STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 31, 2011
v	No. 281046 Macomb Circuit Court
DANTE DESHAWN MOORE, Defendant-Appellant.	LC No. 2007-001116-FC

Before: CAVANAGH, P.J., and JANSEN and SERVITTO, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial convictions of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b), for which he was sentenced to concurrent prison terms of 14 to 30 years. We affirm.

Defendant first argues that the prosecutor improperly vouched for the credibility of witnesses and appealed to the sympathy of the jurors during her closing argument. Because defendant failed to object to the prosecutor's argument or request a curative instruction, this issue is reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

"The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial." *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). A prosecutor may not vouch for the credibility of a witness by suggesting that he or she has some special knowledge of the witness's truthfulness. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). Appeals to sympathy or to empathize with the victim of a crime are also prohibited. *Unger*, 278 Mich App at 237. A prosecutor's remarks must be considered in their entirety when making a determination regarding their propriety. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Defendant argues that the prosecutor improperly referred to the victim's age during her closing argument. The victim was 13 years old and defendant was charged with first-degree criminal sexual conduct with a child aged 13 to 16 years. The victim testified that defendant also abused her before she was 13, but the prosecutor asked her to focus on incidents that occurred when she was 13 or older in keeping with the charges against defendant. We conclude that none

of the prosecutor's brief, isolated references to the victim's age constituted plain error affecting defendant's substantial rights.

Defendant next argues that the prosecutor "vouched" for the victim's testimony by indicating to the jury that she had some "special knowledge" regarding the testimony. Defendant points to the prosecutor's statement that she "never want[s] to go back to being 13 years old." Defendant argues that "[o]ne can only presume the prosecutor had some special knowledge about what it was like at that age." Clearly it is common sense that every adult has knowledge of what it is like to be 13 years old. This hardly constitutes "special" knowledge of any sort. Moreover, the rule prohibiting prosecutors from indicating that they have "special knowledge" exists to prevent prosecutors from suggesting that they have special knowledge of a witness's truthfulness. *Bahoda*, 448 Mich at 277. Certainly any insight the prosecutor had of being a 13-year-old girl would not have given her knowledge of the victim's *truthfulness* in testifying. Defendant's argument is meritless.

Defendant next argues in a supplemental brief filed *in propria persona* that the trial court erred in scoring defendant's offense variables (OVs) at the time of sentencing. Defendant alleges three separate scoring errors. Defendant failed to raise these objections before the trial court, but alleges that the errors place his sentence outside the "proper" minimum sentencing guidelines range, rendering the issues reviewable. See *People v Kimble*, 470 Mich 305, 309-310; 684 NW2d 669 (2004); see also MCR 6.429(C). While we conclude that the trial court incorrectly scored OV 11, defendant's sentence remains within the "appropriate" range. Therefore, this issue is unreviewable. *Id.*

Defendant also argues that defense counsel was ineffective for failing to raise these issues at trial and for rendering them unreviewable by this Court. As noted by our Supreme Court in *Kimble*, MCR 6.508 provides grounds for relief from a sentence that is not otherwise reviewable. In order to be entitled to relief, defendant must demonstrate that there was "good cause" for failure to previously raise the issue and "actual prejudice" flowing from the alleged errors. MCR 6.508(D)(3). Good cause can be demonstrated by ineffective assistance of counsel. *Kimble*, 470 Mich at 314. Actual prejudice, in the case of a sentencing issue, requires that the "sentence is invalid." MCR 6.508(D)(3)(b)(*iv*). Because defendant's sentence was within the minimum sentencing guidelines range proposed by defendant, his sentence was not invalid and he is not entitled to resentencing.

Defendant next argues in his supplemental brief that trial counsel was ineffective for failing to procure additional discovery in preparation for trial and for failing to consult an expert on the issues of delayed disclosure and false disclosure. A defendant must move for a new trial or request an evidentiary hearing to preserve an issue of ineffective assistance of counsel for appeal. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant filed a motion to remand for an evidentiary hearing on this issue, and this Court granted defendant's motion. *People v Moore*, unpublished order of the Court of Appeals, entered February 27, 2009

(Docket No. 281046).[1] A *Ginther*[2] hearing was conducted by the trial court. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

