STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2012
v	No. 302348 Kalamazoo Circuit Court
DAVID FRANKLIN MCNEES, JR., Defendant-Appellant.	LC No. 2010-001165-FC

Before: RONAYNE KRAUSE, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b) (victim was at least 13 but less than 16 years of age and defendant was related to the victim). Because expert testimony regarding sexual abuse was properly admitted, defendant was not denied the effective assistance of counsel, his arguments regarding the admission of other acts evidence under MCL 768.27a lack merit, and the prosecutor did not commit misconduct, we affirm.

This case stems from defendant's repeated sexual assault of his stepdaughter, "AJ," who was 15 years old at the time of trial. Defendant first argues that he was denied his right to a fair trial and to have the fact-finder determine his guilt or innocence when the prosecutor's child sexual abuse expert, Connie Black-Pond, testified regarding the probability that AJ was telling the truth. Because defendant failed to preserve this issue for our review by objecting to the testimony below, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To demonstrate plain error, defendant must show that (1) error occurred, (2) the error was plain, and (3) the plain error affected his substantial rights. *Id.* at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* Defendant bears the burden of demonstrating prejudice. *Id.*

Defendant contends that Black-Pond testified that there was a 95-percent chance that AJ was telling the truth. Defendant mischaracterizes Black-Pond's testimony. Rather than testifying as defendant argues, Black-Pond testified that approximately 95 percent of her patients at the Children's Trauma Assessment Center had been exposed to "threatening events" and that approximately 40 percent had been exposed directly to sexual abuse. She also testified that approximately 95 percent of her private practice child and adult patients had been sexually

abused or suffered physical or emotional abuse. Black-Pond provided this testimony in the context of establishing her qualifications as an expert in sexual abuse. Such testimony did not constitute error, and, contrary to defendant's argument, Black-Pond did not testify that there was a 95-percent chance that AJ was telling the truth.

On redirect examination, after the trial court declared Black-Pond an expert in the assessment and treatment of sexual abuse victims, Black-Pond testified that only two to three percent of children lie about sexual abuse. "[A]n expert witness may not render a legal conclusion regarding whether sexual abuse actually occurred." *People v Peterson*, 450 Mich 349, 365; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). Moreover, "an expert may not vouch for the veracity of a victim" and "may not testify whether the defendant is guilty." *Id.* at 352. Black-Pond's testimony was not improper under the circumstances of this case. During cross-examination, defense counsel asked Black-Pond about a child's motivation to lie about sexual abuse. She responded that most of the research that had been conducted was in the context of divorce and custody cases, and she opined that children who lie are generally coached. On redirect examination, the prosecutor asked her about the percentages of children who lie. Black-Pond responded that, in the context of divorce and custody cases, approximately two to three percent of children might lie. Because the allegations in this case did not arise in the context of a divorce or custody dispute, Black-Pond's testimony was not improper and could not be interpreted as suggesting that there was only a two to three percent chance that AJ was lying about the sexual abuse.

In any event, even if Black-Pond's testimony was erroneously admitted, defendant cannot establish prejudice considering the overwhelming evidence against him. AJ testified regarding numerous, detailed sexual encounters with defendant, and Jeffrey Smith corroborated AJ's testimony, including recounting sexual encounters in which he participated with AJ and defendant. In addition, AJ's friend, "JD," testified that defendant performed oral sex on her and asked her to participate in a sex act involving both defendant and AJ, and defendant's former stepdaughter, "CD," testified that defendant engaged in sexual intercourse with her on numerous occasions when she was approximately AJ's age. Further, the trial court properly instructed the jury with respect to its role in assessing credibility and the limited use of expert testimony. See *Peterson*, 450 Mich at 378. "[J]urors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Thus, defendant has failed to demonstrate plain error affecting his substantial rights.

Defendant next argues that his trial counsel rendered ineffective assistance by failing to object to Black-Pond's testimony. Although defendant filed a motion to remand this case for a *Ginther*[1] hearing, this Court denied the motion,[2] and no hearing was conducted. Accordingly, our review is limited to errors apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

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

[2] *People v McNees*, unpublished order of the Court of Appeals, entered June 8, 2011 (Docket No. 302348).

To prove ineffective assistance of counsel, a defendant must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that the result of the proceeding would have been different but for counsel's alleged error. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). The defendant bears the burden of establishing the factual predicate for his claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). The defendant must also overcome the presumption that counsel's performance constituted sound trial strategy. *People v Dendel*, 481 Mich 114, 125; 748 NW2d 859 (2008), amended 481 Mich 1201 (2008).

With respect to the 95 percent figure previously discussed, defense counsel did not render ineffective assistance because no error occurred. "Counsel is not required to raise meritless or futile objections[.]" *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004). Similarly, counsel was not ineffective for failing to object to Black-Pond's testimony that two to three percent of children lie about sexual abuse. As previously discussed, because that figure pertained to sexual abuse allegations in the context of divorce or custody disputes, it was not particularly relevant to this case. In addition, trial counsel attempted to use the figure to defendant's advantage during closing argument by arguing that if three percent of the 2,500 children that Black-Pond evaluated at the Children's Trauma Assessment Center had lied, that meant that 75 children had lied. Thus, counsel used the figure as a matter of trial strategy to support his argument that AJ was lying. This Court will not "second-guess" matters of trial strategy with the "benefit of hindsight[,]" and "[t]he fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel." *People v Williams*, 240 Mich App 316, 331-332; 614 NW2d 647 (2000). Further, even if counsel's performance fell below an objective standard of reasonableness, defendant has not demonstrated a reasonable probability that the result of the proceeding would have been different if counsel had objected to Black-Pond's testimony.[3] *Frazier*, 478 Mich at 243.

Defendant next challenges the admission of other acts evidence involving JD and CD, his former stepdaughter. Because defendant did not object to the admission of the evidence, our review is limited to plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764. Defendant argues that the admission of this evidence under MCL 768.27a was improper because the statute sets forth a rule of trial procedure that conflicts with MRE 404(b), and, as such, the statute must yield to the court rule on separation of powers grounds. Defendant's argument lacks merit. This Court previously addressed this issue in *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007), and determined that MCL 768.27a is not a purely procedural rule, but rather, is a "substantive rule of evidence because it does not principally regulate the operation or

[3] We reject defendant's argument that a *Ginther* hearing is necessary for this Court to review this issue. As previously stated, this Court denied defendant's motion to remand for a *Ginther* hearing with respect to this claim of error.

administration of the courts." Therefore, this Court held that the statute does not violate separation of powers principles.[4] *Id.* at 620.

Defendant also argues that the admission of CD's testimony under MCL 768.27a denied him a fundamentally fair trial because MCL 768.27a contains no requirement that the trial court balance the prejudicial effect of the evidence against its probative value as required by MRE 403.[5] According to defendant, CD's testimony was "devastating" and amounted to improper propensity evidence, which the prosecutor used to bolster AJ's credibility. This Court has held that, when evidence is admitted under MCL 768.27a, "the court must still employ the balancing test of MRE 403." *People v Brown*, ___ Mich App ___; ___ NW2d ___ (Docket No. 297728, issued October 20, 2011), slip op at 5. Here, because defendant never challenged the admissibility of CD's testimony, the trial court did not employ the balancing test. Nevertheless, defendant cannot demonstrate plain error.

MRE 403 provides, in relevant part, that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice[.]" "A defendant's propensity to commit criminal sexual behavior can be relevant and admissible under the statutory rule to demonstrate the likelihood of the defendant committing criminal sexual behavior toward another minor." *People v Petri*, 279 Mich App 407, 411; 760 NW2d 882 (2008). "Unfair prejudice exists when there is a tendency that the evidence will be given undue or preemptive weight by the jury, or when it would be inequitable to allow use of the evidence." *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). CD's testimony tended to show that it was more probable than not that AJ was telling the truth because defendant engaged in similar conduct with CD when CD was defendant's stepdaughter. Whether AJ was telling the truth had significant probative value given defendant's claim that she fabricated the allegations against him. See *People v Mann*, 288 Mich App 114, 118; 792 NW2d 53 (2010). Thus, defendant has failed to demonstrate that the danger of unfair prejudice substantially outweighed the probative value of CD's testimony.

In his Standard 4 brief on appeal, defendant asserts several claims of ineffective assistance of counsel. Although defendant moved to remand this case for a *Ginther* hearing,

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[4] We note that this issue is currently before our Supreme Court in *People v Watkins*, 489 Mich 863; 795 NW2d 147 (2011), in which the Court directed the parties to address, among other issues, "(1) whether MCL 768.27a conflicts with MRE 404(b) and, if it does, (2) whether the statute prevails over the court rule[.]" The Court has not yet issued a decision in the case.

[5] Our Supreme Court is also currently addressing this issue. In *Watkins*, 489 Mich at 863, and *People v Pullen*, 489 Mich 864; 795 NW2d 147 (2011), our Supreme Court directed the parties to address "whether the omission of any reference to MRE 403 in MCL 768.27a (as compared to MCL 768.27b(1)), while mandating that evidence of other offenses 'is admissible for any purpose for which it is relevant,' would violate a defendant's due process right to a fair trial[.]" Moreover, in *Pullen*, the Court directed the parties to address "whether the Court should rule that evidence of other offenses described in MCL 768.27a is admissible only if it is not otherwise excluded under MRE 403."

because this Court denied his motion[6] and no hearing was held, our review is limited to mistakes apparent on the record. *Jordan*, 275 Mich App at 667.

Defendant first contends that trial counsel failed to properly investigate his case. Specifically, defendant argues that counsel failed to discover that AJ had made similar allegations previously, that AJ wanted defendant out of the house, and that Smith's statement to the police had been tainted by his review of the police reports. "When making a claim of defense counsel's unpreparedness, a defendant is required to show prejudice resulting from this alleged lack of preparation." *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). Further, "[a] defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). Here, defendant has failed to demonstrate prejudice as a result of counsel's alleged unpreparedness, and nothing in the record indicates that counsel failed to present all substantial defenses. "A substantial defense is one that might have made a difference in the outcome of the trial." *Id*. Defense counsel cross-examined AJ, argued that she was not credible, and cross-examined Smith regarding his motivation to testify against defendant. Because defendant cannot demonstrate prejudice and all substantial defenses were presented, this claim of error lacks merit.

Defendant next argues that his counsel was ineffective for failing to move for the admission and in camera inspection of evidence regarding AJ's other false allegations of sexual abuse. "[T]he defendant should be permitted to show that the complainant has made false accusations of rape in the past." *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). Defendant relies principally on alleged prior inconsistent statements contained in Child Protective Services reports. Because the reports are not included in the record, however, and our review is limited to mistakes apparent on the record, *Jordan*, 275 Mich App at 667, they are beyond the scope of our review. Further, nothing in the record suggests that AJ in fact made false accusations of rape previously. Thus, defendant has failed to demonstrate a reasonable probability that the result of the proceeding would have been different but for counsel's alleged error. *Frazier*, 478 Mich at 243.

Defendant next argues that his trial counsel was ineffective for failing to object to inadmissible testimony. Defendant contends that counsel should have objected to his ex-wife's testimony based on the spousal privilege statute, MCL 600.2162. Defendant's argument lacks merit for two reasons. First, the privilege provided by the statute belongs to the testifying spouse and not to the defendant. *Moorer*, 262 Mich App at 76. Here, defendant's ex-wife did not seek to assert the privilege. Second, under MCL 600.2162(3)(c), the privilege does not apply in a prosecution for a crime committed against a child of either or both spouses. Thus, the privilege was inapplicable in this case. "Counsel is not required to raise meritless or futile objections[.]" *Id.*

Defendant also argues that counsel was ineffective for failing to object to JD's testimony admitted pursuant to MCL 768.27a. JD testified that she and defendant "made out" and that he

[6] *People v McNees*, unpublished order of the Court of Appeals, entered September 13, 2011 (Docket No. 302348).

performed oral sex on her. Defendant contends that this testimony was not properly admissible under MCL 768.27a because JD was 17 years old when the act occurred and was beyond age 16, i.e., the age of consent in Michigan. MCL 768.27a provides, in relevant part:

> (1) Notwithstanding section 27, in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. . . .
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> (2) As used in this section:
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> (a) "Listed offense" means that term as defined in section 2 of the sex offenders registration act, 1994 PA 295, MCL 28.722.
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> (b) "Minor" means an individual less than 18 years of age.

First-degree criminal sexual conduct, MCL 750.520b, is a "listed offense" in MCL 28.722. Further, JD was a "minor" within the meaning of MCL 768.27a because she was under age 18 when the conduct occurred. Thus, her testimony was properly admissible under MCL 768.27a. Moreover, even if JD's testimony was not admissible under MCL 768.27a, it would likely have been admissible under MRE 404(b) because JD was a very close friend of AJ, and the conduct demonstrated defendant's scheme, plan, and intent to engage in sexual relations with young women similar in age to AJ. Thus, counsel did not render ineffective assistance by failing to object to JD's testimony regarding her sexual activity with defendant.

Defendant also argues that counsel should have objected to the testimony of his ex-wife, AJ, JD, and Smith on the basis that it was inadmissible hearsay. "'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). The testimony of defendant's ex-wife and JD did not constitute hearsay because defendant made the statements that he now challenges. Under MRE 801(d)(2)(A) a statement is not hearsay if it is offered against a party and is "the party's own statement." In addition, AJ's challenged testimony was not hearsay because it was not offered for the truth of the matter asserted. MRE 801(c). AJ's testimony that defendant had told her that he would leave her mother when AJ turned 18 and marry AJ instead was not admitted for its truth. Rather, the statement was admitted to show its impact on AJ. See *People v Chambers*, 277 Mich App 1, 11; 742 NW2d 610 (2007). Further, although Smith's testimony that defendant had told him that defendant was sexually interested in Smith's daughter, sister, and mother constituted hearsay, defendant has failed to demonstrate that the testimony prejudiced him considering the overwhelming evidence against defendant. Defendant cannot show that there existed a reasonable probability of a different result had counsel objected to Smith's testimony. *Frazier*, 478 Mich at 243.

Defendant next argues that his trial counsel failed to effectively cross-examine witnesses. "Decisions regarding . . . how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). Although defendant claims that Smith's testimony was improperly influenced by his knowledge of the police reports and witness statements, defendant's claim is purely speculative, and he fails to articulate any basis in the

record to support his claim. Because our review of defendant's argument is limited to mistakes apparent on the record, *Jordan*, 275 Mich App at 667, and nothing in the record supports defendant's claim, his argument fails.

Defendant next argues that trial counsel was ineffective for failing to object to the jury instruction regarding the testimony admitted pursuant to MCL 768.27a because JD's testimony was erroneously admitted under that statute. As previously discussed, defendant's argument lacks merit. Thus, counsel's failure to object did not constitute ineffective assistance of counsel. "Counsel is not required to raise meritless or futile objections[.]" *Moorer*, 262 Mich App at 76.

Defendant next contends that his counsel rendered ineffective assistance of counsel by failing to object to the prosecutor's improper statements made during closing argument. During her closing argument, the prosecutor incorrectly stated that defendant's ex-wife filed for divorce after learning of AJ's allegations. Rather, defendant's ex-wife filed for divorce after learning that defendant had misled her regarding the nature of his previous criminal sexual conduct conviction. Although the prosecutor's statement was not accurate, defendant cannot demonstrate that, but for this minor factual discrepancy, it is reasonably probable that the result of the proceeding would have been different. *Frazier*, 478 Mich at 243. Thus, defendant has failed to establish prejudice.

Defendant also argues that the prosecutor committed numerous other acts of misconduct. Because defendant failed to preserve this issue for our review by objecting to any of the alleged instances of prosecutorial misconduct, our review is limited to plain error affecting his substantial rights. *Unger*, 278 Mich App at 235.

Defendant contends that the prosecutor committed misconduct by admitting evidence of his sexual conduct involving JD under MCL 768.27a. As previously discussed, this argument lacks merit because the evidence was properly admitted. In any event, even if the evidence was erroneously admitted, "[a] prosecutor's good-faith effort to admit evidence does not constitute misconduct[,]" *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007), and "[t]here is nothing improper about a prosecutor's reliance on a state court's evidentiary ruling, whether or not the ruling itself was correct," *People v Blackmon*, 280 Mich App 253, 269 n 7; 761 NW2d 172 (2008), quoting *Frazier v Huffman*, 343 F3d 780, 792 (CA 6, 2003) (emphasis deleted).

Defendant next argues that the prosecutor committed misconduct by arguing facts not in evidence. "Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Defendant contends that the prosecutor misquoted Smith's testimony when she argued that defendant had propositioned Smith's elderly mother. Contrary to defendant's claim, Smith testified that defendant did proposition his mother. Thus, the prosecutor's argument was based on the evidence and was not improper.

Defendant next contends that the prosecutor argued facts not in evidence and improperly vouched for AJ's credibility by arguing that she should be believed and that she "maintain[ed] a consistent story." "A prosecutor is prohibited from vouching for a witness' credibility or suggesting that the government has some special knowledge that a witness will testify

truthfully." *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Here, the prosecutor's comment did not suggest any special knowledge regarding AJ's credibility. Rather, the prosecutor permissibly argued, based on the evidence presented, that AJ was worthy of belief while defendant was not. See *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Thus, no error occurred.

Defendant next argues that the prosecutor argued facts not in evidence by contending that defendant "groomed" AJ for sexual activity. This argument was a reasonable inference drawn from the evidence that defendant told AJ that he would marry her and gave her cigarettes, alcohol, and marijuana. Thus, the argument was proper. *Watson*, 245 Mich App at 588.

Finally, defendant argues that the prosecutor improperly implied that AJ did not have chlamydia. Defendant mischaracterizes the prosecutor's remarks. The prosecutor did not argue that AJ did not have chlamydia, but rather, that it was irrelevant from whom she contracted the disease. The prosecutor's remark was properly responsive to defense counsel's suggestion that because defendant did not have Chlamydia, defendant did not have sex with AJ. A prosecutor may respond to the arguments of defense counsel. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Accordingly, the prosecutor's remarks were not improper.

Further, because all of defendant's claims of prosecutorial misconduct lack merit, he cannot demonstrate that counsel was ineffective for failing to object to the alleged instances of misconduct. "Counsel is not required to raise meritless or futile objections, and thus defense counsel was not ineffective." *Moorer*, 262 Mich App at 76.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood