

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 26, 2011

v

LENNARD BERNARD LASTER,
Defendant-Appellant.

No. 296281
Kent Circuit Court
LC No. 09-003285-FC

Before: HOEKSTRA, P.J., and MURRAY and M. J. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial conviction of first-degree criminal sexual conduct (victim under age 13, defendant age 17 or older), MCL 750.520(b)(2)(b). Defendant was sentenced to 25 to 40 years' imprisonment. We affirm.

Defendant's first argument is that counsel rendered ineffective assistance of counsel when he allowed the victim's mother to sit next to her while she (the ten-year-old victim) testified, and then allowed the victim to take a break during her testimony. The main problem with trial counsel's actions, according to defendant, is that *prior* to the mother sitting on the stand with the victim, and *prior* to taking a break, the victim had provided testimony on cross-examination that was favorable to the defense theory.

This issue was preserved for review when defendant moved to remand this case for a *Ginther*¹ hearing on the same basis. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). However, because this Court denied defendant's motion, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

In order to demonstrate that he was denied the effective assistance of counsel a defendant must show that counsel's performance was "deficient" and that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "To

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

demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* at 600.

After reviewing the record, we hold that counsel did not act deficiently with respect to his cross-examination of the victim. Here, the victim was very young and indicated that she was confused by defense counsel's questions. Counsel made a strategic decision to soften his approach to try and help the victim through her cross-examination. He had nothing to lose by appearing sympathetic to the victim where the victim had already reaffirmed her direct testimony that defendant sexually assaulted her. Additionally, defendant's criticism raises a classic case of second-guessing with hindsight counsel's actions based only on the results of the questioning. Nothing in the record suggests that it was clear that upon re-questioning the victim after the break she would testify that defendant committed the crime, as opposed to returning to her initial testimony that was favorable to defendant. This type of argument is unpersuasive. See *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001) ("This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight").

In any event, even if we were to find that counsel acted deficiently, defendant cannot show that there is a reasonable probability that "but for counsel's error, the result of the proceeding would have been different." *Carbin*, 463 Mich at 600. There was substantial evidence of defendant's guilt. At trial, the victim repeatedly testified that defendant sexually assaulted her. When the victim's mother confronted defendant about the victim's accusations, defendant responded by admitting that the victim was telling the truth and stated, "if that's what she said, then that's what happened." Defendant then ran out of the house, and police later found him, which evinced a consciousness of guilt. See *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003) ("evidence of flight is admissible to support an inference of 'consciousness of guilt' and the term 'flight' includes such actions as fleeing the scene of the crime"). Just as importantly, defendant twice admitted to police that he had sexual relations with the victim. During his first police interview, defendant stated that he had sexual contact with the victim between 10 to 20 times and he described one sexual assault in detail. During a subsequent police interview, defendant altered his story and stated that he only had sex with the victim, "the first time."² In sum, there was overwhelming evidence of defendant's guilt, and any deficiency on the part of defense counsel with respect to his cross-examination of the victim had no impact on the outcome of the trial. *Carbin*, 463 Mich at 600.

² At trial defendant again changed his story and advanced an incredible theory that he and the victim arranged to fabricate the sexual assault charges in order to "help" the victim's mother overcome the sexual abuse she suffered as a child. A rational trier of fact could have easily concluded that defendant lacked credibility. See *People v Unger*, 278 Mich App 210, 226; 749 NW2d 272 (2008) (conflicting statements are relevant and tend to show a consciousness of guilt).

Next, defendant argues that defense counsel rendered ineffective assistance of counsel when he recalled the victim as a hostile witness. “Decisions regarding . . . whether to call or question witnesses are presumed to be matters of trial strategy, which [this Court] will not second-guess with the benefit of hindsight.” *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). As we already noted, defense counsel had limited options available to him given the overwhelming evidence and defendant’s incredible testimony, and we will not second-guess counsel regarding his strategic decision to recall the victim. *Id.*

Defendant also argues that he was denied a fair trial when the prosecutor introduced several hearsay statements. Defendant failed to preserve any of his evidentiary challenges for review because he did not raise a contemporaneous objection on the same basis at trial. *People v Grant*, 445 Mich 535, 545-546, 553; 520 NW2d 123 (1994). Whether evidence is admissible under a statute or the rules of evidence involves a question of law that we review de novo. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Unpreserved evidentiary errors are reviewed for plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Under the plain error standard, a defendant must show: (1) that an error occurred, (2) the error was plain, i.e., clear or obvious, (3) that the plain error affected his substantial rights in that the error affected the outcome of the lower court proceedings. *Id.*

Defendant contends that the victim’s mother, a police officer, a forensic interviewer, and a doctor all offered hearsay testimony at trial. After reviewing the record, we agree that there were several instances of improper hearsay evidence within each of these witnesses’ testimonies including improper hearsay within hearsay. See MRE 801; MRE 802; MRE 805. However, defendant cannot show that the inadmissible evidence amounted to plain error that affected his substantial rights. *Carines*, 460 Mich at 763-764. As discussed above, there was substantial evidence of defendant’s guilt in this case including defendant’s own admissions. For the same reason, defendant’s argument that defense counsel was ineffective when he failed to object to the inadmissible hearsay evidence also fails. *Carbin*, 463 Mich at 600.

In a Standard 4 brief, defendant raises an issue concerning a hearing and the “undue influence of a [juror],” however, defendant’s failure to either *explain* his position or provide *any* analysis or discussion amounts to abandonment of the issue. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) (“An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority”).

Affirmed.

/s/ Joel P. Hoekstra
/s/ Christopher M. Murray
/s/ Michael J. Kelly