

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS RICHARD RUTKOWSKI,

Defendant-Appellant.

UNPUBLISHED

December 17, 2009

No. 285753

St. Clair Circuit Court

LC No. 07-002780-FC

Before: Donofrio, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant appeals as of right his convictions of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c. The trial court sentenced defendant to concurrent prison terms of 15 to 30 years on the CSC I counts and 5 to 15 years on the CSC II count, with 41 days' credit. We affirm.

Defendant's convictions arose out of his sexual relationship with his roommate's daughter, which started when the daughter was approximately aged nine and continued several years until she moved to live with her father out of state. The girl alleged that defendant abused her nearly every day, starting with digital/genital abuse and progressing to digital, object, and penile penetration. The abuse took place when the girl accompanied defendant on long haul trucking jobs, as well as in the homes defendant shared with the girl, her brother, and her mother.

Defendant's theory of the case was that the girl and her brother concocted the CSC allegations in order to be permitted to live with their father. According to defendant, the children did not like the discipline and chores that their mother and defendant imposed upon them, and the children perceived their father to be more lenient. This theory rested in large part upon whether the jury found the girl's trial testimony credible. The convictions indicate that the jury found the girl's description of the abuse to be credible. We defer to the jury's credibility determinations. *People v Lemmon*, 456 Mich 625, 645-646; 576 NW2d 129 (1998). Accordingly, we will not reverse defendant's convictions unless defendant can establish an error warranting reversal.

Defendant first argues that the prosecutor committed several acts of misconduct during voir dire, opening statement, and closing argument. Defendant objected to only one of these alleged acts of misconduct. During closing argument, defendant objected to the prosecutor's assertion that a mattress was missing from defendant's home. Defendant argued that there was no evidence of a missing mattress. The trial court allowed the prosecutor to continue the argument concerning the mattress. Defendant now contends that the reference to a missing mattress was a constitutional due process violation. We disagree.

When addressing a constitutional error involving prosecutorial misconduct, this Court examines the record to determine whether the alleged misconduct tainted the trial to such a degree that the conviction was a denial of due process. *People v Blackmon (After Remand)*, 280 Mich App 253, 262; 761 NW2d 172 (2008). We find no misconduct in the mattress reference, and thus find no constitutional violation. A prosecutor's statements to the jury must be supported by the evidence or by reasonable inferences from the evidence. *People v Unger*, 278 Mich App 210, 241; 749 NW2d 272 (2008). Here, having reviewed the evidence and the exhibits, we find that the prosecutor's argument was a reasonable inference from the evidence.

Defendant also contends that the prosecutor improperly stated that defendant first touched the girl sexually on the outside of her clothes. As defendant points out, the record does not support the prosecutor's statement. A prosecutor may not refer to evidence unless the evidence is substantiated. *People v Wolverton*, 227 Mich App 72, 78; 574 NW2d 703 (1997). If the prosecutor fails to substantiate evidence referenced in opening statement, this Court must determine whether the prosecutor acted in bad faith, and whether the lack of substantiation prejudiced the defendant. *Id.* Here, we find no bad faith. The references to touching outside of clothing had limited persuasive value, particularly in light of the girl's extensive testimony describing digital/genital, object/genital, and genital/genital touching. The prosecutor's brief references to touching outside of clothing did not increase the likelihood that the jury would convict defendant of the charged conduct. As such, we find no error.

In addition, defendant contends that the prosecutor committed misconduct by reneging on an agreement that the girl would undergo a medical examination. Defendant has not provided this Court with a record of the putative agreement, which apparently occurred prior to the time the prosecutor dismissed charges against defendant without prejudice. Moreover, defendant has provided nothing to indicate that a physical examination would have resulted in exculpatory evidence, given the amount of time that had elapsed since the alleged abuse. Consequently, we find no misconduct regarding the lack of a medical examination. *Cf. Brady v Maryland*, 373 US 83; 83 S Ct 1194, 10 L Ed 215 (1963).

Defendant also asserts that the prosecutor improperly bolstered the girl's credibility, improperly appealed to the jurors' sense of civic duty, and misstated the burden of proof. We disagree with these assertions. The challenged statements were responsive to statements or arguments made by defendant. "A prosecutor may fairly respond to an issue raised by the defendant." *People v Brown*, 279 Mich App 116, 135; 755 NW2d 664 (2008).

Defendant next argues that the trial judge made erroneous evidentiary rulings and exhibited an obvious bias toward the prosecution. Although defendant claims that these errors

were constitutional in nature, we disagree, and accordingly we apply the standard of review for nonconstitutional errors. To prevail on his evidentiary challenges, defendant has the burden of demonstrating that the trial court abused its discretion and that the errors resulted in a miscarriage of justice. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). To prevail on his unpreserved challenge to the trial court's neutrality, defendant must demonstrate plain error affecting his substantial rights. *Id.*

We find no abuse of discretion in the trial court's evidentiary rulings, nor do we find evidence of bias. Defendant first sought to introduce evidence from the girl's electronic messaging sites, which included references to use of alcohol and marijuana. Defendant argued that this evidence was admissible to impeach the girl's preliminary examination testimony that her father forbade her from using alcohol or drugs. As plaintiff correctly points out, evidence concerning whether the girl used alcohol or marijuana is at best tangentially probative of whether her father actually allowed such behavior. Accordingly, under MRE 403, the trial court was within its discretion to exclude the evidence.

We recognize that one of the electronic messages appears to relate information concerning the girl's perception that her father would allow her to choose whether to use alcohol. Although this electronic message may have been admissible for impeachment purposes, we find no error requiring reversal in the exclusion of the message. Defendant introduced other impeachment evidence and has not demonstrated that exclusion of this particular message was a miscarriage of justice. *Carines*, 460 Mich at 774. Likewise, we find that defendant has not established an abuse of discretion or a miscarriage of justice to support his other allegations of evidentiary error.

Defendant's claims of judicial bias are similarly flawed. This Court presumes that the trial judge was impartial, and the burden is on defendant in this case to overcome the presumption. See *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992). To prevail, defendant must demonstrate a "deep-seated favoritism or antagonism" on the part of the trial judge. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999). A contested judicial ruling will rarely support a claim of bias. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 597; 640 NW2d 321 (2001). Moreover, "[a] trial judge's erroneous ruling, even when 'vigorously and consistently expressed,' is not grounds for disqualification." *Ireland v Smith*, 214 Mich App 235, 249; 542 NW2d 344 (1995). We find nothing in the record to indicate that the trial court was biased against defendant.

Lastly, we reject defendant's claim that the verdict was against the great weight of the evidence. Although the majority of the testimony against defendant came from the complainant, we have previously decided that a complainant's testimony alone is sufficient to uphold a CSC conviction against a challenge to the weight of the evidence. See *People v Musser*, 259 Mich App 215, 219; 673 NW2d 800 (2003). Further, our Legislature has established that "[t]he testimony of a [CSC] victim need not be corroborated in prosecutions under [MCL 750.520b to 520g]." MCL 750.520h.

Here, the prosecutor presented sufficient evidence to allow reasonable jurors to find that defendant engaged in sexual conduct with an underage girl who was a member of his household.

See MCL 750.520b; MCL 750.520c. The evidence included testimony describing sexual activity to support the CSC II count and testimony describing sexual penetrations to support the CSC I counts. *Id.* As noted previously, we cannot second-guess the jury's determinations as to the credibility of the witnesses. Accordingly, we must affirm the convictions.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Donald S. Owens