STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LLOYD RAYMOND BRUEGGEMAN,

Defendant-Appellant.

UNPUBLISHED
November 22, 1996

No. 187724
LC No. 95-001477-FC

Before: Saad, P.J., and Griffin and M. H. Cherry,* JJ.

PER CURIAM.

Defendant appeals by right his conviction for first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). Defendant was sentenced to 240 to 360 months for sexually assaulting his eldest daughter in the living room of their home. We affirm.

I

Defendant argues that his conviction should be reversed because the trial court excluded testimony of an officer who had interviewed the victim. Defendant sought to have the officer testify solely for the purpose of impeaching the victim's testimony regarding her trial statements about the interview. The trial court found no inconsistency between the officer's report and the victim's testimony and therefore ruled that impeachment would be improper. Because the officer's report is not part of the record provided to us, our review is compromised. Nonetheless, even if exclusion of the impeachment testimony was error, it was harmless and thus does not warrant reversal. The victim herself admitted that she had lied repeatedly regarding the assault and thus had already been thoroughly impeached with regard to this issue. Therefore, the officer's testimony would have had negligible impeachment value.

II

Defendant contends that the trial court abused its discretion by allowing evidence of defendant's flight. Although in the past we have recognized the equivocal nature of evidence of flight, we have held

* Circuit judge, sitting on the Court of Appeals by assignment.

that it is generally relevant and admissible to show consciousness of guilt. *People v Cutchall*, 200 Mich App 396, 398; 504 NW2d 666 (1993). Further, defendant was able to explain his flight, indicating he moved to accept employment. Moreover, the victim provided testimony proving all the elements of the offense. Therefore, the prejudicial effect of this testimony appears minimal. Accordingly, the trial court's admission of the evidence of defendant leaving the county was not an abuse of discretion.

Defendant also makes a related argument that the trial court erred when it refused the prosecutor's request that it give CJI2d 4.4, the instruction regarding flight evidence. At trial defendant apparently did not wish to have the instruction, but on appeal he argues that the trial court's ruling in his favor was error. Nothing supports defendant's argument in this regard and, in any case, defendant waived review of the instructions because he acceded to them at trial. *People v McCray*, 210 Mich App 9, 14; 533 NW2d 359 (1995); *People v Taylor*, 159 Mich App 468, 488; 406 NW2d 859 (1987).

III

Next, we find no error requiring reversal in the trial court's scoring of the applicable offense variables. The sentencing court's score of twenty-five points for offense variable 2 is supported by evidence that defendant pushed the victim and yelled at and struck her mother immediately after the sexual assault. *People v Kreger*, 214 Mich App 549, 552; 543 NW2d 55 (1995). We also disagree with defendant's argument regarding offense variable 6. Nothing in the guidelines indicates that a defendant must sexually assault a person for the person to be considered a victim for purposes of this offense variable. Although defendant disputed the evidence that he beat his wife for forty-five minutes when she intervened in defendant's sexual assault of their daughter, that evidence was nonetheless part of the record and supports the court's scoring of ten points for this offense variable. There was also adequate evidence that defendant exploited his victim's vulnerability, due to her youth and his authority status, to support the court's score of fifteen points for offense variable seven. Finally, defendant correctly points out that the parties and the court agreed at the sentencing hearing that offense variable 25 should be scored at zero. Although this was not properly reflected in the sentencing information report, this error was harmless because correcting it would not change the offense level and the guidelines would therefore remain the same. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

IV

Defendant argues in his supplemental brief that certain remarks made by the prosecutor during his closing argument improperly bolstered the credibility of expert witness Barbara Cross. We note that defendant did not object to these remarks below. Appellate review of assertedly improper prosecutorial remarks is generally precluded, although an exception exists where a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Regardless, the remarks at issue were proper argument. A prosecutor is free to argue the evidence and

all reasonable inferences therefrom as they relate to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Specifically, a prosecutor is permitted to comment on the testimony in a case. *People v Gilbert*, 183 Mich App 741, 745; 455 NW2d 731 (1990). In the remarks at issue, the prosecutor expressed that Cross, having worked with both the prosecution and defense counsel in various cases, supported her credibility because it indicated that she was not one-sided. We conclude that this was reasonable argument based on the evidence. One could reasonably view such an expert as having a broader perspective than one who habitually worked only for either the prosecution or the defense. While "using the prestige of the prosecutor's office to inject personal opinion is improper," *Bahoda*, 448 Mich at 286, in making the remarks at issue, the prosecutor did not do so, but rather provided arguments for the jury to consider in evaluating Cross' credibility.

Defendant also argues in his supplemental brief that the complainant's testimony (that he had vaginal intercourse with her during the same incident in which she asserted that he committed the charged oral penetration), was improper under MRE 404(b), which governs the admissibility of other acts evidence. Because this testimony directly explained circumstances of the charged crime, it was admissible on that basis, regardless of whether it would also have been admissible as other acts evidence. *People v Delgado*, 404 Mich 76, 83-84; 273 NW2d 395 (1978). Contrary to defendant's position, because this testimony was not admitted as other acts evidence, it was not subject to the notice requirement of MRE 404(b)(2).

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry