

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL DEWAYNE FOSTER,

Defendant-Appellant.

UNPUBLISHED

June 29, 2006

No. 261601

Wayne Circuit Court

LC No. 04-008570-01

Before: Fort Hood, P.J., and Cavanagh and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of armed robbery, MCL 750.529, five counts of first-degree criminal sexual conduct, MCL 750.520b (multiple variables), second-degree criminal sexual conduct, MCL 750.520c (multiple variables), and two counts of assault with intent to commit sexual penetration, MCL 750.520g(1). We affirm.

Defendant first claims that the trial court abused its discretion when it admitted into evidence his postarrest statement made to Investigator William Galen. Defendant argues that his statement to Investigator Galen regarding the alleged sexual assault was inadmissible hearsay because the statement was self-serving and exculpatory, and did not fall under any of the hearsay exceptions. He also indicates that the trial court failed to address this objection. Defendant further argues that the trial court erred in instructing the jury on how to use the statement in its finding of facts. We disagree with both claims.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). Because defendant did not object to the jury instructions below, this issue is unpreserved. When issues are unpreserved, this Court's review is for plain error affecting the defendant's substantial rights, and will only reverse if the "error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

By definition, hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c); *People v McLaughlin*, 258 Mich App 635, 651; 672 NW2d 860 (2003). Hearsay is inadmissible at trial unless there is a specific exception allowing its introduction. *Id.* MRE 801(d)(2) provides that a statement is not hearsay if it is offered against a party and the statement

is the party's own statement. *People v Kowalak*, 215 Mich App 554, 556-557; 546 NW2d 681 (1996). "Admissions by a party are specifically excluded from hearsay and, thus, are admissible as both impeachment and substantive evidence under MRE 801(d)(2)." *People v Lundy*, 467 Mich 254, 257; 650 NW2d 332 (2002).

The victims, mother and daughter, testified that defendant sexually assaulted them while at defendant's home in Detroit, Michigan. When Investigator Galen questioned defendant regarding the sexual assault, defendant told Investigator Galen that the mother was at his house on the night in question to buy some jewelry. According to defendant, the mother and another person, named Russell Hayes, were at his house that night. Defendant maintained that he and the mother did not have sexual intercourse that night, but they had been sexually intimate before because they had a prior relationship. Defendant also told Investigator Galen that the daughter was not at his house on that night and that he did not pull a knife on the mother or take the mother's money.

While it is true that parts of defendant's statement were exculpatory because he denied any involvement in the crimes charged, the statement was admissible as non-hearsay evidence under MRE 801(d)(2) and was offered to challenge defendant's theory of the case. Defendant's theory of the case was that he and the mother engaged in consensual oral sex and that the mother said otherwise because the daughter walked in on them engaging in the sexual act. The statement was offered against defendant to show that (1) defendant told Investigator Galen that the daughter was not at his house on that night and, (2) defendant had indicated that he and the mother did not have sex on that night.

Even though the trial court permitted defendant's statement to Investigator Galen into evidence without addressing defendant's hearsay objection, or rather, his objection to the "use of [the statement]," the error is harmless. See MCR 2.613(A); *McLaughlin, supra* at 650. The statement is non-hearsay under MRE 801(d)(2) and, therefore, even if the court had ruled on the hearsay objection, the statement would have been admitted into evidence. For that reason, defendant has failed to show that the trial court's failure to address his objection on hearsay grounds was prejudicial, i.e., that the outcome of the case would have been different had the court addressed the hearsay objection.

Because the statement was properly admitted into evidence, defendant's argument that the court improperly instructed the jury regarding the use of the statement is without merit. The jury instructions were proper in light of the evidence presented. In defendant's statement to Investigator Galen he denied having sexual relations with the mother on that night and he denied that the daughter was at his house on that night. This statement conflicted with defendant's testimony at trial. The court properly instructed the jury that it may or may not find that defendant made the statement to Investigator Galen. The court also properly instructed the jury that it must decide which witnesses to believe and the importance of their testimony. It was also proper for the court to instruct the jury that it may consider the context in which the statement was made, if it finds that defendant made the statement. A trial judge must "instruct the jury as to the law applicable to the case and [in his charge] make such comment on the evidence, the testimony and character of any witnesses, as in his opinion the interest of justice may require." MCL 768.29. Defendant did not object to the jury instructions when they were given and has failed to show that the instructions were improper. Thus, this argument is without merit.

Next, defendant raises two claims of prosecutorial misconduct. First, defendant argues that the prosecutor's questioning regarding whether he had any cards, letters, receipts or photographs to show that he and the mother had a prior relationship was improper because it shifted the burden of proof to him to produce evidence to support his claim. Because defendant objected to the questioning, we review the record de novo to determine whether defendant was denied a fair and impartial trial. See *Ackerman, supra* at 448.

A witness may be cross-examined "on any matter relevant to any issue in the case, including credibility." *People v Layher*, 464 Mich 756, 764; 631 NW2d 281 (2001). The prosecutor did not engage in misconduct by inquiring into whether defendant had evidence to support his claim that he and the mother had a prior relationship. Defendant's theory of the case was that he and the mother were in a prior relationship and that the mother only said that he sexually assaulted her because the mother was embarrassed that the daughter walked in on them engaging in oral sex. During cross-examination the prosecutor asked defendant if he had any evidence to support his claim. Aside from defendant's testimony, no evidence was presented to support his claim. The prosecutor's questions did not shift to defendant the burden of proving his innocence, but properly attacked the credibility of defendant's theory that he and the mother had a prior relationship and that the sexual contact between them was consensual. See *People v Fields*, 450 Mich 94, 105-107; 538 NW2d 356 (1995); *People v Brown*, 267 Mich App 141, 153; 703 NW2d 230 (2005). Therefore, the prosecutor's questions were not improper.

Defendant's second claim of prosecutorial misconduct is that the prosecutor shifted the burden of proof during closing argument when he argued that defendant presented no evidence to support his claim of a prior relationship with the mother. But, defendant failed to object to the prosecutor's closing argument therefore our review is for plain error affecting substantial rights. See *Ackerman, supra*.

During closing argument, the prosecutor commented on the lack of evidence to support defendant's claim that he and the mother had a prior relationship. The prosecutor's argument was not improper because it attacked defendant's credibility and his theory of the case. Arguing that evidence does not exist attacks the credibility of the theory presented. See *Fields, supra* at 106. This Court has also found that "arguments regarding the weight and credibility of the witnesses and evidence presented by defendant do not shift the burden to the defendant to prove his innocence, but rather question the reliability of the testimony and evidence presented." *Id.* at 107. The prosecutor's closing argument was a "fair response" to defendant's theory that he and the mother had a prior relationship. See *id.* at 111. No evidence was presented to support defendant's claim and, therefore, the prosecution was free to argue that no evidence was presented to support defendant's claim.

In any event, any minimal prejudice possible from the closing argument was cured by the trial court's instructions that the jury had to decide the case on the evidence and that the remarks of counsel were not evidence. See *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004). The court also instructed the jury that the burden of proving the elements of the crimes charged rested with the prosecution and that defendant was not required to prove his innocence or to do anything. This Court has found that "counsel is not obligated to make futile objections." *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Because defendant has failed to show that the prosecutor's closing argument was improper, he has not shown that his

counsel was ineffective for failing to object to the argument. In sum, defendant was not denied a fair and impartial trial as a consequence of the alleged prosecutorial misconduct.

Affirmed.

/s/ Karen M. Fort Hood

/s/ Mark J. Cavanagh

/s/ Deborah A. Servitto