

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EVAN NATHANIEL PULCIFER,

Defendant-Appellant.

UNPUBLISHED

May 20, 2021

No. 353384

Midland Circuit Court

LC No. 19-008255-FH

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

PER CURIAM.

Defendant, Evan Nathaniel Pulcifer, appeals his jury-trial convictions of two counts of fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(a); malicious destruction of a building causing damage or injury between \$200 and \$1,000, MCL 750.380(4)(a); and furnishing alcohol to a minor, MCL 436.1701(1). The trial court sentenced Pulcifer to serve 10 months in jail and to five years' probation for his CSC-IV convictions. The trial court also sentenced Pulcifer to 10 months in jail for his malicious destruction of a building conviction and to 60 days in jail for his furnishing alcohol to a minor conviction. We affirm.

I. BACKGROUND

This case arises out of the sexual assault of the then 13-year-old victim by Pulcifer, who was 24 years old at the time. At the time the crimes occurred, the victim was friends with Pulcifer's 14-year-old sister, who will be referred to as MP.

On a weekend in April 2019, the victim went to MP's house with another friend, who will be referred to as KT, for a sleepover. On Saturday evening, KT, MP, and the victim went with Pulcifer to spray paint silos that were located near MP's house. Pulcifer provided KT, MP, and the victim with alcohol after they returned to the house. When MP began vomiting, KT took MP to an upstairs bedroom. Pulcifer then asked the victim to walk back to the silos with him. The victim agreed. After they arrived at the location, Pulcifer and the victim went into a nearby shed. The victim testified that Pulcifer "groped" and "caressed" her buttocks, put his hand on her inner thigh, and touched the bottom of her breast. Thereafter, KT and MP entered the shed, and KT "ripped [the victim] off of" Pulcifer. The victim testified that KT and MP were upset with her and

that all four of them returned to MP's house. The victim did not report the assaults to her father when he picked her up from MP's house on Sunday morning. However, when the victim went to school on Monday, she told a guidance counselor about "the situation" at the urging of KT.

Pulcifer was arrested and charged with three counts of CSC-IV, malicious destruction of a building, furnishing alcohol to a minor, and accosting a minor for immoral purposes, MCL 750.145a.¹ At trial, the victim, KT, and MP testified about the events that occurred on the night of the crimes. Although KT and MP did not testify that they saw Pulcifer touch the victim's "intimate parts,"² KT and MP both agreed that the victim and Pulcifer were alone in the shed together. KT and MP also testified that Pulcifer had spray painted the silos with them and had provided KT, MP, and the victim with alcohol. Pulcifer's mother testified that Pulcifer admitted to spray painting the silos and to providing alcohol. However, Pulcifer's mother testified that Pulcifer denied touching the victim. Pulcifer did not testify on his own behalf. Pulcifer was acquitted of one count of CSC-IV and of accosting a minor for immoral purposes, but was convicted of the remaining charges. Pulcifer was sentenced as described above. This appeal followed.

II. ANALYSIS

Pulcifer argues that he is entitled to a new trial because defense counsel was ineffective by failing to object to MP's improper vouching testimony and by asking Pulcifer's mother about Pulcifer's credibility. We disagree that Pulcifer is entitled to a new trial.

Pulcifer failed to raise an ineffective assistance of counsel claim in the trial court in connection with a motion for a new trial, and this Court denied Pulcifer's motion for remand to the trial court for a *Ginther*³ hearing.⁴ "Therefore, our review is for errors apparent on the record."

¹ Pulcifer was also charged with contributing to the delinquency of a minor, MCL 750.145. However, that charge was dismissed before trial.

² "A person is guilty of criminal sexual conduct in the fourth degree if he or she engages in sexual contact with another person . . . [and] [t]hat other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person." MCL 750.520e(1)(a). The statutory definition of "sexual contact" "includes the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner" MCL 750.520a(q). " 'Intimate parts' includes the primary genital area, groin, inner thigh, buttock, or breast of a human being." MCL 750.520a(f).

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

⁴ On October 28, 2020, Pulcifer's motion to remand for a *Ginther* hearing was denied "without prejudice to a case call panel of this Court determining that remand is necessary once the case is submitted on a session calendar." *People v Pulcifer*, unpublished order of the Court of Appeals, entered October 28, 2020 (Docket No. 353384).

See *People v Abcumby-Blair*, ___ Mich App ___, ___; ___ NW2d ___ (2020) (Docket No. 347369); slip op at 8, lv pending.

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 demonstrate ineffective assistance of counsel,

a defendant must show: (1) that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms; and, (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. [*Abcumby-Blair*, ___ Mich App at ___; slip op at 8 (quotation marks and citations omitted).]

