

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEITH ALLEN MANSFIELD,

Defendant-Appellant.

UNPUBLISHED

April 3, 2008

No. 277155

Oakland Circuit Court

LC No. 2006-211073-FH

Before: Whitbeck, P.J., and Jansen and Davis, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of two counts of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a), for which he was sentenced to two years' probation with 183 days in jail. We affirm. This appeal is being decided without oral argument. MCR 7.214(E).

I

Defendant first argues the prosecutor committed misconduct (1) by stating in closing argument that defendant was a "flat out liar," and (2) by using the prestige of her office to vouch for the victim and by telling the jury that it would be "absurd" to find that the victim was lying. We disagree.

The prosecutor did not refer to defendant as a "flat out liar." Rather, the prosecutor stated that defendant had "flat out lied" on the witness stand by giving testimony that was inconsistent with his prior statements given at a police interview. A prosecutor may use "emotional language" in closing argument, *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003), and is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case, *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Further, "there is no reason why an attorney may not state to the jury his belief that a witness is or is not credible where there are testimonial conflicts and the outcome of the case turns upon which witnesses the jury believes." *People v Johnson*, 62 Mich App 63, 75; 233 NW2d 188 (1975). We conclude that the prosecutor's comments, when taken in context, were not objectionable because they were made in reference to specific evidence and were not used as a personal attack on defendant's credibility.

Nor did the prosecutor commit error by vouching for the credibility of the victim. “A prosecutor may not vouch for the credibility of witnesses by claiming some special knowledge with respect to their truthfulness[.]” *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005); see also *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, the prosecutor is allowed to argue from the facts that a witness is believable when the defendant’s guilt depends on whom the jury should believe. *Johnson, supra* at 75; see also *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The prosecutor did not improperly vouch for the victim or claim to have any special knowledge of the victim’s credibility. Instead, the prosecutor reasonably argued that the victim was believable on the basis of certain inconsistencies in defendant’s statements to the police and defendant’s testimony at trial. The prosecutor’s comments did not amount to improper vouching.

II

Defendant next argues that defense counsel was ineffective for failing to object to the abovementioned, alleged prosecutorial improprieties. We disagree. Because the issue was not preserved for appellate review, our review is restricted to errors apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

To establish ineffective assistance of counsel, a defendant must show that trial counsel’s performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that but for counsel’s error, the result of the proceedings would have been different. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). In this case, the challenged prosecutorial remarks did not improperly denigrate defendant or vouch for the victim’s credibility. Therefore, any objection to these challenged comments would have been futile. “[C]ounsel does not render ineffective assistance by failing to raise futile objections.” *Ackerman, supra* at 455. We perceive no ineffective assistance of counsel in this regard.

III

Defendant argues in his supplemental brief that the trial court erred by denying his request for a copy of the victim’s videotaped statement and that reversal is required because the court failed to order the prosecution to turn over the video recording. He contends that the video would have constituted favorable impeachment evidence. Defendant is entitled to no relief.

It is true that criminal defendants have a due process right to obtain favorable or exculpatory evidence that is in the possession of the prosecution. *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963); *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). This general rule extends to favorable impeachment evidence in the prosecution’s possession as well. *United States v Bagley*, 473 US 667, 676; 105 S Ct 3375; 87 L Ed 2d 481(1985); *People v Banks*, 249 Mich App 247, 254; 642 NW2d 351 (2002).

However, the failure to disclose favorable impeachment evidence “does not require automatic reversal, even where, as in the present situation, the prosecution’s case depends largely on the credibility of a particular witness.” *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The failure to disclose favorable impeachment evidence in the prosecution’s

possession requires reversal “only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Id.* at 281-282.

We acknowledge that the defense did not receive a copy of the victim’s videotaped statement. However, even assuming *arguendo* that the video would have provided favorable impeachment evidence, we cannot conclude that reversal is required. The defense received a written transcript of the victim’s videotaped statement, and defense counsel used this transcript to impeach the victim at trial. Defendant now asserts that trial counsel would have been better able to impeach the victim with the actual videotape than with the written transcript. However, defendant does not specify the manner in which counsel’s impeachment of the victim would have differed had he possessed the actual videotape. We cannot conclude that the failure to turn over the actual videotape of the victim’s statement in any way affected the outcome of defendant’s trial. *Id.* No reversal is required on this ground.

Nor can we conclude that reversal is required under the best evidence rule, MRE 1002, which requires the admission of an original recording in order to prove the contents of that recording. We find that the trial court strictly violated the best evidence rule by admitting the written transcript in place of the original recording. However, defendant has not established that it is more probable than not that this evidentiary error influenced the outcome of his trial. MCL 769.26; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Alton T. Davis