

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

January 13, 2004

Plaintiff-Appellee,

v

No. 243888

Washtenaw Circuit Court

LC No. 01-001388-FH

MATTHEW WAYNE OWENS,

Defendant-Appellant.

Before: Donofrio, P.J., and Griffin and Jansen, JJ.

PER CURIAM.

Defendant, Matthew Wayne Owens, appeals as of right his conviction by a jury of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). Defendant was sentenced by the trial court to nine months in jail, with credit for time served. We affirm.

On appeal, defendant first contends that there was insufficient evidence to sustain his conviction of fourth-degree criminal sexual conduct. In reviewing the sufficiency of the evidence in a criminal case, this Court must review the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000); *People v Harmon*, 248 Mich App 522, 524; 640 NW2d 314 (2001). “The standard of review is deferential: a reviewing court is required to draw all reasonable inferences and make credibility choices in support of the jury verdict.” *Nowack*, *supra* at 400. This Court must resolve all evidentiary conflicts in favor of the prosecution. *Harmon*, *supra* at 524.

Defendant was charged with engaging in sexual contact with another person and “[t]hat other person is at least 13 years of age but less than 16 years of age, and the actor is 5 or more years older than that other person.” MCL 750.520e(1)(a). MCL 750.520a(n) defines “sexual contact” as “the intentional touching of the victim’s or actor’s intimate parts or the intentional touching of the clothing covering the immediate area of the victim’s or actor’s intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification, done for a sexual purpose, or in a sexual manner . . .”

Here, the charge against defendant stems from an incident following a belated neighborhood Fourth of July party (on July 7, 2001). Many friends, neighbors, and neighborhood children were present at the party, including defendant and his daughter, and the

victim, a thirteen-year-old girl. After consuming alcohol and becoming visibly intoxicated, defendant was invited to sleep at the nearby house of his friend, John Vanharen. Several neighborhood girls were also having a sleepover there with Vanharen's younger children. The victim testified that defendant was dancing near her and a friend during the party and was trying to "get up on it, like dancing with us," which made the two girls feel uncomfortable. She testified that following the fireworks display she took the youngest Vanharen child back to the Vanharen house where the other girls and defendant were staying. When the victim entered the house, she encountered defendant, who was headed upstairs at the time. She testified that he whispered in her ear "will you come visit me." Defendant then kissed her on the cheek, hugged her, and placed both of his hands on her buttocks. She pushed him away and told him "no." The victim testified that she felt uncomfortable following the incident and returned to the living room until her mother entered the house. She then left with her mother and informed an adult about the incident the following day.

Defendant now contends there was insufficient evidence to sustain his conviction of fourth-degree criminal sexual conduct. Defendant maintains there was no objective or corroborative evidence presented regarding the allegations made by the victim that he kissed her and touched her buttocks for the purpose of sexual arousal or gratification, done for a sexual purpose, in a sexual manner. We disagree.

The victim's testimony alone adequately established the elements of the charged offense. The testimony of a criminal sexual conduct victim need not be corroborated. MCL 750.520h; *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). In addition, the testimony of another witness reinforced the victim's version of the incident. Madison Vanharen, then nine years old, testified that defendant kissed the victim in the living room and that the victim attempted to "back off" from defendant. A friend of the victim testified that defendant was dancing near her and the victim at the party and, after she informed defendant that they were only thirteen, he made the comment that "you guys have the bodies of a 17 year old." Although the defense pointed out tangential inconsistencies in the victim's testimony, the determination of the credibility of the witnesses belongs to the trier of fact, even if the testimony is inconsistent. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). A jury verdict may not be overturned on the basis of credibility determinations. *Nowack, supra*; *Terry, supra* at 452. Here, the evidence presented at trial adequately established that defendant intentionally touched the victim's buttocks while stating that he wanted her "to come up and visit him," and that defendant was aware that the victim was thirteen years old at the time. A rational jury, when viewing the evidence in the light most favorable to the prosecution, could have determined that the essential elements of the crime were proven beyond a reasonable doubt. *Nowack, supra*.

Defendant next contends that he was denied a fair trial by alleged prosecutorial misconduct. Defendant argues that during closing argument, the prosecutor diverted the jury with a personal, disparaging attack on defense counsel and misrepresented the nature of the evidence presented at trial. Specifically, defendant cites portions of the argument of the prosecutor purportedly attacking the credibility and skills of defense counsel: the prosecutor argued that defense counsel "smelled blood," that she "paraded pages of testimony up to these fourteen year olds [witnesses]," and that some of the inconsistencies in the witnesses' testimony pointed out by defense counsel were "pure fantasy on the part of the defense."

Because defendant failed to object to the allegedly improper remarks during trial, this Court will only review defendant's claim for plain error. *People v Carines*, 460 Mich 750, 764-765, 774; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Carines, supra* at 763. "The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings." *Id.* "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.* "Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse." *Id.* "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affected the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.*

Prosecutorial misconduct issues are decided case by case, . . . and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. . . . Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. . . . Prosecutorial 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. [*Schutte, supra* at 721 (citations omitted).]

We conclude that no prosecutorial misconduct occurred. The prosecutor referred to the impeachment of witnesses to show that the inconsistencies that were revealed were immaterial to the case. Defense counsel attacked the witnesses' credibility during cross-examination, and the prosecutor's comments were responsive to issues raised by defense counsel. The record does not indicate that the prosecutor went outside the evidence presented at trial. Moreover, there is no indication that the prosecutor directly attacked defense counsel's credibility or made statements to purposely mislead the jury. The prosecutor's remark regarding defendant's "fantasy" theory was in direct response to defense counsel's closing statement, and the prosecutor's comment about defense counsel "parading pages of testimony" was used to demonstrate that the inconsistencies uncovered were not relevant to the case. Such arguments do not constitute plain error affecting defendant's substantial rights, *Schutte, supra*, and, therefore, appellate review of this unpreserved issue is not warranted.

Finally, defendant argues that he was denied a fair trial "when the trial court received a note from the jury indicating that they were deadlocked and sent them back in without consulting with counsel or addressing the concerns." Defendant maintains that the trial court improperly refused to advise the undecided jury regarding the steps it should take to resolve the deadlock and, by treating the jury's dilemma this way, the court essentially coerced the jury into returning a verdict. Because defendant failed to challenge this procedure at trial, review of this claim is limited to plain error affecting defendant's substantial rights. *Carines, supra*.

Defendant's claim that the trial court did not consult with counsel on receiving notes from the jury is without merit. At 3:27 p.m. on the third day of trial, the court, in the presence of the prosecutor and defense counsel, stated that he had received two notes from the jury. The first note asked how long the jurors would be required to stay in deliberation because many of them

needed to contact their families. The court responded by informing the jurors that he would keep them until 6:00 p.m. that evening, and if a verdict had not been reached, he would have them return at 8:30 a.m. the following day. The second note stated that they were unable to reach a unanimous verdict. In response to this note, the court read the “deadlocked jury” instruction, CJI2d 3.12, and sent them back for further deliberations. The court clarified the separate notes and responses to counsel, and they both signed the notes indicating they were aware that they had been received and addressed by the court. There is no indication in the record that the court ignored either note, and both attorneys were made aware of and acknowledged that they had been received.

Moreover, a judge may instruct a jury after deliberation begins on any instructions that are appropriate. MCR 6.414(F). The extent to which a court instructs the jury lies within the sound discretion of the trial court. *People v Perry*, 114 Mich App 462, 467; 319 NW2d 559 (1982). Here, there is no evidence of coercion on the part of the trial court because there was no substantial deviation from the standard “deadlocked jury” instruction, CJI2d 3.12. *People v Pollick*, 448 Mich 376, 384; 531 NW2d 159 (1995); *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984). The record does not otherwise suggest that the trial court gave any instruction or acted in a manner that would have caused a juror to abandon his or her own conscientious opinion and defer to the decision of the majority solely for the sake of reaching a unanimous verdict. *Hardin, supra* at 316. Thus, we conclude that no plain error occurred that would require reversal of defendant’s conviction.

Affirmed.

/s/ Pat M. Donofrio
/s/ Richard Allen Griffin
/s/ Kathleen Jansen