

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROY WILLIAMS MORTON,

Defendant-Appellant.

UNPUBLISHED

April 15, 2003

No. 239030

Macomb Circuit Court

LC No. 2001-002213-FC

Before: Gage, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury on eight counts of first-degree criminal sexual conduct, that being four counts of penile vaginal sexual penetration with a child under thirteen years of age, MCL 750.520(b)(1)(a), and four counts of penile/vaginal sexual penetration with a child over thirteen years but less than sixteen years of age and the defendant being a member of the same household, MCL 750.520(b)(1)(b).¹ He was also convicted by the same jury on four counts of third-degree criminal sexual conduct for engaging in penile/vaginal sexual penetration using force or coercion to accomplish the sexual penetration, MCL 750.520(d)(1)(b). He was sentenced to twenty-five to forty years for the first-degree criminal sexual conduct convictions and five to fifteen years for the third-degree criminal sexual conduct convictions. He appeals as of right and we affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first alleges prosecutorial misconduct, arguing that the prosecutor's opening statement was an improper appeal to jurors' sympathies and referenced some courtroom behavior from the previous day. The defense did not object at the time, therefore, the remarks could not be cured by an immediate instruction. The alleged improper statement went as follows:

You will understand that this is not some story. This is not some little actress up there that this is real. You are going to see what this has done to this kid and the evidence will show you will be able to observe. I believe you were already able to observe it yesterday. Her reaction when those charges were being read. That this is very real.

¹ The complainant is defendant's stepdaughter.

Apparently the prosecution was referring to the behavior of the complainant while the court read the charges to the jury pool that had been assembled in the courtroom. The defense claims that this remark during the opening statement denied him a fair trial. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prejudicial remarks made by a prosecutor are grounds for reversal only where an objection and a curative instruction could not have rectified the situation. *Id.* An examination of the record demonstrates that there was no miscarriage of justice.

Complainant alleges the prosecutor's remark was an inappropriate appeal to sympathy. We find, however, this was a brief isolated statement that did not blatantly appeal to the jury's sympathy. In fact, the jury had an opportunity to witness the incident and the prosecutor did not have to say much more than what he did. In addition, the court later instructed the jury that the prosecutor's statements are not evidence and that sympathy should not influence their decision. Any alleged prejudice was cured by the trial court's subsequent instructions.

Defendant next contends that the trial court erred in failing to grant his motion for a new trial in response to the allegation that the verdict was against the great weight of the evidence. It is in the trial court's discretion to grant or deny a new trial, and this Court reviews the trial court's decision for an abuse of discretion. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). An abuse of discretion exists when the trial court's denial of the motion was manifestly against the clear weight of the evidence. *Id.* Although defendant filed a motion for new trial contesting the issue of the verdict being against the great weight of the evidence, he failed to file the transcript of the hearing wherein the court denied the motion on June 6, 2002. Although one could construe this as an abandonment of his issue on appeal, *People v Anderson*, 209 Mich App 527; 531 NW2d 80 (1995), we will consider it simply based on the evidence.

In reviewing the record as a whole it is for the trier of fact to determine the credibility of the witnesses. *People v Lemmon*, 456 Mich 625, 642-643; 576 NW2d 129 (1998). Complainant testified that defendant sexually abused her on a regular basis for six years. He denied it. There is no error in denying a motion for a new trial where the only issue is which witness to believe. See *id.* The issue of credibility should not be disturbed lightly. This Court will not substitute its judgment for the trier of fact regarding this issue of credibility. In addition there was a third witness, that being the defendant's son-in-law, Joseph Williams, who saw the defendant leave the victim's bedroom sometime between 3 and 3:30 a.m. one morning, fastening up his bathrobe and looking startled when he saw Mr. Williams. This clearly corroborates at least one instance of the many that was testified to by the complainant. The transcript clearly demonstrates all the elements of the crime charged. The trial court did not abuse its discretion by denying the motion for new trial.

Affirmed.

/s/ Hilda R. Gage
/s/ William B. Murphy
/s/ Kathleen Jansen