STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVE HALCHISHAK,

Defendant-Appellant.

UNPUBLISHED
May 30, 1997

No. 192201
Lenawee Circuit Court
LC No. 95-006510 FC

Before: Jansen, P.J., and Young and R.I. Cooper,* JJ.

PER CURIAM.

Defendant appeals as of right from a jury trial conviction for second-degree criminal sexual conduct (CSC). MCL 750.520C(1)(f); MSA 28.788(3)(1)(f). On appeal, defendant argues that he was denied a fair trial by prosecutorial misconduct. He argues that the trial court improperly denied his motion to compel the prosecutor to elect between counts. He claims that the trial court abused its discretion by denying discovery of medical reports. He claims the trial court abused its discretion in refusing to admit evidence that the complainant previously made a false report of sexual assault. He argues that his sentence was disproportionate to the offense. Finally, he claims that the cumulative effect of errors denied him a fair trial. We affirm.

In his first issue, defendant claims that the prosecutor made three improper remarks during her rebuttal argument. The Michigan Supreme Court has held that "[a]ppellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Defendant objected to only one of the remarks, one concerning a reference to the Bobbit incident.

The test of misconduct by a prosecutor is whether the misconduct rose to the level of denying defendant a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). Questions involving misconduct by a prosecutor are decided on a case by case basis. *People v Mack*, 190 Mich App 7, 19; 475 NW2d 830 (1991). When reviewing an issue of prosecutorial misconduct,

this Court "must examine the pertinent portion of the record and evaluate the alleged improper remarks in context." *People v Vaughn*, 186 Mich App 376, 385; 465 NW2d 365 (1990). The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989). A remark which might otherwise be improper may not require reversal when it is made in response to issues raised by defense counsel. *Id.*

Defendant claims that the prosecutor erroneously stated that the chiropractor who treated the complainant testified that her injury was consistent with the alleged assault. A prosecutor may not argue or refer to facts not on the record. *People v Wilson*, 163 Mich App 63, 66; 414 NW2d 150 (1987). The prosecutor is, however, entitled to comment on the evidence and to draw reasonable inferences from it. *Id.* at 66. In the instant case, the prosecutor did not actually argue that the chiropractor testified that complainant's injury was consistent with the alleged assault. Her argument suggests that the prosecutor was relying on her own inference that the shoulder spasm was consistent with complainant's allegations that defendant held her arm over her head. This was permissible. Furthermore, any confusion arising from the prosecutor's argument could have been corrected with a timely curative instruction. Accordingly, defendant is not entitled to relief on this basis.

Defendant also argues that the prosecutor improperly suggested that the jury could convict defendant on the basis of the prosecutor's special knowledge. This Court has recognized "the well-known rule that the prosecutor may not ask the jury to convict the defendant on the basis of the prosecutor's personal knowledge and the prestige of his office rather than on the evidence." *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985). We do not find that the prosecutor's statements violated this rule. Read in context, the prosecutor's remarks do not indicate that the prosecutor was suggesting that her office had personal knowledge of the incident outside of the evidence presented at trial. The prosecutor commented that complainant's description of defendant's penis as firm, but not erect, was corroborated by evidence that defendant was impotent, a fact which complainant could not have known. She argued that the prosecutor's office therefore proceeded not merely on the basis of complainant's allegations, but also on this corroborative evidence. This statement was therefore not improper.

The third instance of prosecutorial misconduct cited by defendant is the prosecutor's remarks concerning the Bobbit incident. A prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice. *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995). These remarks must be viewed in context. In his closing argument, defense counsel commented that complainant's behavior immediately following the alleged incident was not indicative of a rape. He commented that it made no sense for complainant to collect payment from defendant and write a receipt if defendant had just raped her. It appears that the prosecutor responded to this argument by using the Bobbit incident as an example of how irrationally people might act in emotionally charged situations.

The prosecutor exercised poor judgment by her digression into the Bobbit case. Although the Bobbit reference was ostensibly responsive to defense counsel's argument that complainant's conduct was not sensible, it was just barely relevant. The prosecutor could have, and should have, made her

rebuttal argument without digressing into the sordid and scandalous details of the Bobbit case. However, we are unable to see how defendant was deprived of a fair trial by this digression. Nothing the prosecutor said compared the parties of the instant case to the Bobbits. Because the Bobbit incident involved a wife's brutal and shocking assault on her husband, reference to the case was just as likely to arouse sympathy for defendant as for complainant.

In his second issue, defendant claims that the prosecutor should not have been permitted to charge him with first-degree CSC, second-degree CSC, and assault with intent to commit CSC involving penetration. This raises an issue of whether defendant's rights under the Double Jeopardy clause, US Const, Am V; Const 1963, art 1, § 15, were violated. See *People v Rogers*, 142 Mich App 88, 92; 368 NW2d 900 (1985). This issue presents a question of law. Questions of law are reviewed de novo on appeal. *Oakland Hills Development Corp v Lueders Drainage Dist*, 212 Mich App 284, 294; 537 NW2d 258 (1995).

Defendant relies on *People v Johnson*, 406 Mich 320; 279 NW2d 534 (1979), in support of his argument that the prosecutor erred in charging him with separate counts of first-degree CSC, second-degree CSC, and assault with intent to commit CSC. In *Johnson*, the Michigan Supreme Court held that a defendant may not be charged with multiple counts of first-degree CSC, MCL 750.520b; MSA 28.788(2), when there has been a single act of penetration, but more than one of the aggravating circumstances which elevates third-degree CSC, MCL 750.520d; MSA 28.788(4), to first-degree CSC, is present. *Id.* at 331.

In *People v Rogers*, 142 Mich App 88; 368 NW2d 900 (1985), this Court held that *Johnson, supra*, 406 Mich 320, is not applicable when there have been multiple acts of penetration. *Id.* at 92-93. In *Rogers*, the Court upheld the defendant's conviction of three counts of first-degree CSC because the complainant testified that the defendant penetrated her twice, and his co-actor did so at least once. *Id.* at 92. This testimony permitted the jury to convict defendant for two first-degree CSC counts, plus an additional count on an aiding and abetting theory. *Id.* The Court noted that the convictions were not for a single offense, but for separate acts of penetration. *Id.*

Under *Rogers*, if the complainant had testified to two acts of penetration, defendant could have been charged with two counts of first-degree CSC. *Id.* By analogy, if the evidence supports a finding that there was an act of sexual conduct which is distinct from the act of penetration, a defendant could be charged with separate counts of first-degree and second-degree CSC. In the instant case, the complainant testified that defendant forcibly placed her hand in contact with his penis, and then placed his hand in her pants, and digitally penetrated her vagina. Defendant's act of forcing the complainant to touch his penis is an act of sexual contact distinct from the act of digitally penetrating her vagina. Therefore, it was not improper to charge defendant with both counts.

We need not consider whether it was improper to charge defendant with both first-degree CSC and assault with intent to commit CSC involving penetration. The jury instructions advised the jury that they could not convict defendant of both charges, because the assault merged into the first-degree

charge if penetration was completed. Accordingly, there was no opportunity for the jury to convict defendant of both counts.

Defendant next argues that the trial court abused its discretion by denying discovery of medical reports. We review for abuse of discretion. *Stanaway, supra*, 446 Mich 680. Medical records and records of sexual assault counselors are privileged. MCL 600.2157; MSA 27A.2157; MCL 600.2157a(2); MSA 27A.2157(1)(2). The rules explicitly prohibit discovery of information or evidence which is protected from disclosure by constitution, statute, or privilege. MCR 6.201(C).

However, the Supreme Court held in *Stanaway, supra*, 446 Mich 643, that "in 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 a reasonable probability that the records are likely to contain material information necessary to the defense." *Id.* at 677. In the instant case, defendant did not state in his motion for discovery of medical records what exculpatory evidence he believed the medical records might contain; nor did he offer factual support for such a belief. Because defendant did not comply with the requirements set forth in *Stanaway* the trial court did not abuse its discretion in denying this motion.

Defendant claims that the trial court erroneously denied him the right to present evidence that complainant made a false allegation of sexual assault in 1990. We review a trial court's decision to admit or exclude evidence for abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996).

The rape-shield statute and court rule prohibit introduction of evidence of a CSC victim's sexual past except under specifically prescribed circumstances. MCL 750.520j; MSA 28.788(9); MRE 404 (a)(3). However, our Supreme Court held in *People v Hackett*, 421 Mich 338; 365 NW2d 120 (1984), that a defendant "should be permitted to show that the complainant has made false accusations of rape in the past." *Id.* at 348. This Court has noted that prior false accusations

> are relevant in subsequent prosecutions based upon the victim's accusations because the fact that the victim has made prior false accusations of rape directly bears on the victim's credibility and the credibility of the victim's accusations in the subsequent case, and preclusion of such evidence would unconstitutionally abridge the defendant's right to confrontation. [*People v Williams*, 191 Mich App 269, 272; 477 NW2d 877 (1991).]

This Court has held:

> the defendant is obligated initially to make an offer of proof with regard to the proposed evidence and to demonstrate its relevance to the purpose for which the evidence is sought to be admitted. If necessary, the trial court should conduct an evidentiary hearing in camera to determine the admissibility of the evidence, and at the hearing, the trial court has the responsibility of restricting the scope of cross-examination to prevent

> questions that would harass, annoy, or humiliate the victim and to guard against fishing expeditions. [*Id.* at 273.]

The defendant must be able to offer concrete evidence to establish that the complainant had made a prior false accusation, and may not merely conduct a fishing expedition in hopes of finding evidence that the prior accusation was false. *Id.*

In the instant case, defendant has offered no concrete evidence that defendant's report of the 1990 incident was false. If introduced at trial, the evidence would lead to a fishing expedition concerning which party has truthfully described the 1990 incident. We therefore find no abuse of discretion.

Defendant argues that his sentence violated the principle of proportionality. The reviewing court presumes that sentences within the guidelines are not an abuse of discretion and are proportionate. *People v Milbourn*, 435 Mich 630, 657-658; 461 NW2d 1 (1990). Sentences within the guidelines are presumed proportionate unless unusual circumstances are present. *People v Harrington*, 194 Mich App 424, 431; 487 NW2d 479 (1992). This Court should take into consideration the circumstances surrounding the offense and the offender. *People v Parrish*, 216 Mich App 178, 185; 549 NW2d 32 (1996).

We do not find that the sentence was disproportionate to the offense. Defendant argues that the sentence is too harsh given his declining health and advanced age. We do not find that this argument overcomes the presumption of proportionality, especially when defendant has been sentenced at the low end of the guidelines.

Because we have found no error, other than the inappropriate reference to the Bobbit case, we need not consider defendant's argument that the cumulative effect of errors denied him a fair trial.

Affirmed.

/s/ Kathleen Jansen
/s/ Robert P. Young, Jr.
/s/ Richard I. Cooper