STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 1, 2012
v	No. 303602 Kalkaska Circuit Court
JAMES AARON PRENTICE, II, Defendant-Appellant.	LC No. 10-003274-FH

Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction following a jury trial of two counts of third-degree Criminal Sexual Conduct (CSC III), MCL 750.520d(1)(a) (victim aged 13 to 15), and two counts of furnishing alcohol to a minor, MCL 436.1701(1). Defendant was sentenced to concurrent terms of 52 months to 15 years for each CSC III conviction and to 44 days in jail with credit for 44 days served for each furnishing alcohol to a minor conviction. We affirm in part, reverse in part, and remand for further proceedings.

The events underlying the instant case occurred in the late night hours of June 19, 2010, when the then 15-year-old victim and two other minors, including defendant's son, ended up spending the night at defendant's home. The three consumed alcohol, some at least in defendant's presence, and the victim became intoxicated. The victim testified that during the course of the evening, defendant sexually assaulted her twice. There was no physical evidence or eyewitness testimony to attest the sexual assaults.

Following trial, defendant filed a motion for a new trial. In support of his motion, defendant presented two witnesses that testified that the victim told them that she did not remember anything that happened after she fell asleep due to her intoxication. Defendant also entered into evidence a post from the victim's MySpace account dated June 20, 2010 that read as follows: "Got a little crazy last night/this morning. Haha i [sic] don't remember what happened. But, it was fucking fun (: ." Although the trial court characterized the evidence presented at the motion hearing as "powerful stuff," it concluded that it could not serve as the basis for awarding a new trial under existing caselaw because it could only be used for impeachment purposes. This appeal followed.

On appeal, defendant first argues that the trial court erred by denying defendant's motion for a new trial. A trial court's ruling on a motion for a new trial based upon newly discovered

evidence is reviewed for an abuse of discretion. *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993). An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). "To merit a new trial on the basis of newly discovered evidence, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and (4) was not discoverable and producible at trial with reasonable diligence." *Davis*, 199 Mich App at 515.

Before denying defendant's motion, the trial court made the following statement:

> This is pretty powerful stuff . . . but you're right. I mean, it goes to the weight and not the purpose, which is strictly impeachment. If someone had been sexually assaulted as she had testified to, I do not understand why she would post something like this on her MySpace accounts the next day or the same day but later in the day. But it's clearly only admissible for impeachment purposes and I think my hands are tied.
>
> This troubles me greatly, believe me. I think my hands are tied by the Court of Appeals precedent of *Davis*, which is 199 Mich App 502, and its progeny and I'm bound to follow that. So unfortunately I'm going to have to deny your Motion for New Trial.
>
> All right. Let's proceed to sentencing. If it is determined that this witness was lying I would expect the prosecutor to pursue perjury charges.

It is well established that newly discovered evidence that could merely be used for impeachment purposes is not grounds for granting a new trial. *Id*. at 516; *Kube v Neuenfeldt*, 353 Mich 74, 82; 90 NW2d 642 (1958). However, the discovery that testimony introduced at trial was perjured is an appropriate ground. *People v Barbara*, 400 Mich 352, 363; 255 NW2d 171 (1977); *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). It appears as though the trial court felt that the newly discovered evidence presented by defendant raised the possibility that the victim's testimony at trial may have been perjured. However, the court did not consider whether this was a proper ground for granting a new trial. Accordingly, we remand this case to the trial court for reconsideration of defendant's motion for a new trial.

In addition to arguing that the trial court erred by denying his motion for a new trial, defendant also argues on appeal that he is entitled to a new trial due to prosecutorial misconduct and ineffective assistance of counsel. We disagree.

On the issue of prosecutorial misconduct, defendant argues the prosecutor made improper remarks during closing arguments. As defendant failed to raise a timely objection, however, review is limited to plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence." *Id*. (internal quotation marks and citations omitted). We review the prosecutor's

comments "in context to determine whether they denied defendant a fair trial." *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995).

