

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WESLEY SCOTT MADDOX,

Defendant-Appellant.

UNPUBLISHED

July 25, 2000

No. 218487

Montcalm Circuit Court

LC No. 98-000246-FH

Before: McDonald, P.J., and Neff and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of third-degree criminal sexual conduct and one count of attempted third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), and MCL 750.92; MSA 28.287, and sentenced to concurrent terms of four to fifteen years' imprisonment and two to five years' imprisonment. Defendant appeals of right. We affirm.

I

First, defendant argues that the trial court erred in denying his motion for new trial based on his claim that his convictions were against the great weight of the evidence. Defendant argues that because the complainant was impeached by prior inconsistent statements and her poor reputation for veracity within her family, and because her testimony contradicted that of other witnesses and presented physical impossibilities, her testimony lacked any probative value and could not be believed by a reasonable jury. We disagree.

We review the grant or denial of a motion for new trial for abuse of discretion. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993), overruled in part on other grounds in *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998); *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *Id.* New trial motions based on the weight of the evidence regarding witness credibility are not favored; such motions should be granted only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the

verdict to stand. *Lemmon, supra* at 639; *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998).

Our review of the trial record persuades us that no physical impossibility makes the evidence preponderate against the verdict so heavily as to risk a miscarriage of justice. Nor do we find that the complainant's testimony was impeached of all probative value or was so inherently implausible that it could not have been believed by a reasonable juror. See *Lemmon, supra* at 643. While the complainant was impeached to some extent, so were the witnesses presenting conflicting testimony as to the completed sexual act in the park. Similarly, the same witnesses presented conflicting testimony. We will not attempt to resolve credibility questions anew, *Gadomski, supra* at 28, and we conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial.

II

Next, defendant argues that prior inconsistent statements to the police by the complainant's two teenaged cousins that tended to implicate defendant should not have been admitted for impeachment purposes where the witnesses were called by the prosecution, knowing that they would deny their earlier statements, and for the sole purpose of introducing those prior statements at trial. We disagree.

We review the admissibility of evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995). An abuse of discretion exists only if an unprejudiced person, after considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000).

The two girls testified to various facts and circumstances that tended to support the complainant's testimony on some matters, provided testimony that conflicted with that of the complainant and another witness as to other matters, and provided some material facts not presented by any other witness. Because their credibility was relevant to matters other than the content of their inconsistent statements, their testimony did not fall within the exception of *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994), and the trial court did not abuse its discretion in admitting the prior inconsistent statements.

III

Finally, defendant argues that a series of remarks during the prosecutor's closing argument shifted the burden of proof and constituted comment on defendant's failure to testify, thereby denying him a fair trial. Although defense counsel addressed some of these comments during his own closing argument, he raised no objection regarding the comments until after the trial court instructed the jury, excused the jury to deliberate, and obtained counsel's explicit approval of the final instructions. We find that neither defense counsel's closing argument nor the belated objection constituted a proper objection to the comments. *People v Wells*, 238 Mich App 383, 390; 605 NW2d 374 (1999); *People v Jones*, 73 Mich App 107, 110; 251 NW2d 264 (1976). Without a timely objection to the prosecutorial misconduct, we will only review a defendant's claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

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). Prosecutorial misconduct issues are decided case by case; we must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *Id.* The propriety of a prosecutor's remarks depends on all the facts of the case. 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. *People v Schutte*, ___ Mich App ___; ___ NW2d ___ (Docket No. 213259, issued 5/2/2000), slip op at 4; *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). A prosecutor may not comment on a defendant's failure to testify or present evidence, but may argue that certain evidence is uncontradicted and may contest evidence presented by the defendant. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999); *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), *aff'd* 460 Mich 55; 594 NW2d 477 (1999).

Of the four sentences or phrases challenged by defendant, two of them, read in context, were clearly proper. The statement "[w]hen you get down to it, this is a case of who you believe and who you don't believe and if you believe [the complainant], you must convict the defendant as charged," merely pointed out that the complainant's testimony alone, if believed, could support a conviction. The statement "[w]hat is he trying to cover up if he's so innocent?" plainly referred to defendant's apparently false statement to the investigating officer regarding the time of his trip to the park with the complainant and her cousins.

During her comments on the meaning of "a reasonable doubt," the prosecutor stated that the term did not mean that jurors were to give defendant "the benefit of the doubt." Defendant argues that this constituted a misstatement of the prosecutor's burden of proof. The prosecutor also stated "[w]hat it comes down to is, who is telling the truth, [the complainant] or the defendant." Defendant argues that this constituted impermissible comment on his failure to testify. When defendant objected to the comments after the jury was excused, the prosecutor explained that the latter remark merely referred to the inconsistent testimony from various witnesses concerning defendant's denial of the allegations. Although we do not believe that these comments denied defendant a fair and impartial trial, *Paquette*, *supra* at 342, we also conclude that any potential confusion of the jury would have been alleviated by a timely instruction. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996). We therefore find no miscarriage of justice. Furthermore, the trial court provided adequate instructions on these issues before excusing the jury to deliberate. *Lawton*, *supra* at 354. Reversal on this ground is therefore not warranted.

Affirmed.

/s/ Gary R. McDonald

/s/ Janet T. Neff

/s/ Brian K. Zahra