Generally, counsel is presumed to be effective and a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness, and (2) defendant was so prejudiced by counsel's deficiency that there is a reasonable probability that, without the error, the outcome would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Further, the defendant must demonstrate that "the attendant proceedings were fundamentally unfair or unreliable." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). In order to demonstrate that an attorney's performance was substandard, a defendant must also overcome a strong presumption that the attorney's trial strategy was sound, even if the strategy was ultimately unsuccessful. *Id*. at 715. An appellate court will not substitute its judgment for that of defense counsel on questions of trial strategy. *Id.*

Defendant's first argument is that defense counsel was ineffective for failing to seek records of the victim's psychological evaluation and records of the victim's "arrest[] for assault[]." We note that there is no evidence that the victim was arrested for assaulting her mother, as asserted by defendant. The officer in charge, Michael Gagnon, testified that when the case was referred to him it was for incorrigibility, "a status offense, not a criminal offense." The victim's mother never testified regarding an assault complaint and, in any case, never went forward with any sort of complaint after the victim's disclosure. There is no evidence that there was a record of an assault charge for defense counsel to obtain.

Much of the *Ginther* hearing involved questioning defense counsel regarding why he did not seek to obtain the records of the victim's psychological evaluation. Defense counsel testified that he did not seek to obtain the records because they were privileged. He also never sought to have the court make an in camera inspection of the records under MCR 6.201(C)(2). On cross-examination, defense counsel stated that he did not have a "good-faith belief, grounded in articulable fact, that there [was] a reasonable probability" that the records would "contain material information necessary to the offense," as required for a motion under MCR 6.201(C)(2).

The trial court obtained the records and inspected them. The court concluded that it was a mistake for defense counsel not to at least make a motion under MCR 6.201(C)(2) to have the court inspect the records. Nevertheless, after reviewing the records, the court concluded that

---

[1] We note that defendant also requested to an opportunity to engage in further discovery on remand. Defendant's issue on appeal addressing this request is moot because it was addressed by this Court when it granted defendant's motion to remand.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). We observe that defendant has neglected to file an additional brief post-remand regarding the issues raised at the *Ginther* hearing. Thus defendant's factual support for his argument is noticeably deficient.

there was no discussion in them about the sexual abuse. Instead, the court noted, they were merely "superficial records," containing a therapist's description of "[the victim's] immediate condition." The court further stated there was nothing "relevant or probative" in the records.

On the facts of this case, we cannot conclude that defense counsel performed deficiently by failing to obtain the records and ascertain whether they would be beneficial to the defense. Moreover, even if counsel's performance in this regard could be characterized as deficient, the records were in fact unsupportive, and there is accordingly no basis from which to conclude that the outcome would have been different if counsel had obtained and reviewed them. See *Mack*, 265 Mich App at 129.

Defendant next argues that defense counsel was ineffective for failing to obtain an expert regarding disclosure issues, in particular after Gagnon testified regarding his experience with child disclosure of sexual abuse. Whether to call an expert witness is generally a question of trial strategy on which we will not substitute our own judgment with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Cooper*, 236 Mich App 643, 658; 601 NW2d 409 (1999). However, the failure to consult an expert or investigate whether expert testimony may have been beneficial may itself constitute an unreasonable trial strategy. See *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998).

At trial, Gagnon testified that, in his experience, "young people who are victims of any type of sexual assault . . . have an easier time repressing the memories than adults do." He repeated this point three times. Defense counsel did not object to this testimony. Gagnon further testified that, in his experience, children who live in an abusive home are "very shy and very reserved." He further stated that children "don't remember details on things." Defense counsel objected to this testimony on the ground that Gagnon was not an expert. The trial court overruled the objection, stating, "He can tell us his experience." On cross-examination, with respect to this testimony, defense counsel asked Gagnon, "Does the truth ever change?" Gagnon responded, "The truth doesn't change. People's interpretation of the truth could change." These appear to be the only questions defense counsel asked Gagnon that were directly related to this issue.

At the *Ginther* hearing, a forensic psychologist, Dr. Terence Campbell, testified as an expert that the victim demonstrated multiple warning signs for false disclosure, including viewing the accused as an enemy, delayed disclosure, and the possibility of seeking to avert attention away from her own conduct. He opined that this behavior may have indicated that the victim was affected by oppositional defiant disorder. Campbell also testified that Gagnon's testimony was misleading to the jury when he suggested that it is common for children or adolescents to repress memories of sexual abuse and to be shy and reserved. Campbell opined that current research on this issue demonstrates that this is not an accurate portrayal of child victims of sexual abuse.

