

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY JOE LEONARD, SR.,

Defendant-Appellant.

UNPUBLISHED

March 10, 1998

No. 195251

Ingham Circuit Court

LC No. 95-69350 FC

Before: McDonald, P.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

Defendant was convicted by jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and sentenced to concurrent terms of imprisonment of eight to twenty-five years and three to fifteen years, respectively. Defendant appeals as of right. We affirm.

Defendant's convictions arose from two separate acts of sexual molestation of defendant's then ten-year-old stepdaughter. The victim testified that defendant entered her bedroom, placed his hand under her clothing and inserted a finger into her vagina. The victim also testified that defendant entered her bedroom on another occasion and fondled her through her clothing.

Defendant first argues that the prosecutor improperly vouched for the credibility of the victim in her opening statement and closing argument. Appellate review of allegedly improper prosecutorial remarks is precluded absent an objection unless a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v Howard*, ___ Mich App ___; ___ NW2d ___ (Docket No. 172633, issued 11/25/97) slip op p 7. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* Questions involving prosecutorial misconduct are decided on a case-by-case basis, and this Court must evaluate each question within the context of the particular facts of the case. *Id.*

Defendant failed to object to the prosecutor's remarks. Because a curative instruction could have eliminated the prejudicial effect and failure to consider the issue would not result in a miscarriage of justice, appellate review of the remarks is precluded. *Howard, supra.*

Defendant argues that testimony of a doctor who conducted a medical examination of the victim was improperly admitted because he vouched for the credibility of the victim. The decision whether to admit evidence is left to the discretion of the trial court. *People v Hoffman*, 225 Mich App 103, 104; 570 NW2d 146 (1997). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.*

In a criminal sexual conduct case involving a child complainant, an expert witness may not testify that the sexual abuse occurred, may not vouch for the veracity of a victim, and may not testify whether the defendant is guilty. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). An expert witness may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim. *Id.*

The doctor's testimony concerning the use and importance of a history taken from the victim was properly offered as general background information to convey to the jury how he evaluates suspected victims of child abuse. With regard to the doctor's testimony concerning the recanting of sexual abuse allegations, he testified that the victim's recanting in this case was consistent with that of child sexual abuse victims generally and the testimony was properly offered to rebut an inference that the victim's postincident behavior was inconsistent with that of a real victim. The victim first reported to her teacher that she was being sexually abused in her home by her brother, stepbrother and defendant. When the victim subsequently spoke with a Children's Protective Services worker, she only indicated that she had been abused by her brother and stepbrother. Under these circumstances, the doctor may properly testify regarding whether the victim's recantation is consistent with the behavior of a child sexual assault victim. The doctor did not testify that the sexual abuse occurred, vouch for the veracity of the victim, or testify whether defendant was guilty. In accordance with *Peterson*, the doctor testified with regard to the consistencies between the behavior of the victim and other victims of child sexual abuse to rebut an attack on the victim's credibility.¹

Defendant complains about the doctor's testimony regarding the presence of a social worker or police officer during his taking of a history from a victim and his practice of allowing those individuals to also ask the victim questions. However, the testimony was elicited by defense counsel during the doctor's cross-examination. Defendant may not assign error on appeal to something that his own counsel deemed proper at trial. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995); *People v McCurdy*, 185 Mich App 503, 507; 462 NW2d 775 (1990).

Defendant also argues that the prosecution improperly elicited a denial from defendant on cross-examination for the sole purpose of calling a rebuttal witness to offer prejudicial testimony that should have been introduced in the prosecution's case-in-chief. A trial court's decision regarding the admission of rebuttal testimony will not be disturbed absent an abuse of discretion. *People v Humphreys*, 221 Mich App 443, 446; 561 NW2d 868 (1997). Rebuttal evidence is limited to refuting, contradicting, or explaining evidence presented by the opposing party. *Id.* The test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecution's case-in-chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory

developed by the defendant. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996). A denial cannot be elicited by the prosecutor on cross-examination of a defense witness simply to facilitate the admission of new evidence. *Id.* at 401.

During defendant's cross-examination, the prosecutor asked defendant whether he was upset with the victim for telling her teacher that he had sexually abused her. Defendant responded that he had never displayed any anger or displeasure towards the victim. He also denied that he had displayed any anger or displeasure about what was going on at the victim's school. During the prosecution's rebuttal, a secretary at the victim's school testified that defendant caused several disturbances at the school. Defendant's motion to strike the testimony on the basis that it was irrelevant was granted, and the trial court struck the testimony and instructed the jury to disregard it. Because the secretary's rebuttal testimony was in response to defendant's denial on cross-examination that he had caused disturbances at the victim's school and facilitated the admission of new evidence, the trial court's decision to strike the testimony was a proper exercise of its discretion. *Figgures, supra*. The jurors were instructed to disregard the testimony in their deliberations. As a general rule, jurors are presumed to follow their instructions. *People v Torres (On Remand)*, 222 Mich App 411, 423; 564 NW2d 149 (1997). There was no reversible error.

Affirmed.

/s/ Gary R. McDonald

/s/ Peter D. O'Connell

/s/ Michael R. Smolenski

¹ Moreover, the trial court gave the jury a limiting instruction at defendant's request concerning expert witness testimony in child sexual conduct cases. CJI2d 20.29.