The right to be present at trial is guaranteed by statute, MCL 768.3, and by the United States Constitution, US Const, Am VI. Nevertheless, this right does not necessarily make arguments based on the defendant's presence at trial improper. *People v Buckey*, 424 Mich 1, 15-16; 378 NW2d 432 (1985). Rather, the prosecution is free to argue that the defendant's presence at trial gives the defendant the unique opportunity to observe all prior witnesses and fabricate testimony to conform to those prior witnesses, provided that the evidence supports an inference of such fabrication. *Id*. Moreover, it is not always improper for the prosecution to base an argument on the defendant's status as a criminal defendant. *Id*. at 16.

In this case, during closing arguments the prosecution made the following statement:

> Bear in mind this is also a defendant who got to sit through the entire trial and listen to everybody else's testimony. Bear in mind this is a defendant who has a strong motive to be untruthful or inaccurate. He's on trial for four charges. These are things to bear in mind.

During rebuttal, the prosecution also made the following statement:

> And is there a motive to lie for the defendant? Yes, of course I'm going to argue that because I believe it's . . . present here. He does have that motive. He's here on trial.

Defendant asserts that these comments were improper because they focused on his status as a criminal defendant, and because they made defendant's presence at trial the sole basis for claiming he was fabricating testimony. As noted above, however, it is not improper for the prosecution to base an argument on a defendant's status as a criminal defendant. Further, as noted in *Buckey*, 424 Mich at 15, the "[o]pportunity and motive to fabricate testimony are permissible areas of inquiry of any witness."

Additionally, the prosecution's references to defendant's presence at trial were not divorced from the content of defendant's testimony. In *Buckey*, our Supreme Court held it permissible when a prosecutor "commented on the content of defendants' testimony in relation either to his own earlier inconsistent testimony . . . , or to the testimony of other witnesses." *Id*. In this case, during closing arguments the prosecution not only reminded the jury that defendant had the opportunity to listen to all the other witnesses prior to testifying, but also highlighted the inconsistencies between defendant's version of events and the version of events laid out by the other witnesses.

Further, we note that the trial court properly instructed the jury that defendant was innocent until proven guilty and that the statements and arguments made by counsel are not evidence. Jurors are presumed to follow their instructions. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

On the matter of ineffective assistance of counsel, where, as here, there was no *Ginther*[1] hearing, or a motion for a new trial raising such issue, defendant's claim is preserved only to the extent that the mistakes made by counsel are apparent on the record. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19, 21 (2000). Under both federal and state constitutional law, a defendant in a criminal case has a right to the assistance of adequate and effective counsel. US Const, Am VI; Const 1963, art 1, § 20. In order to prevail under a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below professional norms, that there is a reasonable probability that, but for counsel's error, the result of the proceedings would be different, and that the resultant proceedings were fundamentally unfair or unreliable. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Defense counsel has wide discretion as to matters of trial strategy. *Odom*, 276 Mich App at 415.

First, defendant alleges that defense counsel was ineffective for failing to object to the prosecution's closing argument remarks concerning defendant's credibility. As noted above, however, these remarks were not improper. As trial counsel is not required to make meritless objections, defense counsel's failure to object to the prosecution's comments was not ineffective assistance. *People v Gooden*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant also argues that defense counsel was ineffective for acknowledging during closing arguments that defense counsel had made similar arguments relating to the credibility of criminal defendants when he had worked as a prosecutor. Defense counsel immediately followed this remark, however, with an exposition of why the mere fact that someone is on trial is insufficient to establish that they are not telling the truth. In effect, defense counsel was attempting to defuse the prosecution's argument by demonstrating that it was a standard prosecution argument that did not withstand scrutiny. As such, defense counsel's remarks constituted the carrying out of legitimate trial strategy, did not fall below professional norms, and did not deprive defendant of effective assistance of counsel.

We reverse the denial of defendant's motion for new trial and remand for reconsideration consistent with this opinion. In all other respects, we affirm. We do not retain jurisdiction.

/s/ Patrick M. Meter
/s/ Deborah A. Servitto
/s/ Cynthia Diane Stephens

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).