STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 18, 2012
v	No. 301524 Alger Circuit Court
BRIAN PAUL ROBERTS, Defendant-Appellant.	LC No. 2010-001928-FH

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a jury trial of two counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a) (victim aged 13 to 15 years). The court sentenced defendant to 72 months to 15 years in prison on each count, sentences to run concurrently. We affirm.

Defendant first argues that his sentence was based on insufficient evidence because the victim's testimony was not credible. We disagree. We review the question of sufficiency of evidence de novo to determine whether a rational trier of fact could have found the evidence, when viewed in the light most favorable to the prosecution, to have proven the essential elements of the crime beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992). Uncorroborated testimony of a victim can be a sufficient basis for a CSC conviction. MCL 750.520h; *People v Lemmon*, 456 Mich 625, 642-643 n 22; 576 NW2d 129 (1998).

Because it was not disputed that the victim was between 13 and 15 years old at all relevant times, the only element in question was whether penetration occurred. Defendant emphasizes that the victim repeatedly lied about various aspects of her contact with him, but she openly admitted to those falsehoods and testified unequivocally that defendant had sex with her. Indeed, the victim did so despite defendant's cross-examination and despite stating that she did not want to be there or see defendant go to prison. The jury was therefore aware of the falsehoods. We do not interfere with the jury's role of weighing evidence and determining the credibility of witnesses. See *Wolfe*, 440 Mich at 514. Because the victim's testimony was not impeached beyond all probative value, a rational jury could have found, and did find, that defendant committed the alleged crimes.

Defendant next argues that he was deprived of a fair trial by the prosecutor impermissibly appealing to the jury's sympathy and vouching for the victim's credibility. We believe that some of the prosecutor's commentary crossed the line of propriety, but we do not believe it rises to the level of misconduct warranting reversal.

"The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Because defendant neither moved for a new trial nor a *Ginther*[1] hearing, nor raised a contemporaneous objection to any of the instances he now alleges constituted prosecutorial misconduct, his claim of ineffective assistance of counsel is unpreserved and reviewed only for errors apparent on the record. *People v Armisted*, 295 Mich App 32, 45-46; 811 NW2d 47 (2011). A conviction generally will not be set aside on the basis of remarks to which a defendant did not object if the prejudicial effect thereof could have been cured by a timely curative instruction. *People v Duncan*, 402 Mich 1, 15-17; 260 NW2d 58 (1977). In the event that the prejudicial effect of some impropriety could not have been eliminated with a cautionary instruction, the failure to object will be deemed irrelevant. See *People v Humphreys*, 24 Mich App 411, 415-416; 180 NW2d 328 (1970).

Prosecutors play a special and unique role in our system of justice, and must not only zealously seek to convict the guilty, but must simultaneously zealously ensure that those accused of crimes receive a fair trial. It has long been established that

> [i]t is the duty of the public prosecutor to see that the person charged with crime receives a fair trial, so far as it is in his power to afford him one, and it is likewise his duty to use his best endeavor to convict persons guilty of crime; and in the discharge of this duty an active zeal is commendable, yet his methods to procure conviction must be such as accord with the fair and impartial administration of justice . . . [*People v Dane*, 59 Mich 550, 552; 26 NW 781 (1886).]

Consequently, prosecutors are in no way obligated to be as bland as possible, and it is entirely proper for a prosecutor to discuss with the jury why a witness ought to be found credible or not on the basis of the evidence. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005); *People v Unger*, 278 Mich App 210, 240; 749 NW2d 272 (2008). Nonetheless, the prosecutor may *not* appeal to the jury to sympathize with the victim or vouch for a witness's credibility. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Likewise, the prosecutor may not play on the jury members' fears and prejudices or urge the jury to convict as a civic duty. *Bahoda*, 448 Mich at 282. The prosecutor does not have absolute discretion, but the prosecutor does have considerable latitude.

For the most part, the prosecutor's commentary was proper. For example, the prosecutor characterized the victim as "vulnerable" and "needy and desperate for attention and affection and approval," which was consistent with the evidence of the otherwise unhappy and neglected life the victim led. The prosecutor's reference to a "coaching defense" was simply a fair summary of

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defendant's argument that no sexual intercourse took place, and the victim's testimony was the result of express or implied coercion by her mother and others. A "prosecutor may fairly respond to an issue raised by the defendant." *Brown*, 279 Mich App at 135. Likewise, the prosecutor's assertion that the victim "is truthful when it matters" was responsive, not improper. The prosecutor's reference to the situation involving another man, who apparently admitted to improper contact with the victim at an earlier time, did not imply that the prosecutor had special knowledge of the victim's truthfulness. The prosecutor's statement that the victim did not believe her mother really cared about her is likewise consistent with the evidence. The prosecutor's statement that defendant used the victim as his "sex toy . . . like an inflatable doll" for the summer, and that he just "drop[ped] her like a hot potato," however, are dangerously close to a deliberately inflammatory ploy to exploit the jury's emotions, particularly in light of some of the other comments the prosecutor made.

The prosecutor clearly stepped over the line into a civic duty argument, and blatantly misstated the law in the process, by asserting that

> [i]t's not like we use this charge to address the social problem of teenagers having sex with each other. We don't use it on the 15- and the 18-year-olds who are dating. It's about exploitation. We use it in this situation when there's an enormous age difference and a – members of the same household . . . But she doesn't see the exploitation inherent in that age difference and those circumstances.

MCL 750.520d prohibits sexual penetration by *a person*, of *any* age, with a person between the ages of 13 and 16. MCL 750.520d(1)(a). The age difference between the actor and the victim is only relevant to fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). It is, in fact, precisely as illegal under MCL 750.520d(1)(a) for a 15-year-old and an 18-year-old to have sexual intercourse as it was for defendant and the victim here. This was clearly not only a civic duty argument based on an incorrect recitation of the law, but an appeal to the jury's presumed emotional reaction to the thought of the age difference, rather than rational analysis of the evidence. We find the prejudice here mitigated, however, by the fact that the victim was indeed an unusually vulnerable person, and defendant was in a position of some authority over her and a member of the same household; the prosecutor's core message, that "it's about exploitation," is a fair argument from the evidence, albeit not for all of the reasons asserted.

We also are particularly concerned with the prosecutor urging the jury to convict defendant because acquitting him would be a "terrible result" of sending the victim the "message . . . that she indeed isn't worthy of belief or protection or of – of the rest of her childhood." This admonition was delivered immediately after the prosecutor's emotional description of the victim as having been treated as a "sex toy . . . like an inflatable doll" and subsequently abandoned. In context, we believe this discussion ventured well into being an impermissible sympathy argument, again clearly intended to play on the jury's emotions. The prosecutor apparently was responding to the *anticipation* of an argument that she *expected* defendant to make—but that defendant did not in fact make. Had defendant actually made such an argument, the prosecutor's argument might have been properly responsive, but the prosecutor did not make any rebuttal argument. In context, this argument was improper.

However, we do not believe the prosecutor's impropriety cost defendant a fair trial. The trial court instructed the jury that it must "not let any sympathy or prejudice influence your decision," that the "lawyers' statements and arguments are not evidence," and the jury "should only accept things that the lawyers say that are supported by your own common sense and general knowledge." Jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Clearly, it is possible that the jury's emotions could be manipulated to the point that it could no longer be safely presumed that the jurors could easily or reliably put those emotions aside, especially in a case that turns significantly on a credibility contest. However, we do not believe that the prosecutor's arguments here were that egregious. We suggest that the prosecutor exercise some caution in the future to ensure the reliability of convictions, and we note that our Supreme Court has also remarked on the prosecutor's unprofessional and inappropriate practices. *People v Richardson*, 489 Mich 940; 798 NW2d 13 (2011). However, the prosecutor's conduct was not sufficiently prejudicial to undermine defendant's verdict.

Defendant argues that trial counsel was ineffective for failing to object to the above-described improprieties committed by the prosecutor. We disagree. As discussed, some of defendant's complained-of alleged improprieties were not improper at all. Also as discussed, we are not persuaded that the improprieties the prosecutor did commit likely affected the outcome of the trial. We do not believe that counsel not objecting would be unsound strategy. Counsel may have concluded that any objection would have only drawn the jury's attention more closely to any given comment or caused the jury to think negatively about defendant. In any event, counsel cannot be found ineffective for failing to object to permissible commentary or impermissible commentary that did not ultimately affect the outcome of the proceedings. See *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012); *Unger*, 278 Mich App at 242-243.

Next, defendant argues that he is entitled to resentencing as the trial court erred in calculating prior record variables (PRVs) 3, 4, and 5, and offense variable (OV) 4. We disagree. "This Court reviews a trial court's scoring of a sentencing guidelines variable for clear error." *Lockett*, 295 Mich App at 182. "A scoring decision is not clearly erroneous if the record contains *any* evidence in support of the decision." *Id*. (internal quotation marks and citations omitted; emphasis in original). *Id*. Defendant argues that because there had been a gap of more than ten years between his discharge from juvenile adjudication on June 23, 1999, and the instant charged offense, and he had no other offenses in the interim, the "10-year-back rule" precluded any of these PRVs from being scored. See MCL 777.50; *People v Billings*, 283 Mich App 538, 551-552; 770 NW2d 893 (2009). The trial court opined that "trying to pinpoint a date is obviously difficult" but found that "he was obviously also in the home before the June 23rd date according to the testimony in the record before the Court." Pursuant to the applicable preponderance of evidence standard, we find no clear error in the trial court's findings.

Pursuant to MCL 777.34(1)(a), OV 4 should be scored at 10 points if the victim has sustained a "[s]erious psychological injury requiring professional treatment occurred to a victim." It is immaterial whether the victim actually sought treatment and there must be actual evidence of psychological injury; the "trial court may not simply assume that someone in the victim's position would have suffered psychological harm, because MCL 777.34 requires that serious psychological injury '*occurred* to a victim.'" *Lockett*, 295 Mich App at 182-183 (emphasis added by *Lockett*); MCL 777.34(2). The record here shows that the victim was

psychologically troubled and had been long before defendant entered her life. The trial court correctly indicated that "these particular instances" with defendant "haven't added to her well-being," and it seems likely to us that these offenses exacerbated her problems. Indeed, it is hard to imagine how they could not. Simply because a victim is troubled prior to being victimized should not be to the benefit of the offender. The opposite is true. We again find no error.

Lastly, defendant raises an additional claim of ineffective assistance of trial counsel, asserting that trial counsel should have procured an expert witness to testify on possible coercion of the victim to testify. Defense counsel decisions on whether to obtain or call an expert witness are presumed to be matters of trial strategy "for which this Court will not substitute its judgment." *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003). Defendant asserts that an expert witness could have testified that the victim's interviews failed to follow forensic interviewing protocol and how that failure could have affected her statements. Defendant has not shown that such an expert would have testified that the victim's testimony was the result of lies or coercion. Further, the victim testified before the jury, allowing them to make their own credibility determinations based on her tone and behavior. Thus, as in *Ackerman*, "[d]efendant offers no proof that an expert witness would have testified favorably if called by the defense. Accordingly, defendant has not established the factual predicate for his claim." *Id.* Finally, the decision not to obtain an expert witness was one of trial strategy reserved for defense counsel, and defendant "has not met his heavy burden of overcoming the presumption that his trial counsel employed effective trial strategy." *Id.*

We affirm.

/s/ Amy Ronayne Krause
/s/ Stephen L. Borrello
/s/ Michael J. Riordan