STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 10, 2009
v	No. 285563 Isabella Circuit Court
DANIEL LEE SLOCUM, Defendant-Appellant.	LC No. 07-002008-FC

Before: Beckering, P.J., and Cavanagh and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(b)(*ii*) (making it a felony to engage in sexual penetration with a person who is at least 13 but less than 16 years of age and related to the actor by blood or affinity), and accosting, enticing or soliciting a child for immoral purposes, MCL 750.145a. The trial court sentenced defendant to serve concurrent terms of 135 to 360 months in prison for the CSC I conviction and 17 to 48 months in prison for the accosting conviction. The trial court also ordered defendant to pay a fine of $1,000 and costs of $2,000 for the CSC I conviction, and a $400 fine and $800 costs for the accosting conviction, as well as a $60 crime victim rights assessment for each charge, and restitution. Because we conclude that there were no errors warranting relief, we affirm.

Officers arrested defendant in October 2007, after the complainant revealed to her counselor that she had had a sexual relationship with defendant that began in 2003 and ended in 2005. Defendant admitted to the sexual relationship, but testified that the first sexual encounter between the two took place when the complainant was 16. The complainant, however, testified to several sexual encounters that took place before her sixteenth birthday.

Defendant first argues that the trial court erred when it permitted the complainant to make two highly prejudicial statements and that the admission of these statements warrants a new trial. This Court reviews a trial court's evidentiary decisions for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

When asked by the prosecutor about the change in the relationship over time, the complainant testified that she was scared of defendant, in part, because he is "racist." She also testified that the sex between them became "more aggressive." At this point, defense counsel objected. After the judge excused the jury, he sustained the objection as to the "more

aggressive" language, and overruled the objection to the "racist" statement. When the jury came back, the judge did not instruct the jury as to the sustained objection.

Credibility was a central issue at trial, and one potential attack on the complainant's credibility was the question of why, in light of her testimony that she did not want to be in a relationship with defendant, she remained in the relationship for nearly two years. She testified that she was afraid of defendant, and one reason she felt afraid was because she felt defendant was racist. The testimony was relevant. MRE 401. Defendant argues that even if it was relevant, the probative value was substantially outweighed by its prejudicial effect. While we recognize that an accusation of racism can be prejudicial, we conclude that the trial court did not abuse its discretion when it determined that any unfair prejudice did not substantially outweigh the probative value of this testimony. *Yost*, 278 Mich App at 353.

To the extent that it was error for the trial court to fail to inform the jury that it had sustained defendant's objection to the testimony about the changing nature of the sexual relationship, such error was harmless. In order to warrant relief, the defendant had to show that the admission of this testimony undermined the reliability of the verdict. *People v Mateo*, 453 Mich 203, 211; 551 NW2d 891 (1996). The statement was brief and isolated, was not developed through further examination by the prosecutor, and was not referenced in the prosecutor's closing argument to the jury. In light of these facts, defendant cannot show that this was more likely than not outcome-determinative. *People v Lukity*, 460 Mich 484, 494; 596 NW2d 607 (1999).

Defendant also argues that he was prejudiced by the trial court's refusal to review in camera the complainant's counseling records for the period of 2003 to 2004. The complainant saw a counselor in 2003 and 2004, before the sexual relationship with defendant began, and continuing into their relationship. In 2007, after the relationship was over, she saw the counselor again, and it was at this time that she purportedly first told him about the sexual relationship. Because the crux of the case was whether the first sexual encounter between the two took place before or after the complainant's sixteenth birthday, any statements she might have made to her counselor during the 2003 to 2004 time period about when the sexual relationship started would be highly material. However, both the complainant and her counselor testified that she made no mention of sex with defendant during those sessions. Defendant argues that if the complainant did disclose the sex in 2003 or 2004, then her counselor had a motivation to lie about it, because he could face liability for failing to report. Also, he continues, if the complainant told her counselor that the sex began after her sixteenth birthday, then she had a motivation to lie about it as well if she had an interest in seeing him convicted.

In *People v Stanaway*, 446 Mich 643, 677; 521 NW2d 557 (1994), the Michigan Supreme Court addressed the issue of discovery of privileged records that might contain exculpatory evidence. The *Stanaway* Court stated:

> [I]n an appropriate case there should be available the option of an in camera inspection by the trial judge of the privileged record on a showing that the defendant has a good-faith belief, grounded on some demonstrable fact, that there is reasonable probability that the records are likely to contain material information necessary to the defense. [*Id.*; see also MCR 6.201(C)(2).]

Defendant did not show that his belief was grounded in articulable fact, such as to require in camera review of the records. Defendant merely speculated that it was possible that the complainant or the counselor were not being truthful. Defendant's speculation was not sufficient to warrant an in camera review. *Stanaway*, 446 Mich at 677. Therefore, the trial court did not abuse its discretion when it declined defendant's request.

We also reject defendant's claim that the trial court erred when it ordered him to pay fines and costs that were not authorized by statute at the time defendant committed his crimes. Defendant claims, without any apparent basis, that the trial court imposed these fines and costs under MCL 769.1k, which was in effect at the time of sentencing, but not at the time of defendant's conduct. The trial court did not refer to any statute at the time of sentencing. However, MCL 769.34(6), which was in effect at the time of defendant's conduct, gave the trial court the discretion to order fines and costs. See *People v Lloyd*, 284 Mich App 703, 708-710; ___ NW2d ___ (2009). MCL 750.145a, the statute criminalizing soliciting, enticing, or accosting a child for immoral purposes, also authorizes the imposition of a fine for the conviction of that offense. Accordingly, the trial court had the authority to impose the fines and costs at issue.

Defendant next argues that the prosecutor improperly vouched for the complainant's credibility, improperly claimed that defendant lied, expressed his personal opinion as to the guilt of defendant, and made statements aimed at arousing and inflaming the passions of the jury during his closing arguments. Defendant's trial counsel did not object to these statements at trial. Therefore, we review this claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

During his closing statement, the prosecutor made the following remarks regarding the complainant:

> She doesn't have any motive to lie whatsoever. . . .
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> * * *
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> Autumn had no incentive to lie to you folks when she testified. . . . She's had to tell the police several times about very private things that have happened that are very embarrassing to her and she did that. . . .
>
> [S]he's had to testify at a preliminary examination. . . . So again, no incentive to lie. . . .
>
> Then she's had to testify yet another time in front of you folks—fourteen strangers—another Judge who's a stranger, court staff, and anyone else who maybe comes into the courtroom. . . . She's also had to divulge this, when she testified, in front of family and friends. . . So no incentive for her to lie whatsoever.
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> * * *

> She had a very good memory as opposed to the Defendant who had a selective memory.
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> * * *
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> So we look at [the complainant] and whether she has an incentive to lie, and then we look at the Defendant who has great incentives to lie. . . . Well, the Defendant has an incentive to get out of trouble for the crimes he's committed in this case. He has an incentive to lie to cover up a sexual relationship he had with someone who was twenty-six, close to twenty-seven years younger than he was. When Autumn was a little toddler, he was approaching thirty years of age.
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> * * *
>
> And the Defendant, he lied several times. And he lied and I caught him on cross examination lying several times. . . .
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> * * *
>
> But the Defendant lying on several levels started with his testimony about who initiated the sexual intercourse between himself and [the complainant]. . . .
>
> * * *
>
> But I submit to you that was the situation, the moment, where you say aha, you're lying. I call it the aha moment, that you caught him in a direct lie.

Although it is improper for a prosecutor to personally vouch for the credibility of his witness, it is not improper for a prosecutor to argue from the evidence that his witness is credible. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). It is also not improper for a prosecutor to argue that the opposing witness is not credible or even has lied. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The difference depends on whether the prosecutor's statements bear a relation to the evidence presented in the case, or whether they imply some personal knowledge on the part of the prosecutor. Viewing the prosecutor's statements in context, see *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004), we conclude that he never improperly vouched for the credibility of his witness, but argued that the evidence supported inferences that the complainant had no motivation to lie and that defendant did.

Defendant also asserts that the prosecutor's statements as to the age difference were not relevant and could only serve to provoke an emotional response in the jury. Viewed in context, the statements are meant to help support the prosecution's theory that defendant was motivated to lie by embarrassment or shame at the sexual relationship. Even if the comment about the defendant being nearly 30 when the complainant was a toddler was excessive, such an isolated statement does not require reversal. Where defendant fails to object and request a curative instruction, reversal is not required unless the effect of the statement was so prejudicial that the effect could not have been cured by a jury instruction. *People v Duncan*, 402 Mich 1, 18; 260 NW2d 58 (1977). Such is not the case here.

Defendant's claim of ineffective assistance of counsel based on the alleged prosecutorial misconduct also fails. The prosecutor's closing argument was not improper, and thus, any objection would have been futile. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, the jury was instructed that "[t]he lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." We conclude that this instruction cured any minimal error. See *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) ("Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.").

We also reject defendant's argument that his sentence was an unconstitutional under *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (1999), and *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Our Supreme Court has determined that Michigan's indeterminate sentencing scheme does not violate the rules stated in those cases. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006).

Finally, we do not agree that there was any error warranting relief with regard to defendant's allegation that the trial court improperly limited his discovery of phone logs and his argument that he was entitled to an adverse inference instruction based on a missing video of the interview with the complainant. We conclude that defendant has abandoned his claim of error regarding the phone logs; defendant's argument with regard to this claim is devoid of any meaningful discussion or citation to the record or authorities. See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998). With regard to his claim that he was entitled to an adverse inference instruction, defendant has not presented any evidence that the prosecution or police acted in bad faith. Absent evidence of bad faith, defendant was not entitled to an adverse inference instruction. See *People v Davis*, 199 Mich App 502, 515; 503 NW2d 457 (1993).

There were no errors warranting relief.

Affirmed.

/s/ Jane M. Beckering
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly