STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 30, 2013
v	No. 306881 Wayne Circuit Court
DEANTE JAMES MOORE, Defendant-Appellant.	LC No. 11-005239-FJ

Before: GLEICHER, P.J., and SAWYER and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct. MCL 750.520b(1)(a). He was sentenced to fifty-nine months to fifteen years in prison. He now appeals and we affirm.

Defendant first argues that the prosecutor committed misconduct in three instances: by improperly questioning the victim's mother so as to elicit sympathy from the jury, by vouching for the victim's credibility during opening statement and by vouching for the victim's credibility during closing argument. Defendant did not preserve the vouching issues for appeal by making timely objections at trial. *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). And while defendant did timely object to the questioning of the victim's mother, the objection stated a different ground than that raised on appeal. Therefore, defendant has also failed to preserve his claim concerning the prosecutor's questioning of the victim's mother. *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Accordingly, we review defendant's prosecutorial misconduct challenges for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In both the opening statement and closing argument, the prosecutor asserted that the complaining witness, a twelve year old boy, had no reason "to make these things up" or to "say[] that this happened, if it didn't really happen[.]" A prosecutor may not vouch for the credibility of a witness or suggest that he or she possesses special knowledge concerning a witness's truthfulness. *People v Laidler*, 291 Mich App 199, 201; 804 NW2d 866 (2010). However, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The challenged remarks simply do not constitute vouching. Rather, the prosecutor properly

contended that the victim had not fabricated his testimony. By encouraging the jury to review the evidence and draw reasonable inferences supporting the victim's credibility, the prosecutor did not commit misconduct.

We similarly reject defendant's contention that the prosecutor improperly attempted to illicit sympathy from the jury by generally questioning the mother regarding her son's character. Because the victim's character and credibility were placed at issue during defense counsel's opening statement, the prosecutor did not commit misconduct by responding with the mother's testimony.[1]

Next, defendant argues that the trial court erred in allowing the prosecutor to waive the presence of an endorsed witness, Latoya Hall. We disagree. The rules relating to the failure to produce an endorsed witness were summarized by this Court in *People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004):

> A prosecutor who endorses a witness under MCL 767.40a(3) is obliged to exercise due diligence to produce that witness at trial. *People v Cummings*, 171 Mich App 577, 583-585; 430 NW2d 790 (1988). A prosecutor who fails to produce an endorsed witness may show that the witness could not be produced despite the exercise of due diligence. *People v Canales*, 243 Mich App 571, 577; 624 NW2d 439 (2000). If the trial court finds a lack of due diligence, the jury should be instructed that it may infer that the missing witness's testimony would have been unfavorable to the prosecution's case. CJ2d 5.12; see also *People v Snider*, 239 Mich App 393, 422; 608 NW2d 502 (2000). We review a trial court's determination of due diligence and the appropriateness of a "missing witness" instruction for an abuse of discretion. See *People v Bean*, 457 Mich 677, 684; 580 NW2d 390 (1998); *Snider, supra*. [Footnote omitted.]

When Hall was served with a subpoena she stated that she would appear in court. After she failed to appear on the first day of trial, a bench warrant was issued. The police went to the three different addresses they had for Hall, finally speaking to her sister at the third address. While the police were unable to obtain Hall's address the sister did call her on a cell phone and the police were able to speak to Hall. She again assured the police that she would be at court the next day.

"Due diligence" signifies an "attempt to do everything reasonable, not everything possible, to obtain the presence of res gestae witnesses." *People v George*, 130 Mich App 174, 178; 342 NW2d 908 (1983); see also *Cummings*, 171 Mich App at 585; at 577. Additionally, MCL 767.40a(4) permits a prosecutor to "add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." We are not persuaded that the trial court abused its discretion in determining that there was due diligence, excusing the production of this witness, and refusing to give the missing witness instruction.

[1] Defendant has not raised MRE 608(a) as a ground for challenging the mother's testimony.

Finally, defendant argues that the verdict was against the great weight of the evidence. Review of this issue is hampered by the fact that, while defendant frames this issue as one involving the great weight of the evidence, much of his discussion in his brief concerns whether there was sufficient evidence to support his conviction. But because defendant failed to move for a new trial, any claim that the conviction was against the great weight of the evidence was not preserved for appeal and review would be limited to determining if there was plain error. *People v Musser*, 259 Mich App 215, 218; 573 NW2d 800 (2003). Accordingly, we will focus on whether there was sufficient evidence to support the conviction.[2]

We review a claim of insufficiency of the evidence de novo and consider the evidence in the light most favorable to the prosecution. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). We must determine whether a rational trier of fact could find that the elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748 (1992).

To convict defendant, the prosecutor had to prove that he engaged in sexual penetration with a person under the age of 13. MCL 750.520b(1)(a). The victim, who was nine years old at the time of the alleged event, testified that defendant forced him to perform fellatio on defendant. Fellatio is a form of sexual penetration. MCL 750.520a(r). Accordingly, there was sufficient evidence to support defendant's conviction. Defendant argues that there was no corroborating evidence. But the victim's testimony need not be corroborated. MCL 750.520h. Defendant also argues that had Hall testified, it would have been established that she masterminded a false accusation to gain revenge against defendant. That claim, however, is at best speculation. Defendant also complains that no specific date was given regarding when the incident occurred. While that may have been helpful, "[i]n criminal sexual conduct cases, especially those involving children, time is not usually of the essence or a material element." *People v Sabin,* 223 Mich App 530, 532; 566 NW2d 677 (1997).

In sum, sufficient evidence supported the jury's verdict.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Karen M. Fort Hood

[2] Because we will conclude that there was, in fact, sufficient evidence to support defendant's conviction, it necessarily follows that there was no plain error with respect to the argument about whether the verdict was against the great weight of the evidence.