

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
May 29, 2012

v

MICHAEL ROBERT PORTER,
Defendant-Appellant.

No. 304168
Grand Traverse Circuit Court
LC No. 11-011170-FC

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Following a jury trial, defendant Michael Porter was convicted of two counts of criminal sexual conduct in the first degree (CSC I) in violation of MCL 750.520b(1)(a) (victim under 13 years old) and one count in violation of MCL 750.520b(1)(b)(ii) (victim related to offender), five counts of possessing child sexually abusive material, MCL 750.145c(4), and one count of using a computer to commit a crime, MCL 752.796(1); MCL 752.797(3)(d). The sentencing court departed upward from the sentencing guidelines and sentenced defendant to serve concurrent prison terms of 40 to 70 years for the CSC I convictions, two to four years for the possessing child sexually abusive material convictions, and two to seven years for the using a computer to commit a crime conviction, with 119 days jail credit. We affirm.

Defendant first argues that the prosecution failed to present sufficient evidence to support the three counts of CSC I. We disagree. When reviewing a sufficiency challenge, “evidence is reviewed de novo, in a light most favorable to the prosecution, to determine whether the evidence would justify a rational jury’s finding that the defendant was guilty beyond a reasonable doubt.” *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005).

In determining whether the prosecution has presented sufficient evidence to sustain a conviction, this Court must consider whether there was sufficient evidence to justify a rational jury finding guilt beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-514; 489 NW2d 748, mod 441 Mich 1201 (1992). All conflicts in the evidence must be resolved in favor of the prosecution. *Id.* at 515. In its analysis, this Court “is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000). The issue of credibility is for the jury to decide, and this Court does not revisit credibility issues on appeal. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002).

Defendant cites a portion of the victim's testimony and concludes that the victim's testimony was insufficient to sustain defendant's conviction on two of the three counts of CSC I because the victim "gave equivocal and/or inconsistent testimony about whether any sexual penetration occurred and/or whether the sexual penetration occurred in Grand Traverse County." Defendant's entire argument consists of these two sentences:

If the complainant had a reasonable doubt as to whether or not an act of sexual intercourse occurred during May of 2010, a reasonable jury must have had a reasonable doubt about it as well because, in the absence of additional evidence, it would defy logic for a reasonable jury to be more certain about a fact than the witness who testified about that fact. Similarly, if the complainant believed that only two acts of intercourse occurred during October/November of 2009, and had a reasonable doubt as to whether both acts occurred in Grand Traverse County, a reasonable jury must have had a reasonable doubt as to whether the prosecution had proven that both of the charged acts had taken place in Grand Traverse County.

It was undisputed that the victim, LP, was either under 13 or related to defendant, or both, when the alleged penetrations occurred. Whether defendant penetrated LP was disputed, as defendant denied doing so, stating that he had been "perfectly faithful to my wife for 25 years." His testimony was rebutted by LP, who testified that defendant had been "raping me ever since I can remember."

It is true that many of the specific instances that LP recalled occurred outside of Grand Traverse County, while LP and defendant were traveling or on vacation. However, LP unequivocally testified that defendant assaulted her at her house in Grand Traverse County at least three or four times during her seventh grade year, which was in 2008 and 2009, testifying that defendant "would come into my room and he would just talk for a while and then he would have intercourse. First he would start feeling my legs and start feeling around my genitals and then he would have intercourse." LP testified that she does not "recall specific times," stating "I'm sure it happened more than I remember specifically. But I can't recall the specific times."

LP also testified that the last assault she remembered occurred in May of 2010, at the end of her eighth grade year. She said that she had her boyfriend over, and then her "dad came in later that night and said if you want [the boyfriend] to continue to come over, you know, you have to do this." She said that defendant then "did what he normally did, touching and then intercourse."

Defendant's argument that the testimony was equivocal or inconsistent is essentially an attack on LP's credibility. Defendant is asserting that LP was not credible because she could not give dates or describe the specific rapes and answered some questions inconsistently as to whether one or two rapes occurred in October or November. However, the jury, having convicted defendant of the three charged counts of CSC I, necessarily determined that the LP was credible and that defendant was not. This Court may not interfere with the jury's credibility determination. *Nowack*, 462 Mich at 400; *Milstead*, 250 Mich App at 404. A rational jury could conclude from LP's testimony that defendant penetrated her, because she testified that he did so

many times during her seventh and eighth grade years. Accordingly, the evidence, viewed in the light most favorable to the prosecution, was sufficient to support defendant's conviction.

Defendant next argues that the prosecutor engaged in misconduct sufficient to deprive him of a fair trial. We disagree. Defendant failed to preserve this issue by raising a timely and specific objection to the misconduct in the trial court, *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008), and so this Court's review is for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Reversal is warranted only when a plain error resulted in a conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Id.* at 774. Further, reversal is not required if the prejudicial effects of an improper prosecutorial comment could have been cured by a timely jury instruction. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The prejudicial effects of most improper prosecutorial statements can be cured by such an instruction, and jurors are presumed to follow their instructions. *Unger*, 278 Mich App at 235-236.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Watson*, 245 Mich App at 586. Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The propriety of a prosecutor's conduct depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). The remarks must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

Defendant contends that remarks made by the prosecutor during closing argument improperly shifted the burden of proof, appealed to juror sympathy, and bolstered LP's credibility. Defendant refers this Court to the following:

First of all, I want to talk about the statements of [LP]. And, yes, how they have at times changed. How she added more detail as time went on. I want to talk to you about, again, that instruction, that [LP]'s testimony is enough [to convict defendant]. Because if we flip that around, that — that means that *in order to find the Defendant, Michael Porter, not guilty, you have to be willing to look at [LP] and tell her we don't believe you. We have a reasonable doubt about what you said.*

* * *

Now I want to talk about that instruction that we talked about. *And the Judge is going to tell you that if you believe [LP]'s testimony and her testimony satisfies the elements beyond a reasonable doubt, that's all you need to find the Defendant guilty.*

So the flip side of that instruction is, if you're going to find the Defendant not guilty, then you have to be able to look at [LP] and say we don't believe you. We have reasonable doubt about what you said. And the Defendant sat there this

morning and tried to say, yup, she made it up. Doesn't know why, but wants us to believe that she made it up. [Emphasis added.]

Defendant first argues that the prosecution impermissibly shifted the burden of proof. It is fundamental in our legal system that a person is presumed innocent until proven guilty. *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987). As such, the prosecution's burden to prove that a defendant is guilty beyond a reasonable doubt may never be shifted to a defendant, which would obligate a defendant to prove his innocence. *Id.*

Defendant fails to explain how these remarks shifted the burden of proof. When viewed in context, the prosecutor was identifying three things. First, she was asserting that LP's testimony proved each element of the offense beyond a reasonable doubt. Second, she identified the rule that a CSC victim's testimony does not need to be corroborated in order for the jury to find a defendant guilty. See MCL 750.520h (“[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g.”); see also CJ12d 20.25 (“[t]o prove this charge, it is not necessary that there be evidence other than the testimony of [name complainant], if that testimony proves guilt beyond a reasonable doubt.”). And third, that the testimony of LP and defendant could not both be true. The remarks did not relieve the prosecutor of the burden of proof beyond a reasonable doubt. Indeed, she made this perfectly clear to the jury when she said, “if you believe [LP]’s testimony *and her testimony satisfies the elements beyond a reasonable doubt*, that’s all you need to find the Defendant guilty.”

Moreover, defendant cannot show that he was prejudiced as a result of the prosecutor's statement. The trial court instructed the jury on more than one occasion that the burden was on the prosecution to prove its case, that defendant was presumed innocent, and was not required to prove anything or even present evidence. The trial court further instructed the jury that the attorneys' closing statements were not evidence, and, if not supported by the evidence, should not be considered by the jury. Thus, even if defendant could show a prejudicial effect, it was presumably cured by the trial court's instructions. *Unger*, 278 Mich App at 235-236.

Defendant next argues that the prosecutor impermissibly appealed to the jury's sympathy. It is true that a prosecutor may not appeal to the jury to sympathize with the victim. *Watson*, 245 Mich App at 591. Such appeals constitute improper argument. *Id.* Here, however, defendant provides no explanation how or why the above passage appealed to juror sympathy. The passage contains nothing that is obviously inflammatory. The statement that the jurors would have to “look” at LP and tell her that they did not believe her is not an appeal to sympathize with LP. It is a statement regarding whether the jury believed LP's testimony and not with the way defendant treated LP. The statement was isolated, not blatant, and not inflammatory. *Watson*, 245 Mich App at 591. Further, the trial court in this case instructed the jury that it “must not let sympathy or prejudice influence your decision.” Under these circumstances, even if defendant could show a prejudicial effect, it was presumably cured by the trial court's instructions. *Unger*, 278 Mich App at 235-236. Hence, there was no plain error.

Defendant also contends that remarks made by the prosecutor during closing argument improperly bolstered LP's credibility. Defendant refers this Court to the following:

Now I want to talk to you about the other witnesses and how they support [LP]'s testimony. Again, [LP]'s testimony is supported by other — other witnesses and by the physical evidence that was presented. First of all, SP. Obviously she noticed changes in [LP]'s behavior. She talked about the fact that she goes to bed earlier in the evening. *And she obviously believes [LP]*, because [defense counsel] was the one that asked, but the week following the disclosure, she filed for divorce. And she hasn't had a conversation since the day she found this out. * * * She [AP] testified that the Defendant went into [LP]'s room quite often at night. That she heard [LP] and her dad not getting along.

[LP] telling her dad, get out of my room. *Again, she obviously believes [LP]*. And she learned in a difficult way, but she learned watching these videos, her dad was looking at her in the same way that he looking at [LP]. [Emphasis added.]

While a prosecutor may not bolster a witness's credibility by asserting that she has some special knowledge that the witness is testifying truthfully, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), a prosecutor may argue from the facts in evidence that a defendant is worthy or not worthy of belief, *People v Dobek*, 274 Mich App 58, 67; 732 NW2d 546 (2007).

Here, the prosecutor's comments on LP's credibility were based on the evidence introduced at trial and did not suggest that the prosecutor had any special knowledge of the truth unknown to the jury. *Bahoda*, 488 Mich at 276. Instead, when read in their full context, the statements were intended to convey to the jury that the evidence indicated that LP was worthy of belief. *Dobek*, 474 Mich App at 67. Additionally, the trial court instructed the jury that they were the sole judges of the evidence and that the attorneys' statements and arguments were not to be considered as evidence. Thus, even if defendant could show a prejudicial effect, it was presumably cured by the trial court's instructions. *Unger*, 278 Mich App at 235-236. Hence, there was no plain error.

Defendant also argues that his trial counsel was ineffective for failing to object to the prosecutor's conduct. Effective assistance of counsel is presumed, and a defendant claiming ineffective assistance is required to overcome a strong presumption that sound trial strategy motivated counsel's conduct. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

None of defendant's complaints concerning the performance of his defense counsel amounted to objectively unreasonable conduct that affected the outcome of his trial. Defendant has failed to establish that any objection by counsel during the prosecutor's closing argument would have been meritorious. Consequently, counsel cannot be ineffective for failing to raise a meritless objection to the closing argument. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502, (2000). Moreover, given that any prejudicial effect from the closing was presumably cured by the trial court's instructions, *Unger*, 278 Mich App at 235-236, defendant

cannot establish that the outcome of the proceedings would have been different had his counsel objected to the prosecutor's allegedly improper statements. *Mack*, 265 Mich App at 129. Therefore, defendant's claim of ineffective assistance of counsel must fail.

Finally, defendant argues that the sentencing court abused its discretion in departing upward and imposing a 40 year minimum sentence for the three CSC I convictions. We disagree. In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination reviewed for clear error, the determination that a particular factor is objective and verifiable is reviewed as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the amount of the departure is reviewed for an abuse of discretion. *People v Smith*, 482 Mich 292, 300; 754 NW2d 284 (2008). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes." *People v Babcock*, 469 Mich 247, 274; 666 NW2d 231 (2003).

"A court may 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." MCL 769.34(3). A substantial and compelling reason for departure from the guidelines range must be objective, verifiable, of considerable worth in determining the length of the sentence, keenly or irresistibly grab the court's attention, and exists only in exceptional cases. *Smith*, 482 Mich at 299. Moreover, "[t]he trial court may not base a departure 'on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight.'" *Id.* at 300, quoting MCL 769.34(3)(b). Finally, a departure from the guidelines range must render the sentence proportionate to the seriousness of the defendant's conduct and his criminal history. *Id.* at 299-300.

At sentencing, the court stated that "there is a statute that says that any criminal sexual conduct first degree with a victim under the age of 13 has a mandatory 25 year minimum. So, that's sort of where we have to start." The sentencing court noted that the 25 year minimum would apply "if we had a single penetration by a stranger of a 12 year old," but that "[w]hat we have here is many, many penetrations of his own child, starting as young as age 10," adding that the circumstances of the instant case "is far more than the minimum considered in the statute." The court then sentenced defendant to serve 40 to 70 years for each CSC I conviction, recognizing that this was a departure from the guidelines. The court stated that "the statute" "has to do with a single penetration of a stranger whose [sic] under the age of 13, and this is many multiples of that, and I think that more than justifies a departure from the 15 year top end of the guideline range," adding that this was a substantial and compelling reason to depart. Additionally, the sentencing court noted that OV-13 does not account for any penetrations beyond the three scored under that variable, and that there were "many such instances" beyond those three in the instant case. LP testified that defendant abused her multiple times each week for as long as she could remember. Therefore, the trial court's stated reasons for departure were objective and verifiable. *Smith*, 482 Mich at 299. Considering the egregious nature of the crime, and the frequency with which defendant assaulted LP, the trial court's determination that the

upward departure was supported by substantial and compelling reasons was not an abuse of discretion. *Id.*

Affirmed.

/s/ Donald S. Owens

/s/ Michael J. Talbot

/s/ Patrick M. Meter