

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY ALAN JONES,

Defendant-Appellant.

UNPUBLISHED

January 4, 2002

No. 224666

Macomb Circuit Court

LC No. 99-001309-FH

Before: Owens, P.J., and Holbrook, Jr. and Gage, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct involving a minor between 13 and 15 years of age, MCL 750.520d(1)(a). The trial court sentenced defendant to 1 to 15 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that insufficient evidence supported his conviction. The victim testified that in April 1999 when she was fourteen years of age, defendant pinned her against a couch, removed her pants and his own, then inserted his penis into her vagina and engaged in intercourse with her for approximately fifteen minutes or a half-hour. Viewing this testimony in the light most favorable to the prosecution, we conclude that a rational jury could have found beyond any reasonable doubt that defendant engaged in sexual penetration with another person who was between 13 and 15 years of age. MCL 750.520d(1)(a); *People v Godbold*, 230 Mich App 508, 522; 585 NW2d 13 (1998). To the extent that defendant characterizes the victim's testimony as incredible, we will not consider this credibility challenge in the context of defendant's insufficient evidence argument. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997) (noting that a trial court cannot determine witness credibility in deciding a motion for a directed verdict of acquittal, "no matter how inconsistent or vague that testimony might be").¹

¹ Although defendant failed to file a motion for new trial, he cites on appeal *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998), in support of his contention that the victim's lack of credibility warrants this Court's grant of relief. In *Lemmon*, the Supreme Court addressed to what extent a trial court reviewing a motion for new trial might consider the credibility of the trial witnesses. The Supreme Court held that a new trial based on the weight of the evidence should be granted only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result, and explained that absent exceptional

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Defendant next raises several allegations of prosecutorial misconduct. Defendant's failure to object at trial to many of the alleged instances of misconduct precludes appellate review unless any prejudicial effect could not have been cured by a cautionary instruction or our failure to consider the issue would result in a miscarriage of justice. *People v Cooper*, 236 Mich App 643, 650; 601 NW2d 409 (1999).

We first reject defendant's unpreserved contention that the prosecutor improperly urged the jury to place itself in the victim's position.² After reviewing the prosecutor's statement in context, we find that it did not improperly appeal to the jurors' self-interest but properly and rationally suggested that the victim was credible and worthy of belief. *Cooper, supra* at 653.

Defendant also asserts that the prosecutor injected improper other acts evidence "and labeled [defendant] as a repeat child molester" by inquiring of the victim on redirect examination, "I believe the testimony is [defendant]'s in jail on Samantha's case, all right?" The victim's friend Samantha was mentioned on several occasions during the victim's testimony, initially when the victim explained that she met defendant through Samantha. During cross examination of the victim, defense counsel inquired whether on the weekend in April 1999 after defendant was arrested she told defendant's sister that she "didn't know if [defendant] could have raped Samantha or not." Although the prosecutor's question on redirect did introduce the specific notion that defendant went to jail in early April 1999 for possibly committing a sexual assault against Samantha, defense counsel immediately objected to the prosecutor's inquiry and requested that it be stricken. The trial court sustained the objection, struck the question from the record, and provided a correct curative instruction to the jury "to disregard the reference made by

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circumstances a court may not substitute its view of witness credibility for the constitutionally guaranteed jury determination thereof. *Lemmon, supra* at 642.

Even had defendant moved for a new trial, defendant failed to establish that any exceptional circumstances existed that would justify a rejection of the victim's testimony. Contrary to defendant's argument on appeal, the victim's testimony did not contradict indisputable physical facts or laws or qualify as so inherently implausible that it could not be believed by a reasonable juror, and was not seriously impeached to the extent that the case was marked by uncertainties and discrepancies. *Lemmon, supra* at 643-644. The facts that the victim was uncertain regarding the exact date of defendant's sexual assault and that the assault might have occurred on a different day of the victim's spring break than the date to which she initially testified do not significantly undermine the jury's acceptance of her allegations that defendant sexually assaulted her. See *People v Naugle*, 152 Mich App 227, 235; 393 NW2d 592 (1986) (noting that time is not an element of a sexual assault offense). The same can safely be said with respect to the several other minor alleged imperfections in the victim's account, i.e., that she could not recall exactly how long she and defendant had spent at various locations before the assault, that she did not report the assault shortly after it occurred, that she recalled enduring the assault for anywhere between fifteen minutes and a half-hour, and that she could not remember whether defendant wore a condom during the assault; absolutely none of these alleged defects in the victim's testimony render it so implausible or uncertain that her account qualified as unworthy of belief.

² The prosecutor made the challenged remark during his opening statement, and defendant placed an objection on the record during the next day of the trial.

the prosecutor regarding Samantha's rape case," which was "stricken as evidence [and] therefore must not be considered as probative of the charge in this case." Under these circumstances, we cannot conclude that any impropriety in the prosecutor's inquiry more likely than not was outcome determinative. *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999).

To the extent that defendant challenges the prosecutor's mention of Samantha's name to the second witness who testified at trial, we conclude that the prosecutor did not attempt to inject unfounded prejudicial innuendo into the proceedings but merely phrased a question based on the previous trial testimony of the victim. *People v Duff*, 165 Mich App 530, 538; 419 NW2d 600 (1987); *People v Pearson*, 123 Mich App 462, 464; 332 NW2d 574 (1983).

For his final claim of prosecutorial misconduct, which also is unpreserved, defendant reprints the prosecutor's closing and rebuttal arguments and asserts that the prosecutor improperly vouched for the victim's credibility and defendant's guilt and shifted the burden of proof to defendant. After reviewing the prosecutor's arguments, we find that he properly argued from the evidence and the reasonable inferences arising therefrom that the victim was worthy of belief and that defendant was guilty, *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995); *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), and properly responded to defendant's suggestions that the victim's testimony was incredible and that she was lying. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant lastly argues that defense counsel rendered ineffective assistance when she inquired of the victim on cross examination whether she advised defendant's sister that she did not know whether defendant might have sexually assaulted Samantha. Defense counsel clearly intended to raise the inference that the victim was lying about defendant's assault by establishing that although the victim spoke with defendant's sister shortly after defendant allegedly assaulted her and was asked by defendant's sister whether she believed that defendant could have raped Samantha, defendant said nothing about her own assault by defendant. We will not with hindsight second guess defense counsel's ultimately unsuccessful trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Affirmed.

/s/ Donald S. Owens
/s/ Donald E. Holbrook, Jr.
/s/ Hilda R. Gage