STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2012
v	No. 298270 Wayne Circuit Court
KEVIN LEQUENT WILSON, a/k/a KELVIN WILSON, Defendant-Appellant.	LC No. 09-028277-FH

Before: MURPHY, C.J., and HOEKSTRA and MURRAY, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a, for which he was sentenced to five years' probation, with three months to be served in jail. For the reasons stated in this opinion, we affirm.

I. FACTUAL BACKGROUND

Defendant's conviction is the result of an incident involving his 10-year-old daughter. The victim testified that defendant arrived home shortly after midnight in an apparently intoxicated condition. According to the victim, defendant instructed her to take off her clothes and told her that he was going to show her or teach her how to have sex. The victim stated that she became scared and went upstairs, but defendant again called her down and made another statement regarding teaching her about sex. The victim explained that she returned upstairs and was scared, so she climbed out a bedroom window and went to a neighbor's house where she called 911 to report what happened. The 911 recording was played for the jury and a transcript of the call was admitted into evidence. Defense counsel did not object to the portion of the 911 recording containing the victim's statements, but he objected to the portion of the recording that included the 911 operator's conversation with the neighbor, who inquired whether defendant was drinking. Defense counsel argued that the prosecutor failed to establish a foundation to authenticate the neighbor's statements. The trial court overruled the objection.

Defendant testified and denied soliciting the victim for sex. He claimed that when he returned home, he suspected that the victim had been outside associating with boys in the neighborhood well beyond her bedtime. He stated that he asked the victim if she was sexually active with boys in the neighborhood, to which the victim responded "not yet." According to

defendant, when he told the victim to go upstairs and take off her clothes, he meant that he wanted her to change into her pajamas. Defendant also claimed that he told the victim: "Do you want me to teach you about sex you come to me," meaning that he wanted her to learn about sexual matters from him, and not from her peers in the neighborhood. Defendant also theorized that the victim may have falsely accused him of solicitation because she resented his strict discipline.

After the jury convicted defendant of accosting, enticing, or soliciting a child for immoral purposes, defendant filed a motion for a new trial or a *Ginther*[1] hearing. Defendant argued that defense counsel was ineffective for failing to call witnesses other than defendant, for failing to object to the admissibility of the 911 recording, for advising defendant to waive a preliminary examination, and for failing to adequately cross-examine and impeach the witness. The trial court granted defendant's motion, and defense counsel and defendant's wife testified at the hearing. After the hearing, the trial court found that defense counsel was not constitutionally ineffective.

II. SUFFICIENCY OF THE EVIDENCE

Defendant argues that the evidence at trial was not sufficient to support his conviction. "This Court reviews de novo claims of insufficient evidence, viewing the evidence in the light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Bennett*, 290 Mich App 465, 472; 802 NW2d 627 (2010). The elements of the crime may be proved by circumstantial evidence and reasonable inferences arising from the evidence. *Id.*

Defendant was convicted of violating MCL 750.145a, which provides:

> A person who accosts, entices, or solicits a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age with the intent to induce or force that child or individual to commit an immoral act, to submit to an act of sexual intercourse or an act of gross indecency, or to any other act of depravity or delinquency, or who encourages a child less than 16 years of age, regardless of whether the person knows the individual is a child or knows the actual age of the child, or an individual whom he or she believes is a child less than 16 years of age to engage in any of those acts is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $4,000.00, or both.

In *People v Kowalski*, 489 Mich 488, 499; 803 NW2d 200 (2011), our Supreme Court explained that a defendant may be convicted of accosting, enticing, or soliciting a child for an immoral purpose if the prosecution proves beyond a reasonable doubt either "that the defendant (1) accosted, enticed, or solicited (2) a child . . . (3) with the intent to induce or force that child to

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

commit (4) a proscribed act[,]" or alternatively, "that the defendant (1) encouraged (2) a child . . . (3) to commit (4) a proscribed act."

In this case, the 10-year-old victim testified that defendant instructed her to remove her clothes and told her that he was going to show her how to have sex. The victim explained that she was scared and left the room to go upstairs, but defendant called her down and again made a statement regarding teaching her about sex. The victim stated that she again went upstairs and, because she was scared, she climbed out a bedroom window and went to a neighbor's house where she called 911 to report what had happened. Viewed in a light most favorable to the prosecution, the victim's testimony was sufficient to enable the jury to find beyond a reasonable doubt that defendant accosted, enticed, or solicited the child victim with the intent to induce or force her to submit to sexual activity.

