

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER GALLAGHER,

Defendant-Appellant.

UNPUBLISHED

July 13, 2001

No. 222982

Oakland Circuit Court

LC No. 98-163855-FC

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

MEMORANDUM.

Defendant appeals as of right from a jury conviction of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), for which he was sentenced to concurrent terms of twenty to forty years in prison, and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a), for which he was sentenced to eight to fifteen years in prison. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first contends that the trial court erroneously admitted other acts evidence under MRE 404(b)(1). We review the trial court's decision for an abuse of discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

We agree that evidence that defendant once spat in his wife's face was irrelevant. It did not explain the victim's delay in reporting the sexual abuse because the victim never said that she was afraid defendant would harm her if she revealed what had happened. However, given that the victim testified unequivocally that defendant had sexually abused her, that a doctor found physical evidence of vaginal penetration, and that the doctor's physical findings were not inconsistent with anal penetration, it is unlikely that the error in admitting evidence of the spitting incident was outcome determinative. Therefore, reversal is not required. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Defendant next contends that the prosecutor engaged in misconduct by arguing that defendant's testimony contradicted that of a Children's Protective Services worker. Claims of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the record and evaluates the alleged improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Because the Protective Services worker never testified to the condition of defendant's house, the prosecutor improperly argued facts not in evidence when she argued that defendant's testimony about the condition of his house contradicted the testimony of the Protective Services worker. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). However, the court sustained the objection and later instructed the jury that the lawyers' arguments were not evidence, which was sufficient to dispel any prejudice. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995). In light of the instruction and the fact that the condition of defendant's house was a collateral issue, it is unlikely that the error affected the jury's decision and therefore reversal is not warranted. *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994).

Affirmed.

/s/ Henry William Saad
/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy