

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN EDWARD CARPENTER,

Defendant-Appellant.

UNPUBLISHED

February 13, 2001

No. 219186

Cheboygan Circuit Court

LC No. 98-001917-FH

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JOHN EDWARD CARPENTER,

Defendant-Appellee.

No. 219800

Cheboygan Circuit Court

LC No. 98-001917-FH

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a) (sexual contact with child under thirteen years of age). The trial court sentenced defendant to 270 days' imprisonment on each count. In Docket No. 219186, defendant appeals as of right, challenging his convictions on the basis of prosecutorial misconduct. In Docket No. 219800, the prosecutor appeals as of right, challenging defendant's sentence as disproportionately lenient. We affirm.

I

In Docket No. 219186, defendant claims that several instances of alleged prosecutorial misconduct at trial prevented him from receiving a fair and impartial trial. We disagree. Claims of prosecutorial misconduct are reviewed on a case by case basis to determine whether defendant received a fair and impartial trial. *People v Rice (On Remand)*, 235 Mich App 429, 435; 597

NW2d 843 (1999). When reviewing claims of prosecutorial misconduct, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context. *Id.*

Defendant first argues that the prosecutor improperly elicited testimony from the victim regarding defendant's prior acts against the victim's sister. Several years prior to the trial in this case, defendant confessed to sexual molestation of the victim's sister and was subsequently convicted of aggravated assault. He served eighty days in jail and completed two years' probation. At a pre-trial hearing in the instant case, the trial court ruled that evidence of defendant's sexual abuse of the victim's sister was inadmissible. During trial, the prosecutor asked the victim why he did not tell anyone about the alleged abuse at the time that it occurred, and the victim replied that he was scared to do so because "I seen [sic] what went on when my sister went to court." Defendant objected to this testimony, but prior to the trial court's ruling on the objection, the prosecution asked the victim whether he was scared, to which the victim replied he was scared "because I didn't want that to happen. I didn't want to have to go to court." Later during his testimony, the prosecutor asked the victim to identify in whom he first confided about the sexual abuse, to which the victim responded that he confided in his sister. The victim also testified that at the time he revealed the abuse to his sister, members of his family were talking about defendant. When the prosecutor asked the victim if his family was angry with defendant, the trial court excused the jury and held a discussion with the parties in chambers. Although the discussion was not transcribed on the record, defendant claims, and the prosecutor does not dispute, that the trial court offered to give a cautionary instruction to the jury regarding the victim's statements, but defendant declined the instruction for strategic reasons.

Because there is no indication in the record that defendant moved to strike the victim's statements or requested a cautionary instruction and defendant admits to refusing such an instruction when proposed by the trial court, this Court's review is limited to whether the statements were so erroneously admitted and so unfairly prejudicial they were outcome determinative. We conclude that the statements made by the victim were not so egregious and that a curative instruction would have removed any unfair prejudice. See *People v Guenther*, 188 Mich App 174, 187; 469 NW2d 59 (1998). In addition, the victim's objectionable remarks were vague, fleeting, and indirect. *Id.* At no point during his testimony did the victim directly implicate defendant in a prior bad act against his sister. The statements at issue merely implied that his sister went through some ordeal that required her to go to court and that his family was talking about defendant at the time he told his sister about the abuse he suffered. *People v Burch*, 170 Mich App 772, 776; 428 NW2d 772 (1988). Further, the trial court was prepared to offer a curative instruction, but did not do so at defendant's request. Under these circumstances, we find no error requiring reversal.

Defendant also claims that the prosecution engaged in misconduct by asking the victim's mother her opinion about defendant's credibility. Specifically, the prosecutor asked the witness whether defendant had always been truthful with her. Defendant objected, and the trial court sustained the objection. The prosecutor then asked the victim's mother if she was familiar with defendant's reputation for truthfulness, to which she responded that she was. Before the witness could give her opinion, however, defendant objected and the trial court dismissed the jury. After a discussion with the parties, the trial court concluded that evidence of defendant's bad character or reputation for untruthfulness was inadmissible unless defendant introduced evidence of his

good character or reputation for truthfulness, and it sustained defendant's objection. The trial court also promptly delivered a cautionary instruction to the jury to disregard the prosecutions questions to the victim's mother regarding defendant's credibility.