In his testimony at the *Ginther* hearing, defense counsel acknowledged that the issue of the victim's delayed disclosure was a relevant issue in this case. He further acknowledged that the victim demonstrated multiple signs of possible false disclosure. He testified that he did not consult with an expert because it is "not [his] way of practice" for criminal sexual conduct cases. He explained that this is because the case hinged primarily on a question of credibility between

the victim and the defendant and that an expert does not "help attack the credibility of the witness."

At trial, defense counsel questioned the victim's mother about the victim's delayed disclosure. The mother testified that the victim told her that she did not disclose earlier because she was too scared. Defense counsel also asked the victim repeatedly regarding why she failed to disclose earlier, eliciting testimony that she was afraid of defendant. He also elicited testimony that she had always hated defendant.

In his closing argument, defense counsel argued that the victim had ample opportunity to disclose the sexual abuse after defendant had left the house and, therefore, after her fear of him should have lessened. Counsel further argued that the victim's disclosure to the psychological evaluator gave the victim a good opportunity to extract herself from a bad situation by refocusing the attention on someone else. He further noted that the victim expressed a long record of hatred toward defendant.

Defense counsel's only explanation for why he did not consult an expert was that it was "not his practice" to do so in a case that hinges primarily on credibility. In other words, counsel's decision in this regard does not appear to have been strategic in nature. Nevertheless, we are unable to conclude that there is a reasonable probability that the outcome would have been different if defense counsel had consulted and retained an expert. *Mack*, 265 Mich App at 129. Defense counsel, himself, presented much of Campbell's logic in his own closing argument. Thus, even if Campbell had testified for the defense at trial, he would have merely lent some additional weight to the ideas that defense counsel had already presented regarding the victim's credibility. Accordingly, we simply cannot conclude that any error in this regard was outcome determinative.

Defendant next argues that Gagnon should not have been permitted to testify regarding disclosure issues without first being qualified as an expert. Defendant further argues that Gagnon was not qualified as an expert on these issues. This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007). Preliminary questions of law are reviewed de novo. *Id.* An erroneous evidentiary ruling does not require reversal unless it affirmatively appears that it is more probable than not that the error was outcome determinative. MCL 769.26; *People v Lukity*, 460 Mich 484, 488, 495-496; 596 NW2d 607 (1999).

MRE 701 provides the framework for opinion testimony from a lay witness:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

On the other hand, in order to give opinion testimony based on specialized knowledge, a witness must be first qualified as an expert under MRE 702. In this case, Gagnon testified several times "based on his experience." He stated that "generally, with young people who are victims of any type of sexual assault . . . they seem to have an easier time repressing the memories." He also

maintained that "children's statements are less specific or less detailed." He testified that he has observed that children who have "witnessed abuse in the home" tend to be "very shy and very reserved." Finally, he testified that it is "not unusual" for "someone that has undergone sexual abuse estimated at least 50 times" to not remember every single incident. Each of these statements was qualified either by Gagnon or the prosecutor as based on Gagnon's experience working on "well over a hundred" CSC cases.

Whether Gagnon's testimony constitutes lay or expert opinion testimony is a close question. Gagnon's testimony was "rationally based on" his perceptions of the victim and other sexual abuse victims and, at least arguably, "helpful to a clear understanding of . . . a fact in issue," i.e., the victim's conduct. MRE 701. The question is whether his testimony was *also* grounded in "scientific, technical, or other specialized knowledge," requiring that he be qualified as an expert. MRE 702. We conclude that it was.

Although Gagnon's testimony was not "a technical or scientific analysis," it was nevertheless based on his specialized knowledge of sexual abuse victims, acquired through his experience as a police officer. See *People v Petri*, 279 Mich App 407, 416; 760 NW2d 882 (2008). It was not simply a "common sense" opinion but was expressly qualified as an opinion arising from his extensive experience. See *People v McLaughlin*, 258 Mich App 635, 658; 672 NW2d 860 (2003). Finally, Gagnon's testimony was not directly related to his own perceptions of the victim. Rather, Gagnon simply testified regarding behavioral tendencies of victims like the victim in this case without actually stating that the instant victim exhibited those tendencies in her interview with him. Gagnon's testimony constituted expert testimony because it went beyond his perceptions and commonsense inferences arising therefrom, and was based on his specialized experience as a police officer. The trial court erred by admitting this testimony without requiring that Gagnon be qualified as an expert.

Nevertheless, a "police witness can be qualified as an expert on the basis of experience or training in child sexual abuse cases." *Petri*, 279 Mich App at 416. Gagnon's testimony was expressly limited to observations borne out of his experience as a police officer. Thus, it is clear that Gagnon would have qualified as an expert witness for the purposes of making these observations. He testified that he had worked on over 100 similar cases involving both children and adult victims. He testified that he has had significant training on issues relating to sexual assault cases, including interviewing child victims. See *id*. Further, it was not more probable than not that the admission of Gagnon's testimony was outcome determinative. As noted, Gagnon's testimony was expressly limited to his observations and experience as a police officer. Whether the victim remembered details of every incident of abuse was not at issue in this case.

Defendant also argues that the scientific literature contradicts Gagnon's observations and that he therefore could not have been qualified as an expert. But Gagnon did not purport to make any representations regarding scientific studies. Instead, he testified from his experience. The fact that defendant could have called another expert witness to rebut Gagnon's observations—but did not—does not change the fact that Gagnon's testimony was proper expert testimony based on the limited scope of his expertise.

Defendant also argues that the prosecutor committed misconduct when she repeatedly highlighted defendant's exercise of his right to post-arrest silence.

> A defendant's right to due process guaranteed by the Fourteenth Amendment is violated where the prosecutor uses his postarrest, post-*Miranda* warning silence for impeachment or as substantive evidence unless it is used to contradict the defendant's trial testimony that he made a statement, that he cooperated with police, or that trial was his first opportunity to explain his version of events. [*People v Solmonson*, 261 Mich App 657, 664; 683 NW2d 761 (2004).]

At trial, the prosecutor ventured, or attempted to venture, into this territory several times. First, the prosecutor asked Gagnon, "[W]ere you able to speak with [defendant] or get any written statement from [defendant]." Before Gagnon answered, defense counsel objected and the court sustained the objection. The prosecutor again asked if Gagnon had received a written statement and another objection was sustained. Finally, the prosecutor asked, "Were you ever able to get any other contact from anyone regarding [this] case, other than [from the victim]?" Gagnon responded that he was not.

Next, the prosecutor asked:

> *Q.* Now, as an officer, is there anything that you are—on a CSC case—that you need to do to follow up, other than get a statement from the victim, or as you said, to try to get both sides of the story?
>
> *A.* Basically, we need to get both sides of the story. It's—I don't like working with one side of the story. I like to talk to both people to see—

Defense counsel again objected and the trial court again sustained the objection, stating, "I don't want any reference to the two people involved here."

Lastly, the prosecutor asked defendant on cross-examination, "[D]o you think it's important to have both side[s] of the story?" She followed up by asking, "Do you recall the officer coming to talk to you?" Defense counsel objected and the trial court sustained the objection. Immediately thereafter, the prosecutor asked defendant, "[D]id you ever take the time yourself . . . to get in touch with [Gagnon]?" The trial court again sustained an objection, ending the line of questioning.

When the prosecutor's questioning of Gagnon strayed into a discussion of defendant's silence, the questioning was arguably cut off by defense counsel's timely objections. Nevertheless, Gagnon did testify, "I don't like working with one side of the story," and also testified that he did not talk to anyone other than the victim about the case. Therefore, it was likely clear to the jury that Gagnon was operating without defendant's "side of the story," albeit without any further context.

The prosecutor's questioning of defendant was more direct. She directly asked defendant whether he "[got] in touch" with Gagnon regarding this case. While defendant was prevented from answering the question, there would be a reasonable inference raised simply from the prosecutor's question that defendant had not spoken with Gagnon. This inference would have been reinforced by the prosecutor's earlier questioning of Gagnon.

The prosecutor's questioning in this regard was improper. See *People v Taylor*, 245 Mich App 293, 304; 628 NW2d 55 (2001). Nevertheless, we conclude that this error was harmless beyond a reasonable doubt. *People v Miller*, 482 Mich 540, 559; 759 NW2d 850 (2008). The issue of defendant's silence was only raised on three separate occasions, two of which were only a few moments apart, and the questioning of Gagnon was otherwise properly related to his investigation. Moreover, the prosecutor never argued that defendant's silence was in any way indicative of his guilt. See *People v Shafier*, 483 Mich 205, 221; 768 NW2d 305 (2009). Further, defense counsel's timely objections prevented answers to most of the prosecutor's questions. In short, there is little or no basis for concluding that the prosecutor's improper questions were outcome-determinative in this case.

Affirmed.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen