STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 27, 2011
v	No. 298747 Kalamazoo Circuit Court
LIBORIO CHAVEZ ALBALLAR, Defendant-Appellant.	LC No. 2009-002028-FH

Before: O'CONNELL, P.J., and METER and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions following a bench trial of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c. Defendant's convictions arose from his sexual touching of B.W. and J.W., both under 13 years old. The trial court sentenced defendant to two concurrent terms of 54 months to 15 years' imprisonment. We affirm.

Defendant first argues that there was insufficient evidence to support all the elements of the crimes because the testimony of a witness who established defendant's age was stricken from the record.[1] He therefore argues that there was insufficient evidence to establish that he was age 17 or older at the time of the offenses.

Defendant misrepresents the law concerning CSC II. That defendant was age 17 or older was not an *element* of this offense, see MCL 750.520c, but rather a sentence enhancement. Indeed, MCL 750.520n(1) states: "A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring . . . ." MCL 750.520c(2)(b) states: "In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under section 520n if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age."

[1] The trial court struck the testimony because of the witness's violation of a sequestration order.

At any rate, the record was sufficient to establish beyond a reasonable doubt that defendant was age 17 or older at the time of the offenses.[2] A witness testified that defendant and her mother had been live-in partners for 14 years. In addition, a detective indicated that defendant had a warrant out for his arrest in California in 1996. The trial court was entitled to rely on reasonable inferences drawn from circumstantial evidence. See *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005). No error is apparent.

Defendant next argues that the prosecutor improperly relied on leading questions during the testimony of B.W.[3] We review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Claims of prosecutorial misconduct are reviewed on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). When reviewing a prosecutorial misconduct claim, "this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Avant*, 235 Mich App 499, 508; 597 NW2d 864 (1999).

In *People v Kosters*, 175 Mich App 748, 756; 438 NW2d 651 (1989), this Court held that it is "within the trial judge's discretion to allow the prosecutor a fair amount of leeway in asking questions of young children called in his case-in-chief." There, the prosecutor used leading questions to obtain the testimony of the defendant's five-year old son to establish the elements of first-degree criminal sexual conduct. *Id*. at 751. This Court cited former MRE 611(c) (now represented in MRE 611(d)(1)),[4] and stated, "[t]he prosecutor's questions were only leading to the extent necessary to develop the witness's testimony in light of his age." *Kosters*, 175 Mich App at 756.

A young child will inevitably require more leading than an adult to establish his or her testimony. The courtroom can easily make a child uneasy and nervous. Under *Kosters*, MRE 611 cannot be read to prevent a prosecutor from establishing his or her case-in-chief on account of the age of the witness. More recently, in *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001), this Court rejected a prosecutorial misconduct claim where the 13-year-old stepdaughter (and victim) of the defendant was asked leading questions during direct examination in a first-degree criminal sexual conduct case. The Court expressed the opinion that such leading questions were needed to establish the victim's testimony given her age. *Id*.

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[2] We note that the trial court specifically found that defendant was over the age of 17 at the time of the offenses, and it sentenced defendant to lifetime electronic monitoring.

[3] Defendant's question presented for appeal refers to "child witnesses," but his argument is focused on B.W.

[4] MRE 611(d)(1) provides: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony."

We conclude that defendant was not denied a fair trial when the prosecutor asked leading questions of B.W. Like in *Kosters* and *Watson*, B.W. was a child victim asked to take the stand in a criminal sexual conduct case. This Court noted in *Kosters* that inconsistency and fuzzy memory evident in a child victim's testimony are normal and do not necessarily reflect on credibility. *Kosters*, 175 Mich App at 751. It follows that in order for the prosecutor to establish her case at trial, some leading questions were required to keep B.W. focused on answering the correct questions.

Defendant also argues that his counsel's failure to object to the leading questions and notice and point out the contradictions in B.W.'s testimony at the preliminary examination compared to her testimony at trial is sufficient to establish ineffective assistance of counsel.

> To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Defendant must further demonstrate a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. [*People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001) (citations omitted; emphasis removed).]

Defendant has not met this high standard. Indeed, because the prosecutor's leading questions were permissible under MRE 611(d)(1) and this Court's precedent, objections to them would not have changed the outcome of the proceedings. Further, the trial court was within its discretion to credit parts of B.W.'s testimony but not others, and in fact it did so. Objecting to inconsistencies would not have changed the trial court's ability to act as the sole judge of credibility, and we cannot conclude that any inaction on the part of counsel affected the outcome of the proceedings. A new trial is not warranted.

Defendant lastly argues that he did not properly waive his right to a jury trial because he was not adequately advised that he could actually select the impartial jurors, rather than have them assigned to his case. He further claims that the prosecution indicated that it intended to use allegations that defendant had assaulted other children as evidence against him, and, because this evidence never materialized, defendant's waiver of trial by jury was not knowingly made. Defendant did not raise these issues in the trial court, and we therefore review this issue under the plain-error standard. *Carines*, 460 Mich at 763, 774.[5]

In order for a waiver of trial by jury to be valid, it must be knowingly and voluntarily made. *People v Cook*, 285 Mich App 420, 422; 776 NW2d 164 (2009). If a trial court complies with the requirements in MCR 6.402(B)[6] and MCL 763.3,[7] a presumption is established that the

[5] We would find no basis to reverse even if we deemed this issue preserved.

[6] MCR 6.402(B) reads:

defendant's waiver was knowingly, intelligently, and voluntarily made. See, generally, *People v Mosly*, 259 Mich App 90, 96; 672 NW2d 897 (2003). Here, the trial court complied with both provisions. The court explicitly informed defendant that he possessed a constitutional right to trial by jury. Defendant stated that he understood that a jury trial required a unanimous verdict. Defendant also told the trial court that he had consulted with his lawyer and had not been coerced into giving up his right to trial by jury. This procedure, done in open court, was sufficient to satisfy the plain language of MCR 6.402(B). Additionally, defendant confirmed that his signature appeared on the waiver form pursuant to MCL 763.3. Therefore, a presumption was established that defendant waived his right to a jury trial knowingly and voluntarily.

Defendant cannot overcome this presumption based on his appellate arguments. Indeed, a trial court is not required to go into detail explaining the jury-selection method before a jury-trial waiver will be deemed valid. For example, in *People v Shields*, 200 Mich App 554, 560; 504 NW2d 711 (1993), this Court considered the following exchange on the record:

> *The Court:* And Mr. Shields, you understand you have a Constitutional right to a trial by a jury?

> **Waiver and Record Requirements.** Before accepting a waiver, the court must advise the defendant in open court of the constitutional right to trial by jury. The court must also ascertain, by addressing the defendant personally, that the defendant understands the right and that the defendant voluntarily chooses to give up that right and to be tried by the court. A verbatim record must be made of the waiver proceeding.

[7] MCL 763.3 reads:

> (1) In all criminal cases arising in the courts of this state the defendant may, with the consent of the prosecutor and approval by the court, waive a determination of the facts by a jury and elect to be tried before the court without a jury. Except in cases of minor offenses, the waiver and election by a defendant shall be in writing signed by the defendant and filed in the case and made a part of the record. The waiver and election shall be entitled in the court and case, and in substance as follows: "I, _____, defendant in the above case, hereby voluntarily waive and relinquish my right to a trial by jury and elect to be tried by a judge of the court in which the case may be pending. I fully understand that under the laws of this state I have a constitutional right to a trial by jury.
>
> _____
> Signature of defendant.
>
> (2) Except in cases of minor offenses, the waiver of trial by jury shall be made in open court after the defendant has been arraigned and has had opportunity to consult with legal counsel.

Defendant: Yes, Your Honor.

The Court: You don't want a jury though, you want me to try it without a jury?

Defendant: Yes, Your Honor.

The Court: And you know I'll be deciding the facts in the case as well as the law?

Defendant: Yes, Your Honor.

The Court: And that's what you want?

Defendant: Yes, Your Honor.

The Court: And you signed that waiver?

Defendant: Yes.

This Court held the defendant's waiver in *Shields* to be valid. *Id*. at 560-561. The trial court there did not explain the intricacies of the jury-selection process to the defendant, nor ask for the defendant's rationale for waiving his right; it merely confirmed that the defendant knew he had a constitutional right to a trial by jury and that he intended to voluntarily waive that right. Here, the trial court went even further to protect defendant's right to a jury trial by making sure defendant had discussed the matter with his attorney. Defendant stated, through his interpreter, in open court that his preference was for a trial in front of a judge. There was no plain error affecting substantial rights.

Defendant argues alternatively that he did not knowingly or intelligently waive his right to a jury trial because he based his waiver decision on the prosecution's intention to call witnesses, K.S. and M.P., to establish that defendant committed prior sexual offenses against a minor. Defendant argues that because the evidence of these prior acts "never materialized," he is entitled to a new trial. We disagree.

First, defendant cites no authority for his position and has therefore waived his argument. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). In any case, defendant's allegations are disingenuous. The prosecution did attempt to show during the trial that defendant had previously assaulted K.S. and M.P. when they were minors.[8] Thus, defendant's decision to

[8] The prosecutor called a rebuttal witness who testified that K.S. and M.P. had made allegations that defendant had touched them. This occurred after K.S. and M.P. denied the allegations during the main prosecution case.

waive his right to a jury trial was not based on an "erroneous factual basis," as defendant argues. Reversal is unwarranted.

Affirmed.

/s/ Peter D. O'Connell
/s/ Patrick M. Meter
/s/ Jane M. Beckering