

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OSCAR LEE HENSLEY,

Defendant-Appellant.

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UNPUBLISHED

March 8, 2002

No. 227954

Genesee Circuit Court

LC No. 99-005160-FC

Before: Jansen, P.J., and Zahra and Meter, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). He was sentenced as a fourth-offense habitual offender, MCL 769.12, to thirty-five to sixty years' imprisonment. He appeals as of right. We affirm.

Defendant argues that the trial court erred in admitting evidence of his prior conviction for unlawfully driving away an automobile (UDAA), MCL 750.413, for impeachment purposes pursuant to MRE 609. On appeal, defendant asserts that the conviction was inadmissible under MRE 609(c), because the conviction and release from confinement occurred more than ten years earlier. However, defendant did not make this argument in the trial court. On the contrary, defense counsel represented that defendant had been released from prison in June 1999, thus satisfying MRE 609(c).<sup>1</sup> Defendant also argues that the trial court erred in balancing the probative value against the prejudicial effect of the conviction as required by MRE 609(b). Despite the age of the conviction, the trial court concluded that, as a theft offense, it was probative of veracity and that its dissimilarity to the charged offense reduced the potential prejudice. On balance, the trial court did not abuse its discretion in admitting the prior conviction. *People v Bartlett*, 197 Mich App 15, 19; 494 NW2d 776 (1992).

Defendant argues that the prosecutor improperly "shifted the burden of proof" during closing argument by remarking that defendant had failed to produce witnesses to support his testimony that he was not alone with the complainant. Where, as here, defendant testifies at trial, the prosecutor may comment on his failure to call corroborating witnesses. *People v Fields*, 450

<sup>1</sup> Although defendant asserts that the presentence report indicates that he was released in 1988, he has not submitted a copy of the presentence report on appeal, as required by MCR 7.212(C)(7).

Mich 94, 115; 538 NW2d 356 (1995); *People v Jackson*, 108 Mich App 346, 351-352; 310 NW2d 238 (1981). Thus, the prosecutor's remarks did not improperly "shift the burden of proof" or deny defendant his right to due process.

Defendant also argues that he was denied his right to due process when the prosecutor remarked during closing argument that "she [the complainant] knows what will happen if her perpetrator is let go." Although defendant argues on appeal that the remark was an improper "community protection" argument, he did not object on this basis at trial. Therefore, the issue is not preserved, *People v Nantelle*, 215 Mich App 77, 86; 544 NW2d 667 (1996), and our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Because the trial court sustained defense counsel's objection to the remark, directed that the remark be stricken, and repeatedly advised the jury that statements of counsel are not evidence, we conclude that defendant's substantial rights were not affected by the remark. *People v Bahoda*, 448 Mich 261, 281; 531 NW2d 659 (1995).

Lastly, defendant argues that he was denied the effective assistance of counsel because trial counsel failed to object to (1) alleged hearsay testimony during the testimony of the complainant's adoptive mother and a police officer, (2) the prosecutor's cross-examination of defendant concerning collateral facts pertaining to his prior UDAA conviction, and (3) the prosecutor's community protection remark discussed above. Having considered the alleged errors by trial counsel, we conclude that none of them were prejudicial. In light of the strong physical evidence supporting the complainant's allegations, there is no reasonable probability that the outcome of the proceeding would have been different but for counsel's failure to object. *People v Toma*, 462 Mich 281, 202-303; 613 NW2d 694 (2000.)

Affirmed.

/s/ Kathleen Jansen  
/s/ Brian K. Zahra  
/s/ Patrick M. Meter