STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 24, 2014
v	No. 311017 Macomb Circuit Court
DAJUAN MARCEL GRATTON, Defendant-Appellant.	LC No. 2012-000306-FC

Before: O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(a), and one count of kidnapping, MCL 750.520b(1)(a). The trial court sentenced defendant to life imprisonment for one CSC conviction, and to 375 to 696 months' imprisonment for the second CSC and kidnapping convictions. Defendant appeals as of right. We affirm.

Defendant was convicted of accosting and sexually assaulting a 12-year-old child whom defendant confronted on a street in Warren while the child was walking home. The victim testified that defendant approached him on a bicycle and told him several times that he would "give head." The victim ignored defendant, but defendant dropped his bicycle, forcibly embraced the victim, and instructed the victim to walk with him while telling the victim that he had a knife. While they walked together, defendant ordered the victim to pull down his pants, following which defendant digitally penetrated the victim's anus at least three times. Defendant thereafter took the victim behind some houses and penetrated the victim's anus with his penis. Defendant then accompanied the victim to the victim's apartment complex. Defendant instructed the victim not to tell anyone what had occurred, and warned him that he knew where the victim lived and that he would be watching him.

The victim immediately told his mother, who contacted the police. The victim underwent a forensic examination, and he also viewed several photographic lineups of known sex offenders, but he did not identify anyone. A police artist drew a sketch of the suspect based on the victim's description. Shortly after the sketch was released to the media, the police received an anonymous tip identifying defendant as a suspect. Another photographic lineup was prepared that included defendant's photo, and the victim "immediately" identified a photograph of

defendant as the person who assaulted him. Forensic analysis of swabs taken from the victim revealed the presence of sperm cells that matched defendant's DNA profile.

I. RIGHT TO A PUBLIC TRIAL

Defendant first argues that the trial court erred in closing the courtroom to the public during the victim's trial testimony without complying with MCL 600.2163a and in violation of his constitutional right to a public trial. The record does not factually support this claim.

Both the federal and state constitutions guarantee a criminal defendant the right to a public trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 663-664; 821 NW2d 288 (2012). However, that right is not absolute. In *Vaughn*, 491 Mich at 653, our Supreme Court, quoting *Presley v Georgia*, 558 US 209, 214; 130 S Ct 721; 175 L Ed 2d 675 (2010), observed:

> A defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding even over a defendant's objection:
>
> > [T]he party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure.

MCL 600.2163a(16) and (17)[1] allow a court to make "special arrangements" to protect child witnesses in certain types of cases. The statute applies to prosecutions for first-degree CSC, MCL 600.2163a(2)(a), where the victim is a child under the age of 16, MCL 600.2163a(1)(d)(*i*) and (2)(a).

In this case, however, the record discloses that the courtroom was never actually closed to the public during defendant's trial. Although the prosecutor had filed a motion requesting closure of the courtroom to the public during the victim's testimony, and although the trial court had indicated on the record that it was inclined to grant the motion, the court later clarified on the record that the courtroom was never closed because no spectators were present when the victim began testifying. Thus, it was unnecessary to decide the motion or to make special arrangements to protect the victim's welfare. When a reporter later attempted to enter the courtroom, the trial court ordered a recess and the reporter was thereafter allowed to remain in the courtroom during the victim's continued testimony. Because the record does not support defendant's argument that the courtroom was actually closed to the public or that special arrangements to protect the victim's welfare were actually made, we reject this claim of error.

[1] The statute was amended by 2012 PA 170, effective June 19, 2012. As in effect at the time of defendant's trial, §§ 16 and 17 were codified as §§ 15 and 16, respectively.

II. SUBSTITUTION OF COUNSEL

Defendant next argues that the trial court erred by denying his request for substitute counsel on the first day of trial. We disagree. "A defendant is only entitled to a substitution of appointed counsel when discharge of the first attorney is for 'good cause' and does not disrupt the judicial process." *People v Buie*, 298 Mich App 50, 67; 825 NW2d 361 (2012). When a defendant asserts that assigned counsel is not adequate or diligent, or is disinterested, the trial court should hear the defendant's claim and, if there is a factual dispute, take testimony and state its findings and conclusion on the record. *People v Ginther*, 390 Mich 436, 441-442; 212 NW2d 922 (1973). "The circumstances that would justify good cause rest on the individual facts in each case." *Buie*, 298 Mich App at 67. A trial court's decision regarding substitution of counsel is reviewed for an abuse of discretion. *Id*.

The record does not support defendant's claim that the trial court erred by failing to make an adequate inquiry into the alleged breakdown of the attorney-client relationship before denying defendant's request for substitute counsel. The court gave defendant an opportunity to state his reasons for his dissatisfaction with appointed defense counsel, allowed defense counsel to respond to defendant's complaints, and then allowed defendant an opportunity to make any additional comments. Defendant's principal dissatisfaction with defense counsel involved defense counsel's failure to pursue an alibi defense and investigate other evidence. Defense counsel explained that he contacted defendant's proposed alibi witnesses and they informed him that they could not support defendant's claim of alibi. In addition, defendant wanted counsel to obtain a surveillance video from a liquor store, but the store, which was in the vicinity of the location of the crime, did not have any video showing that defendant was at the store. The police had investigated surveillance videos of other nearby businesses, but those videos also did not show defendant. Counsel explained that he had confirmed that defendant had rented a motel room on the night of the offense, but there was no record of the time at which that room was rented. Although defendant also asked counsel to obtain telephone records, defendant never explained why the records would be helpful, and defendant had already given a statement to the police admitting his presence in the area where the crime was committed. After listening to defendant's complaints and defense counsel's response, the trial court stated that it was satisfied that defense counsel had been effective in his representation of defendant and denied defendant's request to appoint new counsel.

The record clearly refutes defendant's argument that the trial court did not adequately inquire into the nature of defendant's dissatisfaction with appointed counsel. The court permitted defendant to explain the basis for his dissatisfaction with counsel and allowed defense counsel to respond to defendant's complaints. Defendant's explanation and defense counsel's response provided the court with an ample basis for determining that good cause for the appointment of new counsel did not exist. Moreover, defense counsel's refusal to pursue an alibi defense, where defendant's own proposed alibi witnesses were unwilling to testify in support of the defense, and counsel's investigation had not revealed any factual support for an alibi defense, did not establish good cause for substitution. Counsel is ethically prohibited from presenting testimony that he knows is false. See *Nix v Whiteside*, 475 US 157, 168, 172; 106 S Ct 988; 89 L Ed 2d 123 (1986), and *Buie*, 298 Mich App at 66. Accordingly, the trial court did not abuse its discretion in denying defendant's request for substitute counsel.

III. VOUCHING FOR THE VICTIM'S CREDIBILITY

Defendant next argues that defense counsel was ineffective by failing to move for a mistrial after a police detective improperly vouched for the victim's credibility. Because defendant did not raise this issue in a motion for a new trial or request for a *Ginther*[2] hearing, our review of this claim is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). To establish ineffective assistance of counsel, defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness and resulting prejudice. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011). To establish prejudice, defendant must demonstrate a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id*.

This claim relates to the following emphasized portion of Detective Dailey's testimony, on direct examination by the prosecutor:

> *A.* During [the victim's] statement he indicated that the suspect had spoken to bystander who was in the area.
>
> *Q.* Okay.
>
> *A.* That [the victim] suspected was a friend, so spoke with the subject, and –
>
> *Q.* Without telling us what he said, based on information that you obtained from this bystander, what did you do you [sic] next?
>
> *A. I just basically – by speaking with the bystander I determined that* [*the victim's*] *statement up to that point had been factual and actually helped as far as determining whether or not* [*the victim*] *was truthful*.
>
> *Q.* Okay. So where did you go after you met with the bystander.
>
> *Mr. Garon [Defense counsel]*: Your Honor, I'm going to object to that last statement.
>
> *The Court*. Sustained.

