STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 22, 2000
v	No. 215981 Cass Circuit Court
SCOTT LAWRENCE ROGERS, Defendant-Appellant.	LC No. 98-009416

Before: Doctoroff, P.J., and Holbrook, Jr. and Smolenski, JJ.

PER CURIAM.

Defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and was sentenced to a term of 4 to 15 years' imprisonment. Defendant appeals as of right. We affirm.

This case arises from an encounter between defendant and his female victim during the early morning hours of November 8, 1997 at a party given by John "J.P." Gartland. The party was attended by defendant, J.P., Lindsey Griffing, Krystle Bolock, J.P.'s younger brother, Karl Gartland, and Daniel Fred. At trial, defendant's sole defense was that the victim consented to vaginal intercourse.

Defendant first argues that his conviction of third-degree criminal sexual conduct was not supported by sufficient evidence. Specifically, defendant argues that there was insufficient evidence to allow the jury to conclude that defendant forced or coerced the victim to have sexual intercourse. We disagree. To determine whether sufficient evidence has been presented to sustain a conviction, this Court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended 441 Mich 1201 (1992).

To establish third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), the prosecutor must prove beyond a reasonable doubt that defendant engaged in sexual penetration with the victim, and that defendant accomplished the sexual penetration by force or coercion. *People v Hutner*, 209 Mich App 280, 283; 530 NW2d 174 (1995). Force or coercion includes, but is not limited to, physical force or violence, threats of force, threats of retaliation,

inappropriate medical treatment, or concealment or surprise. MCL 750.520d(1)(b); MSA 28.788(4)(1)(b); MCL 750.520b(1)(f); MSA 28.788(5)(1)(f); *People v Brown*, 197 Mich App 448, 450; 495 NW2d 812 (1992). "Force or coercion is not limited to physical violence but is instead determined in light of all the circumstances." *Brown, supra.*

Here, viewing the evidence in the light most favorable to the prosecution, it is clear that there was sufficient evidence to support a finding that defendant used force or coercion to sexually penetrate the victim. The victim testified that she repeatedly told defendant "no" as he removed her clothes, that she unsuccessfully tried to hold onto her clothes, and that defendant pushed her hands above her head. Further, the victim's testimony revealed that after defendant removed all of her clothes against her will, she turned her head away and told defendant to stop as defendant tried to kiss her. When defendant tried to lift the victim's legs, she told defendant to stop, that she wanted her clothes, and that she wanted to go to bed. The victim testified that when defendant pushed his penis into her vagina, she put her feet on defendant's chest in order to push defendant off, and defendant responded by telling her to shut up and by covering her mouth.

In addition, Daniel Fred testified that he saw defendant carry the victim down the stairs from the bedroom to the reclining chair, and that the victim was barely awake at the time and was talking in an almost incoherent manner. Fred testified that he heard the victim say "no" as Fred listened to defendant and the victim talking in the basement. Further, Fred also heard the victim tell defendant "No, get off me, leave me alone." When Fred entered the basement, he observed defendant on top of the victim holding the victim's arms over her head so that they were "pinned down."

Karl Gartland testified that the victim "seemed to be dazedly confused" while sitting on defendant's lap in the reclining chair approximately ten minutes before defendant carried the victim downstairs to the basement couch. Karl further testified that he heard the victim say "no" on two separate occasions while defendant and the victim were on the basement couch, and that he heard defendant tell the victim to "shut up." Karl also testified that he saw defendant removing his penis from the victim's vagina when he ran into the basement.

Krystle Bolock testified that she saw "pinkish blood" on the toilet paper that the victim used to wipe her vagina after the assault, and that the victim told Bolock that defendant had forced himself on her. The testimony of the nurse and the doctor confirmed that the victim had a one-centimeter tear on the beginning of her vaginal opening, and that a one-time penetration with a penis could have caused the tear.

On the basis of this evidence, the jury was justified in finding beyond a reasonable doubt that defendant used force or coercion to sexually penetrate the victim. We therefore conclude that defendant's conviction for third-degree criminal sexual conduct was supported by sufficient evidence.

Defendant next argues that the verdict was against the great weight of the evidence. We disagree. A motion for a new trial based on the great weight of the evidence should be granted only when the evidence preponderates so heavily against the verdict that a serious miscarriage of justice would result if the verdict were allowed to stand. *People v Lemmon*, 456 Mich 625, 627, 639-642;

576 NW2d 129 (1998); see also *People v Gadomski,* 232 Mich App 24, 28; 592 NW2d 75 (1998). Absent exceptional circumstances, issues of witness credibility are for the jury, and the trial court may not substitute its judgment for that of the jury. *Lemmon*, *supra*, 642.

Here, the trial court denied defendant's motion for a new trial 1) because defendant's motion was untimely pursuant to MCR 7.208(B)(1) and MCR 7.212(A)(1)(a)(iii), and 2) because "[b]ased upon a review of the record[,] this court is satisfied that the standard enunciated in . . . *Lemmon* [was] met in this case." Although the trial court's ruling on defendant's motion for a new trial was terse, its ruling was not an abuse of discretion. *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998); see also *People v Brown*, 239 Mich App 735, 744-745; 610 NW2d 234 (2000).

