STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 30, 1999
v	No. 199856 Clinton Circuit Court
MARSHALL RAYMOND SIMPSON, Defendant-Appellant.	LC No. 96-006069 FC ON REHEARING

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). He was sentenced to ten to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that the prosecutor's comments during closing argument amounted to prosecutorial misconduct and consequently denied him his right to a fair trial. Defendant asserts that the prosecutor impermissibly attacked defendant's credibility, insinuated he was lying, and vouched for the veracity of the complainant, defendant's daughter. Claims of prosecutorial misconduct are reviewed de novo. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995). An appellate court will determine if the remarks, taken in context, denied the defendant the right to a fair trial. *Id*. at 267. In this case, they did not.

The prosecutor's comments, taken as a whole, constituted a permissible argument that defendant's testimony was not credible. Defendant elected to testify, and like any other witness, his credibility was subject to attack. *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995), citing *Brown v United States*, 356 US 148, 154; 78 SCt 622; 2 LEd 2d 589 (1958). Moreover, a prosecutor may comment on the testimony of witnesses in the case, and "may argue upon the facts and evidence that a witness is not worthy of belief." *People v Caldwell*, 78 Mich App 690, 692; 261 NW2d 1 (1977). Furthermore, the prosecutor's comments suggesting that the defense theory was not plausible did not amount to shifting the burden of proof. See *Fields, supra*, pp 115-116.

We also disagree with defendant's claim that the prosecutor committed misconduct by vouching for the complainant's veracity. A prosecutor may not vouch for the credibility of a witness, but a prosecutor may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor merely asked the jury to consider the complainant's interest in the outcome of the case and to contrast her interests with defendant's own interests in the outcome. The prosecutor never suggested that the People had the knowledge or ability to determine whether the complainant was being truthful or that the complainant was telling the truth. In short, the prosecutor never vouched for the complainant's credibility. Finally, contrary to defendant's assertion, the prosecutor's closing argument did not violate a court order prohibiting experts from testifying about the complainant's veracity. Again, the prosecutor was free to make permissible comments about the complainant's credibility in closing. *Caldwell, supra*, p 692.

Defendant also argues that the trial court erred by admitting testimony regarding defendant's alleged prior acts of sexual misconduct with the complainant and that, consequently, his right to a fair trial was denied. Again, we disagree. Although both parties argue the applicability of the rape-shield law, MCL 750.520j; MSA 28.788(10), and MRE 404(a)(3), their reliance on that authority is misplaced because the law is aimed at protecting the victim, not a defendant. The statute was designed to minimize the possibility that the victim would be tried for her character, "instead of the defendant for his conduct." *People v Stull*, 127 Mich App 14, 17; 338 NW2d 403 (1983). Defendant also claims that the evidence was inadmissible similar acts testimony under MRE 404(b). However, in admitting the evidence, the trial court properly weighed its probative value against the risk of unfair prejudice and concluded that its admission was permissible under *People v DerMartzex*, 390 Mich 410, 413; 213 NW2d 97 (1973). In *DerMartzex*, the Supreme Court held that "the probative value [of similar acts evidence] outweighs the disadvantage where the crime charged is a sexual offense [involving a member of the same household] and the other acts tend to show a familiarity between the defendant and the person with whom he allegedly committed the offense." Because the probative value of the antecedent uncharged sexual acts between defendant and his daughter outweighed any prejudice to defendant, we find no abuse of discretion in the admission of the evidence. *DerMartzex, supra*, pp 413-415.

Lastly, although not raised on appeal, we will address the issue of whether the trial court erred in excluding a witness' testimony relating to a statement allegedly made by the complainant that she had been raped by two men. Under *People v Mikula*, 84 Mich App 108, 115; 269 NW2d 195 (1978), this Court set forth the following two propositions. First, in a prosecution for a sexual offense, the defendant may cross-examine the complainant regarding prior false accusations of a similar nature and, if she denies making them, submit proof of such charges. Second, where the verdict necessarily turns on the credibility of the complainant, it is imperative that the defendant be given an opportunity to place before the jury evidence so fundamentally affecting the complainant's credibility. See also *People v Haley*, 153 Mich App 400; 395 NW2d 60 (1986). Although the better course may have been to permit the challenged witness's testimony regarding the alleged prior sexual activity of the complainant, we cannot say that the trial court abused its discretion in weighing defendant's right to confrontation against legitimate concerns of jury confusion and distraction, including the collateral issue of the witness's veracity, and concluding that the rape evidence would not bear significantly on the issue of

penetration or on the defense theory that the victim was lying when she alleged that defendant had raped her on a regular basis for years.[1]

Moreover, we note that the trial court indicated in its pretrial ruling that defendant would be allowed an opportunity to create a record showing that the proposed evidence was indeed necessary to preserve his right to confrontation and that the trial court would reconsider its ruling excluding the evidence if a sufficient showing was made. At no time after his initial objection did defense counsel again raise the issue of admitting the rape evidence, or otherwise seek reconsideration of the trial court's ruling as the judge had offered. The United States Supreme Court has stated that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986). Thus, because defendant was offered the opportunity to create a sufficient record for the admission of the rape evidence, but failed to do so, we decline to address the merits of this issue further.[2]

The prior unpublished per curiam opinion of this Court, as well as the concurrence by Judge Markman, both issued on 12/29/98, are hereby vacated.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] In addressing the rape-shield act in light of a defendant's Sixth Amendment right to confrontation, the Supreme Court stated in *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984):

> The determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its ecslusion would not unconstitutionally abridge the defendant's right to confrontation.

[2] Further, we note that, following the prosecutor's impeachment of the challenged witness at the pretrial hearing, it would not have been an unreasonable trial strategy for the defense *not* to pursue calling the witness. The issue of her bias was, at least arguably, readily apparent from her pretrial testimony.