

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DONALD EVERETT SIMMONS,

Defendant-Appellant.

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UNPUBLISHED

December 15, 2000

No. 220899

Calhoun Circuit Court

LC No. 98-004711-FC

Before: O’Connell, P.J., and Zahra and MacKenzie,\* JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), two counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b); MSA 28.788(5)(1)(a), and one count of gross indecency between males, MCL 750.338; MSA 28.570. The trial court sentenced defendant to ten to twenty years’ imprisonment for each count of first-degree criminal sexual conduct, one to two years’ imprisonment for each fourth-degree criminal sexual conduct conviction, and two to five years’ imprisonment for the gross indecency conviction. We affirm defendant’s conviction and sentence, but remand for determination whether the presentence investigation report should be corrected.

I. “Bad Acts” Evidence

Defendant contends that he did not receive effective assistance of counsel because his attorney failed to object to portions of the victim’s testimony that defendant characterizes as prejudicial evidence of his prior bad acts. Defendant also contends that the trial court violated his constitutional right to a fair trial in failing to interrupt the victim’s testimony or to order the jury to disregard the testimony. We disagree.

The testimony at issue, which was unresponsive, consisted of the victim’s statements that defendant asked to walk with the victim to the school where the criminal acts occurred because defendant had to visit his probation officer, whose office was located near the school. Defendant argues that this testimony was not admissible because it was “prior bad act” evidence, and

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

therefore inadmissible under MRE 404(b). Defendant blames both defense counsel and the trial court for allowing this prejudicial testimony into evidence.

The United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, sec 20, guarantee the right to effective assistance of counsel. *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show both that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). In this case, defendant has failed to overcome the presumption that defense counsel's failure to object was a matter of trial strategy. While defense counsel could have objected to the reference to defendant's probation, doing so would have drawn the jurors' attention to the very matter that defendant sought to avoid them hearing in the first place. See *People v Bahoda*, 448 Mich 261, 287 n 54; 531 NW2d 659 (1995) ("Certainly there are times when it is better not to object and draw attention to an improper comment.").

Defendant also argues that the trial court failed in its duty to prevent the admission of the victim's statement regarding his probation, and that the court should have given a cautionary instruction. We disagree. As noted, the testimony regarding defendant's probation was unresponsive, and a cautionary instruction would have further drawn the jury's attention to it. In our view, the trial court would have risked interfering with defense counsel's trial strategy had it acted without a request from defendant.

## II. The Prosecutor's Closing Remarks

Defendant next contends that the prosecutor deprived him of a fair trial when she attempted to evoke sympathy from the jury and to urge the jury to convict defendant to fulfill its civic duty. He further argues that his trial counsel was ineffective in not objecting to the comments. We disagree.

Defendant objects to the italicized portions of the following statement that the prosecutor made during closing argument:

When you go back into the jury room you are going to have to decide whether you think [the victim] was lying or not. Then if you think he is lying – if you feel he was lying, you also need to decide what is his motivation for lying. Why would he come in here and lie to us? There's a 15 year old boy at the time, now 16, he sat right there and in front of a group of complete strangers, all adults,

judge who he doesn't know, the attorneys, any strangers that decide to walk in off the street and sit in this courtroom, whether it be the newspaper or a group of Boy Scouts on a field trip, he had to sit there and tell this humiliating, degrading thing that happened to him.

*If that's not bad enough we have to sit here in front of everybody—he has to sit here, face the person that did that to him. He struggled with it. It was upsetting, but he did the best he can [sic]. He told you exactly what happened. He shared a very humiliating, degrading story with you. The evidence verifies it. What [the victim] told you verifies it.*

*Other witnesses told you he has not been himself. He's been crying. He's been upset. You yourself saw him crying and upset.*

This Court decides prosecutorial misconduct issues on a case-by-case basis. We must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of the prosecutor's remarks further depends on all the facts of the case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991).

Although a prosecutor may argue that the jury should believe a particular witness, the prosecutor may not appeal to the jury to sympathize with the victim. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Our review of the prosecutor's comments leads us to conclude that the prosecutor's arguments were not improper appeals for sympathy. The prosecutor made the remarks in the course of arguing that the victim's testimony was truthful. The statements were intended to focus the jury's attention on the victim's demeanor on the stand, not to garner sympathy for the victim. Consequently, defense counsel's failure to raise an objection did not constitute ineffective assistance.

Defendant also argues that the prosecutor made an improper civic duty argument when she stated: "The defendant has a right to a fair trial, but the victim also has a right too. He has a right to justice. [The victim] is asking you for justice." Defense counsel did not object to the statement at the time it was made, but instead told the jury in her own closing that the prosecutor had made an improper civic duty argument. Defendant now asserts that defense counsel was ineffective in failing to object to the remarks.

A prosecutor may not appeal to the fears and prejudices of jurors and persuade them to convict the defendant as part of their civic duty. *Bahoda, supra* at 282. We review the remarks in context to determine whether the prosecutor made an improper civic duty argument. *Id.* at 267, 283. In *People v Bass (On Rehearing)*, 223 Mich App 241, 251-252; 581 NW2d 1 (1997), vacated in part on other grounds in *People v Bass*, 457 Mich 866; 577 NW2d 667 (1998), the prosecutor made an appeal for "justice" during closing argument at the end of a lengthy discussion of the evidence, and then made further comments on the evidence. This Court concluded that the remarks were isolated, that the prosecutor's arguments were otherwise proper, and that an objection and curative instruction could have eliminated any prejudicial effect. This Court concluded that the prosecutor did not deny the defendant a fair and impartial trial. The

present case is indistinguishable from *Bass*, and therefore the prosecutor's remarks did not deprive defendant of a fair trial.

Nor do we conclude that defendant's attorney was ineffective for not objecting to the remarks. Defense counsel attempted to mitigate the effects of the prosecutor's argument in her own closing statements. Furthermore, given that most of the evidence was not in dispute, we cannot conclude that the result of the proceeding would have been different even if defense counsel had objected.

### III. Sentencing Issues

Defendant contends that he is entitled to resentencing because the court suggested that errors in the presentence report would be corrected if necessary, but never were, and because the court stated its belief on the record that defendant would not be incarcerated with a "generalized adult population," when in reality he was. Defendant argues that as a result of these errors the court relied on inaccurate information, which led to an improper sentence to a term of ten to twenty years in an adult prison. We disagree.

First, defendant contends that the basic information sheet in the presentence investigation report incorrectly stated that defendant was being sentenced in conjunction with a probation violation. The court said that the report would be corrected if, on further review, it determined that the report was incorrect. Defendant argues that because the court's sentence was not for his probation violation, the basic information sheet should have been changed and included in the record. Because all of the requested changes were not made, defendant contends that the court sentenced him based on inaccurate information and that he is entitled to resentencing.

The purpose of the presentence report is to give the sentencing court as much information as possible so that the sentence can be tailored to both the offense and the offender. *People v Miles*, 454 Mich 90, 97; 559 NW2d 299 (1997); *People v Potrafka*, 140 Mich App 749, 751; 366 NW2d 35 (1985). The information is presumed to be accurate, but on assertion of a challenge to the factual accuracy of the information, the court has a duty to resolve the challenge. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997); *People v Regelin*, 178 Mich App 128, 130; 443 NW2d 436 (1989), vacated in part on other grounds 437 Mich 897; 465 NW2d 327 (1991). Here, the court told defense counsel that it would resolve her challenges to the accuracy of the presentence report, but did not document whether it took any action.

At the sentencing hearing, the court considered numerous challenges to the presentence investigation report and immediately made most of the requested changes. Specifically, the court updated the number of days that defendant had served in prison and made a host of modifications to the scoring of certain offense variables. Regarding the probation violation sentence question, the court decided that any change, if necessary, would be made after a more careful review. The transcript regarding the probation sentence question reads as follows:

[Defense counsel]: . . . in regard to the first page of the basic information report, in the middle of that page it indicates a probation violation, new sentence, it's marked as yes. And I believe that that should be corrected to no. This isn't a probation violation sentence.

[The court]: All right. Once again, I'll ask Ms. Glass to check that out. If it's correct, she'll make the change.

We concur with defense counsel's assertion that his present sentence was not a probation violation sentence. We are also certain that the trial court was aware that defendant's sentence was for his convictions for CSC and gross indecency, and not for a probation violation. Since all parties were aware of this fact, we find no error. However, we remand to the trial court to determine whether the presentence investigation report warrants correction.

Defendant's second argument is that the court imposed a harsher sentence on him than it intended because of its mistaken belief regarding where defendant would actually be incarcerated. Defendant cites a statement that the prosecutor made before sentencing:

He was tried in this court. He was found guilty of a life offense. He is not going to be put in a cell with murderers and adult rapists. That is not going to happen.

Defendant also cites a statement that the trial court made before sentencing him:

I acknowledge your age. That's weighed heavily on me. It really has. But, on the other hand, this as the Prosecutor points out is an offense that ultimately carries up to life in prison.

\* \* \*

They have a new facility, Mr. Simmons, I think is designed for young people like you that are sex offenders, and I think you're going to get counseling there. You are not going to be included in a generalized adult population.

Defense counsel informs us that defendant is not in the Michigan Youth Correctional Facility that the prosecutor and the court apparently had in mind when they made these statements. Instead, defendant is incarcerated at the Michigan Reformatory with adult males ranging in age from fourteen to twenty-six years, or males of any age requiring certain protection needs. Defendant asks this Court to remand for resentencing because defendant was sentenced on the basis of inaccurate information.

Defendant suggests that the trial court must have intended a particular destination for him at sentencing and that the Department of Corrections was required to follow the court's loosely worded recommendation. Because the Department of Corrections placed defendant in a different location than the trial court apparently contemplated, defendant contends that the court relied on inaccurate information in sentencing defendant. We disagree. The trial court is responsible for sentencing the defendant and the Department of Corrections is responsible for determining where the defendant will serve the sentence. The court's comments in this case were merely observations regarding defendant's probable destination, not the court's intended destination for him. Moreover, while appellate counsel's affidavit indicates that defendant is incarcerated at a Michigan Reformatory in Ionia, the affidavit contains no information regarding whether the

facility differs from the one that the trial judge discussed. We find no error requiring reversal in this issue.<sup>1</sup>

Affirmed, but remanded for determination whether the presentence investigation report should be corrected. We do not retain jurisdiction.

/s/ Peter D. O'Connell

/s/ Brian K. Zahra

/s/ Barbara B. MacKenzie

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<sup>1</sup> Further, defendant's appellate counsel revealed at oral argument that he had been moved to the facility that he alleged that the trial court originally intended. Therefore, he no longer needs the relief that he requested in his brief on appeal.