Because it is the province of the jury to determine whether a particular witness spoke the truth, it is improper for a witness to comment or provide an opinion on the credibility of another person while testifying at trial. *People v Musser*, 494 Mich 337, 349; 835 NW2d 319 (2013). Here, Detective Dailey's challenged testimony could be construed as an improper comment on the victim's credibility. Therefore, defense counsel appropriately objected to the testimony, and

[2] *People v Ginther*, 390 Mich at 443.

the trial court appropriately sustained the objection. Nevertheless, defendant now argues that defense counsel was ineffective for failing to move for a mistrial on the basis of the improper testimony. We disagree.

"A mistrial should be granted only where the error complained of is so egregious that the prejudicial effect can be removed in no other way." *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992). Here, Detective Dailey's objectionable testimony was not grounds for a mistrial for several reasons. First, the statement was brief and isolated, and the prosecutor did not comment on it afterward. Second, the objectionable statement was not intentionally elicited by the prosecutor. Rather, it was unresponsive to the prosecutor's question regarding Dailey's next step in his investigation. Generally, "unresponsive testimony by a prosecution witness does not justify a mistrial unless the prosecutor knew in advance that the witness could give unresponsive testimony or the prosecution conspired with or encouraged a witness to give that testimony." *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Although "[p]olice witnesses have a special obligation not to venture into . . . forbidden areas" and this Court will scrutinize an unresponsive remark by a police officer "to make sure the officer has not ventured into forbidden areas which may prejudice the defense," *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983), the statement here was made in the context of explaining the course of the police investigation, not for a clear purpose of vouching for the victim's credibility. Third, to the extent that the statement could be perceived as an improper comment on credibility, any prejudice was cured when the trial court sustained defendant's objection. Fourth, the trial court later instructed the jury that it was not to consider any testimony that it had stricken or excluded. "It is well established that jurors are presumed to follow their instructions," *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), and the court's instructions are presumed to cure most errors. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). In light of these considerations, defendant has not established that a mistrial was required. Because counsel is not required to make a futile motion, *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998), defense counsel was not ineffective for failing to move for a mistrial.

IV. RIGHT TO REMAIN SILENT

Defendant lastly argues that he is entitled to a new trial because the prosecutor improperly elicited testimony regarding defendant's post-arrest exercise of his right to silence. Because defendant did not object to the challenged testimony, this issue is not preserved. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Accordingly, we review the issue for plain error affecting defendant's substantial rights. *People v Borgne*, 483 Mich 178, 184; 768 NW2d 290 (2009).

This claim relates to the following emphasized portions of Detective Dailey's testimony, on direct examination by the prosecutor:

> *Q. Did you get any other information from him*?
>
> *A. As the interview continued, I confronted* [*defendant*] *with the fact that he was on foot in the area, same place the assault had occurred in question. At that time he became uncooperative and requested an attorney*.

Q. So, did you tell him right away why he was being questioned?

A. No, I did not.

Q. Did you tell him that will he [sic] was a suspect in a sexual assault that occurred on November 28, 2011?

A. Eventually I did, yes.

Q. Eventually in your interview?

A. Yes.

Q. And so the interview ends because he doesn't want to talk to you anymore?

A. That's correct.

The Fifth Amendment, as applied to the states through the Fourteenth Amendment, "forbids [] comment by the prosecution on the accused's silence" at trial. *People v Clary*, 494 Mich 260, 265; 833 NW2d 308 (2013), quoting *Griffin v California*, 380 US 609, 615; 85 S Ct 1229; 14 L Ed 2d 106 (1965). "[A]fter an arrested person is formally advised by an officer of the law that he has a right to remain silent, the unfairness occurs when the prosecution, in the presence of the jury, is allowed to undertake impeachment on the basis of what may be the exercise of that right." *Borgne*, 483 Mich at 187, quoting *Doyle v Ohio*, 426 US 610, 619 n 10; 96 S Ct 2440; 49 L Ed 2d 91 (1976). When a defendant exercises his right to remain silent, that silence may not be used against him at trial. *People v Bobo*, 390 Mich 355, 360-361; 212 NW2d 190 (1973); *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001). However, introduction of evidence that the defendant exercised his right to remain silent does not mandate reversal in all cases. Reversal may not be required if the prosecution did not make a deliberate attempt to place the defendant's silence before the jury. *People v Dennis*, 464 Mich 567, 575; 628 NW2d 502 (2001); *People v Truong (After Remand)*, 218 Mich App 325, 336-337; 553 NW2d 692 (1996).

In *Greer v Miller*, 483 US 756; 107 S Ct 3102; 97 L Ed 2d 618 (1987), the defendant, who was charged with murder, testified on his own behalf that he was not involved in the murder, but the perpetrators sought his advice after the murder was committed. *Id*. at 758. The prosecutor asked the defendant on cross-examination why he did not give this information to the police after his arrest. *Id*. at 759. The defendant objected and moved for a mistrial. The trial court sustained the objection and instructed the jury to "ignore [the] question, for the time being," but denied the motion for a mistrial. *Id*. The Supreme Court noted that the trial court "explicitly sustained an objection to the only question that touched upon [the defendant's] postarrest silence," and "the court specifically advised the jury that it should disregard any questions to which an objection was sustained." Additionally, the prosecutor was not permitted to call attention to the defendant's silence, and "[t]he fact of [the defendant's] postarrest silence was not submitted to the jury as evidence from which it was allowed to draw any permissible inference . . . ." *Id*. at 764-765. The Court further held that the prosecutor's question did not rise

to the level of prosecutorial misconduct depriving the defendant of his due process right to a fair trial. *Id*. at 765-766.

In *Dennis*, 464 Mich 567, the prosecutor asked the arresting officer, "What type of investigation follow-up did you do with regard to this?" The officer replied, "I went out and attempted to interview [defendant], and at that time it was refused. He wished to speak to an attorney prior to me asking him any questions." *Id*. at 570 (brackets in original). The trial court denied the defendant's request for a mistrial because it was "convinced the prosecutor did not intend to elicit testimony on this point and that it did not think 'the jury picked it up or caught it in any way.'" *Id*. at 571. The trial court later instructed the jury that the defendant had an "absolute right" to consult an attorney before answering questions, and that his exercise of this right "is not any indication of anything." *Id*. The Court distinguished the case from *Doyle*, in which the prosecutor repeatedly asked the defendant questions to emphasize that he did not provide an exculpatory explanation of events after his arrest. *Id*. at 575. The Court concluded that the case was analogous to *Greer*, and noted that "the conduct of the prosecutor in *Greer* was far worse in that he attempted to directly inject the defendant's silence into the defendant's trial while the prosecutor in the present case inadvertently elicited testimony about the present defendant's refusal to submit to a police interview." *Id*. at 577. Accordingly, the Court held that there was no constitutional violation because the prosecutor did not deliberately elicit the detective's response, but instead asked an open-ended question regarding the detective's investigation. The Court concluded that it was "evident that the prosecutor's question, while it may have been inartfully phrased, was aimed at eliciting testimony about these investigative efforts, not about the defendant's refusal of a police interview." *Id*.

In the instant case, the prosecutor did not purposefully elicit Dailey's testimony that defendant "became uncooperative and requested an attorney." The prosecutor permissibly questioned Dailey about the progress of the interview. The prosecutor's question did not invite Dailey's response. The prosecutor asked a follow-up question that incorporated Dailey's statement that the interview ended because defendant did not want to continue, but she did not comment on or argue that defendant's decision to end the interview involved the exercise of his Fifth Amendment rights or should be used to draw an improper inference. Accordingly, there was no plain error. Further, defendant has not demonstrated that the testimony affected his substantial rights (i.e., was outcome-determinative), considering that it was brief and the prosecutor did not call attention to it or comment on it in closing argument.

We also reject defendant's related claim that defense counsel was ineffective for failing to object to the testimony. Counsel's failure to object was not objectively unreasonable where the objectionable reference was brief and unsolicited, the prosecutor did not attempt to capitalize on it, and any objection would have drawn more attention to the remark. *Armstrong*, 490 Mich at 289-290.

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey