

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LOUIS MICHAEL SCHMUCKAL,

Defendant-Appellant.

UNPUBLISHED

August 6, 1999

No. 209953

Grand Traverse Circuit Court

LC No. 97-007391 FC

Before: Murphy, P.J., and Doctoroff and Neff, JJ.

PER CURIAM.

Defendant was charged with one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). After a jury trial, defendant was convicted of one count of first-degree criminal sexual conduct. He was sentenced to eight to twenty years in prison. He appeals as of right. We affirm.

Defendant first argues that the prosecutor's failure to specifically identify the dates of the incidents giving rise to the charges violated his due process rights and the prohibition against double jeopardy. We disagree. This Court will not reverse a trial court's determination that the time of the offense alleged in the information was sufficiently specific absent an abuse of discretion. *People v Miller*, 165 Mich App 32, 46; 418 NW2d 668 (1987), remanded on other grounds, 434 Mich 915 (1990).

Here, the information indicated that the offenses occurred on or about June 1991 through February 1992. An indictment or information must contain "[t]he time of the offense as near as may be. No variance as to time shall be fatal unless time is of the essence of the offense." MCL 767.45(1)(b); MSA 28.985(1)(b). When determining to what extent specificity of the time of an offense will be required, courts should consider 1) the nature of the crime charged, 2) the victim's ability to specify a date, 3) the prosecutor's efforts to pinpoint a date, and 4) the prejudice to the defendant in preparing a defense. *Miller, supra* at 46; *People v Naugle*, 152 Mich App 227, 233; 393 NW2d 592 (1986).

Here, defendant was charged with criminal sexual conduct offenses. "Time is not of the essence nor a material element in a criminal sexual conduct case, at least where the victim is a child." *People v*

Stricklin, 162 Mich App 623, 634; 413 NW2d 457 (1987). Furthermore, in light of complainant's testimony that the sexual abuse occurred almost every night for several years, and that the incidents were all very similar to each other in that they all involved defendant coming into complainant's bedroom during the night, it is understandable that complainant was unable to identify a specific date or a discrete incident. In addition, we cannot disagree with the trial court's finding that the prosecutor made serious attempts to pinpoint a date. Finally, defendant has not shown any prejudice resulting from the prosecutor's failure to more specifically identify the dates of the offenses. Although defendant asserts that the lack of specificity prevented him from developing an alibi defense, "where complainant alleged that the offenses occurred almost daily and defendant and complainant lived in the same house throughout the alleged time period, it is unlikely that defendant could have raised an effective alibi defense." *Naugle, supra* at 234-235. Thus, we conclude that the trial court did not abuse its discretion in finding that the dates stated on the information were sufficiently specific.

Defendant next argues that the district court judge erred in refusing to disqualify himself from conducting the preliminary examination after the prosecutor informed the court at a prior hearing that defendant had not denied the criminal sexual conduct allegations. However, defendant waived this issue by not seeking de novo review by the chief judge of the challenged judge's refusal to disqualify himself. MCR 2.003(C)(3); *People v Williams (After Remand)*, 198 Mich App 537, 544; 499 NW2d 404 (1993). Furthermore, even if defendant had not waived this issue, he failed to demonstrate actual prejudice resulting from the alleged bias against him. MCR 2.003(B)(1); *People v Coones*, 216 Mich App 721, 726; 550 NW2d 600 (1996)(Bandstra, J). Thus, defendant has not demonstrated that the district court erred in denying the motion for disqualification.

Defendant next argues that he was denied a fair trial because Detective Robbins destroyed the notes he took while interviewing defendant, and because the prosecutor erroneously stated at a motion hearing that Robbins did not take notes during the interview. We disagree.

First, as noted by the trial court, the prosecutor's erroneous statement that no notes were taken at the interview did not deny defendant a fair trial because the notes had already been destroyed at that time. Thus, regardless of the prosecutor's misrepresentation, the notes were unavailable. Furthermore, the destruction of the notes did not deny defendant a fair trial. When a defendant claims that he was denied a fair trial because police notes were destroyed before being turned over to the defense, the court must consider 1) whether the suppression of the notes by the police was deliberate, 2) whether the notes were requested, and 3) whether "hindsight discloses . . . that [the] defense could have put the evidence to not insignificant use." *People v Petrella*, 124 Mich App 745, 752-753; 336 NW2d 761 (1983), *aff'd* 424 Mich 221 (1985). Here, the notes were requested by the defense. However, there was no indication that the notes were destroyed in bad faith in an attempt to suppress evidence. Rather, the evidence indicated that the notes were destroyed pursuant to a departmental policy. *Id.* Furthermore, Detective Robbins' notes were summarized and typed in the form of a police report that was provided to defendant. *People v Leo*, 188 Mich App 417, 427; 470 NW2d 423 (1991). Moreover, defense counsel conducted an extensive cross-examination of Officer Robbins regarding the circumstances surrounding defendant's police statement, including the destruction of the notes. *Cf. People v Paris*, 166 Mich App 276, 282-284; 420 NW2d 184 (1988) (reversing the defendant's convictions where the evidence against him was not strong and the destruction of the notes deprived the defendant of an opportunity to effectively cross-examine the officer). Under these circumstances, we conclude that defendant was not denied a fair trial by the destruction of the notes.

Defendant next argues that he was denied a fair trial by prosecutorial misconduct.¹ We disagree. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *Id.* Appellate review of improper prosecutorial remarks is generally precluded if defendant does not object to the remarks at trial because the failure to object deprives the trial court of an opportunity to cure the error. *Id.* However, an exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.*

First, defendant asserts that he was denied a fair trial because the prosecutor improperly elicited testimony from Detective Robbins regarding defendant's invocation of his right to remain silent and his right to counsel. Generally, a defendant's exercise of his right to remain silent cannot be used against him to impeach his exculpatory story. *Doyle v Ohio*, 426 US 610; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990); *People v Bobo*, 390 Mich 355, 359; 212 NW2d 190 (1973). However, where a defendant has waived his *Miranda*² rights and is generally prepared to talk to the police, "his statements, the manner in which he phrased those statements, and his varying degrees of candor" are fit matters for the jury to consider. *People v Sholl*, 453 Mich 730, 738; 556 NW2d 851 (1996). Here, evidence indicated that defendant waived his *Miranda* rights and agreed to speak to Detective Robbins regarding the sexual abuse allegations. Defendant's statement that he did not want to discuss the nature of the "problem" he had with complainant, after answering several other questions regarding the allegations, did not amount to "an affirmative and unequivocal invocation of his right to remain silent." *People v Davis*, 191 Mich App 29, 36; 477 NW2d 438 (1991). Furthermore, no prejudice resulted from Detective Robbins' testimony that defendant requested counsel. We also note that defendant did not timely object to the challenged testimony and a limiting instruction could have cured any prejudice resulting from the questioning. *McElhaney*, *supra* at 283. Thus, we cannot conclude that defendant was denied a fair trial by the prosecutor's questioning regarding defendant's statement to the police.

Second, defendant contends that he was denied a fair trial because the prosecutor made a civic duty argument during her closing arguments. It is improper for a prosecutor to make a civic duty argument that appeals to the fears and prejudices of the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Here, assuming the prosecutor's argument was improper, the trial court gave an immediate curative instruction that the jury's verdict must be based on the evidence, alone, and that there was no duty to send any message to the community through the verdict. Any prejudice resulting from the prosecutor's remarks was cured by the court's instruction. Thus, the prosecutor's argument did not deny defendant a fair trial.

Finally, defendant argues that the prosecutor misstated the burden of proof when she argued that "[i]f you truly believe that the defendant didn't do any of these things, did nothing wrong, then you return a verdict of not guilty." The prosecutor's argument did not state the proper burden of proof. However, upon defense counsel's objection, the trial court immediately instructed the jury regarding the correct burden of proof. The court gave another curative instruction, instructing the jury to use the correct burden of proof, when the prosecutor stated that "if there is more than a mere possibility that the victim is telling the truth here, then you should return a verdict of guilty." While the prosecutor's

statements were improper, in light of the court's immediate curative instructions, they did not deny defendant a fair trial.

Affirmed.

/s/ William B. Murphy
/s/ Martin M. Doctoroff
/s/ Janet T. Neff

¹ Defendant's statement of this issue includes an argument that the prosecutor committed misconduct by "misrepresenting the facts." However, defendant presents no argument regarding the issue and does not indicate which facts were allegedly misrepresented. Thus, we cannot review the issue.

² *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d 694 (1966).