

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD LYNN HILTS,

Defendant-Appellant.

UNPUBLISHED

May 26, 2000

No. 215840

Midland Circuit Court

LC No. 98-008758-FC

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), and sentenced to two concurrent terms of thirty months' to fifteen years' imprisonment. Defendant appeals of right and we affirm.

First, defendant argues that the trial court erred by allowing the prosecution to question defendant and his wife, Robin Hilts, regarding a telephone conversation Robin had with the complainant's mother, a relative, during which Robin suggested to the complainant's mother that she drop the charges against defendant. Defendant also contends that the prosecution should not have been allowed to play an audiotape of the conversation to impeach Hilts. He argues that the trial court abused its discretion by failing to exclude this evidence under MRE 404(b)(1). We disagree. Although defendant initially raised an objection to the prosecution's cross-examination of defendant on this topic based on the failure to provide pretrial notice under MRE 404(b)(2), defendant failed to object that the evidence was improper. Generally, an objection based on one ground at trial is insufficient to preserve for appeal a challenge to the admission of evidence on another ground. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996). Absent manifest injustice, there can be no abuse of discretion if the trial court's discretion was not invoked by a timely objection. *People v Cain*, 238 Mich App 95, 127; 605 NW2d 28 (1999). Further, defendant declined to object to the admission of the tape when introduced.

Assuming the claim of error was preserved, defendant must show that it is more probable than not that the claimed error affected the outcome of the trial. *People v Lukity*, 460 Mich 484; 495-496; 596 Mich 607 (1999). We conclude that it is unlikely that the questions or the taped telephone

conversation affected the outcome of the trial. In fact, the conversation presented a cogent argument why defendant should be found not guilty. The gist of the conversation was that Robin pointed out that although the complainant's mother and father were present, they had observed nothing, and so would be in the position of testifying, in effect, that their daughter was lying; or, if they did see something, they would be at risk of losing her for failure to report the alleged abuse. The tape contained the mother's admission that she had not seen anything, and clearly made the point that the father was in a position to have observed the second incident had it actually occurred. It also contained Robin's adamant assertion that she had not asked defendant what he was doing at the time of the alleged second incident, contrary to the victim's assertion. Furthermore, in his closing argument, defense counsel urged jurors to evaluate the taped conversation as a whole, and not just the threatening statements the prosecution presented out of context. Under these circumstances, reversal is not required.

Next, defendant argues that he was denied a fair trial by the prosecutor's remarks and conduct at trial. Defendant alleges that the prosecutor bolstered the credibility of the complainant, deprived him of the benefit of the doubt, and badgered Robin Hilts during cross-examination. 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 misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Noble*, 238 Mich App 647; 608 NW2d 123 (1999). The propriety of a prosecutor's remarks depends on all the facts of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Id.*; *Paquette, supra* at 341-342; *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994), but the prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The prosecutor need not state the inferences in the blandest possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant argues that the prosecution erred by vouching for the credibility of the complainant. A prosecutor may not vouch for the credibility of a witness to the effect that he has some special knowledge that the witness is testifying truthfully. *Bahoda, supra* at 276. A prosecutor may, however, argue from the facts that the defendant or another witness is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In this case, the prosecutor did not vouch for the complainant's credibility, but rather argued that the jurors should conclude that complainant was being truthful, and that defendant was not, based on the absence of evidence of any motive on complainant's part to lie, while defendant had an interest in hiding the truth. The prosecutor did not imply special knowledge of the complainants's truthfulness, *Bahoda, supra* at 276; *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988), nor did he vouch for her credibility based on the prestige of the prosecutor's office. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995).

Defendant also argues that the prosecution's cross-examination of Robin Hilts constituted badgering the witness. We disagree. The prosecutor was entitled to question Robin Hilts on matters relevant to her bias and her credibility and the cross-examination did not amount to badgering.

Defendant also argues that the prosecutor improperly stated in closing that applying the principles of reasonable doubt, burden of proof, and the presumption of innocence, does not mean that the jury is obliged to give defendant "the benefit of the doubt."

Defendant objected to the mischaracterization of the reasonable doubt standard, but apparently did not request a cautionary instruction. The court discussed the matter off the record with counsel, and then the prosecutor returned to the record to complete his rebuttal. Apparently, the prosecutor intended only to inform jurors that they were not required to give defendant the benefit of the doubt in evaluating his credibility as a witness and that they should evaluate his credibility just as they would evaluate the credibility of any other witness.

After argument, the trial court instructed the jury that it was the court's duty to instruct on the law, that the jury must take the law as the court states it, and that if a lawyer has said something different about the court, the jurors must follow what the court says. The court then instructed on the presumption of innocence, the burden of proof and the concept of reasonable doubt. While the court did not specifically direct the jury's attention to the prosecutor's statement during argument and distinguish between the standard of proof under which the jurors were to evaluate the guilt or innocence of defendant and the permissible method for evaluating defendant's credibility as a witness, defendant did not request such an instruction. Viewed in the context of the whole trial, including the jury instructions that followed promptly after the end of the prosecutor's rebuttal, the prosecutor's statement did not deprive defendant of a fair trial.

Finally, defendant argues that because at sentencing, the court refused to rely on a statement in the PSIR to increase defendant's offense score under the sentencing guidelines, the court necessarily erred in failing to strike the statement from his PSIR. We do not agree. A defendant may not challenge the accuracy of his PSIR on appeal unless he raised the issue at or before sentencing or he demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered. MCR 6.429(C), *People v Bailey (On Remand)*, 218 Mich App 645, 647; 554 NW2d 391 (1996). At sentencing, defendant responded that he had no challenges to the PSIR or the sentencing information report and merely argued against the prosecutor's effort to have the guidelines score increased based on the investigator's statement in the PSIR. The court concluded that in light of the testimony at trial, the investigator's statement did not justify increasing the score. The court's ruling did not obligate it to sua sponte delete information from the PSIR that defendant never requested the court to delete. We find no error.

Defendant also supplied an alternative version of an alleged prior incident of sexual misconduct reported in his PSIR during his allocution. This additional information also did not constitute an objection to the factual accuracy of the PSIR. In the absence of a challenge to the information, we conclude that defendant waived this issue.

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Helene N. White