STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 22, 2009
v	No. 286179 Branch Circuit Court
RICHARD ALLEN FRYE, Defendant-Appellant.	LC No. 07-048754-FC

Before: Servitto, P.J., and Bandstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of six counts of criminal sexual conduct. Defendant was convicted of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age), and was sentenced to 86 months to 15 years' imprisonment. Defendant was convicted of five counts of first-degree criminal sexual conduct (CSC I): one count of violating MCL 750.520b(1)(a) (sexual penetration of a person under 13 years of age), and four counts of violating MCL 750.520b(1)(b) (relation to victim). He was sentenced to life imprisonment for each CSC I conviction. We affirm.

Defendant first contends that the trial court erred in admitting testimony of experts Dr. John Robertson, a pediatrician, and Nicole Merchant, a mental health therapist both of whom testified concerning their professional treatment of two of the four victims involved in this case. Robertson testified that, after he performed a medical examination of victims CL and NF, he formed the opinion that, although he did not find any physical evidence of sexual abuse, both girls were victims of child sexual abuse based on his interviews with them. With respect to victim NF, Robertson testified that he "felt her to be very truthful, and I felt that these events did occur." Merchant testified that, after conducting therapy sessions with CL, she "added a diagnosis of sexual abuse of a victim, of a child victim." Merchant also offered testimony that CL exhibited symptoms and characteristics common in child sexual abuse victims, and testified concerning the methods she uses to determine if her patients are telling the truth.

Defendant contends that both Robertson and Merchant offered inadmissible expert testimony in violation of his due process rights. Defendant failed to preserve this issue for review because he did not raise the issue in the trial court by making a contemporaneous objection to the expert testimony. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). We review unpreserved claims of evidentiary error for plain error affecting substantial rights. *Id*.

"To avoid forfeiture, under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id*.

An expert testifying in a CSC case, "(1) . . . may not testify that the sexual abuse occurred, (2) . . . may not vouch for the veracity of a victim, and (3) . . . may not testify whether the defendant is guilty." *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended on other grounds 450 Mich 1212 (1995). However,

> (1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. [*Id*.]

In this case, we agree with defendant that the challenged testimony was improper in that it essentially set forth each expert's opinion that the sexual abuse occurred and that both victims were truthful. Further, the testimony did not fall within one of the exceptions set forth in *Peterson*, 450 Mich at 352. The law in this regard is so clear, and the error here so apparent, that we find it remarkable that the prosecutor offered this testimony, that defense counsel failed to object and that the trial court did not, *sua sponte*, prevent its introduction.

Nonetheless, although defendant has shown the existence of plain error, he has failed to show that the plain error affected his substantial rights in that it affected the outcome of the proceedings. *Carines*, 460 Mich at 763. This case involved four victims who all offered consistent testimony that defendant sexually assaulted them over a prolonged period of time using a common method; he would isolate them when acting as their primary caregiver and touch and/or penetrate them using his fingers, penis or other objects. Defendant had the opportunity to commit the alleged sexual assaults as he was the primary caregiver for all four victims on numerous occasions. Additionally, the victims' ages at the time of trial enhanced their credibility. See *Peterson*, 450 Mich at 377 n 15 (the victim's age (11) at the time of trial enhanced her credibility). CL and HG were both 16 years old at the time of trial, JG was 14, and NF was 13, and nothing in the record suggests they tailored their testimony or had any motive to falsely accuse defendant.

Further, the victims' testimony in this case was strong and was consistent with other evidence presented. During the time period that CL testified the sexual abuse first started, she informed her mother and the police became involved, and CL testified that defendant told her not to tell anyone about the sexual assaults. This was corroborated by a police report in which defendant was quoted as saying he may have "accidentally" touched CL and that he told her not to tell anyone because of the way her school would overreact. In addition, CL's testimony regarding the abuse was graphic and extremely detailed. She said that defendant began touching her while she was clothed, when she was seven or eight, and that the touching eventually progressed to removal of her clothing and then by the time she was ten or eleven, to penetration. CL testified in great detail how defendant penetrated her vagina with his fingers, his penis, and

sex toys, and how he ejaculated when he penetrated her and forced her to perform fellatio, indicating specifically where the ejaculate went and her bodily reaction to it at the time. CL also described in graphic detail how defendant penetrated her anus using a sex toy on one occasion when she was eight years old. Police discovered sex toys underneath defendant's bed, toys that defendant's wife testified were not used in her marriage with defendant, and, after defendant was arrested and awaiting trial, he informed a cellmate, Jason Hursley, that he used sex toys on his victims. Consistent with CL's testimony that defendant forced her to watch pornographic movies, the police discovered pornographic films in defendant's possession, defendant admitted to owning and viewing pornographic movies, and he informed Hursley that he would watch the films with his victims while he touched them.

Both CL's and NF's testimonies were consistent with the statements they made to Robertson for purposes of medical treatment, and each of the four victim's testimony corroborated that offered by the others. HG's testimony corroborated CL's testimony that defendant would sexually assault more than one victim at the same time; HG testified that defendant forced CL to touch her breasts and that defendant penetrated both victims' vaginas at the same time. HG testified that on one occasion she was isolated and defendant penetrated her vagina with his penis, and CL testified that she observed defendant penetrate HG. NF testified that she saw CL in defendant's bed with defendant underneath covers, and JG testified that, on one occasion, defendant forced her to leave his bedroom so that he could be alone with HG. Furthermore, NF testified that defendant informed both her and CL not to tell anyone about the assaults or they would get into trouble.

The evidence at trial also included defendant's own admissions that he sexually assaulted the victims. Hursley testified that defendant acknowledged having the girls perform fellatio on him, that defendant said the girls never resisted him when he had sex with them, that defendant informed him the state police had his sex toys and that he used the toys on the girls and made the girls watch pornographic movies with him while he touched them. According to Hursley, defendant stated that he would have the girls "lined up" outside his bedroom door, and he described defendant's statements as "sickening." Hursley's credibility was enhanced by the fact that he did not receive any plea bargain or any other consideration for his testimony. Furthermore, the trial court properly instructed the jury as to the weight to be given the expert testimony, that the experts' testimony should be weighed with all of the other evidence presented at trial, and that the jury was the only judge of the facts in this case. "[J]urors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). On this record, we conclude that the improperly admitted expert testimony did not affect defendant's substantial rights because it did not affect the outcome of the lower court proceedings. *Carines*, 460 Mich at 763.

Next, defendant contends that the prosecutor improperly shifted the burden of proof and violated the presumption of innocence when he asked defendant during cross-examination if he was familiar with the phrase "where there's smoke, there's fire" and when he referenced that phrase during closing argument. Defendant contends that this implied he was guilty based solely on the number of allegations involved in the case and that this violated his due process right to a fair trial. Defendant failed to preserve this issue for review because he did not make timely and contemporaneous objections at trial. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). We review unpreserved challenges to prosecutorial conduct for outcome-determinative,

plain-error. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Moreover, we will not "find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Callon*, 256 Mich App at 329-330. The prejudicial effect of most improper prosecutorial statements can be cured by a curative instruction. *Unger*, 278 Mich App at 235.

Prosecutors are "typically afforded great latitude regarding their arguments and conduct at trial." *Unger*, 278 Mich App at 236. A prosecutor "may use 'hard language' when it is supported by evidence, and [is] not required to phrase arguments in bland terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). In addition, a prosecutor has wide latitude to argue all reasonable inferences arising from the evidence. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Moreover, prosecutorial statements are viewed in the context of the entire record. *Thomas*, 260 Mich App at 454. In this case, considering the entire record, we conclude that the prosecutor's statements amounted to proper argument concerning the reasonable inference arising from all of the evidence, that defendant was guilty of the charged offenses. *Dobek*, 274 Mich App at 66. Additionally, the trial court properly instructed the jury as to the correct burden of proof and that defendant was presumed innocent, and jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235. Defendant was not denied his due process right to a fair trial.

Finally, defendant contends that he was denied his right to the effective assistance of trial counsel when defense counsel failed to object to the inadmissible expert testimony and the prosecutor's use of the phrase "where there's smoke, there's fire." Defendant failed to preserve this issue for review because he did not move for a new trial or a *Ginther*[1] hearing; therefore our review is limited to mistakes apparent on the record. *People v Hurst*, 205 Mich App 634, 641; 517 NW2d 858 (1994).

In order to demonstrate that he was denied the effective assistance of counsel under either the federal or state constitutions, defendant must show, inter alia, that deficiencies in his counsel's performance "prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "To 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. In light of our conclusion with respect to defendant's first two arguments, we find that defendant has failed to show that any deficient performance on the part of defense counsel prejudiced his defense in that it affected the outcome of the lower court proceedings. *Id*. Defendant was not denied his constitutional right to the effective assistance of counsel.

We affirm.

/s/ Deborah A. Servitto
/s/ Richard A. Bandstra
/s/ Jane E. Markey

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