

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MYRON DAVID WATKINS,

Defendant-Appellant.

UNPUBLISHED

December 19, 2006

No. 264957

Livingston Circuit Court

LC Nos. 04-014377-FC;

04-014378-FH

Before: Meter, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for multiple counts of first- and second-degree criminal sexual conduct. MCL 750.520b; MCL 750.520c. Defendant received eight concurrent sentences, the longest which is 18 to 40 years' imprisonment. We affirm.

On appeal, defendant alleges five separate instances of prosecutorial misconduct during the prosecutor's closing rebuttal arguments. Defendant properly preserved two of the five instances for appeal, leaving three unpreserved. This Court reviews preserved prosecutorial misconduct claims on a case-by-case basis and decides whether the prosecutor's comments, taken in context, deprived the defendant of a fair and impartial trial. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). In order to merit reversal, the defendant has the burden of showing that it is more probable than not that the misconduct affected the outcome of the case. See *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

Appellate review of unpreserved claims of prosecutorial misconduct is generally barred because the trial court did not have the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). However, a defendant may seek review of improper prosecutorial remarks if a curative instruction could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *Id.* Review of unpreserved claims is for plain error. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004).

Defendant's first claim of prosecutorial misconduct, which was properly preserved, is that the prosecutor "testified" during her rebuttal closing by arguing facts that were not in evidence. Prosecutors may not make statements that are unsupported by the facts in evidence. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). In this case, we agree that the prosecutor argued facts outside of the evidence when she cited a statistic related to the

presence of physical evidence in sexual conduct cases that was not introduced in order to refute an argument made by defense counsel. Nonetheless, the error was cured by the trial court's sustaining the defense objection and providing a curative instruction. Defendant presents no evidence to suggest that the error was outcome determinative. See *Lukity, supra* at 496. And, defendant does not argue on appeal, nor is it apparent from the record, that the curative instruction was insufficient to cure the prosecutor's error. Therefore, we hold that the defendant has failed to meet his burden of proof that the challenged statement deprived him of a fair trial.

Defendant's second claim of prosecutorial misconduct is not properly preserved. Trial counsel objected on one ground, but defendant appeals on a different ground. Defendant argues that the prosecutor made a personal attack on the credibility of defense counsel during her rebuttal closing. After the trial court sustained defendant's objection related to the prosecutor's statistical reference, the prosecutor stated, in reference to physical evidence, "It's not going to be there. And it's not reasonable, he [defense counsel] knows it, that's why he just objected." The remark was "out of line," but defendant has not shown that the curative instruction, which was subsequently issued by the trial court, did not mitigate the prejudice, if any, that was caused by the prosecutor's remarks. See *Stanaway, supra* at 687. In addition, defendant did not offer proof, and the record does not reflect, that defendant suffered a miscarriage of justice because of the remark. *Id.* Therefore, we hold that no plain error occurred. Reversal is not required.

Defendant's third claim of prosecutorial misconduct is based on the prosecutor's reference to shootings that occurred at an Atlanta courthouse during the trial. Defendant did not make a timely, contemporaneous objection or ask for a curative instruction. This issue was therefore not properly preserved for appeal. *Stanaway, supra* at 687. Defendant argues that the prosecutor's remarks constituted an improper civic duty argument. We disagree. The prosecutor did not inject an issue broader than the guilt or innocence of defendant into her closing, and she did not encourage the jurors to suspend their powers of judgment. *People v Bahoda*, 448 Mich 261, 284; 531 NW2d 659 (1995); *People v Truong*, 218 Mich App 325, 340; 553 NW2d 692 (1996). Looking at the prosecutor's remarks in context, it is apparent that she used the shootings as an example to illustrate the point that a criminal's actions are not always logical, which was a direct response to defense counsel's argument that witness testimony was inconsistent and did not make sense. The argument was not improper. Moreover, defendant did not prove that a curative instruction could not have cured any prejudice. Reversal based on the comment is not required.

Defendant's fourth claim of prosecutorial misconduct, which was properly preserved, is that the prosecutor improperly appealed to the jury's sympathy by telling them that she is "a mom" and, therefore, tries to be kind to child victims. It is improper for a prosecutor to use arguments that only appeal to the jury's sympathy. *People v Hedelsky*, 162 Mich App 382, 385; 412 NW2d 746 (1987). Nonetheless, as the lower court observed, the prosecutor's statements were not an improper plea for sympathy. The challenged comment was made in response to defense counsel's accusation that the prosecutor was staging a show for the jury's benefit. We therefore find that defendant has not shown that the prosecutor's remarks deprived him of a fair trial.

Defendant's final claim of prosecutorial misconduct is not preserved. Defendant argues that the prosecutor cried and showed undue emotion during her closing, which in turn deprived defendant of a fair trial. There is no evidence in the lower court record that supports or suggests

that the prosecutor cried. Defendant does not present evidence to support his assertion, other than his own self-serving argument. Moreover, tears, in and of themselves, are not grounds for an automatic reversal. Defendant must establish that the prosecutor's conduct affected the outcome of the proceedings and resulted in the conviction of an actually innocent defendant or interfered with the fairness, integrity, or public reputation of the trial, regardless of innocence. *Thomas, supra* at 454. Defendant has failed to show that the alleged tears were so prejudicial that a curative instruction could not alleviate the prejudice or that the tears themselves require reversal.

Affirmed.

/s/ Patrick M. Meter
/s/ Peter D. O'Connell
/s/ Alton T. Davis