STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DOUGLAS BROOKS SASAK.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

DOUGLAS BROOKS SASAK,

Respondent-Appellant.

UNPUBLISHED
February 16, 2012

No. 301696
Allegan Circuit Court
Family Division
LC No. 09-045012-DL

Before: SAWYER, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent appeals as of right his juvenile adjudication for first- and second-degree criminal sexual conduct. We affirm.

Respondent's convictions arose out of sexual interaction between respondent, then aged 12, and a six-year-old female acquaintance. The girl's father entered a room where the two were together and found respondent partially undressed. After an investigation, the charges at issue ensued.

Respondent first argues that he was denied the effective assistance of trial counsel. A respondent in a juvenile delinquency proceeding is entitled to the effective assistance of counsel. See *In re Ayres*, 239 Mich App 8, 21; 608 NW2d 132 (1999). A respondent is denied effective assistance of counsel if counsel's "performance fell below an objective standard of reasonableness, . . . [and] the representation so prejudiced the [respondent] as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994); see also *Strickland v Washington*, 466 US 668, 692; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

Respondent asserts that his trial counsel was ineffective because he failed to have respondent take a pretrial polygraph examination. Pursuant to MCL 776.21(5), if an individual accused of a criminal sexual conduct offense requests a polygraph examination, that individual must be given one. The results of the examination are inadmissible at trial, however. *People v Dobek*, 274 Mich App 58, 97; 732 NW2d 546 (2007).

In this case, although respondent did not request a polygraph examination before trial, he passed two polygraph examinations after his adjudication. Respondent now argues that trial counsel was ineffective for failing to request a polygraph examination before trial. We disagree. Respondent has not demonstrated that his counsel's performance fell below an objective standard of reasonableness. Indeed, trial counsel's decision to forgo a polygraph examination may have been sound trial strategy. The results of such a test would not have been admissible at trial; thus, submitting to the examination would not have produced a benefit for trial preparation. Accordingly, it was not unreasonable trial strategy for respondent's counsel to forgo a polygraph examination, and we defer to counsel's strategic decisions. See *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Moreover, even if trial counsel's failure to seek a polygraph examination was objectively unreasonable, respondent is not entitled to relief unless he can demonstrate prejudice arising from the alleged error. *Pickens*, 446 Mich at 348-349. Here, respondent has not demonstrated a reasonable likelihood that the results of the polygraph examination would have resulted in dismissal of the charges. See *People v Nichols*, 262 Mich App 408, 415; 686 NW2d 502 (2004) (prosecutor has wide discretion in bringing charges that are supported by the evidence).

Respondent next argues that the trial court abused its discretion by permitting the prosecutor to ask leading questions of the complainant on direct and redirect examination. The trial court determined that leading questions were permissible given the complainant's age and her hesitancy testifying about the incident. We find the trial court's ruling to have been an appropriate exercise of the court's discretion.

In general, "[l]eading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony." MRE 611(d)(1). However, "a considerable amount of leeway may be given to a prosecutor to ask leading questions of child witnesses." *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). "In order to warrant reversal [because leading questions are used at trial], it is necessary to show some prejudice or pattern of eliciting inadmissible testimony." *Id.* (quotation omitted). We review for an abuse of discretion the trial court's decision to permit the use of leading questions. *People v Kosters*, 175 Mich App 748, 756; 438 NW2d 651 (1989).

The trial court did not abuse its discretion in permitting the prosecutor to use leading questions during direct and redirect examination of the complainant. The record reveals that the complainant had difficulty understanding and answering questions at trial. Thus, some leading questions were appropriate to develop her testimony. See *Watson*, 245 Mich App at 587 (the prosecutor may lead a young witness in order to develop her testimony). We note that the prosecution's use of leading questions was not excessive or unnecessarily suggestive. Accordingly, the trial court did not abuse its discretion in permitting the prosecutor to use leading questions. *Id.*

Respondent also argues that the trial court abused its discretion when it interrupted his counsel's closing argument and restricted the scope of the argument. We disagree.

During closing argument, respondent's counsel attempted to argue that because the prosecutor failed to present the testimony of two witnesses who had knowledge of the facts in the case, the jury could infer that those witnesses' accounts would not have been favorable to the

prosecution. After respondent's counsel argued that the jury could draw adverse inferences from the fact that they did not testify, the trial court interrupted his argument and instructed the jury that it could not speculate as to what might have been said by a witness who did not testify.

We review a trial court's ruling with regard to conduct at closing argument for an abuse of discretion. *People v Lacalamita*, 286 Mich App 467, 472; 780 NW2d 311 (2009). We find that the trial court did not abuse its discretion when it limited the scope of counsel's argument and cautioned the jury against engaging in speculation. Indeed, the proffered argument was not a proper inference drawn from the evidence established at trial. See *People v McWilson*, 104 Mich App 550, 555; 305 NW2d 536 (1981) (an inference "may only be drawn from established facts . . ."). There is no evidence that either witness would have testified adversely to the prosecution's case. Therefore, trial counsel's theory was not a reasonable inference, but rather was speculation. *Id.*; see also *Shaw v City of Ecorse*, 283 Mich App 1, 15; 770 NW2d 31 (2009) (speculation is an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference). Thus, because respondent's argument called for speculation and not an inference supported by the evidence, we conclude that the trial court was within its discretion to prohibit trial counsel's reference to adverse inferences. See *McWilson*, 104 Mich App at 555.