It is a “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.” *People v Douglas*, 496 Mich 557, 583; 852 NW2d 587 (2014) (quotation marks and citation omitted). Indeed, “it is the province of the jury to determine whether a particular witness spoke the truth or fabricated a cock-and-bull story[.]” *People v Musser*, 494 Mich 337, 349; 835 NW2d 319 (2013) (quotation marks and citation omitted). “[C]omments [on an individual’s credibility] have no probative value because they 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 citations omitted).

A. TESTIMONY OF MP

During direct examination, the prosecutor asked MP if she “found out” that KT and the victim had “gone to” the school counselor on the Monday following the crimes. After MP responded “Yeah,” the following exchange occurred:

Prosecutor: How did you find out about that?

MP: [KT] texted me.

Prosecutor: . . . Do you consider [KT to be] your friend?

MP: Yeah.

Prosecutor: Is she the type of person who would lie in your estimation?

MP: No.

Prosecutor: . . . [KT’s] a truth-teller?

MP: Yeah.

Prosecutor: In fact she was pretty much trying to do all the right things that night, don’t you agree?

MP: Yeah.

Prosecutor: She was taking care of you, true?

MP: Yes.

Prosecutor: She was trying to take care of [the victim by] going down to the shed?

MP: Yes.

Thus, the prosecutor asked MP to comment on KT's credibility, and defense counsel failed to object. However, the reference to KT's credibility was brief, and this Court has recognized that declining to raise objections may be consistent with sound trial strategy, especially to avoid drawing the jury's attention to unfavorable evidence. *People v Unger*, 278 Mich App 210, 241-243; 749 NW2d 272 (2008). Furthermore, even if the brief reference concerning KT did bolster her credibility, KT did not testify that she had witnessed Pulcifer touch the victim's "intimate parts." Rather, KT testified that, when she entered the shed, she saw the victim sitting on Pulcifer's lap. KT also noted that Pulcifer's arms were "wrapped around" the victim. While KT did testify that Pulcifer had spray painted a silo and had provided her, MP, and the victim with alcohol, this testimony was corroborated by the testimony of the victim, MP, and Pulcifer's mother. Therefore, we fail to see how MP's testimony concerning KT's credibility affected the outcome of the lower court proceedings.

Also, during direct examination and redirect examination, MP was confronted with statements that she had made to law enforcement. MP often indicated that she either did not recall having made certain statements or denied making certain statements to law enforcement. MP also indicated that she had lied to law enforcement about "some stuff" because she did not "want to get in trouble[.]" On redirect examination, the following exchange occurred:

Prosecutor: Okay. Did you ever ask [Pulcifer] why he would do that to your friend?

MP: No.

Prosecutor: Never did? Didn't ask—you didn't tell the Officer that you asked him why he would do that to your friend?

MP: No.

Prosecutor: And he said, "That she followed me, I was just going down there to do graffiti and now she's blaming me."?

MP: Yeah.

* * *

Prosecutor: All right. “And now she’s blaming me.” [Pulcifer’s] blaming [the victim] for all of this, right?

MP: No.

Prosecutor: Okay. You also told the Detective that [the victim’s] not the type of person to lie, didn’t you?

MP: Yeah.

Prosecutor: Okay.

MP: Because I thought she was.

Even assuming that defense counsel’s failure to object was unreasonable, there is no indication that counsel’s failure to do so affected the outcome of the lower court proceedings. Indeed, shortly after MP acknowledged that she told a member of law enforcement that the victim was “not the type of person to lie,” MP indicated that she *thought* that the victim was not the type of person to lie. This statement implies that MP did not believe that the victim was honest about what occurred between her and Pulcifer. Indeed, MP testified that she believed that the victim was “faking” being intoxicated. MP also testified that, when she entered the shed, she saw the victim attempting to sit on Pulcifer’s lap and noted that the victim was “climbing all over him.”

The victim’s testimony also supports that MP did not think that the victim was honest. Specifically, the victim testified that, after KT and MP located the victim and Pulcifer in the shed, MP began “cussing [the victim] out” because MP thought the victim “was faking” being intoxicated. Testimony also supported that the victim and MP were no longer friends at the time of trial and that MP had called the victim derogatory names. Consequently, given that the jury was aware that MP questioned the veracity of the victim’s statements, we fail to see how defense counsel’s failure to object affected the outcome of the proceedings.

B. TESTIMONY OF PULCIFER’S MOTHER

Pulcifer’s mother testified on direct examination that she had learned about the crimes on the following Monday through a member of law enforcement. Thereafter, Pulcifer’s mother spoke to Pulcifer. She testified that Pulcifer admitted that he had spray painted the silos with KT, MP, and the victim, and that he admitted to purchasing them alcohol. Pulcifer’s mother agreed that she had spoken to a member of law enforcement about what Pulcifer told her. When asked if she told a detective that Pulcifer had admitted to “touching” the victim, Pulcifer’s mother indicated that “No, my son did never [sic] admit to me that he had touched her.” Pulcifer’s mother acknowledged that she had “discuss[ed]” Pulcifer’s “credibility” with a detective. During cross-examination, the following exchange occurred:

Defense Counsel: [D]id [Pulcifer] deny having touched [the victim]?

Pulcifer’s Mother: Yes, he did.

Defense Counsel: Okay. Did you ever make any statements to law enforcement in regard to [Pulcifer's] credibility?

Pulcifer's Mother: Yes, I did.

Defense Counsel: Okay. And—and what—what did you tell them?

Pulcifer's Mother: I said that [Pulcifer is] not always honest.

Defense Counsel: Okay. And why would you say that?

Pulcifer's Mother: Because he's not always been honest but I really believe him that he didn't touch her. I talked with him at length multiple times.

Thus, defense counsel asked Pulcifer's mother what she told law enforcement concerning Pulcifer's credibility. Although it is not entirely clear, it appears that defense counsel asked Pulcifer's mother what she told a detective regarding Pulcifer's credibility because she testified on direct examination that she had discussed Pulcifer's credibility with law enforcement, but did not explain exactly what she told law enforcement. It is unclear what response defense counsel was anticipating from Pulcifer's mother because the statements that she made to law enforcement are not contained in the record. Nonetheless, even if defense counsel acted unreasonably, we fail to see how it affected the outcome of the lower court proceedings given that Pulcifer's mother testified that she "really believe[d]" that Pulcifer was being honest when he indicated to her that he had not touched the victim. Thus, defense counsel's questioning provided evidence to the jury that Pulcifer's mother had discussed the crimes with Pulcifer multiple times and that she believed that he had not sexually assaulted the victim. We therefore conclude that counsel was not ineffective in this respect.

Pulcifer also cites *People v Douglas* on appeal and argues that all of defense counsel's errors resulted in prejudice that merits a new trial. However, we conclude that the facts in *Douglas* are distinguishable from the facts herein. In *Douglas*, 496 Mich at 586-588, our Supreme Court concluded that defense counsel's failure to object to three witnesses' vouching testimony was outcome determinative. However, in *Douglas*, the case was "a pure credibility contest" between the victim, who was three years old when the alleged sexual assaults occurred, and the defendant because "there were no third-party witnesses . . . , nor any physical evidence of it." *Id.* at 561, 580. That is not the case here because, as already discussed, KT and MP generally corroborated the victim's testimony regarding the circumstances surrounding the crimes, which increased the victim's credibility. Importantly, KT testified that Pulcifer had encouraged the victim to consume alcohol even after she was visibly intoxicated. KT also testified that, despite promising that he would bring the victim upstairs to join KT and MP, Pulcifer instead left the house with the victim. Importantly, KT and MP both testified that they found Pulcifer and the victim alone in the shed together. MP indicated that the victim was "[t]rying to sit on" Pulcifer's lap. KT testified that she observed the victim sitting on Pulcifer's lap and that Pulcifer's arms were "wrapped around" the victim. KT's reaction to seeing this was to pull the victim off of Pulcifer and out of the shed. Significantly, KT, MP, and the victim all provided testimony that indicated that Pulcifer wanted to keep the events that occurred that evening a secret. Specifically, the victim and MP both testified that Pulcifer said, "Don't tell anyone," and KT testified that Pulcifer made them promise

to say that they never saw him that night. Testimony also supports that Pulcifer asked KT if the victim had “said anything yet” after they returned to MP’s house.

In addition, unlike the three witnesses in *Douglas*, 496 Mich at 586, MP and Pulcifer’s mother are not “figures of apparent authority and impartiality.” Rather, MP testified that she was a 14-year-old high school student and that she was Pulcifer’s sister. Additionally, the jury was well aware that Pulcifer’s mother was his mother. In addition, in *Douglas*, the witnesses testified favorably regarding the victim’s credibility. *Id.* at 583. That is not the case here. Although MP agreed that KT was a “truth-teller,” MP did not testify that she thought that the victim was being truthful at the time of trial. Rather, as discussed previously, MP’s testimony implied that she no longer believed that the victim was truthful. Additionally, as already stated, Pulcifer’s mother testified that she believed that Pulcifer had not sexually assaulted the victim. Moreover, the trial court specifically instructed the jury that it was responsible for making witness credibility determinations. “Jurors are presumed to follow instructions, and instructions are presumed to cure most errors.” *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008).

Affirmed.

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