STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 29, 2007
v	No. 272086 Presque Isle Circuit Court
JAMES R. MARTINDALE, Defendant-Appellant.	LC No. 05-092277-FH

Before: Donofrio, P.J., and Hoekstra and Markey, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of using the internet to communicate with another for the purpose of committing third-degree criminal sexual conduct (CSC III), MCL 750.145d(2)(f), for which he was sentenced to serve a term of 9 to 20 years' imprisonment. Because we conclude that the prosecutor did not engage in misconduct requiring relief, that the trial court did not err in admitting the challenged photographic and testimonial evidence or engage in improper fact-finding in its scoring of the sentencing guidelines, and that defense counsel was not therefore ineffective for having failed to challenge these matters, we affirm.

I. Prosecutorial Misconduct

Defendant asserts that the prosecutor committed several instances of misconduct requiring this Court to reverse his conviction. In doing so, defendant first argues that the prosecutor improperly referenced inadmissible hearsay statements made by the victim to an investigating officer during his opening statement. Generally, we review prosecutorial misconduct claims on a case-by-case basis, examining any remarks in context to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). However, because the instant challenge was not preserved by timely objection below, our review is limited to determining whether defendant has established plain error affecting his substantial rights. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

Defendant correctly asserts that a prosecutor may not knowingly argue or otherwise reference evidence that is clearly inadmissible at trial. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001); see also, e.g., *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986). However, it is well settled that opening statement is the appropriate time to state the

facts that counsel believes will be proven at trial. MCR 6.414(C); see also *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). It is equally settled that when a prosecutor states that evidence will be presented, and it is not presented, reversal is not required in the absence of bad faith by the prosecutor or prejudice to the defendant. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997).

In this case, although the trial court ultimately ruled the officer's testimony regarding the challenged statements inadmissible, because the trial court had not ruled on the admissibility of the statements before the prosecutor commented on the officer's anticipated testimony, and the record reveals that the prosecutor argued in good faith for their admission, defendant has not demonstrated that the prosecutor's argument amounted to misconduct. See *People v Taylor*, 275 Mich App 177, 185; 737 NW2d 790 (2007). Further, the trial court instructed the jury that the opening statements were merely the parties' theories and were not evidence. The court's instruction was sufficient to cure prejudice from the prosecutor's comments, if any, and reversal therefore is unwarranted. *Id*.

Defendant next asserts that the prosecutor committed misconduct by appealing to juror sympathy for the 15-year-old victim during both his opening statement and closing argument. Because defendant failed to object to those portions of the prosecutor's argument challenged here, our review of this claim is again limited to determining whether defendant has shown plain error. *Thomas*, *supra*.

During his opening statement and closing argument, the prosecutor asserted that the victim's difficult and troubled upbringing rendered her "vulnerable" and "easy prey" for defendant, who offered the victim the "things that she needed in her life" in order to accomplish his criminal goal. Defendant argues that these statements constituted improper prosecutorial appeals for the jurors to sympathize with the victim. We do not agree.

Generally, appeals to the jury to sympathize with the victim are improper. *Watson*, *supra* at 591. However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), and in doing so is not limited to the blandest possible presentation of the case and evidence, *Aldrich*, *supra* at 112. Thus, a prosecutor may touch on subject matter that might arouse jurors' sympathy when arguing the evidence and its reasonable inferences in relation to his theory of the case.

Viewing the prosecutor's remarks in context, it is clear that the prosecutor referenced specific facts in evidence and made reasonable inferences based on those facts. Further, while the prosecutor's remarks may have evoked sympathy for the victim, any sympathy would have been derived from the unfortunate facts of her life and not by any intentional effort by the prosecutor to deflect the jury from the facts of the case. Consequently, we do not conclude that the challenged comments constitute improper conduct by the prosecutor. Regardless, even accepting that the prosecutor's remarks were improper appeals for sympathy, they are not grounds for reversal of defendant's conviction because their prejudicial impact, if any, could have been cured with a timely-requested cautionary instruction. *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988).

Defendant additionally argues that "the prosecutor elicited additional unfair sympathy by attempting to point out that [the victim] could not stay in [the] court[room] because testifying about the topic had upset her too much." The record indicates that the challenged comment came during the prosecutor's rebuttal argument and was responsive to defense counsel's general implication that the victim's testimony should not be believed. The record further indicates, however, that the trial court sustained defense counsel's prompt objection to the comment, which the prosecutor conceded was "inappropriate" before hastily concluding his argument. On these facts, and considering that the trial court expressly informed the jury that it "must not let sympathy or prejudice" influence its decision, we do not conclude that defendant was denied a fair and impartial trial by this preserved claim of error. *Aldrich*, *supra* at 110.

Finally, defendant argues that "[t]he prosecutor improperly denigrated defense counsel" during rebuttal argument by referring to him as a "word artisan" and suggesting that discussion of the evidence presented at trial be brought "back to earth." In support of this assertion, defendant cites *People v Dalessandro*, 165 Mich App 569; 419 NW2d 609 (1988), and *People v Wise*, 134 Mich App 82; 351 NW2d 255 (1984). However, defendant's reliance on these cases is misplaced.

The prosecutor in *Wise*, *supra* at 100-101, repeatedly referred to the defense counsel as "not a very candid person" and stated that "he [defense counsel] intentionally misled you." Similarly, in *Dalessandro, supra* at 579, the prosecutor repeatedly argued that the defense counsel was intentionally perpetrating a fraud upon the jury by presenting nothing but "damnable lies."

In contrast, in the instant case the prosecutor did not question defense counsel's veracity or imply that he was fraudulently attempting to mislead the jury. Rather, the prosecutor was responding to defense counsel's characterization of the evidence adduced at trial. This Court has noted "the prosecutor's comments [in cases such as this] must be considered in light of defense counsel's comments." *Watson*, *supra* at 592-593. Indeed, "an otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Here, taken in context, the prosecutor's comments do not amount to misconduct.

In sum, the prosecutor did not commit misconduct when he referred to hearsay evidence in his opening statement and characterized defense counsel as a "word artisan" in his closing argument. Nor did the prosecution improperly appeal to the jurors' sympathy for the victim during his opening statement and closing argument.

II. Evidentiary Questions and the Effective Assistance of Counsel

Defendant next argues that the trial court erred in admitting into evidence a photograph depicting defendant in the nude. Our Supreme Court previously has stated the standard of review applicable to a trial court's evidentiary rulings as follows:

> The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion. However, the decision frequently involves a preliminary question of law, such as whether a rule of evidence or statute precludes the admission of the evidence. We review

> questions of law de novo. Therefore, when such preliminary questions are at issue, we will find an abuse of discretion when a trial court admits evidence that is inadmissible as a matter of law. [*People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003) (internal citations omitted).]

Generally, "[a]ll relevant evidence is admissible, ..." MRE 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. In this case, the victim testified that defendant sent her a nude photograph of himself during one of their online chats. She subsequently identified the photograph that was admitted into evidence as identical to that which defendant had sent to her. We do not agree with defendant's claim that the photograph was not relevant and, therefore, inadmissible.

Defendant was charged with using the internet to communicate with another for the purpose of committing CSC III, MCL 750.145d(2)(f). CSC III is defined as including sexual penetration with another person at least 13 years of age and under 16 years of age. MCL 750.520d(1)(a). In this case, the photograph of defendant tends to show that defendant's purpose for communicating with the victim was sexual in nature. Therefore, it was relevant to the matter to be determined and presumptively admissible at trial.

Defendant further argues, however, that the photograph should nonetheless have been excluded because of its prejudicial nature. Again, we do not agree. Generally, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." MRE 403. Photographs are not, however, inadmissible merely because they are shocking or otherwise disturbing. See *People v Howard*, 226 Mich App 528, 549-550; 575 NW2d 16 (1997). Here, defendant does not dispute that the fact that he sent the victim a nude photograph of himself during the early stages of their relationship was relevant to show the sexual nature of the relationship defendant promoted or otherwise sought to foster with the victim in communicating with her. Although likely somewhat embarrassing for defendant, the photograph was similarly relevant to show these facts and there is nothing on the record before us to indicate that the photograph was itself more prejudicial than the fact that it was sent. Accordingly, we cannot conclude that the trial court abused its discretion in admitting the photograph into evidence at trial.

Next, defendant argues that the trial court erred in admitting hearsay testimony from Arthur Roberts. Roberts testified that he worked weekends at a gas station in Onaway, Michigan. According to Roberts, some time before trial he met a young woman at the gas station. Roberts recalled that it was "[w]intertime" and that the person "was out by the telephone booth . . . standing out there in the snow bank, and waiting." Roberts testified that she was carrying "a bag or a case or something" and that he invited her to come inside the gas station to wait. He further testified that while inside the station the young woman indicated that she was waiting for her boyfriend, who was a truck driver, to pick her up.

On appeal, defendant asserts that the Robert's testimony regarding the young woman's references to her boyfriend was inadmissible hearsay. We review this unpreserved claim of error for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Hearsay is defined as an out-of-court statement offered in evidence "to prove the truth of the matter asserted." MRE 801(c). However, to the extent that Roberts testified regarding out-of-court statements by the young woman, our review of the record convinces us that the statements were not elicited to prove the truth of the matters asserted, i.e., that the woman was at the station waiting to meet her boyfriend and intended to purchase cowboy boots. Rather, the record shows that the statements were offered to identify the victim as the young woman with whom Roberts spoke that evening and thereby corroborate her testimony that she traveled to a gas station in Onaway in order to meet defendant. Because the young woman's statements were not offered for the truth of the matter asserted, they were not hearsay. MRE 801(c). Defendant has thus failed to show plain error warranting relief.

Defendant also contends that because his trial counsel failed to object to the asserted prosecutorial misconduct, the introduction of Roberts's hearsay testimony, and the admission of the nude photograph of defendant, he performed deficiently and a new trial is required. However, because no error was found, defense counsel was not ineffective for failing to object to these matters at trial. Trial counsel is not ineffective for failing to advocate a meritless position. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005)

III. Sentencing

Defendant's final argument on appeal is that the trial judge engaged in improper fact-finding in scoring certain offense variables of the sentencing guidelines, in violation of his federal constitutional right to a jury trial under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, since the filing of defendant's brief on appeal, the Michigan Supreme Court has reaffirmed that a sentencing court does not violate *Blakely* by scoring the offense variables of the guidelines. *People v McCuller*, 479 Mich 672, 676; ___ NW2d ___ (2007). Thus, we must reject defendant's argument.

Affirmed.

/s/ Pat M. Donofrio
/s/ Joel P. Hoekstra
/s/ Jane E. Markey