth Amendment of the United States Constitution guarantees that criminal defendants receive effective assistance of counsel. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed2d 674 (1984). "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 in original). "[A] reasonable probability is a probability sufficient to undermine confidence in the outcome." *People v Randolph*, 502 Mich 1, 9; 917 NW2d 249 (2018).

Defendant argues that his counsel provided ineffective assistance by failing to move for a directed verdict of acquittal. We disagree.

When the prosecution fails to provide sufficient evidence, due process requires the court to direct a verdict of not guilty. *People v Chapo*, 283 Mich App 360, 364; 770 NW2d 68 (2009). As discussed above, the prosecution presented sufficient evidence to convict defendant of count six. The prosecution also presented sufficient evidence concerning the other five counts. In counts one and four the prosecution charged defendant of "penis/vagina" penetration, and YF testified

[1] Because we conclude that defendant's prosecutorial misconduct arguments are without merit, defendant's argument that his trial counsel was ineffective for failing to object to the prosecution's arguments is likewise without merit.

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

that defendant penetrated her vagina with his penis and that this happened more than once. In counts two and three the prosecution charged defendant of "mouth/penis" penetration, and YF testified that defendant penetrated her mouth with his penis and that this happened more than once. In count five the prosecution charged defendant of "penis/anal opening" penetration, and YF testified that defendant penetrated her "butt" with his penis and that this happened more than once. Further, physical evidence corroborated YF's testimony. YF contracted a sexually transmitted disease, and Dr. Guertin testified that she had specific observable injuries to her genital and anal areas consistent with having been sexually assaulted. Defendant's arguments pertain primarily to YF's credibility; however, "[i]t is the province of the jury to determine questions of fact and assess the credibility of witnesses[.]" *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007). From the substantial evidence presented by the prosecution at trial, reasonable jurors could find defendant guilty beyond a reasonable doubt as to each charged offense. Accordingly, defendant lacked entitlement to a directed verdict had defense counsel moved for one. Defense counsel did not provide ineffective assistance by failing to pursue a futile motion. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant argues that defendant's first defense attorney provided ineffective assistance by failing to turn exculpatory evidence over to his new defense attorney. We disagree.

Defendant asserts that YF's cell phone contained pornographic images, that defendant's initial defense attorney possessed YF's cell phone, and that the first attorney never turned YF's cell phone over to defendant's new attorney after he withdrew. Defendant argues that if he had been able to present to the jury evidence that YF had pornographic images on her cell phone, he would have then been able to persuade the jury that these images corrupted her recollection; and that when she testified about what defendant had done to her, she actually remembered the pornographic images that she had seen. Defendant requests that this Court remand the case for a *Ginther* hearing to investigate this claim.

A *Ginther* hearing is not necessary because even if defendant's first attorney failed to turn over the cell phone as a result of negligence, this evidence would not have helped defendant or been outcome-determinative. YF testified that defendant showed her pornography. Other evidence established that YF watched a television show that included sexual themes. Presentation of additional evidence of YF's viewing of pornographic material would have been cumulative. We are not convinced that additional evidence of the contents of YF's cell phone would have resulted in a different outcome at trial. *Head*, 323 Mich App at 539. Therefore, this argument also fails.

Affirmed.

/s/ Thomas C. Cameron
/s/ Stephen L. Borrello
/s/ James Robert Redford