

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH GERALD KINNEY,

Defendant-Appellant.

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UNPUBLISHED

April 12, 1996

No. 167748

LC No. 92-001866-FC

Before: Fitzgerald, P.J., and Corrigan and C.C. Schmucker,\* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a), involving his daughter. He was sentenced to prison terms of eight to twenty-five years for each of the first-degree CSC convictions, and eight to fifteen years for the second-degree CSC conviction. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial by the admission of the hearsay testimony of Dr. Charles Barone regarding statements made to him by the victim. Defendant did not object to Dr. Barone's testimony. An evidentiary issue to which a party did not object at trial may not form the basis for reversal on appeal unless a substantial right of the party was affected. *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995). Because the victim's statements were properly admitted under the medical exception to the hearsay rule, no error occurred. MRE 803(4); *People v Meeboer*, 439 Mich 310, 322; 484 NW2d 621 (1992).

Next, defendant contends that he was denied a fair trial by the admission of the hearsay testimony of witnesses Marisglio, Winokur, Spanke, and Attia. Again, defendant failed to object to any of the allegedly improper testimony. *Barclay, supra*. We have reviewed the allegedly improper testimony of the witnesses and find that it was either not hearsay or was harmless because it was cumulative. Manifest injustice is not present.

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\* Circuit judge, sitting on the Court of Appeals by assignment.

Defendant also maintains that he was denied a fair trial by improper prosecutorial comments during closing arguments. Specifically, defendant argues that the prosecutor improperly stated her personal belief in the credibility of the victim and expressed her personal opinion regarding defendant's credibility and guilt. Defendant failed to object at trial to the alleged improper statements. Appellate review of improper prosecutorial remarks is generally precluded absent an objection by counsel. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Id.*

Manifest injustice is not present in this case. Contrary to defendant's suggestion, the prosecutor did not vouch for the victim's credibility, nor did the prosecutor express her personal opinion regarding defendant's guilt. Rather, the prosecutor argued reasonable inferences that arose from the evidence as it related to her theory of the case, *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989), and properly argued that defendant was not worthy of belief. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990).

Defendant also asserts that he was denied the effective assistance of counsel by his counsel's failure to object to the hearsay testimony of witnesses Barone, Winokur, Marsiglio, Spanke, and Attia, and by counsel's failure to object to the prosecutor's statements during closing argument. We disagree. As noted above, the testimony of the witnesses was either not inadmissible hearsay, or its admission was harmless. A claim of ineffective assistance of counsel based on defense counsel's failure to object that could not have affected defendant's chances for acquittal is without merit. *People v Lyles*, 148 Mich App 583, 596; 385 NW2d 676 (1986).

Last, defendant argues that defense counsel was ineffective by failing to investigate, present a defense, and timely file a notice under the rape shield statute informing the court that he would be questioning the victim about previous allegations of sexual abuse. At trial, defendant made an offer of proof to admit evidence concerning the victim's allegation of sexual abuse. The trial court ruled that the evidence was admissible. Defense counsel then elicited testimony from a social worker that she filed a petition in Probate Court to place the victim in foster care. The witness further testified that during her investigation there were allegations that the mother's boyfriend had inappropriately touched the victim and that there was a court order denying contact between the victim and the mother's boyfriend. Therefore, defendant was able to present testimony that the victim had made prior allegations of sexual abuse. Consequently, defendant has demonstrated no prejudice as the result of defense counsel's failure to file a notice pursuant to the rape shield statute. *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994).

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Maura D. Corrigan  
/s/ Chad C. Schmucker