STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID JAMES WILKE,

Defendant-Appellant.

UNPUBLISHED
January 21, 1997

No. 183393
Recorder's Court
LC Nos. 94-003938;
94-008807

Before: Jansen, P.J., and Reilly and E. Sosnick,* JJ.

PER CURIAM.

In lower court no. 94-003938, defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), unarmed robbery, MCL 750.530; MSA 28.798, and breaking and entering an occupied dwelling, MCL 750.110; MSA 28.305. Defendant was sentenced to serve concurrent terms of eight to twelve years for the first-degree CSC convictions, eighteen months to fifteen years for the unarmed robbery conviction, and two to fifteen years for the breaking and entering conviction. In lower court no. 94-008807, the same jury convicted defendant of four counts of first-degree CSC, kidnapping, MCL 750.349; MSA 28.581, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to serve concurrent terms of thirty-seven to fifty-five years for the first-degree CSC convictions and thirty-five to fifty-five years for the kidnapping conviction, to be served consecutively to a two-year term for the felony-firearm conviction. Defendant appeals as of right. We affirm.

I

A

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

The following facts form the basis for the convictions in lower court no. 94-003938. On March 14, 1994, at approximately 11:30 p.m., defendant telephoned his former girlfriend, the complainant, and requested permission to retrieve his bowling ball from her home in Dearborn Heights. Complainant had ended the relationship with defendant in January 1994. She denied defendant's request, stating that she was going to bed and that he could retrieve the ball another day. Fifteen minutes later, complainant heard a loud noise and found defendant in her kitchen. Defendant had a knife and he pursued her into her bedroom.

There, defendant raped the complainant vaginally. Defendant then demanded that complainant tell him why she had ended the relationship. Complainant attempted to escape, but defendant caught her and forced her to perform fellatio on him. He again raped her vaginally and then demanded money from her. He then ordered her to accompany him to a gas station where he used her credit card to pay for gasoline. Defendant returned complainant to her home where she called the police.

B

The following facts form the basis of the convictions in lower court no. 94-008807. On April 6, 1994, sometime after 9:00 p.m., complainant returned home from her evening classes at the University of Michigan-Dearborn, and, as she was entering her home, defendant ran toward her and struck her on the left side of her head with a "small black gun." Defendant overpowered complainant and took her to a nearby minivan. Defendant repeatedly punched complainant in the eye and mouth. He drove complainant to his residence, tied her wrists, then returned to the van with a brown duffel bag and drove her to a Super 8 Motel near Metro Airport.

Upon arrival at the motel, defendant ordered complainant to the rear of the van and he raped her vaginally. He then took her into the motel and again forced complainant to engage in intercourse. The following morning, on April 7, 1994, defendant again vaginally penetrated complainant, and anally penetrated her with a vibrator.

At 10:45 a.m., defendant left the motel with complainant and drove to Camp Dearborn in Milford. Defendant again forced vaginal intercourse with complainant in the van. Defendant then drove them to a Ramada Inn in Canton, where he sodomized complainant. Defendant ultimately left the motel room to purchase cigarettes, when complainant called the police. Defendant was arrested shortly thereafter.

II

Defendant first argues that the prosecutor, during rebuttal argument, improperly distorted the testimony of defendant's expert witness which constituted prosecutorial misconduct and deprived defendant of a fair trial.

Defendant did not object to the remarks made by the prosecutor at rebuttal now complained of on appeal. Appellate review of allegedly improper prosecutorial remarks is generally precluded absent an objection by counsel. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An

exception exists if a curative instruction could not have eliminated any prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.*

When reviewed in context, the unobjected to remarks were in direct response to defendant's closing argument. Defense counsel stated the following at closing argument:

> Dr. Walker and Mr. Stryker, the defense experts, testified yesterday and *absolutely said* that David Wilke could not form the required legal intent to commit the crimes which he's being charged, because he was mentally ill on March 15th, on April 6th and on April 7th, 1994. [emphasis added.]

In fact, defense counsel's statement that the expert witnesses testified absolutely that defendant could not form the required legal intent to commit the crimes is not an accurate conclusion regarding their testimony. Moreover, even if it was defense counsel's interpretation of the expert witness's testimony that they unequivocally testified that defendant could not form the legal intent, it was the prosecutor's response that the expert's testimony was equivocal since Dr. Walker attempted to qualify his answers. Accordingly, we find that the prosecutor's remarks at rebuttal argument were not improper because they were in direct response to defense counsel's closing argument. See *People v Bahoda,* 448 Mich 261, 286-287; 531 NW2d 659 (1995).

Further, we find no miscarriage of justice because the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence." This would have cured any prejudicial remarks made by the lawyers. *People v Mack*, 190 Mich App 7, 19; 475 NW2d 830 (1991).

III

Defendant next argues that, if failure to object to alleged prosecutorial misconduct precluded appellate review of that issue, then trial counsel's failure to object deprived defendant of the effective assistance of counsel.

In order to establish ineffective assistance of counsel, the defendant must show that, under an objective standard of reasonableness, counsel's performance was deficient and was prejudicial to his case. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). Here, we have already concluded that the rebuttal remarks were not improper. Therefore, defendant cannot show that counsel's performance was either deficient or prejudicial.

IV

Defendant also argues that the trial court deprived him of his right to Sixth Amendment right to confrontation by limiting his cross-examination of the complainant.

Here, defendant sought to introduce evidence of his past sexual relationship with complainant. Specifically, defendant sought to introduce evidence of "aberrant" sexual behavior practiced by complainant and defendant during the course of their relationship. At an *in camera* evidentiary hearing on the matter, complainant admitted to previous vaginal sex, oral sex, and bondage episodes.

Complainant also admitted that on two occasions she shaved her pubic area before engaging in consensual sexual intercourse with defendant. The trial court ruled that defense counsel could question complainant about previous vaginal and oral sex episodes, but refused to admit evidence of the other "aberrant" sexual practices on the ground that it was not relevant.

The rape-shield statute, MCL 750.520j; MSA 28.788(10), generally excludes evidence of prior sexual activity between a defendant and a complainant. *People v Adair*, 452 Mich 473, 478; 550 NW2d 505 (1996). Defendant was charged with a total of six counts of first-degree CSC involving use of a weapon and vaginal and anal penetration. Consequently, evidence of previous bondage or "aberrant" sexual practices would not be relevant to the issue of consent to vaginal and anal sexual acts and, therefore, the evidence would be barred by the rape-shield statute. See *People v Zysk*, 149 Mich App 452, 458-460; 386 NW2d 213 (1986). Accordingly, we find that the trial court did not abuse its discretion in limiting the scope of defendant's cross-examination regarding the prior sexual relationship between complainant and defendant. *Adair, supra*, pp 482-483.

V

Last, defendant argues that the sentences of thirty-seven to fifty-five years for the first-degree CSC convictions and thirty-five to fifty-five years for kidnapping violate the principle of proportionality. They do not. The sentencing guidelines range for the first-degree CSC convictions was fifteen to thirty years or life. In departing from the guidelines' recommended range, the court specifically enumerated on the record several reasons for its upward departure. *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). In considering defendant's depraved conduct, the seriousness of the injuries suffered by the complainant, the nature of the offenses committed by defendant, and the trial court's reasons for departure, we cannot conclude that the trial court abused its discretion in sentencing defendant. Defendant's sentences do not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990); *People v Houston*, 448 Mich 312; 532 NW2d 508 (1995).

Affirmed.

/s/ Kathleen Jansen
/s/ Maureen Pulte Reilly
/s/ Edward Sosnick