

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERARDO GONZALEZ,

Defendant-Appellant.

---

UNPUBLISHED

November 30, 1999

No. 214252

Tuscola Circuit Court

LC No. 97-007267 FC

Before: Gribbs, P.J., and Murphy and Griffin, JJ

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2). The trial court sentenced defendant to fifteen to thirty-five years in prison. We affirm.

I

During closing arguments, defense counsel stated, “And I think we have to look at some of this logically, and kind of forget about some of the testimony.” In rebuttal, the prosecutor stated, “Defense counsel just asked you to forget some of the testimony that was provided during this trial. That’s the last thing on earth I would ask you to do.” Defendant first contends that he was denied the defense of reasonable doubt as a result of the prosecutor’s statement. We disagree.

Defendant did not object to the alleged prosecutorial misconduct at the trial. This Court’s review of a claim of allegedly improper prosecutorial conduct is generally precluded if the defendant fails to timely and specifically object to the conduct at trial; however, this Court may review the conduct in question if an objection and instruction could not have cured the error or if a failure by this Court to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Therefore, we consider this issue to determine whether an instruction could have cured any potential error, and to ensure that there is no miscarriage of justice.

Defendant argues that he was denied a defense of reasonable doubt. Had he objected at trial, the court could have immediately reminded the jury that it must find defendant guilty beyond a

reasonable doubt and that the attorneys' arguments are not evidence. Such an instruction would undoubtedly have cured any prejudicial effect of the prosecutor's statement. As it was, in its final instructions the trial court did instruct the jury that it was to consider all the evidence, that the attorneys' arguments are not evidence, and that it must find defendant guilty beyond a reasonable doubt. Furthermore, considered in the context of the whole of his rebuttal argument, the prosecutor's contested statement was an appropriate response to the arguments proffered by defense counsel in closing. See *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). There was no miscarriage of justice.

## II

Defendant next argues that the trial court misapplied the sentencing guidelines and relied on a misrecollection of testimony during sentencing. On the basis of these alleged errors defendant contends that his sentence is disproportionate. We again disagree.

Defendant failed to submit a copy of his presentence report with this appeal, and thus this issue is not properly preserved. MCR 7.212(C)(7); see *People v Rodriquez*, 212 Mich App 351, 355; 538 NW2d 42 (1995). Notwithstanding this failing, we initially note that the application of the sentencing guidelines presents a cognizable claim for appellate review only if "(1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, and (3) the sentence is disproportionate." *People v Mitchell*, 454 Mich 145, 177; 560 NW2d 169 (1997). Here, there is ample record support for the trial court's findings relevant to the guidelines. Furthermore, because defendant's minimum sentence falls within the guidelines it is presumptively valid. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Neither defendant's age of seventeen, nor his possible intoxication, is an unusual circumstance sufficient to overcome this presumption. See *People v Sharp*, 192 Mich App 501, 505-506; 481 NW2d 773 (1992). Defendant's final claim, that the court improperly relied on an exaggerated version of a witness' testimony, is likewise without merit. It is true that the court did err slightly in recollecting the testimony. However, this mistake was minor and was arguably corrected in a later statement. We hold that the court did not abuse its discretion in sentencing.

Affirmed.

/s/ Roman S. Gibbs  
/s/ William B. Murphy  
/s/ Richard Allen Griffin