

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KELVIN DEWAYNE MILLER,

Defendant-Appellant.

UNPUBLISHED

April 3, 2008

No. 277776

Kalamazoo Circuit Court

LC No. 06-001819-FC

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of criminal sexual conduct in the first degree, the victim being under 13 years of age, MCL 750.520b(1)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to serve concurrent terms of imprisonment of 20 to 40 years for each conviction. Defendant appeals as of right. We affirm.

The prosecutor's theory of the case was that defendant, while dating the young victim's mother, imposed fellatio on the victim on two occasions, the second time telling her he had some "juice" for her, then to spit it out, then not to tell of the ordeal under threat of death. The victim, who was 17 years old at the time of trial, testified that she thought she was in kindergarten at the time in question.

Defendant's sole argument on appeal is that he was denied a fair trial through improper statements from the prosecutor during opening statements and closing arguments.

On appeal, prosecutorial statements admitted over objection are analyzed to determine whether the defendant was denied a fair and impartial trial. *People v Marji*, 180 Mich App 525, 539; 447 NW2d 835 (1989), remanded on other grounds sub nom *People v Thomas*, 439 Mich 836 (1991). However, unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). Comporting with the latter statement is this Court's pronouncement in *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), that, "[a]bsent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct."

A prosecutor enjoys wide latitude in fashioning arguments, and may argue the evidence and all reasonable inferences from it. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). However, it is well established that a prosecutor may not urge a jury to convict out of sympathy for the victim. See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

In this case, during opening statements, over defense counsel's objections, the prosecutor urged the jury, "Believe the child," adding, "When a child's voice cries out for help, it is a tragedy if there is no one there to listen." The prosecutor went on to advise the jury that the teenaged complainant would be overcoming shyness and innocence to describe "vile, shameful, humiliating" experiences from ten years earlier.

Then, at the close of proofs, the prosecutor argued as follows:

Children don't lie, nor adults, to get themselves into trouble.

When [the complainant] came forward and told the police and is now telling you what happened to her ten years ago by this Defendant, she has gotten herself into nothing but trouble. Imagine having to go to a police station, spend an hour or two talking with a detective as a result of what she had said, someone charged with a crime. Having to come to court and testify at a preliminary exam in front of a strange judge. Having to come to the prosecutor's office and talk to me about preparing for trial. Having to come here and take days off of school and testify . . . in front of 13 strange people in a strange courtroom in front of a strange judge, in front of her perpetrator, in front of a strange defense attorney. Having to subject herself to cross-exam both at the preliminary exam and at a trial, knowing that they are going to challenge her testimony. And knowing that she is going to get questioned about all these other little details that she can't remember.

These remarks drew no objections.

We see nothing pernicious in the closing argument. A prosecutor need not confine argument to the "blandest of all possible terms." *Marji, supra* at 538, quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). Where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). In this case, the prosecutor appropriately sought to offer explanations, based on matters in evidence or not in dispute, for why complainant waited approximately a decade before coming forward with her allegations. Reminding the jury that complainant had no incentive to lie, but many to keep quiet, was not an improper appeal to sympathy.

We agree with defendant, however, that the trial court should have sustained the objections to the challenged remarks in the prosecutor's opening statement. As an initial matter, the admonishment to "[b]elieve the child," was not a description of what the prosecutor hoped to prove, but was argument presented prematurely. See MCR 6.414(C) and (G). However, we do not deem the foreshadowing of argument properly presented at the close of proofs as itself denying defendant a fair trial.

Of greater concern is the admonishment that it is tragic when “a child’s voice cries out for help” but does not reach a sympathetic ear. This statement could hardly have had any effect other than to encourage the jury to let sympathy for the victim affect its deliberations. However, such argument is not prejudicial where the bulk of the prosecutor’s arguments were properly tied to the evidence and applicable law. See *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988).

The trial court instructed the jury to decide the case solely on the basis of the evidence, and that the statements of counsel were not evidence. The court additionally instructed that sympathy should not come into play. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because the prosecutor only briefly lapsed into improper argument invoking sympathy, but otherwise confined himself to proper subject matter, and because the trial court’s instructions should have cured any prejudice, we conclude that there is no reasonable possibility that the errors in the prosecutor’s opening statement that defendant brings to light might have contributed to the conviction. The error was therefore harmless, warranting no appellate relief. See *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette