

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES ANTHONY SMITH,

Defendant-Appellant.

UNPUBLISHED

February 17, 2009

No. 280191

St. Clair Circuit Court

LC No. 07-000718-FH

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Defendant was sentenced to serve four to 15 years in prison. We affirm defendant's conviction but remand for resentencing and correction of the presentence investigation report (PSIR) consistent with this opinion.

Defendant first argues that the prosecutor committed misconduct by vouching for the credibility of the complainant and appealing to the jury's sympathy. We agree in part, but we do not find the error sufficient to warrant reversal.

As a general rule, prosecutors have "great latitude" regarding their arguments and conduct. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, "[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), citing *Bahoda, supra* at 276. In addition, "[a]ppeals to the jury to sympathize with the victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Because defendant did not object at the time, we review defendant's assertion that the prosecutor denied him a fair trial for plain error that affected defendant's substantial rights. *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007).

The specific portions of the prosecutor's closing argument to which defendant now objects was as follows:

There are other reasons why [the complainant's] testimony is credible in this case. We can't forget first and foremost, [the complainant] took an oath. Every witness that got up on the witness stand today took an oath. [The complainant] is 13 years old. She promised to Judge Deegan, she promised to the Court that she was going to tell you the truth and *that oath means something to*

her. She told you exactly what happened in the garage. She told you what happened with Tony. [Emphasis added.].

* * *

[The complainant] didn't charge Mr. Smith [defendant] with this crime. The People of the State of Michigan did. *This is not a girl that has decided to try to get someone in trouble.* It was not her choice to do this. And as you can tell by her demeanor on the stand, this was not fun for her. She is a 13-year-old girl that should be enjoying the warm weather, she should be thinking about ending school, she should be thinking about summer with her friends, not coming to court. Not testifying to 13 people about her breasts and about how her mother's ex-boyfriend groped them in the garage.

This was not fun for [the complainant] and to think that someone of her age and of her character would perpetuate a lie to this point to tell all of the people she's had to tell about this, -- Detective Manns, myself, a judge at a preliminary hearing, all of you, Judge Deegan -- to think that someone would fabricate that to this extent, to the pain of herself and her family, is not reasonable. [Emphasis added.]

* * *

If you return a verdict of guilty today you can't undo what Tony [defendant] did to [the complainant], but you can give her some justice. You can let her know that all that she's been through with this case is not for nothing. You can let her know that the turmoil and the testimony hasn't been wasted. Because she's telling the truth and she wants you to understand that what Tony did to her is wrong. So for [the complainant] and for everything that she's been through in bringing this case to light for you, I ask that you find Tony guilty.

The latter quoted portion of the prosecutor's statements clearly amounted to asking the jury to sympathize with the complainant by letting "her know that all that she's been through with this case is not for nothing" and by asking the jury to find defendant guilty "for everything that she's been through in bringing this case to light for you." However, the improper statement was brief, and the trial court instructed the jury that "[t]he lawyers' statements and arguments are not evidence" and that it "should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." Because "jurors are presumed to follow their instructions," *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008), we do not find the error violative of defendant's substantial rights.

A prosecutor's comments do not constitute improper vouching if they constitute "arguments from the facts and testimony that the witnesses at issue were credible or worthy of belief" as opposed to implying that the prosecutor "had some special knowledge that the witnesses were testifying truthfully." *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Further, a prosecutor's remarks are evaluated in context. *Id.* at 64. The context of the prosecutor's quoted statement was an extended argument that if the complainant had fabricated her allegation that defendant sexually molested her, she would have made a report sooner and would have described a more aggravated incident than being inappropriately touched over her

clothing, and furthermore although children “lie to get out of trouble,” the complainant’s report here came closer to “[lying] to get into it.” The prosecutor properly argued that the evidence showed that the complainant was credible, not that the prosecutor had special knowledge of her truthfulness.

The prosecutor’s reference to the complainant as not being a girl who decided to try to get someone in trouble was part of an argument that she did not decide to pursue a criminal charge against defendant and that this factored in favor of her credibility because she did not seek to get defendant in trouble for the incident. The complainant’s mother testified that she called Detective Manns after the complainant told her about something that happened with defendant and that Detective Manns interviewed the complainant. Detective Manns testified that he called the complainant’s mother after being assigned this case, that the complainant’s mother told him that her daughter told her about being touched inappropriately by defendant, and that on the same day he located and interviewed the complainant. Notwithstanding minor discrepancies, the testimony suggests that the complainant’s mother and the police – not the complainant – decided to pursue a criminal charge against defendant. The prosecutor’s statement that the complainant was not a girl who decided to try to get someone in trouble could plausibly be considered reasonable argument from the evidence.

The prosecutor’s assertion that someone of complainant’s age would not perpetuate a lie of this kind all the way through a trial could be a reasonable argument that someone of her age would lack the sophistication to do so, although the reference to her “character” is a closer call. It appears to have been a reasonable reference to her personality and demeanor, particularly her discomfort at testifying; the prosecutor’s statement indicating that this was “not fun” for the complainant was supported by her testimony that it was not easy to talk about what happened with defendant and that she was “pretty upset testifying here today.” Further, it may have been supported by the complainant’s demeanor on the stand. Finally, the prosecutor’s discussion of the complainant’s oath could plausibly be viewed as an argument that the complainant’s demeanor – which the jury could observe for itself – suggested that the complainant took that oath seriously. In short, we find no improper vouching.

Defendant also asserts that the prosecutor committed misconduct during closing argument when the prosecutor stated that the complainant’s testimony describing where defendant had touched her during the preliminary examination was consistent with her testimony during the trial. Defendant argues that this was a misstatement of the evidence because her testimony was, in fact, inconsistent. We disagree.

At the preliminary examination, the complainant indicated that defendant touched her “over top of” her clothes and she explained that she had a shirt and bra on at the time. The complainant never clearly stated during the preliminary examination that defendant touched her breast under her clothing. During the trial, the complainant testified that defendant touched her breast over her clothing and she also corrected defense counsel when he suggested she had testified it was under her clothing at the preliminary examination. Both the preliminary examination transcript and the trial transcript clearly reflect that the complainant stated she was

touched over her clothing.¹ Accordingly, the prosecutor's argument that the complainant's testimony about being touched over her clothes was "very consistent" was proper argument from the evidence. See *Schumacher, supra* at 178-179 (a prosecutor "is free to argue the evidence and all reasonable inferences arising from it as they relate to the prosecution's theory of the case."). We find no misstatement of evidence.

Next, defendant argues the prosecutor improperly cross-examined defendant about the court order removing the children from the home and a no contact order directed at defendant. Defendant contends that the prosecutor improperly attempted to convince the jury that defendant behaved improperly toward not only the complainant, but also the complainant's young sister. We believe that when read in context, the questions from the prosecutor were permissible.

Significantly, defense counsel elicited testimony from defendant on direct examination that the children were removed from the household in June of 2006; defendant testified that he was not "ordered per se not to have any contact with the children," but rather was "just ordered not to have any contact with [the complainant's mother]." The prosecutor inquired whether the no-contact order was at least partially because defendant left the complainant's sister alone. Cross-examination is permissible regarding any relevant matter, including credibility. MRE 611(b). It appears that the cross-examination was to test defendant's credibility in indicating that the no contact order did not involve the children, rather than to imply that defendant had sexually molested the complainant's sister.

Defendant cites *People v Di Paolo*, 366 Mich 394; 115 NW2d 78 (1962). In that case, the prosecutor asked the defendant on cross-examination "whether or not on the 23d day of November, 1940, you were convicted of rape in Erie, Pennsylvania," to which the defendant replied that he was not convicted. *Id.* at 396. The prosecutor further asked "if the police records show that, they are wrong," to which the defendant replied affirmatively. *Id.* However, the prosecution made no attempt to establish that the defendant had in fact been convicted of rape in Pennsylvania. *Id.*² In contrast, the prosecutor here did not improperly suggest an unverified fact. Indeed, at one point in the cross-examination, defendant in the present case said "Okay, yeah" when asked if he was asked to leave the house in part in relation to the complainant's sister, in contrast to the complete denial of the defendant in *Di Paolo* of having been convicted of rape. *Di Paolo* is inapposite.

¹ The complainant did provide an incomplete answer beginning with "He touched me under -" whereupon defense counsel interrupted with an objection. We cannot conclude that this sentence fragment constitutes a true answer, and in any event, the complainant shortly thereafter expressly testified that defendant touched her over her clothing. Although defense counsel could have reasonably argued that the incomplete answer was inconsistent, it was also not a misstatement of evidence for the prosecutor to effectively contend that it did not constitute true testimony.

² Under current Michigan law, a conviction of rape would not typically be admissible for impeachment purposes because MRE 609 allows impeachment only with convictions of crimes containing an element of dishonesty or false statement or an element of theft. However, it was apparently available for impeachment purposes at the time.

Defendant also argues he received ineffective assistance of counsel because his defense counsel did not object during the prosecutor's closing argument to the alleged instances of prosecutorial misconduct. However, the only improper prosecutorial argument established by defendant involved an improper appeal to the jury to sympathize with the complainant, and those relatively brief remarks did not deny defendant a fair trial. Indeed, it is possible that objection might have called the jury's attention to those remarks. Thus, trial counsel's failure to object to those remarks does not support a claim of ineffective assistance of counsel. See *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000) (to establish a claim of ineffective assistance of counsel a defendant "must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial").

Next, defendant argues he should be resentenced because the trial court improperly relied on polygraph examination results during sentencing. We agree. The trial court left defendant's polygraph results in the PSIR over defendant's objection and even implied that it considered the polygraph examination "relevant" and that it believed the polygraph examination put "some things in perspective." Doing so was simply impermissible and constitutes reliance on inaccurate information. *People v Allen*, 49 Mich App 148, 151-152; 211 NW2d 533 (1973). Under MCL 769.34(10), reliance on inaccurate information is an exception to the rule under the sentencing guidelines that this Court "shall not remand for resentencing" if a sentence is within the guidelines range.³ We remand for resentencing and order the trial court to strike any reference to the polygraph examination from the PSIR. See *People v Hoyt*, 185 Mich App 531, 535; 462 NW2d 793 (1990) (holding that a trial court must strike inaccurate or irrelevant information from the PSIR before sending the report to the Department of Corrections).

In order to provide guidance on remand, we nevertheless consider defendant's other assertion of error in his sentencing. Defendant argues that the trial court was not permitted to consider dismissed charges when determining defendant's score for offense variable (OV) 13. We disagree.

It is appropriate to score OV 13 at 25 points if "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). This is irrespective "of whether the offense resulted in a conviction." MCL 777.43(2)(a). A defendant's criminal history may include arrests and juvenile charges without convictions. *People v Cross*, 186 Mich App 216, 218; 463 NW2d 229 (1990); see also *People v Williams*, 111 Mich App 818, 825; 314 NW2d 769 (1981) (holding that a trial court "may consider other criminal activity for which no conviction resulted, provided that defendant has an opportunity for refutation."). Thus, the trial court did not err for considering the dismissed charges in scoring OV 13. Furthermore, a Michigan sentencing court does not violate *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), by engaging in judicial fact-finding to score the offense variables. *People v McCuller*, 479 Mich 672, 676; 739 NW2d 563 (2007). However, the

³ See also *People v Francisco*, 474 Mich 82, 88; 711 NW2d 44 (2006), stating that "if a minimum sentence falls within the appropriate guidelines range, a defendant is not entitled to be resentenced unless there has been a scoring error or inaccurate information has been relied upon."

trial court's scoring of OV 13 impermissibly included consideration of defendant's polygraph results. On remand, the trial court should determine whether the preponderance of the evidence *other* than the polygraph results reflects that defendant committed felonious sexual assault incidents against the complainant's sister.

Defendant's conviction is affirmed, but we remand for resentencing and correction of the PSIR. We do not retain jurisdiction.

/s/ Henry William Saad

/s/ Alton T. Davis

/s/ Deborah A. Servitto