STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH FRANCIS STEAD,

Defendant-Appellant.

UNPUBLISHED
July 16, 2002

No. 229110
Charlevoix Circuit Court
LC No. 00-046409-FC

Before: Wilder, P.J., and Bandstra and Hoekstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct involving sexual penetration of a person under thirteen years of age, MCL 750.520b(1)(a). The trial court sentenced defendant to serve consecutive terms of 5 to 20 years' imprisonment. Defendant appeals as of right, claiming that he was denied his right to a fair trial by improper remarks made during closing argument by the prosecutor, and that his conviction was against the great weight of the evidence. We affirm.

Regarding defendant's claim that his right to a fair trial was compromised by the prosecutor's comments during closing argument, we first note that defendant failed to preserve this issue by objecting to the allegedly improper remarks during closing argument. Therefore, we review defendant's claim for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). To avoid forfeiture under the plain error rule, a defendant must prove that (1) error occurred; (2) the error was plain, meaning clear or obvious, and (3) the plain error affected the defendant's substantial rights. *Id*. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the trial. *Id*. Further, prosecutorial misconduct issues must be decided on a case by case basis, keeping in mind that "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*. at 721.

The first comment about which defendant complains is as follows:

> Ladies and gentlemen, what happened to [the victim] in this case is every working parent's nightmare. A nightmare that tragically came true.
>
> You drop off your most prized possession at someone's house that you know or you think you know that is caring and that will take care of them. And you find

> out later that while you're out trying to earn a living, the baby-sitter's boyfriend is molesting your four-year-old daughter.

Defendant contends that these comments improperly appealed to the jury's social fears and injected issues broader than defendant's guilt into the trial. We believe that whether these comments are improper is a close question; they arguably place the jury in the position of the victim's mother. However, the comments are also an outline of the prosecution's theory of the case, i.e., that the victim was abused while she was being cared-for by a trusted family friend. Nevertheless, when determining whether the comments were plain error we are guided by the principle that "where a curative instruction could have alleviated any prejudicial effect, reversible error will not be found." *Id*. Here, a curative instruction could have cured any prejudice resulting from the prosecutor's comments. Thus, defendant is not entitled to relief on the basis of these comments.

Defendant next complains that the prosecutor exceeded the bounds of proper argument when he asked the jurors to "listen to [their] gut instincts" and "convict the man that hurt" the victim. According to defendant, in making these comments the prosecutor asked the jurors to disregard the evidence and allow their verdict to be directed by the sympathies felt by most adults when confronted with allegations that a child has been sexually abused. However, when read in context, the comments do not ask the jury to disregard the evidence:

> What do you do when your four-year-old daughter looks you in the eye after she's going to bathroom [sic] at 10:30 at night and out of the blue says that her bottom hurts because [defendant] touches her – touches d- touches it down there? He puts his finger down there.
>
> Sitting there watching [the victim], listening to her in her child language, what do you do? You listen to your gut instincts in this case and you convict the man that hurt [the victim].

When read in context, the challenged comments ask the jury to consider the victim's testimony and, based on that testimony, convict defendant. The comments do not ask the jury to disregard the evidence, but rather specifically refer to the evidence presented in the case and argue that on the basis of that evidence defendant should be convicted. Accordingly, the challenged comments do not constitute error entitling defendant to relief.

Defendant next claims that the prosecutor improperly attempted to invoke "a stereotype of the typical 31-year-old male, and convince the jury that there is something unnatural about such males taking care of children, expressing affection for children, or giving children gifts." However, in context, the challenged comment reads as follows:

> The other reason is – reason to doubt is, according to the defense is that the defendant is the nicest guy in the world who would never hurt a child. He loves kids. He's around them all the time. He's everybody's baby-sitter. He takes kids on overnights.
>
> How reasonable is it for a 31-year-old single male to be so enamored with other people's children, to spend so much time with them and to give at least one of

> them a lot of gifts? Why was [the victim] so special? Why did she get so many presents? Maybe it was to shut her up.

In context, the statement is clearly an attempt to refute the defense's attempts to paint defendant as an individual who loves children and would never hurt them. It is also an attempt to argue the facts of the case and the reasonable inferences from those facts. See *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). Accordingly, we find no error in the comments.

Defendant also claims, however, that the prosecutor committed misconduct when she stated during closing argument that, "Every one of you sitting here, especially the women, know that a four or five-year-old little girl can't make something like this up." Once again, when read in context the statement takes on a meaning altogether different than when extracted from the comments surrounding it. After making the subject comment, the prosecutor continued:

> Because, as I said before, and I don't want to beat a dead horse here, but the only way that a child that age that's not over-sexualized and not been exposed to sexual type things and it seems like a normal four or five-year-old little girl, the only way they know that they've got something like that on their body, an anatomical part, and that knows enough to say "ouch" is sadly enough to have lived it and to have had that happen. And the medical – it's no coincidence that the medical backed that up.

The opening sentence, about which defendant complains, is arguably improper to the extent that it singles out the women as having some inherent knowledge that a child cannot lie about sexual abuse. In fact, as defendant points out, there was no evidence at trial to support such a conclusion. However, in context, the statement is tied to the evidence in this case. The prosecutor supports her claim that the victim could not have lied by referring to the victim's mother's testimony that the victim had not been exposed to any sexual material or been told about her sexual organs. In that regard, the prosecutor's comments merely draw an inference from the evidence – namely, that the victim could not have fabricated the penetration because she did not even know that penetration of her body was possible. Therefore, even assuming that the prosecutor's comments were error, because the prosecutor explained what she meant by the comment and referenced the evidence in the case in doing so, reversal is not warranted because an objection and curative instruction could have dispelled any improper inference that child sexual assault victims were incapable of lying. Defendant is not entitled to relief on this basis.

Defendant's final claim of prosecutorial misconduct concerns comments in which the prosecutor asserted that the victim told her version of the abuse to a nurse and to the police. In fact, there was no testimony that the victim had told a nurse (though there was testimony that she had told a doctor) and no specific testimony regarding what the victim had told the police. A prosecutor may not make comments that are unsupported by the evidence. *Watson*, *supra*. However, once again, any error in the prosecutor's comments could have easily been alleviated by a curative instruction clarifying the fact that there was no evidence that the victim spoke with a nurse or told the police the about the abuse. Thus, reversal is not required. *Id*. at 586.

We also reject defendant's contention that the cumulative effect of the prosecutor's comments requires reversal of his convictions. When determining whether cumulative error denied a defendant a fair trial, "only actual errors are aggregated to determine their cumulative

effect." *People v Bahoda*, 448 Mich 261, 292, n 64; 531 NW2d 659 (1995). Factors relevant to a cumulative error determination are "the extent to which the remarks may have misled the jury and prejudiced defendant, whether they were isolated or extensive, whether they were deliberately or accidentally injected, and the strength of other evidence against defendant." *Id*. at 292-293, n 64. Here, only three of the comments were even arguably error, and two of those comments – those regarding the victim's ability to lie about the abuse and to whom the victim had told her version of the abuse – were not outright appeals to sympathy or to societal fears. Indeed, each of the comments were brief and had some reference to the facts of the case, factors which lead us to conclude that those comments could not have seriously misled the jury. The remaining comment – the first about which defendant complained, and which arguably placed the jury in the position of the victim or her mother – while not particularly isolated, was an attempt to relate the prosecution's theory of the case to the jury. Given that the comments in sum were not seriously misleading, that all of the comments were brief, and that all three had some reference to the facts of the case, we do not conclude that their combined effect deprived defendant of a fair trial. Accordingly, defendant is not entitled to relief on the basis of the cumulative effect of these errors.

Finally, defendant asserts that the verdict in this case is against the great weight of the evidence. In making this argument, defendant frames the issue as one of credibility – that of the victim versus defendant – and this Court will not resolve issues of witness credibility. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998) ("absent exceptional circumstances, issues of witness credibility are for the jury"). Indeed, in *Lemmon*, the Court indicated that in the context of a motion for a new trial based on a theory that the great weight of the evidence preponderated against the verdict "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id*. at 647. Thus, reversal is not warranted in this case because the victim's testimony, even when impeached, supported the verdict in this case. See *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999).

We affirm.

/s/ Kurtis T. Wilder
/s/ Richard A. Bandstra

I concur in result only.

/s/ Joel P. Hoekstra