

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID LESLIE COHOON,

Defendant-Appellant.

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UNPUBLISHED

March 28, 2000

No. 217128

Iosco Circuit Court

LC No. 98-003737 FC

Before: Wilder, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of criminal sexual conduct in the first degree (CSC I), MCL 750.520b; MSA 28.788(2), and five counts of criminal sexual conduct in the second degree (CSC II), MCL 750.520c; MSA 28.788(3), entered after a jury trial. The trial court sentenced defendant as an habitual offender to concurrent terms of twenty five to forty years and fifteen to twenty-two and one-half years in prison, respectively. Defendant appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant, defendant's former girlfriend's nine-year-old daughter, testified that defendant committed digital penetration and engaged in other sexual contact with her at various times when her mother was away from the home. Complainant reported the incidents to one of her mother's friends, who reported the allegations to complainant's mother. Complainant's mother, when asked how she reacted when she learned of the allegations, testified that she was angry, and remarked that while she did not want to believe complainant, she did believe her. Defense counsel did not object to this testimony. Defendant testified on his own behalf and denied complainant's allegations.

Defendant argues that he was denied the effective assistance of counsel due to counsel's failure to object to testimony from complainant's mother to the effect that she believed complainant. We disagree.

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and that the representation so prejudiced the defendant that he was denied a fair trial. *People v*

*Pickens*, 446 Mich 298, 313-314; 521 NW2d 797 (1994). Counsel is presumed to have afforded effective assistance; to overcome that presumption, a defendant must show that counsel's failure to perform an essential duty resulted in prejudice. *People v Stubli*, 163 Mich App 376, 379; 413 NW2d 804 (1987).

Defendant's reliance on cases addressing the propriety of an expert witness opining as to whether a complainant was abused, i.e., *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990), is misplaced because complainant's mother did not testify in a professional capacity. Moreover, defense counsel's decision not to object to the testimony could be considered trial strategy. We do not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Finally, any error was harmless, and no miscarriage of justice occurred. *People v Grant*, 445 Mich 535, 552-553; 520 NW2d 123 (1994). There was other testimony, including that provided by complainant, from which the jury could conclude that defendant was guilty.

Defendant next argues that he was denied a fair trial because the prosecutor appealed to the jury's sympathy for complainant by arguing that her innocence had been shattered and that she would suffer from the incident for years.. We disagree.

Defendant did not object to the prosecutor's remarks; thus, we review the issue only if a curative instruction would not have remedied the prejudicial effect of the prosecutor's remarks, or if the failure to review the issue would result in manifest injustice. *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Prosecutorial comments are to 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 Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

A prosecutor may not appeal to the jury to sympathize with the victim. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988). However, in the instant case, the prosecutor made the remarks to which defendant now objects during a rebuttal argument in response to questions raised by defense counsel about complainant's credibility. We conclude that had defendant objected to the remarks, a curative instruction advising the jury that arguments of counsel are not evidence could have remedied any prejudice. No miscarriage of justice occurred. *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Affirmed.

/s/ Kurtis T. Wilder  
/s/ David H. Sawyer  
/s/ Jane E. Markey