

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID ALLEN MOSLEY,

Defendant-Appellant.

UNPUBLISHED

January 24, 1997

No. 185695

Montcalm Circuit Court

LC No. 94-000025-FH

Before: Fitzgerald, P.J., and MacKenzie and A.P. Hathaway,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a), and one count of assault with intent to commit CSC involving penetration, MCL 750.520g(1); MSA 28.788(7)(1). He was sentenced to ten to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

The victim is the daughter of defendant's live-in girlfriend. The victim testified to a series of incidents that occurred between June and November of 1993 in which defendant made her undress, fondled her, and sexually penetrated her.

In his opening statement, the prosecutor asserted that a father-daughter relationship existed between defendant and the victim. He also referred to defendant as a "predator" and a "pervert." Defendant's motion for a mistrial on the ground that these remarks improperly inflamed the jury was denied. On appeal, defendant asserts that he was denied a fair trial by the remarks.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Kulick*, 209 Mich App 258, 259-260; 530 NW2d 163 (1995). Testimony by the victim and her mother was to the effect that there had been a father-daughter relationship between defendant and the victim; therefore, the reference to that relationship in the prosecutor's opening

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

statement was a proper statement of the evidence that would be presented. The prosecutor's reference to defendant as a "predator" and a "pervert," however, came dangerously close to error. While we do not condone such remarks, a review of the record reveals that the prosecutor's remarks were related to subsequently-elicited testimony that defendant used his position of authority in the household to compel the victim to have sexual relations with him, and did not result in defendant being denied a fair and impartial trial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

Defendant next argues that the trial court abused its discretion in denying his motion for a new trial. He claims that the prosecutor, during closing and rebuttal arguments, improperly made a civic duty appeal to the jury by referring to a father-daughter relationship between defendant and the victim and by appealing for religious condemnation of defendant. He also claims that the prosecutor expressed his personal belief that defendant lied during his testimony, that the prosecutor improperly elicited sympathy for the victim by referring to her as "sweet" and "innocent" and by asking the jury to identify with the victim, and that the prosecutor improperly attacked defendant's character by referring to him as a "predator" and a "pervert." As discussed previously, the prosecutor's comment on the father-daughter relationship between defendant and the victim, and the reference to defendant as a "predator," were related to evidence that was presented during the trial. While the prosecutor did "thank God" that the abuse ended, there is no indication that such a comment was an appeal for religious condemnation. The terms by which the prosecutor referred to the victim were stated once, were not material to the defense that was presented, and were not so prejudicial as to justify a new trial. In context, the remarks that defendant alleges were designed to have the jury identify with the victim appear to be directed toward rebutting the defense theory that the victim had fabricated the incidents, and toward addressing witness' statements that the victim had said she wanted to get rid of defendant. In commenting on defendant's credibility, the prosecutor did not tie his remarks to particular pieces of evidence; therefore, the comment appears to have been improper. However, we note that no objection or request for a curative instruction was made at the time the prosecutor made his remarks. "Appellate review of alleged improper remarks is precluded if a defendant fails to make timely and specific objections, unless a failure to review the claim would result in a miscarriage of justice. A miscarriage of justice arises when the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction." *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990). We do not find that the effect of the prosecutor's comment on defendant's credibility could not have been cured by a timely request for instruction. Overall, we do not believe that the trial court abused its discretion in denying the motion for a new trial. *People v Herbert*, 444 Mich 466, 477; 511 NW2d 654 (1993).

Finally, defendant challenges his sentence, arguing that it is disproportionate to the seriousness of the crimes of which he was convicted and that the court punished him for maintaining his innocence and exercising his right to trial. At sentencing, the trial court acknowledged defendant's right to go to trial; the record contains no indication that the court punished defendant for exercising that right. Defendant points out that a presentence investigation report (PSIR) prepared after defendant was tried and convicted recommended a longer sentence than that recommended in a PSIR prepared when it was believed defendant would plead guilty to one charge of CSC III. However, the second PSIR was based on convictions for three counts of CSC III and one count of assault with intent to commit sexual penetration. Given the additional convictions, the difference in the recommendations of the PSIRs is

appropriate. The PSIRs do not support the claim that defendant was punished for his decision to go to trial. The PSIR cites lack of remorse as an aggravating factor, and defendant claims this indicates he was punished for maintaining his innocence; however, the record does not indicate that the trial court placed any reliance on “lack of remorse” as a factor in sentencing. The minimum sentence imposed by the court fell within the sentencing guidelines’ range, and is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Albert*, 207 Mich App 73, 75; 408 NW2d 789 (1994). Defendant has failed to demonstrate the existence of any mitigating factors that would overcome the presumption of proportionality.

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Barbara B. MacKenzie

/s/ Amy Patricia Hathaway