The testimony of the victim, Daniel Fred, Karl Gartland and Krystle Bolock provided a sufficient factual basis to allow the jury to conclude that defendant did in fact force the victim to have sexual intercourse. Because questions of credibility are left to the jury, *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999), we will not disturb the verdict on appeal. We therefore conclude that the trial court did not abuse its discretion in denying defendant's motion for new trial.

Defendant next argues that he was denied a fair trial as a result of the prosecutor's improper tactics during the trial and improper remarks during closing arguments. We disagree. When reviewing claims of prosecutorial misconduct, this Court must examine the record and evaluate the challenged remarks in context. *People v Rice (On Remand),* 235 Mich App 429, 435; 597 NW2d 843 (1999). "The test is whether defendant was denied a fair and impartial trial." *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). However, error requiring reversal will not be found if the prejudicial effect of prosecutorial comments could have been cured by a cautionary instruction. *People v Schutte,* 240 Mich App 713, 720-721; __ NW2d __ (2000). Moreover, where defendant failed to object at trial to the challenged conduct, defendant can avoid forfeiture of the unpreserved issue only by demonstrating a plain error that affected his substantial rights, i.e., that the error affected the outcome of the lower court proceedings. *People v Carines,* 460 Mich 750, 761-762; 597 NW2d 130 (1999)*; Schutte, supra* at 720.

Defendant first argues that "[t]he continual references to 'bitch [and] whore' were taken out of context." While defendant's brief on appeal fails to cite to the relevant portion of the trial transcript, see MCR 7.212(C)(6), we believe that defendant is referring to the following statements by the prosecutor:

> The statements by the defendant, "You're a bitch, you're a whore," and he turns to Krystle, "What are you looking at, bitch," are not the statements of somebody who was caught in the consensual situation that didn't turn out quite like he hoped. It's the statement of a rapist caught in the act.

Assuming that the above excerpt is the one to which defendant is referring, defense counsel failed to object to the prosecutor's remarks. We further note that even if defense counsel had objected to the prosecutor's remarks, there was no error because the prosecutor's statement was supported by the evidence. Specifically, Karl Gartland testified that as he covered the victim with his coat, he heard defendant yelling that the victim is "a bitch and a whore, and that she started it." Also, Bolock testified

that after she ran down the stairs into the basement, defendant looked at Bolock and said, "What are you looking at, bitch?" The prosecutor was free to argue the evidence and all reasonable inferences arising from it as they related to his theory that defendant did not have consensual intercourse with the victim. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). The prosecutor's comments were not improper.

Defendant next argues that it was improper for the prosecutor to have the nurse and the doctor who treated the victim two days after the sexual assault read the victim's medical history to the jury.[1] Defendant argues on appeal that the repeated reading of the victim's medical history by two "esteemed community professionals" crystallized the medical history as "'the truth' in the jurors' minds." However, we find no error in the prosecutor's conduct. Furthermore, defendant's appellate brief indicates that defense counsel chose not to object to the testimony on the basis that "it would have angered the jurors to criticize or limit the testimony of these particular witnesses." Defendant may not waive objection to an issue before the trial court and then raise it as an error before this Court because to hold otherwise would allow the defendant to harbor error as an appellate parachute. *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998)

Next, defendant argues that the prosecutor made several comments during his rebuttal that inaccurately stated facts. Defendant argued that the prosecutor inaccurately stated that "Karl sat on the stairs and heard the beginning of a rape, knowing that [the victim] was not in a condition to defend herself, hearing her say, 'No,' several times, and then he heard her start to cry, and then he heard the cries become muffled, and then he took action." Defendant argues that the prosecutor should have clarified that Karl heard the victim say "no" on two separate occasions that were "possibly ten minutes apart." Also, defendant argues that the victim was the only person who testified that she was crying and that defendant covered her mouth. Again, defense counsel failed to object to the prosecutor's remarks or request a curative instruction. Because the trial court could have read a curative instruction to the jurors in order to cure any prejudice, we conclude that defendant was not denied a fair trial.

Defendant further argues that the prosecutor incorrectly stated that the victim suffered a "torn vagina" as a result of the assault. However, the nurse and the doctor who treated the victim at the emergency room both referred to the victim's injury as a "vaginal tear." Therefore, this claim has no merit.

Defendant next argues that the prosecutor improperly commented on defendant's failure to testify and shifted the burden of proof to the defense when the prosecutor stated that no witnesses ever testified that defendant had consensual sex with the victim. We find no error in the prosecutor's comments.

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[1] We note that the victim was assaulted on November 8, 1997, and she was treated on November 10, 1997; therefore, defendant is incorrect when stating that the victim was treated five days after the assault.

Defense counsel called defendant's brother, Chris, to testify regarding a conversation in which defendant told his version of the events to J.P. and Griffing in June 1998. Although defense counsel called Chris to provide the jury with an account of defendant's version, Chris never testified that he heard defendant tell J.P. and Griffing that he had consensual sex with the victim. The prosecutor's argument that no witnesses testified that defendant had consensual sex with the victim was made in response to defense counsel's argument that the parties engaged in consensual sex. A prosecutor is entitled to fairly respond to a defense counsel's argument in which the defense counsel relies on a defense without producing evidence. *People v Fields*, 450 Mich 94, 110-118 & n 21; 538 NW2d 356 (1995) (citing *United States v Bright*, 630 F2d 804, 825 (CA 5, 1980) (noting that "it is not error to comment on the failure of the defense to produce evidence on a phase of the defense upon which the defendant seeks to rely.")). Thus, the prosecutor's argument did not shift the burden of proof to defendant and was not improper.

Further, defendant argues that the prosecutor made several comments during his rebuttal that improperly attacked defense counsel's credibility. We first note that defendant incorrectly states in his appellate brief that his defense counsel "objected continuously" to the prosecutor's improper remarks during his rebuttal argument. Defense counsel objected only twice during the prosecutor's rebuttal, and neither objection was based upon the grounds argued on appeal. Defense counsel's overruled objection that there was no trial testimony that substantiated the fact that defendant denied having sexual intercourse with the victim is unrelated to this appeal. Defense counsel also objected when the prosecutor said to the jury, "Did you feel that this was just some coverup [sic] to cover up an embarrassing spot, so [the victim] could get to come in here, sit on the stand and be humiliated in front of you by [defense counsel]?" The trial court sustained defense counsel's objection on the ground that the prosecutor's statement was not proper argument. When examining the pertinent portion of the record and evaluating the prosecutor's remarks in context, there is no indication that these comments denied defendant a fair and impartial trial. *Rice, supra*.

Defendant also argues that the prosecutor improperly attacked defense counsel's credibility when the prosecutor explained to the jury why he believed that Karl smiled at one point during cross-examination, and improperly commented on defense counsel's remarks regarding Karl's demeanor. However, after having reviewed the record, we conclude that the prosecutor's comments were made in response to issues raised by defense counsel and were not improper. *Fields, supra*, 110-118 & n 21; *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996).

Defendant next argues that during rebuttal, the prosecutor improperly urged the jurors to convict defendant as part of their civic duty. We note that defendant did not object at trial to the comments he now challenges. A prosecutor may not urge the jurors to convict the defendant as part of their civic duty because such arguments inject issues into the trial that are broader than a defendant's guilt or innocence of the charges, and because they encourage the jurors to suspend their own powers of judgment. *Bahoda, supra*, 282; *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). We have reviewed the prosecutor's remarks in context and conclude that they did not deny defendant a fair trial. The prosecutor's argument merely urged the jury not to ignore the evidence that

the parties did not engage in consensual sex and to find defendant guilty on the basis of the evidence presented. Thus, we find no error.

Finally, defendant argues that the trial court erred in scoring the sentencing guidelines and abused its discretion by imposing a sentence that is not proportionate to the seriousness of the offense or the offender. We disagree.

We review a trial court's sentencing decision for an abuse of discretion. *Fetterley*, *supra* at 525. Our Supreme Court has held that in order to establish a cognizable claim on appeal that the sentencing guidelines were misapplied, a defendant must establish that "'(1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate.'" *People v Raby*, 456 Mich 487, 497-498; 572 NW2d 644 (1998), quoting *People v Mitchell*, 454 Mich 145, 177-178; 560 NW2d 600 (1997).

Here, defendant argues that although the victim suffered a one-centimeter vaginal tear that may have resulted from the one-time penetration, the minor tear is not the type of injury that the guidelines contemplated under OV 2, which addresses "bodily injury." See Michigan Sentencing Guidelines (2d ed, 1988), p 44. Defendant also argues that the victim never protested to being carried to the basement couch and, therefore, OV 5, which addresses the scenario where the victim was moved to another place of greater danger or to a situation of greater danger, should have been scored at zero. See Sentencing Guidelines, *id*. Because defendant does not allege that a factual predicate is wholly unsupported or materially false, but instead challenges the trial judge's calculation of the sentencing variables based on his discretionary interpretation of the facts adduced at trial, he has failed to establish a cognizable challenge to the scoring of the guidelines variables. *Raby*, *supra*, 497-498.

Furthermore, defendant has not shown that his sentence was disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). A sentence within the guidelines range is presumed to be proportionate. *Kennebrew*, *supra* at 609. However, in unusual circumstances, a sentence within the guidelines range can violate proportionality. *Milbourn*, *supra* at 661. A defendant must present unusual circumstances to the trial court before sentence is imposed, or the defendant waives the issue for appeal. *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992).

Here, the guidelines range for the minimum sentence was 36 to 72 months. Defendant's sentence of 4 to 15 years in prison was within the guidelines range. Defendant failed to present any unusual circumstances to overcome the presumption that his sentence was proportionate. We conclude that the court did not abuse its discretion in sentencing defendant.

Affirmed.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.
/s/ Michael R. Smolenski