Next, respondent contends that he is entitled to reversal because of prosecutorial misconduct. He asserts that the prosecution's closing argument misstated the evidence offered by a forensic expert. At trial, a forensic scientist testified concerning the results of DNA testing done on saliva enzyme that was found on the complainant's underwear. The scientist testified that the testing excluded respondent as the donor of the enzyme. However, the scientist also testified that the test was inconclusive, because the level of the complainant's DNA on the sample could mask DNA from other donors. Based on all of the evidence, the prosecutor argued in closing that saliva found on the complainant's underwear belonged to respondent, and that it served as evidence of his guilt.

Respondent is correct that a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence adduced at trial. *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008). Here, however, the prosecutor's argument was supported by the trial evidence. The scientist's testimony regarding the inconclusive test results supported two reasonable inferences: (1) that respondent was not the donor of the saliva; and (2) that respondent could have been the donor of the saliva because the heavy concentration of the complainant's DNA masked any other DNA that might have been on the sample. Where the evidence equally supports one of two competing inferences, the prosecutor does not commit misconduct by arguing one of the inferences in his or her closing. *Id.* Accordingly, the prosecutor's conduct did not deprive respondent of a fair trial. *Id.*

Respondent next argues that the evidence produced at trial was insufficient for a rational jury to adjudicate him guilty of first- and second-degree criminal sexual conduct. We disagree.

When a respondent challenges the sufficiency of the evidence, "we examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt." *People v Ericksen*, 288 Mich App 192, 196; 793

NW2d 120 (2010). Here, respondent was convicted of first-degree criminal sexual conduct under MCL 750.520b(1)(a), on the theory that he engaged in cunnilingus with a complainant who was under 13 years of age. In order to convict respondent under MCL 750.520b(1)(a), the prosecution had to prove that the complainant was under the age of 13 years, and that respondent engaged in sexual penetration. *People v Waclawski*, 286 Mich App 634, 676; 780 NW2d 321 (2009). Sexual penetration includes cunnilingus. MCL 750.520a(r); *People v Lemons*, 454 Mich 234, 254; 562 NW2d 447 (1997).

The evidence was sufficient to support respondent's adjudication for first-degree criminal sexual conduct. The prosecution presented uncontradicted evidence that the complainant was under the age of 13 years. Moreover, the complainant testified that respondent placed his mouth on her vagina. In a criminal sexual conduct case, the complainant's testimony, if found credible by the jury, is sufficient to establish the offense. *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998).[1] Here, the jury found credible the complainant's testimony that respondent placed his mouth on her vagina. We do not assess credibility anew. *People v Daniels*, 172 Mich App 374, 378; 431 NW2d 846 (1988). Thus, the prosecution presented sufficient evidence for a rational jury to adjudicate respondent guilty of first-degree criminal sexual conduct beyond a reasonable doubt.

We also find that the prosecution presented sufficient evidence to adjudicate respondent guilty of second-degree criminal sexual conduct. Pursuant to MCL 750.520c(1)(a), a person is guilty of second-degree criminal sexual conduct if he engages in sexual contact with a complainant who is under 13 years of age. "Sexual contact" includes an intentional touching of the complainant's intimate parts, "if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, *done for a sexual purpose* . . . ." MCL 750.520a(q) (emphasis added). The prosecution presents sufficient evidence to find that touching was done for a sexual purpose if the respondent's conduct could reasonably be construed as having a sexual purpose. *People v Piper*, 223 Mich App 642, 647; 567 NW2d 483 (1997). Thus, the inquiry is an objective one, not a subjective one. *Id.* at 647-650.

In this case, the prosecution produced sufficient evidence to support an adjudication of guilt of second-degree criminal sexual conduct where the complainant testified that respondent intentionally touched her vagina. Respondent argues that he was too young to have acted for a sexual purpose. However, the jury found that those actions could have objectively been performed for a sexual purpose. We decline to interfere with the jury's assessment of the evidence, and we conclude that there was sufficient evidence to support the adjudication.

Finally, respondent argues that the cumulative effect of the errors alleged above entitles him to relief. However, when no errors occur, "a cumulative effect of errors is incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999). As discussed

[1] Respondent alleges that the jury should not have been able to consider the complainant's testimony because it was the product of leading questions. However, having determined that the use of leading questions was appropriate in this case, we reject respondent's argument.

above, respondent fails to establish a single error. Therefore, respondent cannot be entitled to relief on the basis of cumulative error. *Id.*

Affirmed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Amy Ronayne Krause