

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ELBERT PETERSON,

Defendant-Appellant.

UNPUBLISHED

June 18, 2002

No. 232022

Wayne Circuit Court

LC No. 00-004974

Before: Kelly, P.J., and Murphy and Murray, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to concurrent terms of ten to twenty years' imprisonment for the first-degree criminal sexual conduct convictions and four to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction. Defendant now appeals as of right. We affirm.

I.

Defendant argues that the prosecutor engaged in several instances of misconduct, the cumulative effect of which denied him a fair trial. We disagree but will discuss each of defendant's claimed acts of misconduct separately.

Defendant first claims that the prosecution committed misconduct with its statements that defense counsel misled and lied to the jury by reading a quotation from the prosecutor's opening statement as though it said that the prosecutor was concerned that the complaining witness might lie. "The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial." *People v Rice (On Remand)*, 235 Mich App 429, 434; 597 NW2d 843 (1999). When reviewing claims of prosecutorial misconduct, we examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether defendant was denied a fair and impartial trial. *Id.* at 435.

In this case, we find that defense counsel engaged in a serious and evidently deliberate misrepresentation by this misquotation. Indeed, this was only one of a number of instances of misconduct in closing argument by defense counsel. As such, the prosecution's response to the misquotation of her opening statement was not prosecutorial misconduct, but only a proper

attempt to clear the record on a matter crucial to the central issue in the case, the complaining witness' credibility. Similarly, the prosecution's argument that defense counsel was misleading the jury was also in response to defense counsel's mischaracterization of testimony. Although the prosecutor could have used a milder term to describe defense counsel's conduct, we have held that a prosecutor need not "confine argument to the 'blandest of all possible terms.'" *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001) (citations omitted). Accordingly, because the prosecutor's remarks were not improper, defendant was not denied a fair trial.

None of the remaining allegations of prosecutorial misconduct were preserved with an objection at trial. *People v Mitchell*, 223 Mich App 395, 400; 566 NW2d 312 (1997). We review such unpreserved issues for plain error affecting substantial rights, which generally requires a showing of prejudice. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Furthermore, reversal is not required if the prejudicial effect of the prosecutor's comments could have been prevented by a timely curative instruction. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

With this standard of review in mind, defendant next asserts that the prosecutor improperly vouched for the credibility of the complaining witness by making arguments unsupported by the record. A prosecutor may not make a statement of fact to the jury that is not supported by the evidence, but she is free to argue the evidence and any reasonable inferences that may arise from it as they relate to her theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). In this case, defendant's assertion is factually inaccurate. The prosecutor did not vouch for the credibility of the complaining witness. Rather, the prosecutor properly argued based on the evidence presented that the complaining witness was credible. *Id.*; *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). Thus, we find no error affecting defendant's substantial rights. *Carines, supra*.

Defendant also claims that the prosecutor mischaracterized the medical testimony by grossly misrepresenting the examining physician's testimony. We disagree. The prosecutor carefully explained to the jury that the physician did in fact testify that whatever penetration occurred was not necessarily of a sexual nature, much less committed by defendant, and that the injuries could not be dated precisely. Although the physician's testimony may have been somewhat ambiguous, we conclude that the prosecutor's characterization of it was not inaccurate. Regardless, any prejudice that may have resulted from the alleged mischaracterization of the testimony could have been cured by a timely instruction. As such, we find no error requiring reversal. *Schutte, supra*.¹

Defendant next claims that the prosecution committed misconduct during closing argument when it improperly referred to defendant as having a "sick, perverted mind." After a

¹ Defendant also argues that the prosecutor's statements in the opening statement as to what the medical testimony would show was contrary to the physician's testimony. This argument ignores the fact that an opening statement is merely an overview of what the attorney believes the evidence will show and is not evidence. Thus, we do not find prosecutorial misconduct when an opening statement later proves to be less than one hundred percent accurate.

thorough review of the pertinent portion of the record, we find that this remark was clearly in response to defendant's closing argument. We have held that "[o]therwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel." *Id.* Furthermore, we find that an instruction could have cured any prejudicial effect. *Id.*

Last, defendant claims that the cumulative effect of these errors deprived him of a fair trial. Because errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial have not been identified, there can be no cumulative effect of errors meriting reversal. *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

II.

In the alternative, defendant argues that trial counsel's failure to object to any of these alleged instances of prosecutorial misconduct constituted ineffective assistance of counsel. As the above discussion indicates, we have held defendant's prosecutorial misconduct claims to be without merit. Trial counsel is not required to raise meritless objections, and failure to do so does not constitute ineffective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

III.

Defendant's final argument is that the trial court erred in instructing the jury to disregard complainant's testimony regarding her having been the victim of sexual abuse by someone else five or six years ago. However, because the court already ruled that no evidence on this earlier incident could be admitted, and defendant affirmatively acquiesced in that ruling, his waiver has extinguished any error on appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ Christopher M. Murray