STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 8, 2011
v	No. 294673 Washtenaw Circuit Court
THOMAS JOSEPH MCGLYNN, Defendant-Appellant.	LC No. 07-002090-FH

Before: TALBOT, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

A jury convicted defendant of four counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b), and the trial court sentenced him to a prison term of 29 months to 15 years for each conviction. Defendant appeals as of right. We affirm.

Defendant first contends that his trial counsel deprived him of the effective assistance of counsel. Defendant presents several arguments in support of this contention. Whether defendant was denied the effective assistance of counsel is a question of constitutional law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact after an evidentiary hearing for clear error. *Id*. To prevail on his claim of ineffective assistance of counsel, defendant must meet the two-part test stated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 US at 687-688. Courts strongly presume that counsel rendered adequate assistance. *Id*. at 690. Second, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id*. at 694.

Defendant first argues that counsel was constitutionally ineffective because counsel (1) failed to obtain the DVD recording of Doctor Kathleen Faller's interview of the complainant and (2) failed to remedy plaintiff's nondisclosure of the DVD recording. We disagree. Defendant has not overcome the strong presumption that counsel rendered effective assistance. *Id*. at 690.

Counsel's testimony at the *Ginther*[1] hearing illustrates that the decision not to obtain the DVD recording and present it as evidence at the time of Faller's testimony was a matter of trial strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Counsel testified that his ultimate trial strategy was to attack the complainant's credibility. Counsel stated that he chose not to pursue the DVD recording because he already had four inconsistent accounts of the complainant's allegations. Counsel also stated that he did not want to adjourn trial to obtain the DVD and later give Faller an opportunity to expand her testimony. Furthermore, defendant has not established a reasonable probability that the result of his trial would have been different but for counsel's alleged error and the prosecution's nondisclosure.[2] *Strickland*, 466 US at 694. Unlike the situation in *People v Armstrong*, ___ Mich ___; ___ NW2d ___ (2011),[3] the DVD in this case did not contradict unequivocal testimony from the complainant. Although the complainant did not tell Faller that defendant touched her pubic hair, touched her vagina over her pants, and massaged around her nipple, the complainant's statements to Faller were not inconsistent with the complainant's testimony at trial simply because the complainant's

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

[2] We note and reject defendant's argument that there is a reasonable probability that the result of his trial would have been different but for counsel's alleged errors because the jury submitted two questions to the trial court during deliberations that confirmed that the jury had doubts about the strength of the prosecution's case. The first question asked, "What opportunities does the accuser/victim have after the first disclosure to stop the legal process leading up to the trial. For example, should she decide that she doesn't want to proceed or she was lying, and wishes to recant?" And, the second question asked, "Are there penalties for an accuser should she was [sic] to stop the process of the trial or the process leading up to trial[?]" At most, the jury's questions illustrate that the jury evaluated the complainant's credibility and sought information not in evidence to make its evaluation. The questions did not establish that the jury had doubts about the strength of the prosecution's case.

[3] In *Armstrong*, the prosecution elicited unequivocal testimony from the complainant that she never contacted defendant after a second alleged rape occurred. The complainant testified that she wanted "no further contact with the man who had so brutally violated her." *Armstrong*, slip op at p 5. Defense counsel then attempted to introduce defendant's cell phone records rebutting the complainant's testimony, but the prosecution objected for lack of a foundation. The trial court sustained the objection, and defense counsel made no further attempt to have the records admitted. During an evidentiary hearing, defense counsel admitted that his failure to pursue introduction of the records "was not a strategic decision, nor did [he] at any time during trial decide that the phone records were not necessary or beneficial to the defense case." *Id*. at slip op p 6. Our Supreme Court held that defense counsel's performance fell below an objective standard of reasonableness, *Id*. at slip op p 8, and that failing to pursue the admission of the cell phone records was not a matter of sound trial strategy. The Court further held that defendant was prejudiced by the defense counsel's failure to pursue the introduction of the cell phone records because "they offered powerful evidence of the complainant's lying to the jury in a case that essentially boiled down to whether the complainant's allegations of rape were true." *Id*. at slip op p 12.

statements at trial were more specific. At trial, the complainant testified that defendant touched her pubic hair, touched her vagina outside of her pants, and massaged around her nipple. And, the video recording of Detective Steve Brylinski's interview with the complainant revealed that the complainant told Brylinski that defendant touched her pubic hair, vagina, and breast. Indeed, the complainant acknowledged at trial that she did not tell Faller "everything."

We reject defendant's assertion that the DVD recording was "highly exculpatory" because the complainant admitted to Faller that she intentionally injured her shoulder; defendant greatly exaggerates the value of the complainant's statement to Faller. To the extent that the complainant's statement was probative of the complainant's veracity, the evidence was cumulative. Contrary to defendant's assertion, the complainant's statement does not contradict the prosecution's claim that defendant massaged the complainant's shoulder as an excuse to sexually abuse her. The complainant's shoulder hurt regardless of the cause of the pain. And, it is clear that the complainant's breast did not hurt when defendant massaged her. Finally, when read in context, the complainant's statement to Faller arguably strengthens the prosecution's case. The complainant told Faller that she hit her shoulder after defendant "would leave [my room] after doing what he did." The complainant stated that hitting her shoulder was her way of inflicting pain because she was "mad," "hurt," and "confused" by defendant's actions and her mother's absence when defendant would come into the complainant's room and lock the door.

Defendant next argues that counsel was ineffective by not objecting to the complainant's "hearsay" testimony regarding her out-of-court discussions with Brylinski and Doctors Starkman and Sorvino. Defendant also argues that counsel should not have stipulated to the admission of the DVD recording of Brylinski's interview of the complainant. Defendant contends that the prosecutor's use of the complainant's prior statements to the doctors and Brylinski was improper impeachment evidence that eliminated the "sting" from defendant's cross-examination of the complainant. According to defendant, "[i]t is improper for the prosecution to elicit testimony of prior inconsistent statements on direct examination in an attempt to 'impeach' the witness." We disagree and conclude that counsel was not ineffective for failing to object to the complainant's testimony about her statements to the doctors and Brylinski; defendant has not overcome the presumption that counsel rendered effective assistance. *Id*. at 690.

With respect to the complainant's testimony about her statements to the doctors, counsel's testimony at the *Ginther* hearing illustrates that the decision not to object to the testimony was a matter of sound trial strategy. *People v Sharbnow*, 174 Mich App 94, 106; 435 NW2d 772 (1989). Counsel testified that he did not object to the complainant's testimony because he "was attempting to give [the complainant] the opportunity to create another inconsistent story" to attack on cross-examination. Furthermore, we find that the complainant's out-of-court statements to the doctors were admissible as statements for purposes of medical treatment under MRE 803(4) and not hearsay as defendant claims. We also find that the decision not to object to the complainant's testimony regarding her disclosure to Brylinski was a matter of sound trial strategy. *Id*. Counsel testified that he wanted to use the complainant's interview with Brylinski to attack both the complainant's credibility and Brylinski's investigation of the complainant's allegations. Moreover, the complainant's trial testimony that she told Brylinski "what had been happening" was not hearsay as defendant claims; rather, the prosecutor merely established that the complainant made a statement to Brylinski. MRE 801; see also *People v*

Garcia, 31 Mich App 447, 455; 187 NW2d 711 (1971) (out-of-court statement admissible only to show that a statement was made).

While we conclude that the complainant's statements to Brylinski in the DVD interview describing defendant's sexual conduct were hearsay, we nonetheless find that defendant has not established that counsel's stipulation to the admission of the DVD was unreasonable under prevailing professional norms. *Strickland*, 466 US at 687-688. "Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, and this Court will not substitute its judgment for that of counsel regarding matters of trial strategy." *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). As previously discussed, counsel wanted to use the interview to attack the complainant's credibility and Brylinski's investigation of the complainant's allegations. Moreover, counsel believed that the complainant's demeanor during the interview was inconsistent with a criminal sexual conduct complainant. Counsel's closing argument reflected this strategy. Given counsel's stated strategy and his use of the Brylinski interview at trial, counsel's stipulation to the admission of the interview into was strategic and not professionally unreasonable. *Id*.

We reject defendant's argument that the prosecutor improperly impeached the complainant during direct examination. Nothing in the record suggests that the prosecutor used the DVD recording and the complainant's out-of-court disclosures to the doctors and Brylinski to impeach the complainant. The record illustrates that the prosecutor used the testimony and the DVD recording to support the complainant's disclosure of sexual abuse. While defendant argues that the purpose of direct examination is to elicit what a witness knows, the prosecutor's direct examination of the complainant elicited what the complainant knew: how, when, and what she disclosed. Moreover, defendant's reliance on *People v Kilbourn*, 454 Mich 677; 563 NW2d 669 (1997), is misplaced. *Kilbourn* does not support defendant's assertion that "[i]t is proper to refuse to allow the prosecution to elicit in direct examination prior inconsistent statements." Furthermore, *Kilbourn* is distinguishable from the present case. In contrast to *Kilbourn*, the prosecutor here did not attempt to impeach the complainant through the testimony of other witnesses. *Kilbourn*, 454 Mich at 680-681. And, as previously discussed, the record does not illustrate that the prosecutor attempted to impeach the complainant through the use of prior inconsistent statements. Accordingly, defense counsel was not ineffective for failing to make futile objections on the basis that the prosecutor improperly impeached the complainant during direct examination. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004). But, even assuming that counsel was ineffective for failing to object to the complainant's testimony and for stipulating to the admission of the DVD recording, defendant cannot establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 US at 694. The complainant's testimony regarding her statements to the doctors and Brylinski were confirmed by the testimony of other witnesses: Starkman, Marla Lemcke-Duebecke, and Brylinski. See *People v Hill*, 257 Mich App 126, 140; 667 NW2d 78 (2003) ("An erroneous admission of hearsay evidence can be rendered harmless error where corroborated by other competent testimony.").

Next, defendant argues that counsel deprived him of the effective assistance of counsel by failing to object to several instances of alleged prosecutorial misconduct. Defendant first argues that counsel should have objected when the prosecutor argued in the presence of the jury that counsel "attacked" witnesses. We reject this argument. As a general rule, a prosecutor

cannot personally attack defense counsel. *People v Likine*, 288 Mich App 648, 659; 794 NW2d 85 (2010). However, while the prosecutor's choice of words in this case may have been poor, the prosecutor did not personally attack defense counsel. *Id*. Rather, counsel used the word "attack" to characterize defense counsel's method of questioning the complainant and her father. A prosecutor has great latitude when arguing at trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010). As our Supreme Court stated, "[c]riminal trials are not basket luncheons, and we seem faintly to recall that in our experience opposing lawyers rarely if ever pelted each other with rose petals." *People v Allen*, 351 Mich 535, 543; 88 NW2d 433 (1958). Counsel was not deficient on this basis. *Strickland*, 466 US at 687-688.

Next, defendant argues that the prosecutor improperly suggested that defendant had to present a defense and that the prosecutor used the prestige of his office to prejudice defendant during his opening statement. A prosecutor may not attempt to shift the burden of proof onto the defendant. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). A prosecutor may also not place the prestige of his office behind a witness or convey to the jury that he has special knowledge of a witness's truthfulness. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995); *People v Bahoda*, 448 Mich 261, 277; 531 NW2d 659 (1995). In the present case, the prosecutor stated the following during his opening statement:

> So we're not going to have a whole lot of witnesses. You're going to hear from [the complainant]. You're going to hear from her father. You're going to hear from her cousin. Possibly somebody else.
>
> And make no mistake about it the defense is going to try and convince you that she's lying or that there's something about the allegations that she's made that are not true. Can't you believe that she is lying. And you're going to have to decide her credibility.

The prosecutor did not attempt to shift the burden of proof onto defendant through this statement. *Abraham*, 256 Mich App at 273. And, the prosecutor did not place the prestige of his office behind the complainant or imply that he had special knowledge of the complainant's veracity. *Reed*, 449 Mich at 398; *Bahoda*, 448 Mich at 277. Rather, the prosecutor merely forecasted the testimony that he anticipated at trial. See *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991) ("Opening argument is the appropriate time to state the facts to be proven at trial."). Indeed, the prosecutor's opening statement anticipated the proofs actually offered by defendant: testimony from the defendant and the complainant's mother that the complainant was untruthful in the past and with respect to her allegations of criminal sexual conduct. See *People v Anderson*, 79 Mich App 174, 175; 261 NW2d 55 (1977) (prosecutor's characterization during his opening statement of the defendant's relations with the complainant as prostitution were not improper where the prosecutor's statement only anticipated what the proofs would and did illustrate).

Defendant also argues that the prosecutor used the prestige of his office to vouch for the complainant's credibility during the following exchange between the prosecutor and the complainant during direct examination:

Q. Now you testified once before at preliminary examination and you were asked some questions about when [the snow plowing incident] happened.

A. Right.

Q. Do you recall that?

A. Yes.

* * *

Q. Were you trying to be as truthful and accurate throughout that entire testimony that you gave before just like you have been today?

A. Yes.

The prosecutor's question assumed that the complainant was testifying truthfully at trial; thus, the prosecutor implied that he had special knowledge of the complainant's truthfulness. *Bahoda*, 448 Mich at 277. Counsel was deficient for not objecting to the prosecutor's question. *Strickland*, 466 US at 687-688. Nevertheless, defendant has not established a reasonable probability that, but for counsel's error, the result of the trial would have been different. *Id*. at 694. During its preliminary instructions to the jury, the trial court instructed the jury as follows: "The questions the lawyers ask the witnesses are not evidence. Only the answers are evidence. You should not think that something is true just because one of the lawyers asks questions that assume or suggest that it is." Jurors are presumed to follow their instructions. *People v Waclawski*, 286 Mich App 634, 674; 780 NW2d 321 (2009). Thus, the prosecutor's improper question was not prejudicial. Furthermore, even if counsel had objected to the prosecutor's question and the trial court remedied the error by instructing the jurors to disregard the question, substantial evidence that defendant committed second-degree criminal sexual conduct remained.

Defendant similarly challenges the following exchange between the prosecutor and the complainant during redirect examination:

Q. You've given us a lot of detail about a lot of different things. Have you done your absolute best to tell the truth about everything you've been asked about?

A. Yes.

Q. Have you tried to mislead the Judge or this jury or Mr. Reed or anybody else about anything you've told us here today?

A. No, not at all.

The questioning did not place the prestige of the prosecutor's office behind the complainant or imply that the prosecutor had special knowledge of the complainant's veracity during redirect examination. *Reed*, 449 Mich at 398; *Bahoda*, 448 Mich at 277. The prosecutor simply asked the complainant if she was truthful when she testified. Counsel was not ineffective by failing to object to the questioning.

Next, defendant argues that counsel was ineffective by failing to object when Faller vouched for the complainant's "story." We disagree. While an expert may not vouch for the credibility of a complainant, Faller did not do so in this case. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). Rather, Faller testified about why she wanted to interview the complainant and that she wanted to learn how the complainant felt about defendant being prosecuted. Counsel was not ineffective for failing to make a futile objection. *Thomas*, 260 Mich App at 457.

Next, defendant argues that counsel was ineffective by not objecting to the jury instructions. Specifically, defendant argues that the trial court erred when it did not repeat the second-degree criminal sexual conduct instruction for each of the four counts of criminal sexual conduct. We disagree. Reading the jury instructions as a whole, the trial court properly instructed the jury on all the elements of second-degree criminal sexual conduct that were pertinent to this case. *People v Anstey*, 476 Mich 436, 453; 719 NW2d 579 (2006); *People v Bonham*, 182 Mich App 130, 134; 451 NW2d 530 (1989). The trial court did not err by failing to repeat the criminal sexual conduct instruction for each of the four charges; "[e]rror does not result from the omission of an instruction if the charge as a whole covers the substance of the omitted instruction." *People v Canales*, 243 Mich App 571, 574; 624 NW2d 439 (2000). In this case, the instructions as a whole "cover[ed] the substance of the omitted [criminal sexual conduct] instruction." *Id*. Counsel was not ineffective for failing to make a futile objection. *Thomas*, 260 Mich App at 457.

We reject defendant's contention that he is entitled to a new trial because of cumulative error. In this case, there were not multiple errors to aggregate. The only error during trial was counsel's failure to object to the prosecutor's implication that he had special knowledge of the complainant's veracity. This single error was not "so seriously prejudicial" that it denied defendant a fair trial. *People v McLaughlin*, 258 Mich App 635, 649; 672 NW2d 860 (2003).

Defendant's final contention is that the trial court violated his Sixth Amendment and Due Process rights to a full and fair evidentiary hearing when it refused to take testimony from the complainant's brother, Frank Bigowsky, Megan Bunton, Gwen Burns, Doctor Katherine Okla, Gail Benson, and Carl Clark during the *Ginther* hearing.[4] We review a trial court's decision of whether to admit evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). And, we review constitutional issues de novo. *People v Billings*, 283 Mich App 538, 541; 770 NW2d 893 (2009). The purpose of a *Ginther* hearing is "to determine the adequacy of trial counsel from the facts on the record." *People v Mixon*, 170 Mich App 508,

[4] We note that defendant does not present any argument to explain why the trial court erred by not allowing Bigowsky, Bunton, Clark, or Benson to testify at the *Ginther* hearing. Rather, defendant only presents this Court with argument in his appellate brief with respect to the testimony of Jason, Burns, and Okla. Therefore, defendant has abandoned any argument with respect to the trial court's decision prohibiting the testimony of Bigowsky, Bunton, Clark, and Benson. See *Kelly*, 231 Mich App at 640-641 ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims . . .").

517; 429 NW2d 197 (1988). The defendant and the defendant's trial counsel are necessary witnesses at a *Ginther* hearing. See *People v Mitchell*, 454 Mich 145, 169; 560 NW2d 600 (1997). Under MRE 611(a), a "court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to . . . avoid needless consumption of time . . ." Moreover, MRE 403 provides that a trial court may exclude evidence if its probative value is substantially outweighed by "considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

We conclude that the trial court neither abused its discretion nor violated defendant's constitutional rights when it prohibited the complainant's brother, Burns, and Okla from testifying at the *Ginther* hearing. First, defendant has not provided this Court with any legal authority that supports his contention that he has a constitutional right "to a full and fair evidentiary hearing to present evidence and witnesses to establish facts relevant to . . . [his claim] of ineffective assistance of counsel." Defendant cites *Nevers v Killinger*, 169 F3d 352 (CA 6, 1999), and *Ginther*, 390 Mich at 443, in support of this proposition; however, neither case establishes defendant's claim. Moreover, the trial court in this case allowed the necessary witnesses for the *Ginther* hearing to testify: defendant and defendant's trial counsel. *Mitchell*, 454 Mich at 169. Counsel's testimony at the *Ginther* hearing established that he was aware that both the complainant's brother and the complainant's father's relatives had information that the complainant had been exposed to a sexual environment in her father's home. Thus, testimony from the complainant's brother and Burns regarding this fact would have been cumulative and an unnecessary consumption of time. MRE 403; MRE 611(a); MRE 1101. Counsel's testimony also established that counsel made a strategic decision not to introduce evidence of the complainant's exposure to a sexual environment. The complainant's brother was the only witness counsel could call to testify about the complainant's exposure, and the record suggests that the complainant's brother would have been a problematic witness given his unsavory history and counsel's belief that he would commit perjury. Moreover, counsel did not want defendant to be prejudiced by the appearance of dysfunction in the complainant's family. Finally, counsel did not believe that a sexualized environment defense was significant as Doctor Jolie Brams, defendant's trial expert in sexual abuse and child development, did not confirm that exposure to a sexual environment had "significant forensic value." Thus, the trial court's decision that Okla's testimony was unnecessary did not fall outside the principal range of outcomes as Okla's testimony would not have contributed to the issue of whether counsel made a strategic decision not to advance the sexualized environment defense. MRE 403; MRE 611(a); MRE 1101.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey