# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GARY DEAN SNIDER,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 188898
Dickinson Circuit Court
LC No. 94-001760-FC

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Before: O'Connell, P.J., and Sawyer and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction for first-degree criminal sexual conduct (CSC I), MSA 750.520b(1)(f); MSA 28.788(2)(1)(f). He was sentenced to 42 to 120 months in prison. We affirm.

I

Defendant first argues that the evidence was insufficient to support his conviction for CSC I. We disagree.

The elements of the crime of CSC I are sexual penetration, accomplished by the use of force or coercion, resulting in personal injury to the victim. MCL 750.520b(1)(f); MSA 28.788(2)(f). The elements of sexual penetration and use of force were established by the victim's testimony. The element of personal injury was established by the testimony of the victim and her sister. On appeal, defendant argues that the victim's testimony was inherently incredible under the doctrine of *Jackson v United States*, 122 US App DC 324; 353 F2d 862, 867 (1965), which indicated testimony could be found inherently incredible when "the person whose testimony is under scrutiny made allegations which seem highly questionable in light of common experience and knowledge, or behaved in a manner strongly at variance with the way in which we would expect a similarly situated person to behave." Defendant contends that the victim's claim of receiving bruises in the shape of imprints of defendant's fingers after struggling against defendant is not believable because if the victim had struggled as she claimed, she would have moved enough that the bruises would not have been in the shape of distinct fingertips. However, the victim testified that she struggled but was unable to move her arms because defendant

was bigger and stronger than she. Therefore, a rational trier of fact could easily conclude that the incident left finger-shaped bruises on the victim's arms. See *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). Regarding the element of physical injury, defendant notes that there was no medical evidence of the victim's bruises; however, he does not contend that such medical evidence was necessary to prove that physical injury occurred. The victim's testimony established this element.

Defendant also questions the victim's assertion that she thought it was unusual that defendant sat with her on the floor of his living-room after the victim's sister had left the room; defendant implies that if the victim thought that the situation was unusual, she would have left the room. However, the victim's testimony on this point was not inherently incredible in light of the fact that she had known defendant for more than a year, and that defendant was a friend of the victim's mother.

Defendant also cites as incredible the victim's testimony that she had not sought medical treatment after the incident in spite of being eighteen years old at the time, losing her virginity by rape in the incident, and being uncertain of whether defendant had ejaculated. However, defendant has not established that the victim's failure to seek such attention is "highly questionable in light of common experience and knowledge, or … strongly at variance with the way in which we would expect a similarly situated person to behave." Thus, he has not established that the testimony was inherently incredible within the meaning of *Jackson, supra*. Defendant seems to contend that any victim similarly situated to the victim would seek medical attention after the incident; however, defendant does not cite any legal authority or empirical study in support of this argument. Referring to unrelated medical problems suffered by the victim, defendant argues that testimony by the victim and her sister regarding the victim's pain and crying on the night of the incident do not lead to the conclusion that she was abused by defendant. However, portions of the victim's testimony specifically addressed the elements of CSC I—sexual penetration, use of force, and personal injury; therefore, testimony regarding the victim's medical problems does not render the evidence insufficient to sustain defendant's conviction.

Defendant asserts that the victim's disgruntlement with her mother's plan to move in order to be closer to defendant gave the victim a motive to fabricate testimony regarding the incident. However, a prosecutor need not negate every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt in the face of whatever contradictory evidence the defendant provides. *People v Carson*, 189 Mich App 268, 269; 471 NW2d 655 (1991). Defendant also points to the victim's indication that she could not remember portions of the incident in an interview with defendant's investigator, whereas she had given fuller descriptions in earlier statements. Defendant contends that if plaintiff lied to the investigator, then she may have lied to others, even under oath. But rather than bearing on the issue of inherent credibility, this is a matter that goes to the victim's ordinary credibility. A witness' ordinary credibility is not properly reviewed by this Court in determining whether the evidence was sufficient to sustain defendant's conviction. *Wolfe, supra* at 514.

II

Defendant next argues that the prosecutor's remarks in closing argument deprived him of a fair trial by denigrating his defense and implying that defense counsel was trying to mislead the jury. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v*

*LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The propriety of a prosecutor's remarks depends on all the facts of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991).

Throughout opening statement and closing argument, defense counsel made an extended analogy between the trial and the construction of a box. In closing argument, the prosecutor stated, "[t]his is not about cute analogies or anything of that nature. It's only about, like we said before, facts and the law." In rebuttal argument, the prosecutor asserted that "this case is not about little boxes or any other cute analogy." In *People v Minor*, 213 Mich App 682, 689; 541 NW2d 576 (1995), this Court held that a prosecutor's isolated reference to the defendant's "ridiculous story" did not deprive the defendant of a fair trial. In the present case, although the prosecutor's references to "cute analogies" may have been rather sharp, they did not rise to the level of denying defendant a fair trial. See *People v LeGrone*, *supra* at 82-83.

Defendant also contends that the prosecutor improperly stated that several defense exhibits, consisting of drawings the victim and her sister had made of the scene of the incident for defendant's investigator, were of no significance. While questioning the investigator at trial, defense counsel elicited the statement that the drawings were not consistent with each other. The prosecutor's comment in closing argument appears to have anticipated defense counsel's use of the inconsistencies in calling into question the credibility of the prosecution's witnesses. For example, the prosecutor stated that the arrangement of furniture was not at issue in deciding whether the crime could have happened. During closing argument, defense counsel in fact referred to the drawings and stated that inconsistencies in their indication of placement of furniture and the sisters' positions detracted from the credibility of the testimony.

In rebuttal, the prosecutor asserted that inconsistencies in the drawings showing the positioning of the furniture might have occurred because the furniture arrangement in defendant's apartment was not important. The furniture arrangement was not a material element of the crime, and there was no contention that the crime could not have occurred because of the way the furniture was positioned. We conclude that the prosecutor's remarks, addressed to the testimony of defendant's investigator and defense counsel's comment on that testimony, were not improper.

Defendant further takes issue with the prosecutor's statement that defense counsel's attempt to create reasonable doubt was "not based upon evidence that you saw here today. It's based upon her conjecture and her silly questions." In making this statement, the prosecutor was concluding a summary of part of defense counsel's argument in which counsel had questioned the victim's assertion that she had been a virgin before the incident and whether her description of the sexual act was realistic given a lack of foreplay. Emotional language is allowed in closing argument, *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987), although it is improper for a prosecutor to attack defense counsel's veracity, *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988). The characterization of defense counsel's questions as "silly" may have been unfortunate, but "in the haste and heat of a trial it is humanly impossible to obtain absolute perfection, and of necessity some

allowance must be made in determining whether impromptu remarks are to be held prejudicial." *People v Lawton*, 196 Mich App 341, 354; 492 NW2d 810 (1992). As noted above, this Court previously held that a reference to a defendant's "ridiculous story" did not deprive that defendant of a fair trial. *People v Minor*, *supra* at 689. In light of *Minor*, we find that in context, the prosecutor's characterization of defense counsel's questions and assertions regarding the victim's sexual background did not deprive defendant of a fair trial.

III

Finally, defendant argues that his minimum sentence of forty-two months is not proportionate to the offense and the offender. A sentence must be proportionate to the seriousness of the crime and the defendant's prior record. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentence imposed within an applicable sentencing guidelines range is presumptively neither excessively severe nor unfairly disparate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991). The minimum term of defendant's sentence is forty-two months, which is within the guidelines range of twenty-four months to ninety-six months. Defendant has not overcome the presumption of proportionality accorded to his sentence. Defendant contends that the trial court did not take into account the fact that he did not have any prior criminal record; however, a defendant's lack of criminal history does not overcome the presumption of proportionality accorded to a sentence within the guidelines range. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). In imposing sentence, the court emphasized the serious nature of the offense, but also acknowledged letters attesting to defendant's good reputation in the community. We conclude that the trial court did not abuse its discretion in imposing sentence. See *People v Coles*, 417 Mich 523, 550; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, *supra*.

Affirmed.

/s/ Peter D. O'Connell
/s/ David H. Sawyer
/s/ Stephen J. Markman