

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS WAYNE WILKOWSKI,

Defendant-Appellant.

UNPUBLISHED

March 31, 1998

No. 196083

Macomb Circuit Court

LC No. 95-001646 FC

Before: Fitzgerald, P.J., and Markey and J.B. Sullivan*, J.J.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a) and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced to fifteen to thirty years' imprisonment for the first count and five to fifteen years' imprisonment on the second count. Defendant now appeals as of right. We remand.

Defendant contends that he was denied a fair trial due to prosecutorial misconduct. First, he contends that the prosecutor made several improper remarks during closing and rebuttal arguments. Because defendant did not object to any of the instances of alleged misconduct, this Court will only review allegations of prosecutorial misconduct to avoid a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Lee*, 212 Mich App 228, 245; 537 NW2d 233 (1995). We do not find that failure to review this issue would result in a miscarriage of justice, as the prosecutor did not engage in misconduct during her arguments. The prosecutor neither improperly vouched for the witnesses, nor indicated a personal opinion that the victim was truthful. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Quick*, 58 Mich 321, 324; 25 NW2d 302 (1885). The prosecutor did not suggest that the government had some special knowledge that a witness was testifying truthfully. *Bahoda, supra* at 276. The prosecutor merely properly argued that the victim should be believed. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

Defendant also contends that the prosecutor engaged in other misconduct aside from her arguments. He contends that the prosecutor improperly bolstered the victim's credibility. Improper

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

bolstering results when a prosecutor brings out a prior consistent statement of a witness. *People v Rosales*, 160 Mich App 304, 307-308; 408 NW2d 140 (1987). However, we do not believe that improper bolstering of the victim resulted simply because her mother testified about the events before the complainant did so. Defendant also contends that the prosecutor improperly asked defendant to comment on the credibility of a prosecution witness. We disagree. Defendant was merely asked why he believed that the victim's mother would have the victim lie. He was not asked to comment on the witness' credibility, contrary to *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985).

We do believe, however, that a remand is necessary in this case. Defendant contends that the prosecutor improperly elicited, and that the court allowed, hearsay testimony pertaining to the sexual assault. He also contends that the prosecutor improperly introduced evidence of defendant's drug use and arrest and based her arguments on this evidence. There was no objection to any of this evidence or argument and defendant contends that he was deprived of the effective assistance of counsel as a result. Because defendant's arguments pertaining to the admissibility of this evidence and related argument appear to have some validity, we remand this case for a *Ginther*¹ hearing to determine whether defendant was denied effective assistance of counsel by his attorney's failure to object. *People v Travis*, 182 Mich App 389, 395; 451 NW2d 641 (1990); *People v Stapf*, 155 Mich App 491, 499; 400 NW2d 656 (1986).

Next, defendant argues that the trial court abused its discretion when it denied his motion to direct the complainant to undergo a psychiatric evaluation. We disagree.

This Court reviews a trial court's decision to grant or deny defendant's motion for a psychiatric evaluation for an abuse of discretion. *People v Freeman (After Remand)*, 406 Mich 514, 516; 280 NW2d 446 (1979); *People v Graham*, 173 Mich App 473, 477; 434 NW2d 165 (1988). A trial court has discretion to order a psychological evaluation in a criminal case. *Id.* However, there must be a compelling reason underlying the court's decision to put the complainant, or another witness, through such a procedure. *People v Payne*, 90 Mich App 713, 723; 282 NW2d 456 (1979). See *Freeman*, *supra* at 516; *Graham*, *supra* at 477. We do not find that defendant offered a compelling reason requiring the court to order the complainant to undergo a psychiatric evaluation. The fact that defendant finds the complainant's testimony unbelievable is not a sufficient basis for this request. Moreover, defendant has not introduced any evidence to substantiate his claim that the complainant fabricated the allegations or that she had emotional or psychological problems affecting her testimony. Therefore, the trial court did not abuse its discretion in denying defendant's motion.

Finally, defendant contends that he was denied fundamental due process and a fair trial by each individual error as well as the cumulative effect of all the alleged errors. At this point, it cannot be determined whether defendant was denied a fair trial.

This case is remanded for proceedings consistent with this opinion. We retain jurisdiction.

/s/ E. Thomas Fitzgerald

/s/ Jane E. Markey

/s/ Joseph B. Sullivan

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).