STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK ALLEN CURTIN,

Defendant-Appellant.

UNPUBLISHED
April 21, 2000

No. 210316
Macomb Circuit Court
LC No. 97-001572-FC

Before: Griffin, P.J., and Holbrook, Jr., and J.B. Sullivan*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct ("CSC I"), MCL 750.520b(1); MSA 28.788(2)(1), and one count of second-degree criminal sexual conduct ("CSC II"), MCL 750.520c(1); MSA 28.788(3)(1). He was sentenced to concurrent terms of twenty to forty years each for the first-degree CSC convictions and ten to fifteen years for the second-degree CSC conviction. He appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in precluding a prosecution witness from testifying regarding statements made by defendant in which he accused the complainant's babysitter of sexually assaulting the complainant. Because defendant failed to object to the trial court's ruling, our review is limited to whether the evidentiary ruling resulted in manifest injustice. MRE 103(a)(2); *People v Grant*, 445 Mich 535, 546-547; 520 NW2d 123 (1994); *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). We will not reverse on the basis of an evidentiary error unless the court's ruling affected a party's substantial rights. MRE 103(a); *People v Travis*, 443 Mich 668, 686; 505 NW2d 563 (1993)

Contrary to defendant's argument on appeal, he was not denied the opportunity to introduce the statements. The trial court's ruling applied only to the direct examination of the witness by the prosecutor. Prior to cross-examination, defense counsel requested that he be allowed to introduce

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

evidence of the statements. The prosecutor stipulated to defendant's request and the trial court allowed the testimony. Thereafter, during cross-examination, the witness

testified as to the statements made by defendant accusing the complainant's babysitter of sexually assaulting the complainant. Accordingly, defendant has failed to demonstrate that a substantial right was affected by the trial court's evidentiary ruling.

II

Defendant next argues that the trial court's instruction that, in order to prove CSC II, the prosecutor must prove that the touching "was done for sexual purpose or *could reasonably be construed* as having been done for sexual purposes", thus lessening the prosecutor's burden of proof and denying defendant a fair trial. We disagree. Because defendant did not object to the instruction at trial, our review is limited to the question of whether relief is necessary to avoid manifest injustice. See *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993); *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996).

We hold that the trial court's instruction did not deny defendant a fair trial. In a trial for CSC II, the appropriate jury instruction regarding whether a defendant's actions could reasonably be construed as being for the purpose of sexual arousal or gratification is that, in order to convict, a jury must find that an action could reasonably be interpreted as having been for the purpose of sexual gratification, not that the defendant actually intended the physical contact for the purpose of sexual gratification. MCL 750.520c(1)(a); MSA 28.788(3)(1) and MCL 750.520a(k); MSA 28.788(1)(k). Moreover, this Court has held that the statutory language is not unconstitutionally vague and does not shift the burden of proof. See *People v Piper*, 223 Mich App 642, 646-647; 567 NW2d 483 (1997). The trial court's instructions were proper.

III

Defendant next argues that the trial court erred in failing to sua sponte instruct the jury on the defense of duress where there was evidence that he was under duress when he made admissions to a prosecution witness. Again, because defendant failed to raise this issue at trial, our review is limited to the question of whether relief is necessary to avoid manifest injustice. *Van Dorsten*, *supra*; *Ullah*, *supra*.

Duress is an affirmative defense "applicable in situations where the *crime committed* avoids a greater harm." *People v Lemons*, 454 Mich 234, 246; 562 NW2d 447 (1997) (emphasis added). "An affirmative defense is one that admits the doing of the act *charged*, but seeks to justify, excuse, or mitigate it." *Id*. at 245, n 15 (citation omitted; emphasis added). Here, defendant does not argue that he committed the charged crimes of CSC I and CSC II while under duress, but that he made admissions to a prosecution witness while under duress. Because duress is a defense to the *commission of a crime*, *Id.* at 245-246, defendant was not entitled to an instruction on duress. Hence, we hold the trial court's instructions to have been proper.

IV

Defendant's final argument is that numerous instances of prosecutorial misconduct denied him a fair trial. Because defendant did not object to the alleged misconduct at trial, appellate review is precluded unless a curative instruction could not have eliminated any possible prejudice or failure to consider the issue would result in a miscarriage of justice. *Ramsdell*, *supra*. Issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995). The test is whether defendant was denied a fair trial. *Id.*

Our review of the record reveals that the challenged statements made by the prosecutor during closing and rebuttal arguments were either proper responses to defense counsel's arguments or reasonable inferences from the evidence produced at trial. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996); *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Although a prosecutor may not vouch for the credibility of a witness or make a civic duty argument, he or she may argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997); *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Moreover, any prejudice that might have occurred from the prosecutor's remarks could have been cured by a timely objection and curative instruction. Therefore, a miscarriage of justice will not result from our failure to review this unpreserved issue.

Defendant also claims that defense counsel was ineffective for failing to object to the prosecutor's alleged misconduct and the trial court instructions. However, because defendant did not raise this claim in his statement of the issues presented, it is not properly before this Court. *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990). We nevertheless note that this issue is without merit because the prosecutor's statements and the trial court's instructions were not improper. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Counsel is not required to make frivolous or meritless objections. See *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Affirmed.

/s/ Richard Allen Griffin
/s/ Donald E. Holbrook, Jr.
/s/ Joseph B. Sullivan