

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHNNY BERNARD CALVIN,

Defendant-Appellant.

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UNPUBLISHED

December 11, 2007

No. 274240

Wayne Circuit Court

LC No. 06-006673-01

Before: Whitbeck, C.J., and White and Zahra, JJ.

PER CURIAM.

Defendant Johnny Calvin appeals as of right his jury conviction of four counts of first-degree criminal sexual conduct,<sup>1</sup> one count of first-degree criminal sexual conduct,<sup>2</sup> and two counts of second-degree criminal sexual conduct.<sup>3</sup> The trial court sentenced Calvin to 23 years and 9 months to 50 years' imprisonment for each of the first-degree criminal sexual conduct convictions, and 10 to 15 years' imprisonment for each of the second-degree criminal sexual conduct convictions. We affirm Calvin's convictions but remand for resentencing.

I. Basic Facts

Calvin's convictions arise out of the sexual abuse he committed against his fiancé's daughters while living with them. Calvin began sexually assaulting the first daughter when she was ten years old. Calvin would ask to see if she "was clean," lick her breasts and vagina, and state she "checked out okay." On more than ten occasions, Calvin approached her, told her that he wanted to "check" her, and repeated the sexual assault. When she was 12 years old, the sexual assaults escalated. Calvin would offer her money for sexual intercourse. Also, during the years of abuse, Calvin would enter her bedroom, stand next to the bed, lift her shirt, and

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<sup>1</sup> MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age).

<sup>2</sup> MCL 750.520b(1)(b) (sexual penetration with a person at least 13 but less than 16 years of age, and the actor is a member of the same household as the victim; the actor is related to the victim by blood or affinity to the fourth degree; or the actor is in a position of authority over the victim and used this authority to coerce the victim to submit).

<sup>3</sup> MCL 750.520c(1)(a) (sexual contact with a person under 13 years of age).

masturbate until ejaculation. On at least two occasions, she witnessed Calvin do the same thing to her sister.

Calvin began sexually assaulting the second daughter when she was eight years old. After playing outside, she entered the house where Calvin told her she looked dirty. Calvin pulled her pants halfway down and rubbed her breasts and butt. When she was nine years old, Calvin would lick her breasts and vagina. At age ten, Calvin would wait for everyone to go to sleep, enter her room, pull the covers off her, pull her pants down, and lick her. According to her, this happened on more than ten occasions. When she was 14 years old, Calvin tried to force penile penetration. She fought back, and he digitally penetrated her vagina. She testified Calvin digitally penetrated her more than ten times. Calvin would also enter her room and masturbate until ejaculation. She also witnessed Calvin sexually assault her sister on more than one occasion. She often saw Calvin in her sister's bedroom with his head between her legs.

Calvin denied both complainants' allegations.

## II. Prosecutorial Misconduct

### A. Standard Of Review

Calvin argues that the prosecutor violated his due process right to a fair trial by 1) infecting the jury's analysis with unsworn testimony and prejudicial facts not in evidence during closing arguments, and 2) impermissibly shifting the burden of proof by bolstering the credibility of the complainants. We review *de novo* claims of prosecutorial misconduct on a case-by-case basis, examining the remarks in context, to determine whether the defendant received a fair and impartial trial.<sup>4</sup>

### B. Unsworn Testimony And Prejudicial Facts Not In Evidence

During closing argument, the prosecution suggested that at least one of the complainants' reactions to the sexual abuse were typical for rape victims. During rebuttal argument, the prosecutor referred to Calvin's actions as "grooming" behavior typical of pedophiles. Calvin contends that this is the type of testimony normally solicited from an expert witness, and because there was no expert proffered, the prosecution was impermissibly acting as an expert and offering testimony.

"[A] prosecutor may not argue facts not in evidence or mischaracterize the evidence presented[.]"<sup>5</sup> "However, a prosecutor is given great latitude to argue the evidence and all inferences relating to his theory of the case."<sup>6</sup> "A prosecutor's remarks must be examined in context and evaluated in light of defense arguments and the relationship they bear to the

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<sup>4</sup> *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

<sup>5</sup> *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001).

<sup>6</sup> *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

evidence admitted at trial to determine whether a defendant was denied a fair and impartial trial.”<sup>7</sup>

It is clear from the record that the prosecutor was not offering expert testimony, but merely commenting on how different people might react in different situations. The prosecutor argued that each victim acted differently to the sexual abuse because each had a different relationship with Calvin. The first daughter testified that most of the time she had a good relationship with Calvin, while the second daughter’s relationship with Calvin was bad, and she refused to be disciplined by Calvin. The prosecutor argued that one could expect a rape victim to be angry and lash out in the way the second daughter did, while a shy, withdrawn child like the first daughter would act like a child who wished to sleep in on Christmas morning. Taken in context, the prosecution’s argument was not unsworn expert testimony, but rather argument appealing to the jury’s common sense.<sup>8</sup>

Furthermore, the prosecution’s reference to “grooming” behavior was rebuttal to Calvin’s arguments. No misconduct occurs where the prosecutor is merely responding to defense counsel’s arguments.<sup>9</sup> During closing argument, Calvin asked the jury to consider why the abuse was never brought up, even after six years of continuous behavior. The prosecution merely responded to the question, explaining that Calvin prepared the complainants for continuous sexual abuse. So, understood in context, the prosecutor was rebutting an issue broached by Calvin, and not acting as an expert witness.

### C. Burden Shifting

Calvin also argues that the prosecutor usurped the jury’s function of assessing credibility, shifted the burden of proof to Calvin to raise inconsistencies, and suggested that the complainants were credible simply because the prosecution said so. To support his claim, Calvin points out that the prosecution first suggested during opening statements that the complainants’ stories had been consistent over time. Calvin notes, however, that the prosecutor failed to produce evidence of either complainant’s previous statements during trial. Then during rebuttal argument, the prosecutor asked the jury to determine if the complainants had been consistent over time. But Calvin contends that, again, because there were no previously admitted statements, the jury had no way of determining if the complainants had, in fact, been consistent.

A prosecutor may not vouch for the credibility of his or her witness by, for example, implying that he or she has some special knowledge of the witness’s truthfulness.<sup>10</sup> “But a prosecutor may comment on his own witnesses’ credibility during closing argument, especially

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<sup>7</sup> *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

<sup>8</sup> See *People v Kenneth Simon*, 189 Mich App 565, 567; 473 NW2d 785 (1991).

<sup>9</sup> *People v Bobby Earl Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

<sup>10</sup> See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995).

when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes."<sup>11</sup>

This trial was a credibility contest between the complainants and Calvin. In arguing about the complainants' credibility, the prosecutor essentially asked the jury to determine if the complainants had been consistent in repeating their story over and over again. The prosecutor pointed out that the first daughter was cross-examined with the preliminary examination transcript and the written statement she gave to the sex crimes unit. The prosecution also pointed out that during cross-examination, the second daughter was asked about the statement she made to the police. Addressing the complainants' cross-examination, the prosecution admitted that there were two minor instances where the first daughter had been inconsistent and a single instance when the second was impeached. The prosecutor concluded by observing that either the complainants were telling the truth or were fantastic liars. Taken in context, the prosecution was asking the jury to assess the complainant's credibility, and not improperly bolstering the credibility of either complainant.

### III. Ineffective Assistance Of Counsel

#### A. Standard Of Review

Calvin argues that he was denied the effective assistance of counsel when his trial attorney failed to object to the prosecutor's misconduct. More specifically, Calvin argues trial counsel's conduct fell below the objective standard of reasonableness because he failed to challenge the prosecutor when she proffered expert testimony regarding Calvin's alleged "grooming" behavior and when she improperly bolstered the credibility of her witnesses.<sup>12</sup>

Calvin did not move for a new trial or for an evidentiary hearing; therefore, our review is limited to mistakes apparent on the record.<sup>13</sup>

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. A defendant must also overcome the presumption that the challenged action or inaction was trial strategy.<sup>[14]</sup>

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<sup>11</sup> *Thomas, supra* at 455.

<sup>12</sup> Calvin does not argue that he was denied the effective assistance of counsel with respect to the prosecutor's comments suggesting that at least one of the complainants' reactions to the sexual abuse were typical for rape victims because defense counsel objected to the prosecution's argument on that point.

<sup>13</sup> *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

<sup>14</sup> *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997).

## B. Objection To Unsworn “Expert” Testimony

As we previously concluded, the prosecutor did not act as an expert witness when she referred to Calvin’s actions as “grooming” behavior typical of pedophiles. Because the prosecution’s line of argument was proper, there was no need for defense counsel to object because such objection would have been meritless. Defense counsel was not required to make a futile objection.<sup>15</sup>

## C. Objection To Burden Shifting

With respect to Calvin’s argument of impermissible bolstering of the complainants’ credibility, we have previously concluded that the prosecutor’s argument was proper. As such, defense counsel was not required to object.<sup>16</sup>

## IV. Sentencing

MCL 769.34(3) allows a court to “depart from the appropriate sentence range established under the sentencing guidelines . . . if the court has a substantial and compelling reason for that departure and states on the record the reasons for departure.” Only those factors that are objective and verifiable may be used to determine whether substantial and compelling reasons exist, and the reasons justifying departure should keenly or irresistibly grab the attention.<sup>17</sup>

Here, the trial court sentenced Calvin to 23 years and 9 months to 50 years’ imprisonment. This minimum sentence was an upward departure of approximately six years from the recommended range of 10 ½ to 17 ½ years’ imprisonment. Calvin correctly contends that he must be resentenced because, instead of articulating factors to justify a departure from the sentencing guideline range, the trial court gave no reasons at all. Indeed, the prosecution concedes that Calvin is correct. Therefore, we remand this case to the lower court for resentencing within the statutory guidelines, or articulation of substantial and compelling reasons for departure from the sentencing guideline range.

## V. Conclusion

We affirm Calvin’s convictions, but we remand the case for further sentencing proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Helene N. White

/s/ Brian K. Zahra

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<sup>15</sup> See *Thomas*, *supra* at 457.

<sup>16</sup> See *id.*

<sup>17</sup> *People v Babcock*, 469 Mich 247, 257; 666 NW2d 231 (2003).