STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 1999
v	No. 205785 Ottawa Circuit Court
LUIGI MICHAEL SGROIA, Defendant-Appellant.	LC No. 97 20634 FH

Before: Markey, P.J., and Saad and Collins, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Defendant was sentenced as a fourth habitual offender to serve four to fifteen years in prison. Defendant appeals by right. We affirm.

I

On appeal, defendant first challenges the sufficiency of the evidence. He argues that the prosecutor failed to establish the elements of penetration and force or coercion beyond a reasonable doubt because the only evidence was the victim's testimony, and her testimony was inconsistent. We disagree.

In a criminal case, due process requires that a prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the defendant is guilty beyond a reasonable doubt. *People v Warren*, 228 Mich App 336, 343; 578 NW2d 692 (1998). In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could conclude that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

Defendant's argument ultimately reduces down to the question of witness credibility. Questions of credibility are for the trier of fact to resolve, not the reviewing court. *People v McFall*, 224 Mich

App 403, 412; 569 NW2d 828 (1997). Further, the testimony of a criminal sexual conduct victim need not be corroborated. MCL 750.520h; MSA 28.788(8). At trial, the victim described in detail how defendant held her down against her will and penetrated her vagina with his finger. The jury found defendant guilty on the basis of the evidence presented, including the witnesses' testimony. Viewed in the light most favorable to the prosecution, the evidence was sufficient to permit a rational trier of fact to find that the essential elements of the crime were proved beyond a reasonable doubt.

II

Next, defendant argues that five instances of prosecutorial misconduct denied him a fair trial. Defendant did not object at trial to any of the alleged misconduct. Issues of prosecutorial misconduct will not be reviewed absent objection unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). We find no miscarriage of justice in respect to any of the five allegations.

Defendant first alleges that the prosecutor improperly used the age difference between the victim and defendant to bolster the lack of evidence and discredit defendant before the jury. The age difference between defendant and the victim would be apparent to the jury upon observing of these witnesses. Further, there is no basis for concluding that a prompt instruction could not have cured any prejudicial effect or that a miscarriage of justice would occur absent review.

Second, defendant alleges that the prosecutor improperly elicited bad acts testimony about defendant's supplying alcohol to the victim and two others who were underage, and that the only purpose and effect of this testimony was to inflame the jury. Although defendant claims prosecutorial misconduct, defendant first contends this evidence was inadmissible under MRE 404. Defendant's claim lacks merit. A defendant can waive appellate review of the admission of bad acts evidence by failing to timely object or by voluntarily injecting the information by his own actions. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992); *People v McMaster*, 154 Mich App 564, 570-571; 398 NW2d 469 (1986). On direct examination, defendant testified about buying alcohol for the others and used this bad acts evidence in his own defense to explain an incriminating statement. Defendant waived this issue because he failed to object and because he himself voluntarily injected the bad acts evidence.

Regarding the claim of prosecutorial misconduct, the prosecutor's conduct was not an attempt to improperly inject bad acts evidence. The alcohol testimony was relevant to establishing the events of the evening, and, moreover, defendant used the bad acts evidence to exculpate himself. Evidence is not subject to MRE 404(b) analysis merely because it discloses a bad act. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 338 (1993), modified 445 Mich 1205 (1994). "[E]vidence of other criminal conduct of the defendant is admissible to explain or illustrate the circumstances surrounding the commission of the charged offense rather than as substantive proof that because he committed one act he necessarily, or more probably, committed the other." *People v Bowers*, 136 Mich App 284, 295; 356 NW2d 618 (1984). Regardless, there is no evidence that a prompt curative instruction could not have cured any prejudicial effect and, thus, there is no miscarriage of justice.

Third, defendant claims that in discussing witness credibility, the prosecutor improperly shifted the burden of proof in his closing argument. A court reviewing prosecutorial misconduct must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). A prosecutor may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief or is lying. *Howard, supra* at 548. Here, the prosecutor's remarks regarding witness credibility were in the context of a lengthy recitation of supporting facts and testimony. The prosecutor did not distort the burden of proof by telling the jury what it must find in order to reach a verdict. Thus, the prosecutor's remarks on credibility were not improper.

Fourth, defendant claims that the prosecutor improperly vouched for the credibility of a witness in rebuttal argument. A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). 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. See *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992); *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Here, the challenged argument responded to defendant's closing argument addressing precisely who called the police. Further, the prosecutor simply indicated to the jury that it could use the evidence of who called the police to evaluate his witness' overall credibility. The prosecutor did not vouch for his witness by summing up the evidence in response to defense counsel's closing argument. See, e.g., *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

Within his fourth claim of prosecutorial misconduct by improper vouching, defendant secondarily argues that the prosecutor's statement about who called the police improperly shifted the burden of proof. Defendant's argument is without merit. A prosecutor may argue from the facts that a witness is credible. *Howard, supra* at 548.

Fifth, defendant claims that the prosecutor improperly argued facts not in evidence by erroneously implying that defendant changed his testimony about a beer container. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). Here, even if the prosecutor intentionally implied that defendant's testimony had changed when it in fact had not, the jurors heard defendant's previous testimony and most likely could recall for themselves that defendant testified that the girls arrived with beer in a brown bottle. We find no error requiring reversal.

Defendant further asserts that the prosecutor expressed personal disbelief of and enmity for defendant by references to "silly," "stupid," and "weird" sexual diseases. Prosecutors may use hard language when supported by the evidence and need not phrase arguments in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). The prosecutor's arguments were not improper.

In conclusion, defendant asserts that the combination of the alleged instances of prosecutorial misconduct was so devastating that defendant's conviction should be reversed. Except for the possible

implication that defendant's testimony had changed from a beer can to a beer bottle, the prosecutor's conduct was proper. Moreover, defendant failed to object to that remark, and there is no evidence that a curative instruction could not have eliminated any prejudice or that a miscarriage of justice would result.

III

Defendant's third claim on appeal is that he was denied a fair trial by prejudicial rebuttal testimony about his age and his consumption of alcohol. When a party fails to object to the erroneous admission of rebuttal evidence, an appellate court will review the issue only to determine whether the error resulted in manifest injustice. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985).

"Rebuttal evidence is admissible to 'contradict, repel, explain or disprove evidence produced by the other party and tending directly to weaken or impeach the same.'" *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996), quoting *People v DeLano*, 318 Mich 557, 570; 28 NW2d 909 (1947). Generally, rebuttal evidence must relate to a substantive rather than a collateral matter, and contradictory evidence is admissible only when it directly tends to disprove a witness' exact testimony. *City of Westland v Okopski*, 208 Mich App 66, 72; 527 NW2d 780 (1994).

The test of whether rebuttal evidence was properly admitted is not whether the evidence could have been offered in the prosecutor's case in chief, but, rather, whether the evidence is properly responsive to evidence introduced or a theory developed by the defendant. *People v McIntire*, 232 Mich App 71, 108-109; ___ NW2d ___ (1998); *Figgures, supra* at 399.

Here, the prosecutor's rebuttal was not improper. The rebuttal testimony responded to defendant's testimony and apparent theory of defense that the victim was not an innocent seventeen-year-old. Regardless, defendant did not object, and no manifest injustice resulted from the admission of the rebuttal testimony because alcohol was a persistent theme of both the prosecutor and the defense throughout the trial.

IV

Finally, defendant claims ineffective assistance of counsel. Defendant did not assert this claim before the court below. A claim of ineffective assistance of counsel must be preceded by an evidentiary hearing or motion for new trial before the trial court; otherwise, this Court will only review those alleged mistakes of counsel that are apparent on the record. *People v Johnson*, 144 Mich App 125, 129-130; 373 NW2d 263 (1985).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Stanaway, supra* at 687. To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) the result of the proceeding was fundamentally unfair or unreliable. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984);

Stanaway, *supra* at 687-688; *People v Poole*, 218 Mich App 702, 717-718; 555 NW2d 485 (1996).

Defendant claims a combination of six errors resulted in ineffective assistance of counsel. First, defendant claims that counsel was ineffective by allowing the alcohol testimony, which was "bad acts" testimony, because it discredited defendant and reflected counsel's gross misunderstanding of the intoxication defense. This claim fails because there is no evidence that this was not trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Defense counsel presumably relied on this testimony to bolster defendant's credibility and refute the other witnesses' testimony of details of the evening. Further, there is no evidence on the record that defense counsel presented an intoxication defense.

Second, defendant's claim that counsel failed to prepare defendant to testify, resulting in defendant using street language and discrediting himself, must fail. Defense counsel's trial strategy could have been to portray defendant as "candid and frank," and thereby establish defendant's credibility.

Third, defendant's claim that counsel discredited defendant by questioning him about court-ordered medical testing must fail. In her opening statement, defense counsel addressed whether medical evidence existed. Counsel's question on redirect regarding medical testing could have been trial strategy to suggest that no physical evidence resulted from the testing.

Fourth, defendant argues ineffective assistance because counsel did not move for directed verdict at the close of the prosecutor's case-in-chief and at the close of trial. Defense counsel is not obligated to argue a meritless motion. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). This case involved conflicting testimony of the victim and defendant, and additional conflicting testimony from other witnesses. There was no basis for a motion for a directed verdict.

Fifth, defendant argues that counsel failed to file a pretrial motion to exclude defendant's out-of-court statement to the sheriff deputy and should have made the *Miranda*[1] argument before trial, not in front of the jury. Defense counsel's references to *Miranda* occurred in her cross-examination of the deputy who questioned defendant. In closing argument, counsel pointed out that defendant believed the deputy was badgering him and that although defendant made a statement, there were other reasons why defendant said what he did. There is no basis for concluding that counsel's actions were not a matter of trial strategy, particularly in light of the fact that counsel filed a motion in limine to suppress defendant's prior conviction. Even if this were error, defendant has not shown that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different or that the result was fundamentally unfair or unreliable.

Finally, defendant argues that counsel failed to object to what defendant claims are blatantly erroneous facts and abusive statements in the presentencing report. Defendant provides this Court with his affidavit of April 1, 1998, denying that he made an admission as stated in the presentence report. Where a defendant improperly submits an affidavit that was not before the trial court, we will not

consider the affidavit. *People v Canter*, 197 Mich App 550, 556-557; 496 NW2d 336 (1992). This Court's review is limited to the trial court record. *Id*. at 557.

According to the record, defendant reviewed the presentence report and had the opportunity to correct any inaccuracies. The record shows that both defendant and counsel reviewed the report and did not object to the contents. Defendant indicated that he had nothing to say to the court. Further, counsel raised other concerns about sentencing. There is no evidence that counsel's assistance was ineffective. *People v Bailey (On Remand)*, 218 Mich App 645, 647-648; 544 NW2d 391 (1996); *People v Hunt*, 170 Mich App 1, 14-15; 427 NW2d 907 (1988). Even if the statements in the presentence report were erroneous, defendant has not shown prejudice.

Defendant has failed to carry the burden of establishing either that (1) defense counsel's actions did not constitute trial strategy or (2) even if there were error, (a) there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different or (b) that the proceeding was fundamentally unfair or unreliable. Defendant was not denied his right to a fair trial by the ineffective assistance of counsel.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Jeffrey G. Collins

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).