Although the parties seem to agree that the prosecutor's questions to the victim's mother were improper, we do not find that the improper questioning was error warranting reversal. The witness was not allowed to offer her opinion regarding the defendant's character for truthfulness and no evidence was offered to suggest that defendant had a reputation for dishonesty. In addition, the trial court carefully and thoroughly instructed the jury to disregard the question and to refrain from speculating regarding the answer. The trial court also instructed the jury that the statements or arguments of counsel were not evidence and could not be considered during deliberations. Accordingly, we find that defendant was not denied a fair trial as a result of these questions. See *People v Mack*, 190 Mich App 7, 19; 475 NW2d 830 (1991).

Defendant next argues that, during rebuttal argument, the prosecution impermissibly commented on defendant's decision not to testify at trial by referring to the fact that defense counsel did not mention defendant in his closing arguments. A criminal defendant has a constitutional right against compelled self-incrimination and may choose not to testify and rely on a presumption of innocence. *People v Fields*, 450 Mich 94, 108; 538 NW2d 356 (1995). The prosecution may not comment on a defendant's failure to testify. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996), *aff'd* on other grounds 460 Mich 55; 594 NW2d 477 (1999). However, the prohibition against comment regarding defendant's failure to testify does not prohibit the prosecution from fairly responding to the defendant's arguments. *Fields, supra* at 110-111. A prosecutor's comments relating to a defendant's decision not to testify must be viewed in the context of the record. *Rice, supra* at 435.

In its rebuttal argument, the prosecution made the following statement to the jury:

What I want to say to you is very simple. You're not here to decide whether I did a good job or defense attorney did a good job. You're not here to decide whether as defense counsel indicated on a number of occasions that you should trust us – trust me on this. It doesn't matter what you think about the lawyers. This case is not about the lawyers. This case is about criminal sexual conduct about that man. If you'll notice we've been here about an hour and not once did defense counsel talk about that man. That is the art of smoking [sic] mirrors.

Defendant asked to approach the bench and a discussion was held off the record. The trial court subsequently made a record of the discussion, stating that defendant objected to the prosecution's remarks because it was improper to refer to defendant's failure to testify. The trial court also indicated that it denied defendant's motion for a mistrial on that basis.

We are not convinced that the prosecutor's statement was an impermissible reference to defendant's failure to testify. When the statement is read in the context of the entire argument, it is apparent that the prosecutor was simply noting defense counsel's tactic of focusing on the trial strategies of the attorneys rather than the facts of the case. The prosecutor's comment did not directly or indirectly address whether defendant testified, but instead referred to defense

counsel's closing argument that omitted any discussion of defendant or the facts of the case. The statement in context did not shift the burden of proof to defendant, nor did it impermissibly reference defendant's failure to testify. Further, defense counsel declined the trial court's offer to instruct the jury that it could not draw any adverse inferences from defendant's decision not to testify. On this record, we find no error.

In his final allegation of prosecutorial misconduct, defendant argues that the prosecutor improperly attacked defense counsel by comparing him to a barking dog and suggesting that counsel was attempting to mislead the jury. A prosecutor may not personally attack defense counsel because to do so would violate the defendant's right to a presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996).

The first challenged statement occurred during the prosecutor's closing argument when he referred to "the dog barking at [the victim] during the cross-examination questioning." Defendant did not object to this statement. The second statement was made during the prosecutor's rebuttal argument when he referred to defense counsel's failure to mention his client in closing argument as "the art of smoking [sic] mirrors." Defendant objected, however, the record indicates he objected to the prosecutor's statement that defense counsel did not mention defendant in his closing argument, not the statement regarding smoke and mirrors.

After reviewing these statements in context, we do not believe that either statement was a personal attack on defense counsel. The first statement regarding the barking dog was a continuation of a hypothetical question the prosecutor used during voir dire and was mere commentary on defense counsel's aggressive questioning of the victim regarding his version of the facts. There is no indication that the metaphor was intended as an insult or denigration of defense counsel. In any event, even if improper, defendant has not shown that he was prejudiced by the remark to the extent that it could not have been cured by a cautionary instruction. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). Nor do we find that the second challenged statement was improper. The prosecutor contends that the statement was intended to alert the jury to the fact that defense counsel was trying to direct the jury's attention away from the facts and towards the trial tactics of the attorneys. When viewed in the context of the entire argument, this appears to be an accurate representation of the meaning of the statement. Accordingly, we find no error.

Lastly, defendant argues that the cumulative effect of the alleged errors requires reversal of his convictions. Where a defendant argues for reversal due to the cumulative effect of error, the test is whether the defendant received a fair trial. *People v Kvam*, 160 Mich App 189, 201; 408 NW2d 71 (1987). In this case, because we conclude that no error requiring reversal occurred at trial, we reject the argument that the cumulative effect of the errors requires reversal. See *People v Maleski*, 220 Mich App 518, 525; 560 NW2d 71 (1996). Defendant was not denied a fair trial.

II

In Docket No. 219800, the prosecution argues that the trial court erred by imposing a sentence that was below the recommended sentencing guidelines range. The sentence imposed by a trial court is reviewed for abuse of discretion. *People v Milbourn*, 435 Mich 630, 634-635;

461 NW2d 1 (1990). The trial court abuses its discretion when it violates the principle of proportionality by imposing a sentence that is not proportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* at 636.

A trial court should tailor a sentence to the circumstances of the case and the offender in an effort to balance society's need for protection against its interest in rehabilitating offenders. *People v VanEtten*, 163 Mich App 593, 595; 415 NW2d 215 (1987). A departure from the sentencing guidelines unsupported by reasons not adequately reflected in the guidelines indicates the possibility that the sentence is disproportionate to the crime. *Milbourn*, *supra* at 659-660. However, the test is whether the sentence is proportionate to the seriousness of the crime, not whether it departs from or adheres to the guidelines recommended range. *People v Davis*, 196 Mich App 597, 599; 493 NW2d 467 (1992), overruled on other grounds sub nom *People v Miles*, 454 Mich 90, 95; 559 NW2d 299 (1997). The sentencing court may depart from the guidelines when, in its judgment, the recommended range is disproportionate to the seriousness of the crime. *Milbourn*, *supra* at 657. When departing from the guidelines, the sentencing court should articulate on the record its reasons for doing so. *Davis*, *supra* at 599.

In this case, the sentencing guidelines recommended a sentence range of twelve to thirty-six months in prison. The probation officer recommended defendant serve a sentence of one year in the county jail. The trial court imposed a sentence of 270 days in jail, acknowledging that this was a ninety-five day departure below the sentencing guidelines. The trial court justified its decision by noting the lack of force or penetration in the crime, the length of time since the crime occurred, defendant's efforts to cure himself of his sexual addiction, defendant's age, and the fact that defendant turned himself in for the previous offense. We find that the trial court's reasons for departure are adequately supported by credible evidence in the presentence investigation report and the lower court record. Further, contrary to the prosecution's contention, the trial court considered several mitigating factors that were not adequately addressed by the guidelines. *Milbourn*, *supra* at 659-660; *Davis*, *supra* at 599. Therefore, we find that defendant's sentence is proportionate to the seriousness of the offense and the particular offender, *Davis*, *supra* at 599, and the trial court did not abuse its discretion.

Affirmed.

/s/ Kurtis T. Wilder

/s/ William C. Whitbeck