

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 14, 2013

v

JASON LAMONT HANN,  
  
Defendant-Appellant.

No. 307341  
Wayne Circuit Court  
LC No. 11-003712-FC

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Before: MURRAY, P.J., and WILDER and OWENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b. Defendant was sentenced to 12½ to 30 years' imprisonment for his three criminal sexual conduct convictions. We affirm.

Defendant first argues that he was denied a fair trial because the trial court's comments during the proceedings eroded his presumption of innocence and shifted the burden of proof to him instead of the prosecution. We disagree. We review this unpreserved issue of being denied a fair trial for plain error affecting substantial rights. *People v Conley*, 270 Mich App 301, 305; 715 NW2d 377 (2006).

Generally, the following analysis is used to determine whether the trial court's comments deprived the defendant of a fair trial:

Michigan case law provides that a trial judge has wide discretion and power in matters of trial conduct. This power, however, is not unlimited. If the trial court's conduct pierces the veil of judicial impartiality, a defendant's conviction must be reversed. The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial. [*People v Jackson*, 292 Mich App 583, 598; 808 NW2d 541 (2011) (quotation marks and citations omitted).]

Defendant claims that three comments made by the trial judge deprived him of a fair trial because they ostensibly "assur[ed] the jury that there would be an appeal," which mitigated his

presumption of innocence. Defendant equates this to being presented “to the jury in shackles.” After reviewing the contested comments, we find no plain error.

All of the comments involved the trial judge recognizing the existence of appellate courts, including this Court. First, during jury voir dire, after a prospective juror was questioned and made no verbal response, the trial judge stated, “I have to hear what you have to say. . . . We’re taking a record because there is a higher Court.” Second, before the jury was sworn, the trial judge expressed her displeasure with having to provide the jurors with copies of the preliminary instructions she was about to review. She stated,

My clerk is passing to you folders that will be for your seat number. It is going to contain a copy of the instructions that I’m about to give you. . . . When you leave [the jury box], you’ll leave them in your seat.

When the trial is over with, we will give you a copy of my final instructions, and you will be able to put those inside the notebook, and then take them into the jury room with you.

So if you’d like to follow along, you can. Now, very frankly, and I’m going to say it again for the Court of Appeals and the Supreme Court who don’t try a lot of criminal cases and haven’t watched, I think that this is not a good idea because people will be so busy trying to look at what’s in here, they’re not going to listen to what I’m saying. But that’s okay. They get paid a lot more money than I do, and they said we have to do this.

Lastly, while the victim was testifying, the trial judge requested that defense counsel speak “loudly enough for the court reporter. The Court of Appeals has to hear it too.”

None of the comments acted to deprive defendant of a fair trial. The trial judge’s comments could not reasonably be construed as assuring the jury that there would be an appeal. The first and third comments simply were providing context to the jurors regarding why it was so important for everything in the courtroom to be accurately reflected in the court reporter’s transcript. These types of comments did “nothing to reduce the jury’s understanding of the gravity of its responsibility” and did “not tell the jury that injustices will be corrected.” *People v Lewis*, 162 Mich App 558, 566; 413 NW2d 48 (1987), vacated on other grounds 430 Mich 874 (1988). The second comment was simply the trial judge’s expression of her disagreement with the policy of allowing jurors to have a written copy of the preliminary instructions, which she thought was counter-productive. While the trial court’s editorializing for the jury was not desirable, we find no undue influence affecting defendant’s substantial rights.

Defendant next argues that the prosecution committed misconduct by vouching for the credibility of the victim and arguing facts not on the record. We disagree.

Normally, “the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial.” *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). This Court reviews unpreserved claims of prosecutorial misconduct for plain error that affected the defendant’s substantial rights. *People v Fyda*, 288 Mich App 446, 460-461; 793 NW2d 712 (2010). “Reversal is warranted only when the error resulted in the conviction of an actually

innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002) (citation omitted).

"[A] prosecutor may not argue facts not in evidence or mischaracterize the evidence presented . . ." *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). However, the prosecution is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case. *Dobek*, 274 Mich App at 66. Also, "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). Furthermore, we review a prosecutor's comments in context and in light of the defendant's arguments. *Dobek*, 274 Mich App at 64.

The outcome of this case hinged on the jury's view of the credibility of the victim and, in particular, whether she was telling the truth regarding her alleged sexual encounters with defendant. Defendant argued that the victim was not telling the truth and identified inconsistencies in her testimony.

Defendant on appeal claims that the following comments made by the prosecutor during closing argument deprived him of a fair trial: "[I]t's not uncommon for kids to not be very well with numbers and times and so forth"; "Kids act differently, and they're all unique in their own way; and they all handle shock and trauma and these kind[s] of events on their own"; "[W]e didn't hear anything about her acting up or making a big scene"; "She doesn't seem like the kind of child who sits there and wants all this attention"; and repeating the theme from the first comment, "Children are different. They deal with these things differently."

Several of the above comments deal with the prosecutor suggesting to the jury that it is common for children to not be good with "numbers and times" and that "children are different" and "act differently." All of these comments constitute an appeal to the jury to use its common sense, which is permissible argument. See *People v Lawton*, 196 Mich App 341, 355; 492 NW2d 810 (1992). The common, everyday experience of adults is that children as well as adults do not all act similarly in similar situations. Further, it is not an uncommon experience that a child may not be good with "numbers and times." Defendant was not deprived of a fair trial through these appeals to the use of the jurors' common sense understandings.

The other at-issue comments, involving the prosecutor's suggestion that the evidence supported the notion that the victim was not "acting up or making a big scene" and that the victim "doesn't seem like the kind of child who sits there and wants all this attention," were also supported by the evidence. There was record evidence that the victim was withdrawn at the time of these incidents due to her sister's death and that she was not "close" to her family. The prosecution properly argued that this evidence explained why the victim did not initially tell anybody about these incidents, and also permitted the prosecutor to characterize the victim during argument as someone who did not "seem" like she was seeking attention. In making arguments based on the evidence, the prosecutor did not impermissibly vouch for the credibility

of a witness by relying on any “special knowledge” that the jury was unaware of. See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

In sum, the prosecution’s arguments and comments based on its theory of the case, were proper inferences drawn from the evidence, and were within the common knowledge of the jurors. Thus, these arguments were appropriate, *Dobek*, 274 Mich App at 66, and defendant has failed to show that the prosecution committed any error.

Defendant next argues that he was denied the effective assistance of counsel when defense counsel failed to object to the errors discussed *supra*. We disagree.

This Court reviews ineffective assistance of counsel claims, which are questions of constitutional law, de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). In the absence of an evidentiary hearing, this Court reviews a defendant’s claim of ineffective assistance of counsel based on the existing record. *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003).

To demonstrate ineffective assistance of counsel, a defendant must show that his attorney’s performance fell below an objective standard of reasonableness under prevailing professional norms and that this performance prejudiced him. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To demonstrate prejudice, the defendant must show the probability that, but for counsel’s errors, the result of the proceedings would have been different. *Id.* at 290. Counsel is presumed to be effective and engaged in trial strategy, and the defendant has the heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

However, because we have concluded that there was no error to correct and because “[c]ounsel is not ineffective for failing to make a futile objection,” *People v Horn*, 279 Mich App 31, 39-40; 755 NW2d 212 (2008), defendant’s claims of ineffective counsel necessarily fail.

In defendant’s Standard 4 brief, he argues that he was denied the effective assistance of counsel by counsel’s failure to call witnesses from a list defendant provided. Decisions regarding whether to call and question witnesses and what evidence to present are presumed to be matters of trial strategy, *Rockey*, 237 Mich App at 76-77, and this Court does not second-guess counsel on matters of trial strategy, nor does it assess counsel’s competence with the benefit of hindsight, *Horn*, 279 Mich App at 39.

Defendant asserts that he provided to defense counsel a list of witnesses who would have provided favorable testimony in his defense. However, the record does not disclose why defense counsel did not call these witnesses to testify or what these witnesses would have stated if they were called to testify. Therefore, based on the record, defendant has not established that counsel made any errors or that defendant was denied the effective assistance of counsel.

Next, in his Standard 4 brief, defendant argues that he was denied the effective assistance of counsel because defense counsel did not call a medical expert witness to rebut the prosecution’s medical evidence. However, defendant fails to identify what testimony a medical expert would have provided or how the testimony would have benefitted defendant’s case. Thus, this claim of ineffective assistance of counsel is without merit.

Finally, in his Standard 4 brief, defendant argues that he was denied the effective assistance of counsel because counsel advised defendant not to testify in his own behalf and, thus, denied defendant his right to testify. Once again, neither the record nor defendant identifies the alleged “incorrect and misleading” advice counsel provided to defendant. Therefore, defendant has failed to show that he was denied the effective assistance of counsel, and his claim is without merit.

Affirmed.

/s/ Christopher M. Murray

/s/ Kurtis T. Wilder

/s/ Donald S. Owens