STATE OF MICHIGAN

SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v. ANTHONY JOSEPH VEACH, Defendant-Appellant.	Supreme Court No. 160469-71 Court of Appeals No. 342394; 342395; 342396 Macomb Circuit No. 17-447-FC; 17-1859-FC; 17-1865-FC

PLAINTIFF-APPELLEE'S ANSWER TO DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

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ISSUE I

DID THE TRIAL COURT ERR IN CLOSING THE COURTROOM FOR THE VICTIM'S TESTIMONY?

Court of Appeals' Answer: "No"

Defendant-Appellant's Answer: "Yes"

Plaintiff-Appellee's Answer: "No"

ISSUE II

DID THE TRIAL COURT IMPROPERLY ADMIT HEARSAY?

Court of Appeals' Answer: "No"

Defendant-Appellant's Answer: "Yes"

Plaintiff-Appellee's Answer: "No"

ISSUE III

DID THE PROSECUTOR COMMIT MISCONDUCT?

Court of Appeals' Answer: "No"

Defendant-Appellant's Answer: "Yes"

Plaintiff-Appellee's Answer: "No"

ISSUE IV

WAS TRIAL COUNSEL INEFFECTIVE?

Court of Appeals' Answer: "No"

Defendant-Appellant's Answer: "Yes"

Plaintiff-Appellee's Answer: "No"

COUNTER-STATEMENT OF FACTS

The People accept as accurate all of the non-argumentative factual assertions contained within Defendant's Statement of Facts in his Application for Leave to Appeal. However, to the extent that any additional factual guidance is necessary, the People will provide those necessary facts with citation in the argument section of this Answer.

ISSUE I

THE TRIAL COURT DID NOT ERR IN CLOSING THE COURTROOM FOR THE VICTIM'S TESTIMONY.

STANDARD OF REVIEW

Questions of constitutional law are reviewed de novo. *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).

ARGUMENT

The right to a public trial is guaranteed by both the Sixth Amendment of the United States Constitution and article 1, § 20 of the 1963 Michigan Constitution. *Vaughn*, 491 Mich at 650. The right is not absolute, however. In *Vaughn,* 491 Mich at 653, the Court, quoting *Presley v Georgia*, 558 US 209, 214; 130 S Ct 721; 175 L Ed 2d 675 (2010), observed that "[a] defendant's Sixth Amendment right to a public trial is limited, and there are circumstances that allow the closure of a courtroom during any stage of a criminal proceeding even over a defendant's objection." The United States Supreme Court declared the following requirements when the courtroom is closed:

> The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. [*Waller v Georgia*, 467 US 39, 48; 104 S Ct 2210; 81 L Ed 2d 31 (1984).]

It is undisputed that the prosecutor did file a written motion to close the courtroom during the victim's testimony. Additionally, the prosecutor moved

to close the courtroom when the victim testified at the preliminary examination, and defense counsel did not object to closing the courtroom at that time.

The trial court's closure of the courtroom was narrowly tailored to the reasons for the request—to protect the victim's welfare—because it was limited to only her testimony. While the victim was 17 years old at the time of trial, the assaults happened when the victim was 14 and 15 years old, the allegations involved a sensitive matter, and the allegations had caused a significant rift in the victim's family. Indeed, during the one preliminary examination, the court was concerned with the victim and asked if she needed a break because she was starting to feel "sick." (Tr. 5/16/17 at 42). Indeed, during the exams and the trial, the victim's voice was low and at times inaudible. While the courts did ask her to speaks up, they also asked questions evincing concern for her well-being. The court's ruling was intended to protect the victim's welfare and prevent other family members and Defendant's friends from attempting to intimidate the victim or influence her testimony[1].

Because of the victim's preliminary exam testimony, the sensitive nature of the accusations, and the family conflict that had already resulted, there were legitimate reasons for believing that safeguards were necessary to protect the victim's welfare and to prevent her testimony from being influenced by the presence of other members of the Defendant's family and friends. The victim's emotional welfare and preserving the sanctity of her testimony were overriding

[1] While several of Defendant's family members were sequestered because they would be testifying during the trial, counsel indicated several of Defendant's friends wanted to view the testimony.

interests that justified closing the courtroom during her testimony. The trial court's closure decision was tailored to these circumstances, and there was no less restrictive means for allowing the victim to feel secure while testifying, free from the distraction of Defendant's friends and family members who held antagonistic opinions about her accusations. Defendant has not shown that the trial court's ruling violated his constitutional right to a public trial.

ISSUE II

THE TRIAL COURT DID NOT IMPROPERLY ADMIT HEARSAY.

STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision to admit or exclude evidence, and de novo any preliminary legal questions, *People v Mann*, 288 Mich App 114, 117; 792 NW2d 53 (2010), such as whether a statement constitutes inadmissible hearsay, *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). Reversal of a criminal conviction on the basis of a trial court's erroneous evidentiary ruling is only necessary where the error prejudiced the defendant and resulted in a miscarriage of justice. MCL 769.26; *People v Snyder (After Remand)*, 301 Mich App 99, 111; 835 NW2d 608 (2013).

ARGUMENT

MRE 803(2) defines an excited utterance as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." The primary requirements for excited utterances are "1) that there be a startling event, and 2) that the resulting statement be made while under the excitement caused by the event." *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). A sexual assault constitutes a startling event for purposes of the rule. *Id.* at 553. The lack of ability to fabricate, rather than the lack of time to fabricate, is the focus of the excited utterance rule. *Id.* at 551. See *People v Layher*, 238 Mich App

573, 583-584; 607 NW2d 91 (1999) (upholding hearsay evidence admitted under the excited utterance exception when a statement was given one week following a sexual assault). Furthermore, escaping to safety does not necessarily dispel any such emotional influence. See, e.g., *People v Walker*, 265 Mich App 530, 534-535; 697 NW2d 159 (2005), vacated in part on other grounds 477 Mich 856, 720 NW2d 754 (2006).

Here, the victim's mother, Christina Picorilli, testified that the victim was distraught, was sobbing, and was hyperventilating. (Tr. 11/15/17 at 68-69). She also testified that the victim was cowered on the bench in this extreme emotional state. (Tr. 11/15/17 at 70). Additionally, less than two weeks elapsed between the last sexual assault and the disclosure to her mother. Specifically, the last assault occurred on July 3, 2016 and she disclosed to her mother on July 15, 2016. (Tr. 11/15/17 at 73 & 237). As such, little time had passed between the event and the disclosure, which weighs in favor of the lack of ability to fabricate. According the trial court wide discretion regarding its determination that the victim was still under the stress of the startling events when she made the statements, there is no abuse of discretion. see *Smith*, 456 Mich at 552.

However, even if the statement was admitted in error, any error was harmless. When a hearsay statement is erroneously admitted at trial, the error is more likely to be harmless if the statement "is cumulative to in-court testimony by the declarant . . . particularly when corroborated by other evidence." *People v Gursky*, 486 Mich 596, 620; 786 NW2d 579 (2010). For

instance, when an erroneously admitted hearsay statement "involves the testimony of a sixteen-year-old victim whom the defense had full opportunity to cross-examine," the prejudice of the error is minimized. *Smith*, 456 Mich at 555 n 5.

Here, the disclosure and statements to the victim's mother were vague and little to no detail was given or testified to by the mother. Indeed, the victim testified in detail about the sexual assaults, including the circumstances of when she told her mother, what she told her mother, and the reasons that she was distraught and overly emotional. Specifically, the victim was afraid that because the mother found out about Rosey being around the grandmother's house when she wasn't supposed to be, that her father would find out and assault her again as punishment. (Tr. 11/15/17 at 234). Thus, the Defendant cannot show that the limited testimony of the victim's mother affected the outcome of the trial.

ISSUE III

THE PROSECUTOR DID NOT COMMIT MISCONDUCT.

STANDARD OR REVIEW

Defendant next argues that he is entitled to a new trial because of the prosecutor's misconduct at trial. Defendant acknowledges that none of his claims of prosecutorial misconduct were preserved with an appropriate objection at trial, leaving the claims unpreserved. This Court reviews unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *People v Roscoe*, 303 Mich App 633, 648; 846 NW2d 402 (2014). Error requiring reversal will not be found if a curative instruction could have displaced any prejudiced caused by the prosecutor's improper argument. *People v Johnigan*, 265 Mich App 463, 467; 696 NW2d 724 (2005).

ARGUMENT

A prosecutor may not argue facts not in evidence or mischaracterize the evidence, but may argue reasonable inferences arising from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

Here, the prosecutor's remarks were responsive to defense counsel's opening statement and constituted an appropriate argument concerning reasonable inferences from the evidence as they related to the prosecution's theory of the case. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). The prosecutor was arguing that the victim's testimony was credible in rebuttal

to defense counsel's opening statement that Christina Picorilli coached the victim so as to gain some advantage in her divorce from the Defendant. Considered in context, the prosecutor's argument was proper response to the defense's argument and implications that Christina coached the victim.

Additionally, Defendant's argument that the victim was completely inconsistent with her preliminary exam testimony is incorrect. The alleged inconsistency with regards to the timing of the fundraiser was addressed thoroughly at trial and referenced by the prosecutor in her closing argument. Thus, the prosecutor did not hide any such inconsistency and addressed the issue directly. (Tr. 11/17/17 at 70-71). Additionally, the alleged inconsistency with regards to the sterling heights incident and penetration occurring on the chair versus on the floor was also addressed during the victim's testimony. It is apparent from the victim's testimony that the penetration began when the victim's knees were on the floor and her upper body was on the chair. (Tr. 11/15/17 at 170-174). Eventually, the victim remembered being bent over on the floor when the penetration occurred. (Tr. 11/15/17 at 170-174). This is consistent with her preliminary examination testimony.[2] The fact that defense counsel was unable to impeach her with preliminary exam testimony is fair commentary on the weakness of the defense theory and proper argument to illustrate that the victim is credible. The prosecutor did not commit misconduct with regards to this issue.

[2] Even assuming an inconsistency, it was hardly the type of inconsistency that would make or break this case.

The Defendant also complains of the prosecution's reference to Care House. The Defendant complains that the forensic interview did not follow best practices because it wasn't video recorded. However, the prosecutor never stated that Care House followed the "best practices" as listed by the governor's task force. Rather, the prosecutor stated in her opening that:

> The forensic interviewer, there are highly trained. They have specialized knowledge in asking of questions. There is a certain method and manner that is followed based on a protocol that is set forth by a government task force in Michigan. That is the reason why kids go to that facility as opposed to being interviewed by the detective at our local police department. (Tr. 11/15/17 at 8-9).

This statement is neither incorrect nor improper. While the interview was not video recorded, it was transcribed with notes. Indeed, the Defendant does not point to any problem with the forensic interview other than it wasn't recorded. Again, the prosecutor did not commit misconduct.

Defendant also complains about the prosecutor's objections. Specifically, Defendant argues that the prosecutor's objections were frivolous and intended to intimidate the witness. However, the objections were not only proper but were sustained by the trial court. Indeed, at one point the trial court informed the jury to disregard the witness's answer. (Tr. 11/17/17 at 15). The prosecutor properly objected to the witness and the trial court properly sustained the objection. Such action cannot be misconduct.

The Defendant also complains that the prosecutor committed misconduct with regard to the objections during her closing. The prosecutor's remarks were:

> Now contrast that with what you saw from defense witnesses. There was not a single defense witness that took the stand that I think answered a question directly, not one. They evaded the questions, they were squirrelly about the questions. They had to be instructed by the judge to answer the questions. They were trying to give their own answers. Their body language was turned away. There were even a couple witnesses that were hiding their faces when they were answering questions, if they were answering the question at all. (Tr. 11/17/17 at 94-95).

The prosecutor properly commented on the behavior and credibility of the defense witnesses. This is permissible. A prosecutor is free to comment on the improbability of a defendant's theory. See *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). A prosecutor may draw inferences from the testimony and argue that witnesses are not worthy of belief. *People v Buckey*, 424 Mich 1, 14-15; 378 NW2d 432 (1985); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Thus, the prosecutor did not commit misconduct.

The Defendant next complains that the prosecutor elicited improper character and bad acts evidence. The majority of the citations in the Defendant's footnote 10 of his Brief are taken out of context and out of order. The majority of the testimony is how Christina Picorilli met the Defendant and the victim, how she became involved in their lives, the type of homelife both Christina and the Defendant initially provided the victim, and finally how the Defendant and Christina separated. The prosecutor elicited the information to give context to the relationship between Christina and the victim, not to introduce bad character. Indeed, the introduction of the fact that the Defendant went to jail was not used to show bad character; rather it was used

to explain how Christina acquired legal custody of the victim via the Defendant giving her power of attorney to care for the victim. The prosecutor was careful to limit the introduction of the Defendant's incarceration by eliciting that it had nothing to do with this case or any sex-related case whatsoever.[3] (Tr. 11/15/17 at 51).

Additionally, the jail reference was testified to by the victim as a reference point to when the assault began. Specifically, the assaults, which the Defendant termed as "lessons", came after he was released from jail and was going to punish the victim for things she had done while he was in jail. (Tr. 11/15/17 at 149 & 168). Additionally, April Veach volunteered the information about the Defendant going to jail on cross-examination. (Tr. 11/16/17 at 148). Thus, it is apparent that the reference to the Defendant being in jail was not elicited by the prosecutor to show bad character or introduce prior acts; rather it was to establish a point of reference for the sexual assaults as well as to establish how Christina Picorilli became the caregiver for the victim.

At no time did the prosecutor argue that he was guilty due to bad character nor did the prosecutor argue that his time in jail indicated his guilt. The prosecutor did not attack the Defendant's character because of unemployment of incarceration for marijuana. The information was relevant to establish the relationship between Christina Picorilli, the Defendant, and the victim. However, even assuming that this information should have been subject to the notice provision of MRE 404(b), the Defendant does not establish how

[3] Indeed, on cross-examination, defense counsel elicited that the incarceration was for marijuana. (Tr. 11/15/17 at 96).

the lack of notice was prejudicial to him, especially considering the victim's testimony regarding the Defendant's incarceration prior to the assaults was explored at the preliminary examinations in the same way as the trial testimony.

In *People v Jackson*, 498 Mich 246, 278-279; 869 NW2d 253 (2015), our Supreme Court addressed a notice failure under MRE 404(b)(2), stating:

> [The witness's] testimony was substantively admissible under MRE 404(b), notwithstanding the trial court's failure to properly analyze it under that rule. And while it was error for the prosecution not to provide, and the trial court not to require, "reasonable notice" of [the] testimony under MRE 404(b)(2), the defendant has not demonstrated that this error more probably than not was outcome determinative. As discussed above, the lack of proper pretrial notice did not result in the admission of substantively improper other-acts evidence. Thus, although the defendant was not afforded his due opportunity to marshal arguments against its admission before it was introduced at trial, he has not shown that any such arguments would have been availing, or would have affected the scope of testimony ultimately presented to the jury. Furthermore, while the defendant suffered "unfair surprise" from the unexpected introduction of this testimony at trial, he was admittedly aware of [the witness's] general version of events before trial, including her and [and a friend's] prior relationships with the defendant, and he has not demonstrated how he would have approached trial or presented his defense differently had he known in advance that [the witness] would be permitted to testify as she did. For instance, the defendant has not suggested that he would have chosen to explore these prior relationships in greater depth with [the witness], nor has he identified or presented offers of proof from any witnesses he might have called in response to her testimony. He also has not suggested that he would have altered or abandoned his theory of fabrication so as to prevent [the witness] from offering this testimony to counter it. We therefore cannot conclude that the

> defendant suffered outcome-determinative prejudice from the prosecution's failure to follow, and the trial court's failure to apply, MRE 404(b)(2). [Citations, quotation marks, and ellipsis omitted.]

The Defendant only argues that it was patently and totally inadmissible. The Defendant does not even attempt to put forth an argument regarding what he would have done differently had there been notice pursuant to MRE 404(b)(2).

Defendant also complains that the prosecutor referenced the revocation of the power of attorney during her closing argument. The prosecutor's comment in its entirety was:

> Now defense counsel may argue: Well, listen, Skylar is gaining the support of Christina by lying. You know as long as she has made Christina happy by coming forward and making the allegations she doesn't need her family to support her because Christina will do it.
>
> Well, the flaw in that argument is that Christina has always been there for Skylar from the very get go. Christina has been there for Skylar long before any of this sexual allegations, long before any of the issues between the Defendant and Christina and their relationship. Long before this trial Christina was there for Skylar. Christina was the one that put food in the refrigerator, that kept a roof over her head, that made sure that she went to school in some way, shape or form and was educated.
>
> Christina was the one that insured there was appropriate discipline that was taking place. Christina even at the Defendant's request signed a power of attorney to insure that when the defendant himself by his own admission couldn't care for Christina, that she was able to maintain consistency in Skylar's life and make sure that she was going to be taken care of. That her day to day would be taken care of, her school decisions would be taken care of and her medical needs and so on.

> It was Christina that even after the power of attorney was revoked after these allegations came to light, Christina even then wanted to insure that Skylar was taken care of and that she maintain that life-style sand that consistency.
>
> What did Christina do? Christina went through the grueling approximate eight months time period to get her foster care license so she could be a licensed foster parent to Skylar and Skylar wouldn't have to move and be removed to a home she wasn't use to to a life-style she wasn't used to.
>
> The argument that Skylar made up these allegations to make sure that Christina would continue to care for her is absolutely absurd and it defies common sense.
>
> Christina has always been there to care for Skylar and that wasn't going to change. (Tr. 11/17/17 at 57-59).

This was proper commentary on the evidence and the witness's credibility.

ISSUE IV

TRIAL COUNSEL WAS NOT INEFFECTIVE.

STANDARD OF REVIEW

On appeal, Defendant argues that he was denied the effective assistance of counsel. Whether a defendant was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's right to the effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's factual findings, including its credibility determinations, for clear error, but review de novo questions of constitutional law. *People v Dendel*, 481 Mich 114, 130; 748 NW2d 859 (2008). Clear error exists when this Court is left with a definite and firm conviction that the trial court made a mistake. *People v Armstrong*, 490 Mich 281, 289; 806 NW2d 676 (2011). If no evidentiary hearing has been held on a claim for ineffective assistance of counsel, then review of the claim is limited to errors apparent on the record. *Seals*, 285 Mich App at 17.

ARGUMENT

Appellate courts must begin the analysis by assuming that counsel performed effectively. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for counsel's deficient performance, there is a

reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008). To establish that counsel's performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that counsel's actions constituted sound trial strategy. *Armstrong*, 490 Mich at 290. This Court "will not substitute [its] judgment for that of defendant's counsel, nor will [it] use the benefit of hindsight to assess counsel's performance." *People v Unger*, 278 Mich App 210, 258; 749 NW2d 272 (2008). Counsel enjoys great latitude in matters of trial strategy and tactics. *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994). That a defense strategy ultimately fails does not establish ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Defendant argues that his counsel was ineffective for failing to impeach the victim concerning certain prior inconsistent statements. Decisions concerning the cross-examination and impeachment of witnesses are matters of trial strategy. See *People v McFadden*, 159 Mich App 796, 800; 407 NW2d 78 (1987). In addition, defense counsel's failure to impeach a witness on all contradictory prior statements does not constitute ineffective assistance of counsel. See *id.* "Counsel may provide ineffective assistance if counsel unreasonably fails to develop the defendant's defenses by adequately impeaching the witnesses against the defendant." *People v Lane*, 308 Mich App 38, 68; 862 NW2d 446 (2014).

Contrary to Defendant's contention, the testimony between the victim's preliminary exam testimony and trial testimony were not irreconcilably different. Indeed, defense counsel did impeach her with testimony regarding the timing of the fundraiser. The fact that counsel was unable to impeach her does not make him ineffective.

Defendant also argues that counsel failed to object to the instances of prosecutorial misconduct, alleged bad character/bad acts, and hearsay. As discussed in the preceding section, the prosecutor did not commit misconduct and the hearsay was properly admitted as an excited utterance. As such, counsel cannot be ineffective for failing to raise a meritless objection. See *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant also argues that counsel was ineffective for stipulating to the presence of a support person. The Defendant attempts to analogize this case to *People v Short*. However, here the support person, a victim advocate, did not sit with the victim during her testimony. At no time during the victim's testimony did the victim advocate sit at the witness stand, approach the witness stand, or interact with the victim in any way in front of the jury. The victim advocate was allowed to remain in the courtroom while it was closed during the victim's testimony. However, the advocate remained in the gallery and not with the victim at the witness stand. Thus, even assuming counsel should have objected, the Defendant cannot show prejudice.

RELIEF REQUESTED

Given the foregoing, Plaintiff respectfully urges this Honorable Court to **DENY** the Application for Leave to Appeal.

Respectfully Submitted,

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