STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL PATRICK ROBBINS,

Defendant-Appellant.

UNPUBLISHED
November 24, 2020

No. 348693
Ingham Circuit Court
LC No. 18-000446-FC

Before: MARKEY, P.J., and METER and GADOLA, JJ.

PER CURIAM.

A jury convicted defendant, Michael Patrick Robbins, of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(2)(b) (person under age 13 by an individual age 17 or older). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve 300 to 600 months in prison. Defendant appeals as of right. We affirm.

I. FACTS

Defendant's conviction arises from a sexual act against his son JR in May 2015 or May 2016. At that time, JR would have been five or six years old. According to JR, defendant sucked his penis in the bathroom of defendant's home for one to two minutes. Prior to this, JR was playing tag with his older sister; afterwards, he played a video game. During trial, defendant testified to never engaging in any type of sexual act with JR.

JR first told a school friend about the details of the incident in defendant's bathroom. Upon speaking with this school friend, JR realized that what defendant did to him was "bad." In 2017, after an altercation with his older cousin, JR told his mother SR[1] about defendant's act against him. In testimony, SR described that moment to the prosecution:

[1] Defendant and SR are also parents to three other children, which includes JR's older sister.

SR: Most of it was just okay, yea okay, okay. Until I turned around and walked away and turned around to ask him one more thing, and out he came with it.

Prosecutor: Did you get the chance to ask him one more thing?

SR: Yea, I asked him, I said -- like I was on my way out the door to, you know, tell the other kids that they could come in. And I turned around and I looked at him and I said, "…, you didn't do it, did you?" And he said, "Heck, no. Dad made me do that to him once and it's gross."

Prosecutor: How did hearing this make you feel?

SR: I lost it. I don't even -- I didn't even have words. I went outside and I screamed, you know, and everybody was, "What's wrong, what's wrong, what's wrong?" And it -- I think it took me five minutes to get my brain to put the words to the end of my tongue, and then I called the police.

A jury convicted defendant of first-degree criminal sexual conduct. Defendant now appeals to this Court.

II. ANALYSIS

On appeal, defendant argues that SR's testimony regarding the statement that JR made to her about the incident with defendant constituted inadmissible hearsay. Defendant further argues that trial counsel was ineffective for failing to object to such testimony. Because of this, defendant contends that he was prejudiced by trial counsel's performance. In addition, defendant asserts in his Standard 4 brief[2] that trial counsel provided ineffective assistance by failing to call an expert witness in child psychology, and that the prosecutor committed misconduct during her closing arguments.

A. HEARSAY

Defendant's first argument focuses on the following out-of-court statement made by JR to SR: "Heck, no. Dad made me do that to him once and it's gross." Defendant argues that this statement presented at trial during SR's testimony was hearsay and, thus, inadmissible evidence. We disagree. "To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal." *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Defendant did not object to SR's testimony, so his hearsay argument is unpreserved. See *id.*

This Court reviews an unpreserved argument for plain error affecting substantial rights. *People v Seals*, 285 Mich App 1, 4; 776 NW2d 314 (2009). A defendant must show that error occurred, "the error was plain, i.e., clear or obvious," and that the plain error affected his or her

[2] An appellate brief filed in propria persona by a criminal defendant pursuant to Michigan Supreme Court Administrative Order No. 2004-6, Standard 4.

substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

" '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). "Hearsay is generally prohibited and may only be admitted at trial if provided for in an exception to the hearsay rule." *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). For example, MRE 803A provides, in relevant part:

> A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it corroborates testimony given by the declarant during the same proceeding, provided:
>
> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.
>
> *If the declarant made more than one corroborative statement about the incident, only the first is admissible* under this rule.
>
> * * *
>
> This rule applies in criminal and delinquency proceedings only. [Emphasis added.]

In contrast, a statement is not hearsay if it is being offered for a purpose other than to prove the truth of the matter asserted. *People v Musser*, 494 Mich 337, 350; 835 NW2d 319 (2013), citing MRE 801(c).

Here, the prosecution and defendant agree that MRE 803A does not apply. JR made the first corroborative statement to his school friend, and a second collaborative statement to SR. Because only the first corroborative statement is admissible, the statement that JR made to SR was inadmissible under MRE 803A.

However, as the prosecution argues, the statement was not offered to prove the truthfulness of JR's statement. Rather, JR's statement was offered to show notice to his mother SR, and the effect his revelation had on her at that moment. As described to the prosecution, SR was

speechless, screamed, and shortly thereafter called the police. This exchange with the prosecution directly addresses the effect of JR's statement on SR, the listener, rather than to prove its truth that JR performed oral sex on defendant. Additionally, the statement was merely corroborative of JR's own trial testimony. Therefore, the trial court did not plainly err by admitting SR's testimony about JR's statement.[3]

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that trial counsel provided ineffective assistance by not objecting to SR's testimony regarding the statement made to her by JR about the incident with defendant. Also, defendant further contends in his Standard 4 brief that trial counsel was ineffective for failing to call an expert witness in child psychology. We disagree.

The United States and Michigan Constitutions guarantee that in all criminal prosecutions the accused shall enjoy the right to effective assistance of counsel. *People v Kammeraad*, 307 Mich App 98, 122; 858 NW2d 490 (2014). An argument based on ineffective assistance of counsel presents a mixed question of fact and constitutional law. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). "Findings on questions of fact are reviewed for clear error, while rulings on questions of constitutional law are reviewed de novo." *Id*. If a criminal defendant does not ask the trial court for a new trial or an evidentiary hearing based on an ineffective assistance of counsel claim, the law limits our review to mistakes apparent from the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012).

To prove that trial counsel was ineffective, "a defendant must show that (1) the lawyer's performance fell below an objective standard of reasonableness under prevailing professional norms and (2) there is a reasonable probability that, but for the lawyer's deficient performance, the result of the proceedings would have been different." *People v Anderson*, 322 Mich App 622, 628; 912 NW2d 607 (2018). " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id*., quoting *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Our Court presumes effective assistance of counsel; a criminal defendant bears a heavy burden of proving otherwise. *People v Schrauben*, 314 Mich App 181, 190; 886 NW2d 173 (2016).

Regarding trial strategy, "[d]efense counsel must be afforded 'broad discretion' " because of the necessity to take calculated risks to win a case. *People v Pickens*, 446 Mich 298, 325; 521 NW2d 797 (1994). However, "a court cannot insulate the review of counsel's performance by calling it trial strategy." *People v Trakhtenberg*, 493 Mich 38, 52; 826 NW2d 136 (2012). Our Supreme Court has recognized that "[t]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade." *People v Mitchell*, 454 Mich 145, 164; 560 NW2d 600 (1997) (quotation marks and citation omitted).

[3] We decline to conduct an MRE 403 analysis because it was not raised as an issue by defendant's appellate counsel or by defendant himself in his Standard 4 brief.

In this case, defendant did not ask the trial court for a new trial or an evidentiary hearing based on his ineffective assistance of counsel claims. Because of this, our review is limited to mistakes apparent from the record. Furthermore, as discussed, the challenged portion of SR's testimony was not inadmissible hearsay. Therefore, defense counsel's failure to object was not objectively unreasonable because an objection would have been futile. See *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004).

Moreover, defendant has not established that defense counsel provided ineffective assistance by failing to call an expert witness in child psychology. In his Standard 4 brief, defendant argues that his counsel should have called an expert to testify that children "may make up or [elaborate] on stories to feel wanted." In doing so, defendant asserts that JR had a poor relationship with SR and his siblings, so he likely made up the allegation that defendant performed oral sex on him in order to get attention.

Defendant cannot overcome the presumption that deciding against calling an expert witness in child psychology was a matter of effective trial strategy. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Thomas Cottrell, a qualified expert in the area of child sexual abuse dynamics, testified in the prosecution's case-in-chief that delayed reporting in sexual abuse cases was common. Cottrell's testimony was presented in general terms, and Cottrell testified that he had never met JR or reviewed any of his records. Defendant's trial counsel elicited through cross-examination of Cottrell that it was possible that a child could make a false report of abuse to gain sympathy from a parent. This testimony from Cottrell on cross-examination addresses defendant's argument. It is possible that defense counsel may have thought it would be beneficial to have this testimony come from an adverse witness. Our Court allows for broad discretion in such strategic choices. Because of this, defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness. *Trakhtenberg*, 493 Mich at 51.

Also, defendant cannot establish that there is a reasonable probability that the outcome would have been different had counsel called an expert witness in child psychology. *Id*. "Without some indication that a witness would have testified favorably, a defendant cannot establish that counsel's failure to call the witness would have affected the outcome of his or her trial." *People v Carll*, 322 Mich App 690, 703; 915 NW2d 387 (2018). Here, it is unclear whether testimony from his own expert witness would have been favorable to defendant. Without sufficient evidence, defendant cannot establish that his trial counsel was ineffective. See *id*.

C. PROSECUTORIAL MISCONDUCT

Finally, defendant alleges that the prosecutor committed misconduct by shifting the burden of proof during closing arguments. Again, we disagree.

This Court generally reviews a claim of prosecutorial misconduct de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). To preserve an issue regarding prosecutorial misconduct, "a defendant must contemporaneously object and request a curative instruction." *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Defendant did not object to the prosecution's statements during closing arguments or request a curative instruction. Therefore, defendant's unpreserved claim of prosecutorial misconduct must be

reviewed for "plain error affecting the defendant's substantial rights." *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

"Issues of prosecutorial misconduct are decided case by case, and this Court must examine the entire record and evaluate a prosecutor's remarks in context." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). "A prosecutor's comments are to be evaluated in light of defense arguments and the relationship the comments bear to the evidence admitted at trial." *Id*. "A prosecutor may not imply in closing argument that the defendant must prove something or present a reasonable explanation for damaging evidence because such an argument tends to shift the burden of proof." *People v Fyda*, 288 Mich App 446, 463-464; 793 NW2d 712 (2010).

Contrary to defendant's assertion, the prosecutor did not shift the burden of proof during closing arguments. In fact, the prosecutor emphasized that the prosecution had the burden of proof and that defendant was presumed to be innocent. The prosecutor merely asked that the jury follow the trial court's instructions and reach a verdict based on the evidence presented at trial. Further, the trial court instructed the jury that the prosecution was required to prove each element of the crime beyond a reasonable doubt, that defendant was not required to prove his innocence or do anything, and that the lawyers' statements and arguments were not evidence. "Jurors are presumed to follow their instructions, and it is presumed that instructions cure most errors." *People v Mahone*, 294 Mich App 208, 212; 816 NW2d 436 (2011). Defendant makes no attempt to overcome these presumptions. Accordingly, defendant has failed to establish plain error for his prosecutorial misconduct claim.

Affirmed.

/s/ Jane E. Markey
/s/ Patrick M. Meter
/s/ Michael F. Gadola