

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 17, 2016

v

WILLIAM TYLER JORDAN,
Defendant-Appellant.

Nos. 328738; 329111
Wayne Circuit Court
LC Nos. 15-000997-01-FC
15-002314-01-FC

Before: M. J. KELLY, P.J., and MURRAY and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one count of criminal sexual conduct, first-degree (CSC I), MCL 750.520b, and three counts of criminal sexual conduct, second-degree (CSC II), MCL 750.520c. Defendant was sentenced to serve concurrent terms of 25 to 30 years for his CSC I conviction and 10 to 15 years for each CSC II conviction. We affirm.

The charges against defendant arise from incidents occurring in 2013 or 2014 between defendant and his two nieces, IC and AC, who were four and five years old at the time of the incidents. At trial, both victims testified that while they were at their grandparents' home, defendant on several occasions touched their genital areas with his finger, his penis, or both.

Defendant first argues that he is entitled to a new trial because the prosecutor committed error by arguing the effect of testimony that was not entered into evidence. Generally, an assertion that prosecutorial error occurred must be met with a contemporaneous objection or a request for a curative instruction at trial. *People v Bennett*, 290 Mich App 465, 475; 802 NW2d 627 (2010). Review of alleged prosecutorial error¹ is precluded unless “an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). “Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.*

¹ See *People v Cooper*, 309 Mich App 74, 87-88; 867 NW2d 452 (2015).

The test for prosecutorial error is whether the prosecutor's conduct denied defendant a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). Issues regarding prosecutorial error are decided on a case-by-case basis, and the reviewing court must evaluate a prosecutor's comments in context. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). The prosecution may argue from facts in evidence and reasonable inferences relating to the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). And a prosecutor may argue, based on those facts and inferences, whether a witness is credible or not. *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008). While a prosecutor may not vouch for the credibility of a witness to the effect of having some special knowledge that the witness is testifying truthfully, a prosecutor may argue from the facts in evidence that a witness is worthy or unworthy of being believed. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009).

Defendant did not object to the alleged instance of prosecutorial error during the prosecution's closing argument. During the prosecutor's rebuttal argument, defense counsel objected to the prosecutor's statement that "[t]he reason why I said that you know they [the victims] didn't say anything differently is if they had said something differently defense attorney would have brought that up. He would have asked them about it." Although defense counsel did object to those remarks, he failed to state a basis for his objection on the record. Thus, defendant's claims are unpreserved and our review is limited to plain error. *Callon*, 256 Mich App at 329.

The statements being challenged involved the prosecutor arguing that the victims had been consistent in their statements to Kids Talk, the police, and others, that defendant had inappropriately touched them. The victims were young girls, aged five and six years old at the time of trial, and their testimony was at times confusing and unclear regarding times and certain details. The prosecutor used her closing and rebuttal arguments to emphasize that they had been consistent regarding how defendant inappropriately touched and assaulted them, for otherwise defendant would challenge their testimony with any inconsistencies made to Kids Talk or the police. Despite defendant's argument, there was evidence to support the prosecutor's argument. The victims' mother testified regarding what IC told her about defendant touching her, and IC herself testified that she also told personnel at Kids Talk and the police about defendant's assaults.

Addressing the consistency of a witness's statements is a proper matter for closing arguments, and therefore, defendant cannot show any prosecutorial error. *Unger*, 278 Mich App 240. Further, the trial court properly instructed the jury that,

[t]he lawyers statements and arguments and any commentary are not evidence. They are only meant to help you understand the evidence and each sides' [sic] legal theories. You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge.

"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). Defendant has failed to show any plain error affecting his substantial rights. *Callon*, 256 Mich App at 329.

Finally, defendant's reliance on *People v Stanaway*, 446 Mich 643, 685-686; 521 NW2d 557 (1994), is misplaced. In *Stanaway*, the prosecutor argued during closing argument that the complainant had made consistent statements about the defendant's assault to many people including counselors, even though the counselors did not testify at trial and the counseling records were privileged and not reviewed by the prosecutor or entered into evidence at trial. The Supreme Court held that the prosecutor "either was impermissibly arguing facts not in evidence or was vouching for the credibility of the witness." *Id.* at 686. The Court concluded that:

Despite our agreement that the prosecutor's reference during closing arguments to the substance of the confidential disclosures was improper, it does not require reversal because there was no objection, and a cautionary instruction could have cured the misleading inference. However, it was an abuse of discretion requiring reversal for the trial court, despite defense objections, to allow the improper impeachment of a prosecution witness with hearsay testimony that was highly prejudicial. Because the error was not harmless, we therefore reverse the decision of the Court of Appeals and remand for a new trial. [*Id.* at 695-696.]

Stanaway is inapplicable for the simple reason that it did not reverse on the basis of prosecutorial error, but on a separate impeachment issue. Additionally, the prosecutor's statements in essence challenged defense counsel to address any significant discrepancy in the victims' accounts of what defendant did to them and, although the defense counsel had the opportunity, he did not do so. And, as noted, there was evidence that at least AC had spoken to individuals at Kids Talk and the police.² Additionally, the prosecutor did not imply that she had access to confidential documents and she did not attempt to use confidential records to bolster her witnesses' credibility. Lastly, unlike *Stanaway*, even if the prosecutor's remarks could be said to reference facts not in evidence, the trial court's jury instruction that the lawyers' statements and arguments were not evidence effectively cured any potential prejudice that the prosecutor's remarks may have caused.

Defendant next argues that a 25-year mandatory minimum sentence for his conviction of CSC I where the victim was under 13 years of age under MCL 750.520b(2)(b), without considering any mitigating factors, violates the ban against "cruel and unusual punishment," US Const, Am VIII, or the prohibition against "cruel or unusual punishment" under the Michigan Constitution, Const 1963, art 1, § 16. Issues of constitutional law are reviewed de novo. *People v Swint*, 225 Mich App 353, 364; 572 NW2d 666 (1997). Because defendant failed to make an objection at sentencing, this claim of error is not preserved; thus, our review is for plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999).

This Court rejected the same argument in *People v Benton*, 294 Mich App 191, 203-207; 817 NW2d 599 (2011), which we follow under the doctrine of stare decisis and the Michigan Court Rules. MCR 7.215(C)(2) and (J)(1). While recognizing the controlling holding in *Benton*,

² This fact takes this case out of the realm of what occurred in *People v Tyson*, 423 Mich 357; 377 NW2d 738 (1985).

defendant argues that requiring him to serve a 25-year mandatory minimum sentence without any individualized consideration of his age, his lack of prior offenses, and his mental health issues causes his sentence to violate the prohibition against cruel and/or unusual punishment.

In making his argument, however, defendant does not contest the gravity of the offenses and does not compare the mandatory penalty to penalties for other crimes or for the same crime in other states. Rather, defendant argues that the severity of the sentence is cruel and unusual both as applied to him and on its face. Defendant specifically contends that, because he was only 19 years old at the time of the offenses, and current scientific findings establish that his brain was not fully matured to the level of adult offenders, he has a greater potential for rehabilitation than adult offenders, and he should therefore be sentenced accordingly. But “[u]nder the Supreme Court’s jurisprudence concerning juveniles and the Eighth Amendment, the only type of ‘age’ that matters is chronological age,” *United States v Marshall*, 736 F3d 492, 498 (CA 6, 2013), and defendant was an adult when he committed the offenses.³

Affirmed.

/s/ Michael J. Kelly
/s/ Christopher M. Murray
/s/ Stephen L. Borrello

³ Defendant briefly asserts that he suffers from mental health issues that diminished his responsibility, but he failed to raise his mental health issues at trial as a defense and failed to provide specific evidence on this issue at sentencing. And defendant’s sentence did not become cruel and/or unusual because of his lack of prior criminal history. *Benton*, 294 Mich App at 205.