STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL FRAZIER THOMPSON,

Defendant-Appellant.

UNPUBLISHED
August 15, 1997

No. 185455
Macomb Circuit Court
LC No. 94-001600-FC

Before: Sawyer, P.J., and Saad and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) (penetration with victim less than thirteen years of age), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (sexual contact with victim less than thirteen years of age). The trial court sentenced defendant to twenty to forty years' imprisonment for each count of first-degree criminal sexual conduct and to ten to forty years' imprisonment for the second-degree criminal sexual conduct conviction. Defendant now appeals as of right. We affirm.

Defendant's convictions arose out of the sexual abuse of his stepdaughter. The abuse occurred when the child was six years old, but she did not disclose it until several years later.

I

Defendant argues that several instances of prosecutorial misconduct denied him a fair trial. This Court reviews questions of prosecutorial misconduct on a case-by-case basis. The challenged remarks are considered in context and evaluated in light of arguments by defense counsel and their relationship to the evidence presented at trial. *People v Phillips*, 217 Mich App 489, 497; 552 NW2d 487 (1996). The test is whether defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Because defendant failed to object to many of the alleged

improper instances at trial, we will not review these instances unless we find that "the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct." *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant first argues that several of the prosecutor's remarks during opening statement and closing argument amounted to improper vouching of the complainant's testimony. Defendant cites to comments by the prosecutor referring to consistent statements of the complainant. Each time defendant objected, the trial court gave proper curative instructions to the jury. We find that these instructions cured any prejudice resulting from the prosecutor's remarks. Defendant also cites to the prosecutor's entire closing argument and rebuttal. We have reviewed the record and have determined that none of the prosecutor's remarks were improper in light of the fact that all of the statements of the complainant were admitted at trial. *McElhaney*, *supra* at 283.

Next, defendant argues that the prosecutor made a "blatant reference to defendant not presenting any proofs/a defense" when she made the following remark during her rebuttal argument:

> Now he wonders about – he says it's a major question about why they would wait and why they would wait until this specific prosecutor was there. Is it such a major question that would make you hesitate in making an important decision? Gee, why didn't he ask that? Whey (sic) didn't he ask the detective that? Make no mistake about it. He is allowed to ask that and he is allowed to bring witnesses on that issue if he wants.

We find that this remark did not shift the burden of proof to defendant. See *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). Instead, we find that this remark was a proper response to comments in defendant's closing argument referring to evidence at trial that the police waited to bring the case to the prosecutor's office until the prosecutor who handled cases in that area returned from maternity leave. See *People v Spivey*, 202 Mich App 719, 723-724; 509 NW2d 908 (1993). Moreover, we find that the judge's immediate instruction on the proper burden of proof eliminated the risk of any prejudice from this remark.

Next, defendant argues, for the first time on appeal, that the prosecutor argued facts not in evidence and used the prestige of her office in arguing her case. We find that no manifest injustice would result if we decline to review this issue, because the record does not contain any evidence that the prosecutor made these types of arguments.

Defendant further argues that the prosecutor denigrated defense counsel in the rebuttal portion of her closing argument. Defendant did not object to any of the comments he cites. We find that no manifest injustice would result if we refuse to review this issue, because none of the remarks cited by defendant personally attacked defense counsel, suggested that defense counsel was trying to mislead the

jury, or shifted the focus of the trial away from the evidence to the personality of defense counsel. *Phillips, supra* at 498; *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988).

Finally, defendant argues, without citing to the record, that the prosecutor improperly asserted her personal belief in the truth of the charges, argued that the complainant was telling the truth because other witnesses believed her claims, and injected issues broader than the guilt or innocence of defendant into the trial. We find that no manifest injustice would result if we decline to review this issue because we cannot find any such statements in the record.

II

Defendant next argues that the trial court improperly admitted expert testimony. He first contends that it was improper to allow Dr. Yvonne Friday to testify that it was not uncommon for children who are sexually abused to delay disclosing the abuse for several years, because this testimony amounted to improper vouching of the complainant's testimony. We find that the trial court did not abuse its discretion in allowing Dr. Friday to give this testimony. *People v Wilson*, 194 Mich App 599, 602; 487 NW2d 822 (1992). Dr. Friday's educational background and firsthand experience working with sexually abused children qualified her to give such an opinion. See *People v Beckley*, 434 Mich 691, 712-713; 456 NW2d 391 (1990). Furthermore, her opinion did not go beyond stating that delay in disclosure was typical, which was permissible in light of the evidence at trial that the child did not disclose the abuse until several years after it occurred. *People v Peterson*, 450 Mich 349, 379-380; 537 NW2d 857 (1995).[1]

Defendant also challenges the testimony of Suzanne Winoker on similar grounds. We find that this argument is misplaced because Winoker was not qualified as an expert.

Defendant also argues that the trial court improperly admitted hearsay testimony from Dr. Friday, Winoker, and two other witnesses, in which the witnesses repeated the allegations that the child complainant made to them describing the abuse. We find that any error was harmless because the testimony was, for the most part, cumulative of the child's testimony at trial, and, to the extent that it was inconsistent with the child's testimony, the testimony worked to defendant's advantage. Defendant took advantage of the inconsistencies by pointing them out in his closing argument. Therefore, there was no prejudice to defendant.[2] *People v Rodriguez (On Remand)*, 216 Mich App 329, 332; 549 NW2d 359 (1996).

III

Defendant further argues that his conviction for second-degree criminal sexual conduct should be reversed. At trial, the child described several instances which, if believed by the jury, could have sustained a conviction for second-degree criminal sexual conduct. However, there was only one count of second-degree criminal sexual conduct brought against defendant, and the trial court did not instruct the jury that it was required to unanimously agree as to the act that formed the basis of defendant's

conviction. Therefore, defendant contends his conviction must be reversed because of the danger that it could have been based on a nonunanimous verdict.

Defendant did not object to the jury instructions that were given at trial and did not request a specific unanimity instruction. Therefore, this Court's review is limited to determining

whether there was manifest injustice. *People v VanDorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). We find no manifest injustice in this case. A specific unanimity instruction was not required because the alternative acts which could have formed the basis for defendant's conviction were conceptually similar and the proofs presented by both parties were materially identical. *People v Cooks*, 446 Mich 503, 524; 521 NW2d 275 (1994). Furthermore, there is no reason to believe that the instant case confused the jurors in any way. *Id.*

IV

Defendant next argues that the cumulative effect of the errors at his trial requires reversal of his convictions. We do not believe that the effect of any possible actual error at defendant's trial rose to the level of denying him a fair trial. Therefore, reversal is not warranted. *People v Bahoda*, 448 Mich 261, 293 n 6; 531 NW2d 659 (1995).

V

Finally, defendant argues that he is entitled to resentencing on three separate grounds. Defendant first contends that his sentence is disproportionate. Since defendant's twenty-year minimum sentence falls within the guidelines range of 15 to 30 years, it is presumed to be proportionate. *People v Rivera*, 216 Mich App 648,652; 550 NW2d 593 (1996). Defendant did not present any evidence of unusual circumstances to the trial court; therefore, there is nothing to render his presumptively proportionate sentence disproportionate. Accordingly, we find that the trial court did not abuse its discretion. *Id.*

Defendant next argues that the scoring of Offense Variables 2, 7, 13, and 25 was improper. In *People v Mitchell*, 454 Mich 145; ___ NW2d ___ (1997), the Supreme Court held that a claim of miscalculated variable is not in itself a claim of legal error as the guidelines do not have the force of law. The *Mitchell* Court stated:

> On postsentence review, guidelines departure is relevant solely for its bearing on the [*People v*] *Milbourn* [435 Mich 630, 661; 461 NW2d 1 (1990)] claim that the sentence is disproportionate. Thus, application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate. [*Id.* at 177.]

Since we have held that defendant's sentence is proportionate, this Court is precluded from appellate review on the issue of scoring. See *People v Bass*, 222 Mich App ___; ___ NW2d ___ (Docket No. 178342, issued April 25, 1997).

Finally, defendant contends that the trial court improperly considered his failure to admit guilt and lack of remorse when it imposed sentence. First, we note that defendant fails to recognize that it is proper for a trial court to consider a defendant's refusal to express remorse when imposing sentence. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995); *People v Calabro*, 166 Mich App

389,396; 419 NW2d 791 (1988). Furthermore, defendant does not cite to any evidence in the record in support of his assertion, and we have not found any such evidence in our independent review of the record. Therefore, we find that his argument is without merit.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Hilda R. Gage

[1] Because we find that Dr. Friday's testimony was proper, defendant's argument that the prosecutor committed misconduct by eliciting this testimony is without merit.

[2] Defendant also argues that the prosecutor committed misconduct by eliciting this testimony. We decline to review this issue because defendant failed to object at trial.