STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN THOMAS BROOKS, JR.,

Defendant-Appellant.

UNPUBLISHED
January 18, 2000

No. 209008
Ottawa Circuit Court
LC No. 97020969 FC

Before: Zahra, P.J., and Kelly and McDonald, 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). The jury found defendant not guilty of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), or kidnapping, MCL 750.349; MSA 28.581. Defendant was sentenced to ten to fifteen years' imprisonment, with credit for 144 days served, and to pay $60 to the crime victim rights fund. Defendant appeals as of right. We affirm.

The victim in this case alleged that defendant pulled her into his car against her will and later forcibly engaged in nonconsensual sexual intercourse with her. Defendant maintained that she got into his car voluntarily and they engaged in consensual sexual intercourse.

Defendant first argues on appeal that he was denied a fair trial because of prosecutorial misconduct. Specifically, defendant argues that the prosecutor's references throughout the trial to the alleged offense as "the rape" and to the complainant as "the victim" deprived defendant of the presumption of innocence and a determination of guilt or innocence by a jury. In addition, defendant claims that the prosecutor improperly referred to and relied upon inadmissible evidence during his closing argument. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court decides issues of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context to ascertain whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

With regard to the use of the terms "rape" and "victim," defendant claims that the prosecutor's conclusions that a rape occurred and that complainant was a victim permeated the prosecution's case, causing prejudice by arousing the passions of the jury and diverting its attention from the proper issues.[1] We disagree. Although the term is not used in the statute defining the offenses charged, first- and third-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), rape is a generic term for forcible nonconsensual sexual intercourse. See *People v Johnson*, 115 Mich App 630, 636; 321 NW2d 752 (1982). The prosecutor presented evidence that supports the use of this word to characterize what allegedly occurred. Although prosecutors must avoid inflaming the prejudices of a jury, they need not phrase their argument in the blandest of all possible terms; prosecutors have the right and the duty to vigorously argue the state's case. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973); see also *People v Ullah*, 216 Mich App 669,678; 550 NW2d 568 (1996)("prosecutors may use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms"). Further, defense counsel also used the word "rape" to characterize the offense. For these reasons, we conclude that the use of the term "rape" did not deny defendant a fair trial.

Defendant next asserts that the prosecutor's use of "the rape" and "the victim" invited use of these terms by prosecution witnesses, resulting in the impermissible offer of lay witness opinion on an ultimate fact in issue in violation of MRE 701. Defendant focuses his argument on the police laboratory technician's testimony regarding her analysis of the items within the sexual assault evidence kit and asserts that her "opinion that a rape occurred was not rationally based on her perception." Upon review of such testimony, it is apparent that no such opinion was offered, and thus this argument is without merit.

Based on defendant's acquittal of kidnapping and first-degree criminal sexual conduct, defendant next argues that plaintiff's use of these words caused the jury to suspend its critical analysis and judgment in deference to the prosecutor's and his witnesses' authority. Citing *People v Humphreys*, 24 Mich App 411, 418-419; 180 NW2d 328 (1970), defendant suggests that it is improper for the prosecutor to use the authority of the office to bolster the credibility of a witness. Upon review of the record, we conclude that the prosecutor neither stated his belief of defendant's guilt nor vouched for a witness' credibility, and hence the *Humphreys* analysis is inapplicable. We cannot say that error occurred where defendant's reasons for arguing that the jury suspended its own critical analysis and judgment also support the notion that the jury exercised its own judgment by determining whether the prosecution sustained its burden of proof beyond a reasonable doubt on each count.

Next, defendant argues that, even though the trial court instructed the jury that statements by counsel are not evidence, such error could not be corrected and, therefore, manifest injustice occurred because the witnesses adopted and used these terms. More specifically, defendant asserts that the witnesses' use of these terms resulted in the jury considering improper opinion evidence that defendant was a rapist and complainant was his victim. We disagree. The use of the terms "rape" and "victim" by the witnesses merely characterized their perception of the situation. Here, the complainant believed that she was raped, and therefore this characterization of the incident is rationally based on her

perception of the incident. MRE 701. Additionally, it is not uncommon or unexpected that a police officer informed of a crime would consider the complainant as "the victim" of the alleged crime. Similarly, it is not unreasonable or unexpected for a laboratory technician analyzing the contents of a sexual assault evidence kit to perceive that the items enclosed belonged to or came from a victim. Moreover, defendant herein also referred to complainant as the victim, explaining upon inquiry that he was referring to his accuser. We find no error.

Defendant also argues that he was denied a fair trial because, during closing argument, the prosecutor improperly made three references to evidence not admitted at trial, and that such error could not have been cured by an instruction from the court.[2] We find no error. Before any objection was made to the clump of hair being admitted into evidence, the police laboratory technician testified that inside the sexual assault evidence kit was a clump of hair characteristic of head hair which was similar to hair pulled from the victim's head also contained therein. The emergency room nurse identified the evidence kit, as stipulated by defense counsel and admitted, but that remained unopened at trial. After the court's ruling, an officer testified, without objection, that he found a clump of hair at the scene, put it in with the specimen collection kit and sent it to the crime lab. During closing argument, the prosecutor referred to this testimony without objection. Defendant's failure to object or to request a curative instruction precludes appellate review of his claim unless a miscarriage of justice resulted. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). We find no miscarriage of justice where the complained-of remarks were merely comments upon evidence previously adduced at trial without objection.

Next, defendant argues that he was denied a fair trial because the trial court failed to sua sponte instruct the jury and to sua sponte declare a mistrial because of a police officer's improper opinion testimony. Defendant did not request an instruction on improper opinion testimony, nor object to the given jury instructions for that reason. Absent a request for an instruction or an objection to the jury instructions given by the trial court, an appellate court will not consider instructional error unless manifest injustice exists. *People v Van Dorsten*, 441 Mich 540, 544; 494 NW2d 737 (1993), quoting *People v Kelly*, 423 Mich 261, 271-272; 378 NW2d 365 (1985); see MCL 768.29; MSA 28.1052 ("The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused"). We find no manifest injustice here, nor reason for a sua sponte declaration of mistrial, where the trial court sustained defendant's objections to the officer's testimony; directed the witness to recite the facts, not draw conclusions from the facts; and instructed the jury to consider only properly admitted evidence, not excluded evidence or stricken testimony, and that it is the jurors' job to decide the facts and determine credibility. See *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999); *People v Barker*, 161 Mich App 296, 305; 409 NW2d 813 (1987).

Affirmed.

/s/ Brian K. Zahra
/s/ Michael J. Kelly
/s/ Gary R. McDonald

[1] Defendant's reliance on *People v Thangavelu*, 96 Mich App 442; 292 NW2d 227 (1980), is misplaced because the facts are distinguishable.

[2] Defendant's argument that there was insufficient evidence to link the clump of hair found at the scene as being hair that was pulled off of the victim's head, without improperly basing inference upon inference, is without merit. See *People v Orsie*, 83 Mich App 42, 48; 268 NW2d 278 (1978).