Although defendant denied making the statements attributed to him by the victim, and contends that the victim either misinterpreted or was confused about what he said, or was motivated to fabricate the allegations of inappropriate conduct, "[t]his Court will not interfere with the trier of fact's role in determining the weight of the evidence or the credibility of witnesses." *People v Kanaan*, 278 Mich App 594, 619; 751 NW2d 57 (2008). We also reject defendant's argument that his intoxication prevented him from forming the requisite intent to commit the offense. Voluntary intoxication is generally not a defense to a criminal charge. MCL 768.37. Voluntary intoxication is a defense under specific narrow circumstances; however, defendant does not argue those circumstances are applicable in this case. Regardless, defendant's own testimony describing his conduct and his thinking on the night of the offense negates any claim that he was not capable of forming the requisite intent to commit the crime.

Accordingly, we conclude that the evidence was sufficient to support defendant's conviction of accosting, enticing, or soliciting a child for immoral purposes.

III. ADMISSIBILITY OF THE VICTIM'S 911 CALL

Defendant argues that admission of the victim's 911 call denied him a fair trial because the 911 call constituted hearsay and a violation of his Sixth Amendment right to confrontation.

To preserve an evidentiary issue, a party claiming error must make a timely objection, stating the specific ground for the objection unless the ground is apparent from the context. MRE 103(a)(1); *People v Bauder*, 269 Mich App 174, 177-178; 712 NW2d 506 (2005). At trial, defense counsel did not object to the admissibility of the conversation between the victim and the 911 operator, and did not raise an objection to any part of the recording based on hearsay or the Confrontation Clause. Consequently, we review defendant's claims for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999). The defendant must show that an error occurred, the error was plain, and the plain error affected substantial rights. *Id.* Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *Id.* at 763.

Defendant first argues that the 911 recording, in its entirety, was inadmissible hearsay. "Hearsay" is defined as "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);

People v Gursky, 486 Mich 596, 606; 786 NW2d 579 (2010). Hearsay is not admissible except as provided by the rules of evidence. *Id.*; MRE 802.

To the extent that the victim's statements during her 911 call were hearsay because they were offered for their truth, we are not persuaded that they were clearly inadmissible. Plaintiff argues that the statements were admissible under the excited utterance exception to the hearsay rule, MRE 803(2), which permits the admission of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The record does not clearly indicate that the victim's statements would not have qualified for admission under this rule had defendant objected. According to the evidence at trial, the 911 call was made shortly after the victim climbed through a house window after midnight and went to a neighbor's house because she was scared. The officer who responded to the call testified that the victim appeared stressed, scared, and panicked when he arrived. Because the victim's statements to the 911 operator related to a startling event, and there is evidence to indicate that she was still under the stress of excitement caused by that event when she made the 911 call, defendant has failed to establish that admission of her statements during that call constituted a clear or obvious evidentiary error. Further, although the 911 recording also contained out-of-court statements by the 911 operator and the victim's neighbor, those statements were not offered for their truth and, therefore, they were not hearsay. Accordingly, defendant has not established a plain evidentiary error.

Defendant also argues that admission of the 911 recording violated his constitutional right to confront witnesses. The Confrontation Clause, US Const, Am VI, states that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him[.]" The Michigan Constitution also guarantees this right. Const 1963, art 1, § 20. "The Confrontation Clause of the Sixth Amendment bars the admission of 'testimonial' statements of a witness who did not appear at trial, unless the witness was unavailable to testify and the defendant had a prior opportunity to cross-examine the witness." *People v Walker (On Remand)*, 273 Mich App 56, 60-61; 728 NW2d 902 (2006), citing *Crawford v Washington*, 541 US 36, 59, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

The 911 call included statements made by the victim, the 911 operator, and defendant's neighbor. There was no Confrontation Clause violation in regard to the admission of the victim's statements because even assuming the statements were testimonial, the victim testified at trial and was available for cross-examination. See *Crawford*, 541 US at 59 n 9 ("when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of [her] prior testimonial statements").

The admission of the 911 operator's statements and the neighbor's statements during the 911 call also did not violate defendant's right of confrontation because those statements were not offered to prove the truth of the matters stated. "[T]he Confrontation Clause does not bar the use of out-of-court testimonial statements for purposes other than establishing the truth of the matter asserted." *People v Chambers*, 277 Mich App 1, 14-15; 742 NW2d 610 (2007). Accordingly, defendant has failed to demonstrate that admission of the 911 call constituted plain error affecting his substantial rights.

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that he was denied the effective assistance of counsel at trial.

Whether defense counsel was ineffective presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review findings of fact for clear error, and questions of constitutional law de novo. *Id.*

"To prove a claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below objective standards of reasonableness and that, but for counsel's error, there is a reasonable probability that the result of the proceedings would have been different." *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). A defendant claiming ineffective assistance of counsel must overcome the strong presumption that defense counsel's conduct was sound trial strategy. *LeBlanc*, 465 Mich at 579. "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "A particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *People v Matuszak*, 263 Mich App 42, 61; 687 NW2d 342 (2004).

Defendant first argues that defense counsel was ineffective for failing to object to the entire recording of the 911 call on hearsay and Confrontation Clause grounds. Even assuming that defense counsel's failure to object was objectively unreasonable, defendant has not demonstrated that but for counsel's failure the result of the proceedings would have been different. *Swain*, 288 Mich App at 643. As discussed in section III, neither ground provided a clear basis for excluding the evidence; accordingly, there is not a reasonable probability that any objection would have changed the outcome of the trial. Therefore, defendant has failed to demonstrate counsel was ineffective. *Id.*

Defendant also argues that counsel was ineffective for failing to investigate and call witnesses other than defendant. An attorney's decision whether to call a witness is a matter of trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Generally, defense counsel's failure to call a witness will constitute ineffective assistance of counsel only when the defendant is deprived of a substantial defense. *Id.*

The record does not disclose that any of the witnesses suggested by defendant could have provided him with a substantial defense. The victim and defendant both testified that no one else was present during the incident in question. At a post-trial *Ginther* hearing, defendant's wife testified that she was in the house at the time, but did not hear the exchange between defendant and the victim. Defendant suggests that his wife could have testified that the victim's demeanor on the day after the offense was normal. We are not persuaded that such testimony would have been significant; particularly considering the likelihood that defendant's wife would have been perceived as biased in favor of defendant, and the existence of evidence indicating that the victim did not have a good relationship with defendant's wife. Defendant has not overcome the presumption that defense counsel exercised sound trial strategy by determining that any testimony defendant's wife provided would have had minimal value where she had no knowledge of the event in question, and was likely to be perceived as biased in favor of defendant and against the victim. There is no record evidence of how any other witness might have testified and, therefore, no basis for concluding that defense counsel's failure to call any

other witness deprived defendant of a substantial defense. Consequently, we conclude that defendant has not demonstrated defense counsel was ineffective. *Swain*, 288 Mich App at 643.

Defendant also contends that defense counsel was ineffective for failing to adequately cross-examine the victim. The record indicates that defense counsel's cross-examination highlighted potential problems with the victim's testimony, including her resentment of defendant's house rules, her lack of sexual knowledge, defendant's use of corporal punishment, the victim's exposure to a television episode of *Law and Order* immediately before the incident (which counsel suggested may have inspired her to fabricate her allegations), and her admission that defendant was a good father before the incident. Defense counsel explained at the *Ginther* hearing that his cross-examination strategy "involved many nuanced considerations," and he tried to avoid giving the victim an opportunity to give unexpected answers. In light of this evidence, defendant has not overcome the presumption that counsel's cross-examination strategy was objectively sound and reasonable.

Defendant also argues that defense counsel was ineffective for advising him to waive a preliminary examination. The record clearly discloses that this was a matter of trial strategy. Defense counsel explained at the *Ginther* hearing that he weighed the inevitable likelihood that a preliminary examination would lead to a bindover and the potential minimal benefit of creating a record of the victim's testimony for possible impeachment use at trial against the risk that the victim's testimony could lead to a more serious charge, given that there was information in a police report that defendant had touched the victim, and the potential benefit to the prosecution by providing a preview of his cross-examination strategy. In addition, defense counsel explained that defendant advised him that he believed the victim's allegations may have been influenced by a custody dispute involving her mother or by a neighbor, and that the victim was likely to recant her allegations "once the dust settled." Considering these circumstances, defendant has failed to overcome the presumption that defense counsel's recommendation to waive the preliminary examination was sound trial strategy. *LeBlanc*, 465 Mich at 579.

Accordingly, defendant has not established that he was denied the effective assistance of counsel.

Affirmed.

/s/ William B. Murphy
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray