# STATE OF MICHIGAN

# COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARQUISE DELEON GORDON,

Defendant-Appellant.

UNPUBLISHED
December 23, 2008

No. 279858
Kent Circuit Court
LC No. 06-005396-FH

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for third-degree criminal sexual conduct, MCL 750.520d(1)(c) (mentally incapable, mentally incapacitated, or physically helpless victim). Defendant was sentenced to 6 to 15 years' imprisonment. We affirm.

I

Defendant first argues that the prosecutor engaged in numerous acts of misconduct depriving him of a fair trial. We disagree. Defendant did not object to the alleged acts of prosecutorial misconduct at trial. Therefore, we review these unpreserved claims for plain error affecting defendant's substantial rights. *People v Carines,* 490 Mich 750, 755-756; 597 NW2d 130 (1999); *People v Callon,* 256 Mich App 312, 329-330; 662 NW2d 501 (2003). If a timely objection and subsequent jury instruction would have cured any prejudicial error arising from the alleged misconduct, defendant's claim is precluded. *Id.*; *People v Mayhew,* 236 Mich App 112, 123; 600 NW2d 370 (1990).

Defendant first asserts that the prosecutor committed misconduct necessitating reversal by creating a false impression of vulnerability when the victim testified while holding a teddy bear. Even accepting as true the factual predicate for defendant's assertion that the victim held the teddy bear at the prompting of the prosecutor, defendant cites no authority that such constitutes misconduct. Therefore, defendant has abandoned this claim by failing to sufficiently develop his arguments and provide authority. *Mitcham v Detroit,* 355 Mich 182, 203; 94 NW2d 388 (1959); *People v Kelly,* 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Moreover, the record reflects that neither the prosecutor nor the police were responsible for giving the victim the teddy bear. Thus, no plain error exists with respect to this claim.

Defendant next complains that the prosecutor committed misconduct by rehearsing the victim's testimony in advance of trial and by using leading questions during direct examination of the victim. Testimony established that the mentally impaired victim, who was 19 years of age, functioned at the level of a seven or eight year old and had an IQ in the mid to high 40s. The victim testified that she met with the investigating officer 20 or 30 times and practiced her testimony. However, defense counsel used suggestive questioning to elicit these responses from the victim and the investigating officer testified that she had only met the victim three times, and two of those meetings occurred approximately one year before trial. The victim's mother also testified that the victim did not even know of the trial until immediately before, as well as that the victim was told that she needed to tell the truth. Based on the record, defendant has failed to demonstrate that the prosecutor rehearsed and knowingly presented false testimony. *People v Canter,* 197 Mich App 550, 558-559; 496 NW2d 336 (1992).

Although the prosecutor resorted to leading questions during direct examination of the victim, leading questions are permissible to develop a witness's testimony in certain circumstances, such as when the witness is a mentally impaired child. *People v Garland,* 152 Mich App 301, 305, 309-310; 393 NW2d 896 (1986); MRE 611(c)(1). "A considerable amount of leeway may be given to a prosecutor to ask leading questions of a child witness." *People v Watson,* 245 Mich App 572, 587; 629 NW2d 411 (2001); see also *People v Kosters,* 175 Mich App 746, 756; 438 NW2d 657 (1989). The victim in this case functioned at the level of a young child. She had difficulty responding to open-ended questions, difficulty testifying about the intimate subject matter, and frequently gave one-word, nonverbal, or nonresponsive answers, although she did state that she was raped without being prompted. The use of leading questions posed to the child-like victim did not constitute misconduct in this case. *Garland, supra*.

Additionally, defendant asserts that the prosecutor improperly introduced hearsay testimony when he asked witness Darrell Smith, during direct examination, whether Smith told a detective that he knew that the victim was "slow." We agree. Darrell had not testified inconsistently before the introduction of his prior statement to the detective, and that statement was not given under oath. Therefore, Smith's statement to the detective was inadmissible under MRE 801(d)(1)(A). There was also no charge against Darrell of falsification at least until cross-examination. Thus, the statement was not admissible pursuant to MRE 801(d)(1)(B) until that time. However, the prosecutor's conduct in this regard does not require reversal because Smith's statement to the officer was nevertheless admissible on redirect examination, and an objection and instruction could have cured any prejudice. *Callon, supra* at 329.

Defendant also claims that the prosecutor introduced hearsay when referencing a police report while examining witness Officer Hartuniewicz, as follows: "I'm looking at Officer Perdue's report. . . . he talks about going to interview an 18-year-old mentally challenged female; . . . [d]id it become aware [sic] to you that she has some deficits or was mentally challenged?" The prosecutor did not offer Perdue's report for the truth of the matter asserted, that the victim was mentally impaired. Rather, the prosecutor's comment was merely prefatory to his attempt to ascertain if and when Hartuniewicz became aware of the victim's mental impairment. *People v Johnson,* 100 Mich App 594, 599; 300 NW2d 332 (1980). The trial court also instructed the jury that the lawyers' questions were not evidence, and juries are presumed to follow their instructions. *People v Graves,* 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, defendant has not established plain error necessitating reversal on this basis.

Next, defendant argues that the prosecutor improperly elicited testimony at trial that defendant invoked his right to counsel while he was being interviewed by detectives.[1] We disagree. Defendant bases his claim on the following exchange between the prosecutor and a detective, during questioning regarding defendant's tape-recorded interview:

> *Q*. Detective, where you specifically asked the defendant about whether or not clothes came off at the end of this tape, did he indicate he didn't want to talk about that?
>
> *A*. He said he wanted to wait until he had his lawyer.

We first note that defendant has abandoned this claim because he fails to provide his actual statements and fails to cite any supporting authority that his statement as relayed by the detective, constituted an invocation of his rights. *Kelly, supra* at 640-641. Nevertheless, we have reviewed the issue and find no misconduct because the record reflects that the detective's response was a volunteered response unsolicited by the prosecutor and the prosecutor was not attempting to infringe on defendant's constitutional rights. *People v Kramer,* 103 Mich App 747, 757; 303 NW2d 880 (1981).

Further, with respect to defendant's claim that the prosecutor denigrated defense counsel by arguing that he kept the victim on the stand for three hours and got her to capitulate, we find no error. Although the prosecutor may not denigrate defense counsel, *Watson, supra* at 592; *People v Rodriguez,* 251 Mich App 10, 30; 650 NW2d 96 (2002), the prosecutor specifically stated that, "I mean no slight to [defense counsel] here . . . any attorney can get up and get [this victim] spinning in her chair." The prosecutor's argument was based on the evidence of the victim's mental impairment and the reasonable inferences drawn from that evidence; it was a permissible response to the evidence presented a trial, that is, to the victim's inconsistent testimony. *People v Jones,* 468 Mich 345, 352-353; 662 NW2d 376 (2003). Therefore, this comment did not improperly denigrate defense counsel.

That said, however, we do find that the prosecutor's argument that he had, "a duty to seek justice," while defense counsel's "role is to zealously represent his client, regardless of anything else" was improper pursuant to *People v Hunt,* 68 Mich App 145, 148; 242 NW2d 45 (1976). Nevertheless, the prosecutor was responding to defense counsel's repeated references to the prosecutor "spinning" the facts, and a prosecutor may respond in a way that might otherwise require reversal, in response to defense counsel's statements. *Jones, supra* at 352-353. Further, in *Hunt, supra* at 149, this Court observed that there was a pattern of improper statements which were "unwarranted and wholly unnecessary," and that the prosecutor's improper "remarks were part of a deliberate course of conduct," the prejudicial impact of which could not be cured by an instruction. This is in stark contrast to the instant case, involving a single, brief responsive statement by the prosecutor, the prejudicial impact of which, if any, could have been cured by an objection and instruction. *Id.* Therefore, reversal is not warranted.

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[1] The recording of defendant's interview was played at trial. Defendant does not contest that he waived his constitutional rights before the interview.

Finally, we reject defendant's assertion that the "cumulative effect" of any prosecutorial misconduct requires reversal because defendant was not thereby deprived of a fair trial and could have simply cured any errors by objecting and obtaining a curative instruction from the court. *People v Bahoda,* 448 Mich 261, 292 n 64; 531 NW2d 659 (1995).

II

Defendant also asserts several alleged errors by defense counsel, which he claims constitute ineffective assistance of counsel. Review of defendant's unpreserved ineffective assistance claim is limited to the existing record, to determine whether "there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *People v Snider,* 239 Mich App 393, 423-424; 608 NW2d 502 (2000).

First, defense counsel's decision to waive opening statement "can rarely, if ever, be the basis of a successful claim of ineffective assistance of counsel." *People v Pawelczak,* 125 Mich App 231, 242; 336 NW2d 453 (1983). This decision is a matter of trial strategy. *People v Calhoun,* 178 Mich App 517, 524; 444 NW2d 232 (1989). Defense counsel initially reserved his opening statement, but after the prosecution rested and there were no defense witnesses, he chose to give only a closing statement. Defense counsel's closing was extensive; he attacked the victim's testimony regarding what happened during the incident and the different versions she told law enforcement, argued that she knew how to lie and was not socially disabled, attacked the other witnesses' testimony regarding whether they knew the victim was "slow," and argued that defendant did not have an opportunity to see the victim in the daylight and never knew or admitted that she was mentally handicapped. Where, as here, trial counsel delivers an extensive closing argument that fully comments on the defendant's case and the evidence, the defendant is generally not prejudiced when opening statement is waived. See *People v Buck,* 197 Mich App 404, 413-414; 496 NW2d 321 (1992), rev'd in part on other grounds *People v Holcomb,* 444 Mich 853; 508 NW2d 502 (1993).

Second, defendant alleges ineffective assistance of counsel arising from defense counsel's failure to object to the alleged instances of prosecutorial misconduct previously discussed. However, defense counsel is not ineffective for failing to raise futile objections or advocate meritless positions. *Snider, supra* at 425, and the majority of the claims of prosecutor misconduct were meritless. With respect to the remaining instances, defendant has not demonstrated that, but for defense counsel's failure to object, there is a reasonable probability that he would not have been convicted absent the errors, considering the substantial evidence against defendant and the comparatively minor nature of the errors. *Id.* at 424. Defendant has failed to meet his burden of proof.

Defendant also argues that defense counsel should have moved to suppress statements made by the detective to defendant during the recorded interview that was played for the jury. The challenged statements relayed information allegedly provided by the other man involved in this incident, and his statements implicated defendant. Defendant fails to cite the specific statements that he claims were erroneously admitted. *Kelly, supra* at 640-641. However, upon reviewing the transcript, we find that the references by the detective were not admitted as substantial evidence to establish their truth; rather, they were admitted merely as context for defendant's answers to the officer's interview questions. *Johnson, supra* at 599.

Defendant also argues defense counsel was ineffective for presenting information regarding his criminal history to the jury. However, the record reflects that after defendant's tape-recorded interview was held to be admissible, defense counsel decided to use references to defendant's past record during the interview to his advantage, by attempting to show that none of defendant's previous crimes involved assault or criminal sexual conduct. This was a matter of sound trial strategy. *People v Rodgers,* 248 Mich App 702, 716; 645 NW2d 294 (2001). Further, defendant has abandoned his argument regarding the reference to the warrant for his arrest because he failed to adequately brief the issue. *Kelly, supra* at 640-641. Finally, with respect to his cumulative error claim, defendant has failed to show that he was deprived of a fair trial. *Snider, supra* at 424.

III

Defendant next argues that he was denied the right to confront the victim. US Const, Ams VI, XIV; Const 1963, art 1; § 20. Defendant's unpreserved claim is reviewed for plain error. *People v McPherson,* 263 Mich App 124, 137-138; 687 NW2d 370 (2004). A trial court's decision to limit cross-examination is reviewed for an abuse of discretion. *People v Sexton,* 250 Mich App 211, 221; 646 NW2d 875 (2002), quoting *People v Crawford,* 232 Mich App 608, 620; 591 NW2d 669 (1998). A defendant's right to cross-examine a witness is not unlimited; the trial court has broad discretion to limit cross-examination because of harassment, prejudice, confusion, repetitive or irrelevant questions, or concerns for the witness's safety. *People v Adamski,* 198 Mich App 133, 138; 497 NW2d 546 (1993). The trial court violates a defendant's right of confrontation only when it imposes limits on cross-examination that prevent the defendant from placing before the jury facts relevant to bias, prejudice, or lack of credibility. *McPherson, supra* at 138.

Regarding the first alleged incident about which defendant complains, the record reflects that the trial court sustained the prosecutor's objection that the question "[d]id [defendant] do anything to you?" was "asked and answered." Defense counsel had just questioned the victim:

> *Q*. We're talking about the second person who you described [defendant] – or you didn't described, I'm sorry – there's a second person. You don't remember anything about him, do you?
>
> *A*. Uh-uh.
>
> *Q*. He didn't do anything to you, did he?
>
> *A*. Nope.
>
> *Q*. So it was just the first guy, the big guy, that did something to you?
>
> *A*. Yeah, the first guy.
>
> *Q*. When you were testifying earlier with Mr. Bramble, okay, earlier in the morning, you talked about the other man.
>
> *A*. Yup.

*Q*. I just want to make sure of some things. Now, you don't remember who that other man is.

*A*. Nope.

Clearly, defendant was able to place before the jury the fact that the victim stated that the second man did nothing to her. Thus, the trial court did not abuse its discretion in limiting repetitive cross-examination of the mentally impaired victim. *Adamski, supra* at 138.

Defendant next contends that the trial court erroneously curtailed his question posed to the victim: "Have you ever had a history of not telling the truth?" The trial court sustained the prosecutor's objection on grounds that it was the jury's role to determine witness credibility, and that the question was outside of the witness's competence. Defendant is not guaranteed the right to cross-examine the witness "in whatever way, and to whatever extent, the defense might wish." *People v Ho,* 231 Mich App 178, 189-190; 585 NW2d 357 (1998), quoting *People v Bushard,* 444 Mich 384, 391; 508 NW2d 745 (1993) (Boyle, J). The trial court did not abuse its discretion in limiting this line of questioning in light of the victim's limited mental capacity and ability to understand the question. Her confusion and distress from the questioning was evidenced by several interjections such as: "Man, this is hard"; "I want to be done"; "Making me scared"; and "Hate this." She also contradicted herself during cross-examination, and her mother testified that the victim sometimes lies and is easily confused about the chronology of events. Thus, defendant was able to explore the victim's ability to tell the truth and place this information before the jury. On the record, we cannot conclude that defendant was denied his right to confrontation by any limitation imposed by the trial court.

IV

In his final claim of error, defendant alleges that during the taped interview of him that was played for the jury, he unequivocally invoked his right to counsel, but continued to be questioned thereafter, in violation of his constitutional rights. The trial court denied defendant's motion to suppress his statement; we review the trial court's findings of fact for clear error. *People v Adams,* 245 Mich App 226, 230; 627 NW2d 623 (2001).

A defendant has "a constitutional right to counsel during interrogation." *People v Tierney,* 266 Mich App 687, 710; 703 NW2d 204 (2005); US Const, Am V; Const 1963, art 1, § 17. A defendant's Fifth Amendment right to counsel protects his privilege against self-incrimination in a custodial interrogation by requiring the police to cease questioning when the defendant requests counsel. *Tierney, supra* at 710-711. However, the invocation of the right to counsel must be unequivocal. *Id.* at 711. The police do not have to cease the interrogation, and the defendant's statements continue to be admissible, where a "reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel." *Id.*, quoting *Davis v United States,* 512 US 452, 459; 114 S Ct 2350; 129 L Ed 2d 362 (1994). For example, the statements, "[m]aybe I should talk to a lawyer," "[m]aybe I should talk to an attorney," and "I might want to talk to an attorney" are not unequivocal requests for counsel requiring that questioning of the defendant cease. *Id.*

In the instant case, defendant waived his rights after he was advised of them by signing a constitutional rights and waiver form, and he does not contest this waiver. During the interview,

defendant denied that he did anything to the victim, and when asked why the other men involved and the victim were all implicating him, he repeatedly stated, "I don't know." The detective then asked defendant for "his side" of the story:

> *A*. Somebody get—go to jail for goin' to pick somebody up for somebody else and then droppin' em off.
>
> *Q*. Marquise, I haven't even heard your side of what happened. I mean, that makes you—I got other peoples' sides, correct. And they're all pointin' the finger so . . .
>
> *A*. Yea, but see, I don't wanna--
>
> *Q*. . . . here I had—
>
> *A*. I don't wanna speak on this and my lawyer not here and I can't talk to my, you know what I'm sayin', my lawyer cuz—
>
> *Q*. That's fine. And if you wanna talk, you know, with your lawyer then that is absolutely fine. But I'm just sayin' as an investigator, okay . . .
>
> *A*. Yea, I understand.
>
> *Q*. . . . I go through a case. Here I got A sayin' somethin'. B and C are matchin' up with A. One dude's not even gonna talk to me at all who's being accused of something and then the other one I got three stories from him that's bein' accused of somethin'. But yet everybody else matches up.
>
> *A*. Um-hum.

Defendant used the same phrase, "I don't wanna speak on this," or "I just don't wanna get myself into nothin' like this" during other portions of the interview as well.

We find that the trial court did not clearly err in determining that defendant's statements were not unequivocal and unambiguous invocations of his right to counsel. It is unclear why defendant did not want to "speak on *this*." He never indicated that he wanted to cease questioning and obtain the presence of an attorney. His statements indicated that he did not want to respond to Rogers's questions because he did not know why the others implicated him, not because he wanted his attorney. Defendant used the same ambiguous phrase a second time, "I don't wanna speak on this," but this time explained, "because whatever I say, just like you say, can be used in court." He later used the same phrase again, "I don't wanna speak on this," and indicated that he could not distinguish between brothers Darrell and Kevin Smith. Moreover, the record reflects that, leading up to the interview at the jail, defendant specifically contacted the detective, informed her that he was turning himself in that night, requested that she meet with him that night at the jail because he wanted to speak with her, and asked questions during the interview. Thus, we conclude that, considering the circumstances presented to the detective, it was reasonable for the detective to assume that, at most, defendant *might* have been invoking his right to counsel, or was considering doing so, but nevertheless that defendant's statements did

not amount to an unequivocal and unambiguous invocation of his right to counsel. *Tierney, supra* at 710-711.

We affirm.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio