

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GLENN ROBERT BARKER,
Defendant-Appellant.

UNPUBLISHED
May 24, 1996

No. 183704
LC No. 94-2688-FH-H

Before: Gribbs, P.J., and Hoekstra and Stark,* JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of second-degree criminal sexual conduct. Two of the complainants had been defendant's foster daughters prior to his divorce. One of the complainants was defendant's adopted daughter. All three complainants were minors. Defendant was sentenced to five years probation, first year in county jail. We affirm.

First, defendant argues that the trial court erred in denying his motion for a directed verdict because there was no evidence that defendant was a member of the same household as his adopted daughter. MCL 750.520c(1)(b)(i); MSA 28.788(3)(1)(b)(i). We do not agree.

This Court explained, in *People v Garrison*, 128 Mich App 640, 645-647; NW2d (1983), that the "same household" provision of the statute assumes a close and ongoing subordinating relationship that a child experiences with a member of his or her family or with a coercive authority figure." The "length of residency or permanency of residence has little to do with the meaning of the word as it is used in the statute. Rather, the term denotes more of what the Legislature intended as an all-inclusive word for a family unit residing under one roof for any time other than a brief or chance visit." *Id.*

The complainant at issue here is defendant's adopted daughter. Defendant had frequent visitation with her after his divorce, and was sole caretaker of the child during those times. Defendant and his daughter were a family unit residing under one roof during those times, and defendant's ongoing relationship with his child was neither "brief" nor "chance". The abuse alleged in this case occurred

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

when defendant was staying at the complainant's home for a few days to care for her and the other children while their mother, his ex-wife, was in the hospital. Even though defendant and complainant were not staying in defendant's house at the time of the incident, they were a family unit residing under the same roof. The evidence was sufficient to allow a rational trier of fact to find beyond a reasonable doubt that defendant and the complainant were members of the same household at the time this incident occurred.

Defendant also argues that a directed verdict should have been granted because there was no evidence that the touching of a foster daughter complainant was or could have been for the purpose of sexual gratification. There is no merit to this issue. The complainant testified that defendant directed her into her mother's bedroom and had her remove her pants and lie on the bed. Defendant rubbed her vagina and asked her if it felt good. Viewed in a light most favorable to the prosecution, a rational trier of fact could find that the touching was for the purpose of sexual arousal or gratification.

Finally, defendant argues that he was denied a fair trial because the prosecutor improperly vouched for the credibility of the witnesses and for defendant's guilt. Defendant did not object to any of the challenged remarks below. Appellate review of prosecutorial misconduct is foreclosed where the defendant fails to object or request a curative instruction unless the misconduct was so egregious that no curative instruction could have removed the prejudice to the defendant, or if manifest injustice would result from this Court's failure to review the alleged misconduct. *People v Allen*, 201 Mich App 98, 104; 505 NW2d 869 (1993). Questions of prosecutorial misconduct are decided case by case. This Court examines the record and evaluates the prosecutor's remarks in context. The test for prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995).

In this case, while the prosecutor did argue that the complainants' testimony should be believed, he went on to say that the jury must decide who to believe. Although the prosecutor submitted that the complainants' testimony constituted credible evidence, he did not vouch for their credibility. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

Nor, where defendant gave several versions of the charged events, did the prosecutor err in arguing that defendant was lying. *People v Sharbnow*, 174 Mich App 94, 100; 435 NW2d 772 (1989). We find no manifest injustice here.

Affirmed.

/s/ Roman S. Gribbs

/s/ Joel P. Hoekstra

/s/ Charles H. Stark