

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK OWEN ERICKSON,

Defendant-Appellant.

UNPUBLISHED

December 20, 2007

No. 272680

Oakland Circuit Court

LC No. 2006-206448-FC

Before: Jansen, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Defendant was sentenced to 13 to 30 years in prison for the CSC I conviction and to 5 to 15 years in prison for the CSC II conviction. Defendant appeals as of right, and we affirm.

I

Defendant first contends that there was insufficient evidence presented at trial to support his CSCI and CSC II convictions. We disagree.

When deciding whether there was insufficient evidence to support a conviction, we review the record de novo. See *People v Sherman-Huffman*, 241 Mich App 264, 265; 615 NW2d 776 (2000). We view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that the elements of the charged offense were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

To convict defendant of CSC I in this case, the prosecutor was required to prove that the defendant engaged in sexual penetration with a victim who was less than 13 years of age. See *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). Sexual penetration is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body, but emission of semen is not required.” MCL 750.520a(p). In the present case, defendant’s conviction arises out of the digital penetration of the victim. Defendant does not contest that the victim was less than 13 years of age. Therefore, the central question is

whether a rational trier of fact could have concluded that defendant engaged in sexual penetration with the victim.

Defendant argues that the testimony of the victim was not credible, and that the medical evidence and the testimony of the witnesses for the defense contradicted it. In so arguing, defendant effectively invites this Court to judge the credibility of the various witnesses that testified at trial. Issues of credibility, however, are to be decided by the finder of fact. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

The detailed testimony of the victim establishes the elements of the charged offense. The victim testified that defendant inserted his index finger and middle finger into her vagina, and in doing so, caused her pain and bleeding. The victim testified that she saw blood on defendant's fingers when he pulled them from her vagina and also saw blood on toilet paper after later wiping her vaginal area in the bathroom. She also described explicit and disturbing statements that defendant made while digitally penetrating her.

Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational finder of fact could have concluded that defendant digitally penetrated the victim's vagina. Because it is not disputed that the victim was less than 13 years of age, the elements of CSC I were adequately proven at trial. Sufficient evidence existed to support defendant's CSC I conviction.

To convict defendant of CSC II in this case, the prosecutor was required to prove that the defendant engaged in sexual contact with a person who was less than 13 years of age. See *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). MCL 750.520a(o) defines sexual contact as:

[T]he intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner for:

- i.* Revenge.
- ii.* To inflict humiliation.
- iii.* Out of Anger.

Because defendant does not contest that the victim was less than 13 years of age, the central question is whether a rational trier of fact could have concluded that defendant engaged in sexual contact with the victim.

At trial, the victim testified that defendant forced her to rub his penis with her hand until he ejaculated. When asked to be specific, the victim indicated with her hand the acts that defendant allegedly forced her to perform. Such rubbing or touching is reasonably construed as intended for sexual gratification. MCL 750.520a(o). Thus, the touching qualified as sexual contact. When viewing the evidence in a light most favorable to the prosecution, a reasonable

jury could have concluded that defendant engaged in sexual contact with a person less than 13 years of age. Sufficient evidence existed to support defendant's CSC II conviction.

II

Defendant next argues that he was denied a fair and impartial trial because of various instances of prosecutorial misconduct. We disagree.

We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). No error requiring reversal will be found if a curative instruction could have alleviated any prejudicial effect of the prosecutorial statements. *People v Moorer*, 262 Mich App 64, 78-79; 683 NW2d 736 (2004).

The first alleged instance of prosecutorial misconduct occurred while the victim was testifying. After the victim testified that she understood the difference between truth and fiction and that her allegations of sexual abuse were not fictitious, the prosecutor told the victim that she was "doing a good job telling the truth." Defendant argues that this statement improperly vouched for the victim's credibility.

"Included in the list of improper prosecutorial commentary or questioning is the maxim that the prosecutor cannot vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). While it appears that the prosecutor was simply trying to encourage the young victim to testify about personal subjects, the prosecutor's statement does imply special knowledge about the truthfulness of the victim's testimony. Accordingly, the prosecutor's statement was improper. *Id.*

However, although the prosecutor improperly vouched for the credibility of the victim, defendant has failed to show that the prosecutor's statement resulted in prejudice. At the end of trial, the court instructed the jury that it should not consider the attorneys' statements, arguments, or questions in rendering its verdict. In addition, the trial court instructed the jury that it alone could determine the credibility of the witnesses. "Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Finally, despite the fact that the victim testified that defendant committed other acts of sexual penetration with her and showed her sexually explicit material, the jury acquitted defendant of the corresponding, additional charges. Accordingly, it appears that the jury did not find the victim's testimony completely truthful, in spite of the prosecutor's improper statement. Because defendant has failed to show that he was prejudiced by the prosecutor's statement regarding the victim's truthfulness, he has not shown outcome-determinative plain error in this regard. *Carines*, *supra* at 763-764.

Defendant contends that the prosecutor's statement regarding the victim's truthfulness improperly evoked sympathy for the victim. Defendant also asserts that the prosecutor improperly evoked sympathy during her closing argument when she described the victim's difficult family life that had resulted from the decision to accuse defendant of sexual assault. Although a prosecutor must not improperly evoke sympathy for the victim, the prosecutor is granted great latitude in her closing argument. *Bahoda*, *supra* at 282. Indeed, the prosecutor "is

free to argue the evidence and all reasonable inferences from the evidence as it relates to [her] theory of the case.” *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989).

Defendant fails to explain how the prosecutor’s statement regarding the victim’s truthfulness had the effect of evoking sympathy for the victim. With regard to the prosecutor’s statement regarding the consequences of the victim’s decision to accuse defendant of sexual assault, it is clear that the argument was intended to counter the theory of the defense. Earlier at trial, the victim’s mother had testified that she believed the victim was making false allegations against defendant. The defense had also questioned the victim about whether she was upset with her mother because they were not able to spend more time together. It appears to us that the prosecution was therefore simply seeking to rebut defense counsel’s theory of the case and to respond to the properly admitted evidence. Defendant has not shown that the prosecutor’s alleged attempts to elicit sympathy were improper or prejudicial.

III

Defendant argues that trial counsel was ineffective for not objecting to the prosecutor’s allegedly improper statements and arguments. We disagree.

Because defendant failed to preserve this issue of ineffective assistance of counsel, we review her claim for errors that are apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To demonstrate ineffective assistance of counsel, a defendant must establish that her attorney’s assistance fell below an objective standard of reasonableness and that this was so prejudicial to that she was denied a fair trial. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There is a strong presumption that defense counsel’s actions were sound trial strategy. *Id.* In order to demonstrate prejudice, the defendant must establish that there is a reasonable probability that, but for the mistakes of her attorney, the result of the trial would have been different. *People v Mitchell*, 454 Mich 145, 167; 560 NW2d 600 (1997).

Defendant first alleges that he was denied the effective assistance of counsel when his attorney failed to object to the prosecutor’s statement regarding the victim’s truthfulness. “Certainly there are times when it is better not to object and draw attention to an improper comment.” *Bahoda, supra* at 287 n 54. Counsel may very well have determined that an objection would have simply drawn more attention to the prosecutor’s improper statement. Moreover, because defendant cannot show he was prejudiced by the prosecutor’s comment, he necessarily cannot show that he was prejudiced by his attorney’s failure to object.

Defendant also alleges that his attorney was ineffective for failing to object to the prosecutor’s comment during closing argument regarding the victim’s family and home life. As described above, the prosecutor’s argument in this regard was not improper, and defense counsel had no obligation to make a meritless objection. *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

IV

Defendant lastly argues that the court improperly scored the sentencing guidelines. Specifically, defendant alleges that offense variable (OV) 11 was improperly scored at 50 points when it should have been scored at zero points.

MCL 777.41(1) directs the trial court to score 50 points for OV 11 if “[t]wo or more criminal sexual penetrations occurred,” 25 points for OV 11 if “[o]ne criminal sexual penetration occurred,” and zero points for OV 11 if “[n]o criminal sexual penetration occurred.” MCL 777.41(2) directs the court to consider only the “sexual penetrations of the victim by the offender arising out of the sentencing offense,” and to “not score points for the 1 penetration that forms the basis of a first- or third-degree criminal sexual conduct offense.”

At sentencing, defendant received a prior record variable (PRV) score of 10 and an OV score of 125. Defendant’s recommended minimum guidelines range was therefore 135 to 225 months in prison. MCL 777.62

Defendant’s CSC I conviction arose from the digital penetration of the victim. According to the victim, defendant digitally penetrated her on one occasion. OV 11 does not allow for consideration of the penetration that resulted in the actual CSC I conviction. MCL 777.41(2). Therefore, in order to score OV 11 at 50 points, it would have been necessary to find that two other acts of penetration occurred at the time of the sentencing offense. The record does not support such a finding.

The record evidence simply does not establish that two penetrations occurred in addition to the digital penetration that formed the basis of defendant’s CSC I conviction. It does, however, establish that during the digital penetration, defendant also performed cunnilingus on the victim. As a result, the evidence indicates that there was one act of sexual penetration in addition to the penetration that formed the basis of the conviction. We accordingly conclude that OV 11 should have been scored at 25 points rather than 50 points.

A score of 25 points for OV 11 lowers defendant’s OV score from 125 to 100. Nevertheless, even with this adjustment, defendant’s minimum recommended sentence range remains 135 to 225 months. MCL 777.62. Thus, while defendant has shown that the trial court strictly erred in scoring OV 11, the improper scoring did not affect defendant’s guidelines range. “Where a scoring error does not alter the appropriate guidelines range, resentencing is not required.” *People v Francisco*, 474 Mich 82, 91 n 8; 711 NW2d 44 (2006).

Affirmed.

/s/ Kathleen Jansen
/s/ Peter D. O’Connell
/s/ Karen M. Fort Hood