

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN J. NICHOLS,

Defendant-Appellant.

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UNPUBLISHED

December 26, 2000

No. 217120

Wayne Circuit Court

Criminal Division

LC No. 98-002968

Before: Griffin, P.J., and Holbrook, Jr., and Murphy, JJ.

PER CURIAM.

Defendant was charged with three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Following a jury trial, he was convicted of the three counts of first-degree CSC, but acquitted of the single count of second-degree CSC. The trial court sentenced defendant to concurrent terms of ten to twenty years' imprisonment for each conviction. Defendant now appeals as of right. We affirm.

Defendant's convictions arose from allegations of sexual abuse made by the complainant, who was ten years old at the time of trial. Defendant, who was forty years old at the time of trial, was a friend of the complainant's mother. The complainant alleged that several incidents of sexual assault occurred in their apartment while defendant was spending the night.

First, defendant argues that he was denied his Sixth Amendment right of confrontation and his due process right to a fair trial by the court's preclusion, pursuant to the rape-shield statute, MCL 750.520j; MSA 28.788(10), of any reference in the medical records to a prior incident of sexual abuse involving the complainant and three boys. This Court reviews a trial court's decision to admit or exclude evidence under the rape-shield statute for an abuse of discretion. *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984).

In *People v Morse*, 231 Mich App 424, 436-437; 586 NW2d 555 (1998), this Court identified several safeguard procedures that must be followed when determining whether evidence of prior sexual abuse involving the victim and another person is admissible. First, the defendant is obligated to make an offer of proof and demonstrate relevance. If this preliminary hurdle is surmounted, the trial court must then conduct an in-camera evidentiary hearing to determine whether (1) the proffered evidence is relevant, (2) the defendant can establish that

another person was convicted of criminal sexual conduct involving the complainant, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the proceedings. *Id.* at 437.

Although the trial court did not conduct an in-camera hearing, defendant failed to file written notice prior to trial as required by MCL 750.520j(2); MSA 28.788(10)(2) and failed to make an offer of proof. Instead, the issue was raised by the prosecutor, who indicated that she was having a dispute with defense counsel about questioning the medical doctor about his interview with the complainant.<sup>1</sup> The prosecutor stated that the information was barred by the rape-shield statute and was irrelevant. Defense counsel responded that the issue was relevant to show the complainant was being treated for mental “issues” and to show that the complainant had made false allegations in the past. After some discussion, the trial court asked the prosecutor to explain the prior incident; the prosecutor indicated that the mother caught the boys “messing with [the complainant] and did not report that it happened.” Noting there was no evidence of a false allegation, the trial court asked defense counsel if there was anything further to address. Counsel stated that he wanted to introduce the statement as evidence used for medical treatment, to which the court responded that the hearsay exception issue was separate from the rape-shield inquiry and ruled that the evidence was inadmissible.

Clearly, defendant failed to properly raise the issue below by making an offer of proof and demonstrating the relevance of the incident as required by *Morse, supra*. Therefore, the trial court’s failure to conduct an in-camera hearing was inapposite. Moreover, the incident was inadmissible because it did not result in a criminal conviction or appear to be similar to the allegations made against defendant. Accordingly, the trial court did not abuse its discretion in prohibiting any reference to the prior incident.

We further note that defendant’s argument on appeal that the evidence was admissible to demonstrate the complainant’s knowledge about sexual matters was not raised below. Defendant also argues that the court’s ruling precluded him from recalling the complainant and engaging “in any appropriate confrontation;” yet, defendant never indicated that he wished to recall the complainant, who had already testified when the issue regarding the incident arose. Thus, these arguments are not properly preserved for our review. See *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Because defendant has not demonstrated or explained the particular facts underlying the incident on appeal, we find that manifest injustice will not result by our failure to address these arguments. *Id.*

Next, defendant raises several incidents of alleged prosecutorial misconduct during her closing argument. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998); *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

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<sup>1</sup> The complainant apparently informed the doctor that she was in counseling because “three boys touched her or messed with her” when she was five years old.

First, defendant contends the prosecutor improperly vouched for the complainant's credibility. While a prosecutor may not vouch for the credibility of his or her witnesses to the effect that he or she has some special knowledge concerning a witness' truthfulness, *People v Bahoda*, 448 Mich 261, 275; 531 NW2d 659 (1995), we find that the prosecutor in this case clearly did not make such a suggestion or otherwise improperly vouch for the complainant's testimony. Instead, she was appropriately responding to the defense's position that the complainant was lying about the sexual abuse. As noted in *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000), the prosecutor need not state her argument in the blandest possible terms.

Defendant next claims the prosecutor misstated the law by suggesting there was no obligation to prove "any form of intent" and that an accidental touching is still criminal. Specifically, defendant takes exception to the prosecutor's remarks that his claim of accident "is not the issue" and that the issue was "did he do it?" However, because defendant failed to object to the remarks, defendant must establish that any impropriety was outcome-determinative plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Viewed in context, we cannot say that the jury would have disregarded defendant's accident defense as irrelevant by the prosecutor's fleeting remark. In light of the prosecutor's continuing argument that it was unlikely the defendant accidentally penetrated the complainant's vagina with his finger, we believe that defendant has failed to establish the remark was plain error.

Finally, defendant argues the prosecutor impermissibly injected the issue of penalty by the following remarks:

You also can't consider the penalty. That's the Judge's role. But you see how the Judge conducted this trial and you see that he was incredibly fair and nice to everybody. He has to try to do the right thing. If he is convicted he has to sentence this man.

After defense counsel objected, the trial court instructed the jury that it was the duty of the judge to impose the penalty and they were to "give no consideration whatsoever" to the issue of penalty. Even if the remarks are deemed inappropriate, although they accurately stated the law, we find that the trial court's curative instruction cured any resulting prejudice. See *People v Daniel*, 207 Mich App 47, 56; 523 NW2d 830 (1994).

Accordingly, we conclude that defendant was not denied a fair and impartial trial due to alleged prosecutorial misconduct.

Affirmed.

/s/ Richard Allen Griffin  
/s/ Donald E. Holbrook, Jr.  
/s/ William B. Murphy