STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 13, 2014
v	No. 313175 Kent Circuit Court
MARCO ANTONIO VILLAGOMEZ, Defendant-Appellant.	LC No. 11-005410-FH

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

PER CURIAM.

Defendant Marco Antonio Villagomez was convicted after a jury trial of four counts of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a) and MCL 750.520c(2)(b), and one count of accosting, enticing, or soliciting a child for immoral purposes, MCL 750.145a. The trial court sentenced defendant to 54 months to 15 years' imprisonment for each of the four CSC convictions and to one to four years' imprisonment for the accosting conviction, to be served concurrently. He now appeals by right. We affirm.

The victims in this case, MR and ER, are the children of defendant's former girlfriend. The victims lived with their mother, defendant, four sisters, and two of defendant's sisters. On October 31, 2010, the victims' mother took all six children trick-or-treating while defendant stayed home. That evening, she noticed that ER was not acting normal; she was quiet, isolated, would not eat, and appeared to have something on her mind. While driving home, the victims' mother asked the children whether they liked defendant, to which ER responded "no" and began to cry. ER subsequently disclosed that defendant was inappropriately touching her and her sister MR. The victims' mother returned home and confronted defendant, but he denied the accusations and left the home. The police were then called, and the victims' mother told officers what ER and MR had told her. The next day, a detective met with the children and their mother. ER and MR both disclosed to the detective that defendant had touched them inappropriately and also forced them to touch him inappropriately. ER also disclosed that the previous day, defendant had offered ER five dollars in exchange for allowing defendant to touch her. Defendant was subsequently arrested.

Both MR and ER testified at defendant's trial that on multiple occasions defendant touched their "private area" under their clothing with his hands and also forced them to touch his penis, both over and under his clothing. MR testified that the conduct normally occurred when

her mother was not home or early in the morning when her mother and sisters were sleeping. ER also testified that she witnessed defendant enter the bedroom she shared with MR and force MR to touch him. Lastly, ER testified that on the morning she told her mother about the abuse, defendant offered her five dollars to let him touch her. Defendant testified in his own defense and denied the accusations. The jury found defendant guilty on all five charges.

On appeal, defendant first argues that various statements of ER, admitted through the testimony of her mother, were inadmissible hearsay, MRE 802, and that his trial counsel was ineffective for failing to object to those statements. Specifically, defendant challenges the mother's testimony that ER indicated that defendant was abusing her and MR, that ER was afraid to tell because she knew her mother loved defendant and because defendant had said "things would happen" if she told, that during the subsequent confrontation between the victims' mother and defendant at their home, ER told defendant "you told me not to tell mom because something was going to happen," and that she told the detective what the girls had told her, specifically "where [defendant] touched them and stuff, and that he would go in the rooms when he was on his way to work, which is three, four in the morning and everyone's sleeping."

Defendant did not preserve this evidentiary issue by timely objecting or moving to strike the testimony at trial; consequently, we review this claim for plain error. *People v Jones*, 468 Mich 345, 354-355; 662 NW2d 376 (2003). Defendant also failed to preserve his ineffective assistance of counsel claim by moving for a new trial or requesting a *Ginther*[1] hearing, so our review of that claim is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To prevail on a claim of ineffective assistance of counsel, a defendant must establish both that "(1) the performance of his counsel was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different." *Id*. at 659. In sum, defendant must "show that the result that did occur was fundamentally unfair or unreliable." *People v Lockett*, 295 Mich App 165, 182; 814 NW2d 295 (2012).

Defendant's hearsay claim fails. The challenged testimony about what ER told her mother and defendant and what the mother subsequently told a detective was not hearsay because it was not "offered in evidence to prove the truth of the matter asserted." MRE 801(c). Rather, the testimony was offered to establish the chronology of relevant events and to explain how and why the charged offenses came to light. Even if we accepted defendant's claim that the statements constituted inadmissible hearsay, we deem any error harmless because the mother's testimony was merely cumulative to, and corroborative of, the testimony of ER and MR, both of whom defense counsel cross-examined. Accordingly, the prejudicial effect of that testimony was minimal. See *People v Gursky*, 486 Mich 596, 620; 786 NW2d 579 (2010) (the admission of hearsay that is cumulative to the declarant's testimony in court may be harmless error because the primary rationale for excluding hearsay is the inability to test the reliability of out-of-court statements). Moreover, the testimony of ER and MR standing alone was sufficient to convict

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

defendant on all charges. MCL 750.520h; see also *Gursky*, 486 Mich at 623. Defendant cannot establish that the challenged testimony affected the outcome of the trial, as required to warrant reversal under the plain error standard. *Jones*, 468 Mich at 355. Because defendant cannot show the testimony was outcome determinative, his attendant claim of ineffective assistance of counsel must also fail. *Sabin*, 242 Mich App at 659.

Defendant next argues that the trial court committed plain error in allowing inadmissible character evidence and that his trial counsel was ineffective for failing to object to that evidence. Specifically, defendant challenges testimony from both ER and MR that they were afraid to say anything to their mother about the abuse because defendant "looked like" or "seemed like" the type of person who would cause the mother harm if they told. Defendant also challenges testimony from MR that she argued with defendant a lot, in part because he hit the victims' younger sister "all the time." Defendant failed to preserve these issues, and we review the evidentiary issues for plain error, *Jones*, 468 Mich at 355, and the claim for ineffective assistance of counsel for mistakes apparent on the record, *Sabin*, 242 Mich App at 658-659.

"Generally, Michigan's Rules of Evidence proscribe the use of character evidence to prove action in conformity therewith." *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). In this case, however, we find that none of the testimony disputed by defendant constituted impermissible character evidence. First, the testimony from MR and ER regarding why they were afraid to disclose the abuse did not implicate MRE 404(b) because the prosecution did not use the testimony to establish that defendant acted in conformity with his character; i.e., that he attempted to harm the mother after the victims disclosed the abuse. Rather, the testimony was offered simply to explain why the victims waited to disclose the abuse. See *People v Sholl*, 453 Mich 730, 741; 556 NW2d 851 (1996) (Explaining that, notwithstanding the limits on the admissibility of character evidence, "it is essential that prosecutors and defendants be able to give the jury an intelligible presentation of the full context in which disputed events took place"). Because the evidence was admitted for a purpose other than to prove defendant acted in conformity with the victims' perception of his character, it was not inadmissible character evidence. Second, the testimony from MR that defendant hit the victims' younger sister did not implicate MRE 404(b) because that testimony concerned the nature of defendant's relationship with the children, not his character, and it was not elicited to show defendant acted in conformity with a bad character trait. Because none of these statements constituted impermissible character evidence, they were not inadmissible as other prior bad acts, and the trial court did not commit plain error in allowing them. Finally, because the testimony was admissible, defendant cannot establish that his counsel was ineffective for failing to object. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) ("counsel is not required to advocate a meritless position").

We affirm.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Christopher M. Murray