STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL CURTIZ GRIMMETT, II,

Defendant-Appellant.

UNPUBLISHED
January 26, 2001

No. 216301
Oakland Circuit Court
LC No. 98-159840 FC

Before: Sawyer, P.J., and Jansen and Gage, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree criminal sexual conduct (victim under age thirteen), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The trial court sentenced him to eight to twenty years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the prosecutor made improper comments during his closing arguments. Because defendant did not object at trial to the allegedly improper remarks, we will review defendant's claim only for plain error. No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Defendant challenges the prosecutor's statement that the jury had "already heard" that the victim's boyfriend, another possible suspect, was in school at the time of the crime. At trial, no testimony was given about the boyfriend, but defense counsel mentioned him during opening statements and said the jury would hear that the boyfriend was in school. In his own closing argument, defense counsel also commented on the boyfriend, clarifying for the jury that it had not heard any testimony about him. This retort, combined with the instructions given the jury,[1] emphasized that there was no evidence on the issue and that the statements concerning the boyfriend represented mere argument. Defendant has not shown that a timely instruction could not have cured any prejudice, nor that absent the remark the jury would have thought someone else was the perpetrator; no evidence about any other suspect was heard. We find that this remark did not affect the outcome of defendant's trial. *Schutte*, *supra*.

[1] The trial court instructed the jury that it was to determine the facts of the case and that the attorneys' statements and arguments were not evidence.

Defendant also complains of the prosecutor's comment questioning the logistics of defendant's alibi. The prosecutor said,

> And also ask yourself this. Is [defendant] going to drive from Oak Park to Southfield, drive all the way back to Oak Park and then get picked up by James and then drive all the way to Farmington Hills? If you know anything about Oakland County, Southfield is on the way to Farmington Hills if you're coming from Oak Park, but he drives all the way back home. All of these stories don't make sense, and that's exactly what they are, stories.

While this comment arguably was improper, any resulting prejudice could have been cured by an instruction at the time the remark was made. Furthermore, the trial court instructed the jury that only it could decide the facts of the case and that the attorneys' arguments were not evidence.[2]

Because (i) the jury received instructions curing any prejudice arising from the prosecutor's remarks and (ii) absent the prosecutor's remarks, ample evidence supported defendant's conviction, we conclude that in the context of the entire trial the prosecutor's comments do not amount to plain error. *Schutte*, *supra* at 721; *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998).

Defendant also argues that his minimum eight-year sentence was disproportionate because he lacked any prior criminal history. When reviewing challenges to the proportionality of a sentence, we are limited to determining whether the trial court abused its discretion by violating the principle of proportionality, which requires that sentences imposed be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). Defendant's sentence is presumptively proportionate because it fell within the minimum guidelines range of five to ten years. *People v Rice (On Remand)*, 235 Mich App 429, 447; 597 NW2d 843 (1999). Because defendant failed to allege any unusual circumstances tending to counter this presumption, we conclude that defendant's eight-year minimum sentence qualifies as proportionate. *People v Rivera*, 216 Mich App 648, 652; 550 NW2d 593 (1996) (noting that unusual circumstances might render a presumptively proportionate sentence disproportionate); *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994) ("[T]he factors cited by defendant, i.e. his employment, lack of criminal history, and minimum culpability, are not unusual circumstances that would overcome that presumption.").

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Hilda R. Gage

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[2] The prosecutor in her rebuttal similarly had advised the jury, "You heard the facts in this case so if I misstate the facts recall on your memory, not what I'm telling you because what I'm telling you is not evidence, it's just argument."