

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAMILTON CHARLES GILBERT,

Defendant-Appellant.

UNPUBLISHED

June 7, 1996

No. 191998

LC No. 92005336-PC

ON REMAND

Before: Doctoroff, C.J., and O'Connell and Smolenski, JJ.

PER CURIAM.

This case is before us on remand from our Supreme Court. In Docket No. 154079, we reversed defendant's conviction because of the prosecutor's improper use of child sexual abuse syndrome evidence and prosecutorial misconduct. Our Supreme Court remanded the case for reconsideration in light of *People v Peterson* and *People v Smith*, 450 Mich 349; 537 NW2d 857 (1995); *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995); and *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995). We now affirm defendant's convictions but remand for reconsideration of defendant's sentence in light of the erroneous scoring of the sentencing guidelines.

In our earlier decision, we held that, during rebuttal, the prosecutor erroneously compared the victim's testimony to the expert's explanations of normal behavior for a sexual abuse victim. We stated that the following statements by the prosecutor to the jury during rebuttal merited reversal:

Isn't it incredible that this child who just made this up, according to Mr. Haynes, who doesn't have enough good sense to make up her story so it coincides with what Mr. Haynes believes to be reasonable and normal sexual activity and preferences? She just happens to make up a story that coincides so wonderfully with the physical evidence? Isn't that remarkable?

And isn't it remarkable that she was able to demonstrate the kind of qualities that Mary Ann McRoberts [the expert on child sexual abuse] has indicated are consistent with a

child that has been sexually molested having never met Mary Ann McRoberts, having never been examined by Mary Ann McRoberts.

* * *

That in fact she is behaving in a manner that is consistent with a child who has been sexually abused; not wanting to have her father punished; wanting to go home; wanting to be in the home and loved by her family; wanting to be in a position where she is still loved by her father, continuing to love her father; not wanting to report it because she was afraid of reprisal because she would be found to be bad, that she did something bad that she shouldn't let her father do these things.

In *Peterson, supra*, our Supreme Court clarified its earlier opinions about the admission of expert testimony in child sexual abuse cases. The Court stated that the prosecution may present evidence in its case-in-chief to generally explain the common post-incident behavior of children who are victims of sexual abuse if that evidence is relevant and helpful. The prosecutor may comment on the evidence adduced at trial by comparing reasonable inferences drawn from the expert's testimony to the facts of the case. *Id.* at 373.

Pursuant to *Peterson*, we now hold that the prosecutor's comments during rebuttal only amounted to a comparison between the expert's testimony at trial and the victim's testimony. Because the victim's testimony was among the facts of the case, the prosecutor's remarks were not erroneous.

In our earlier decision, we also determined that several other comments by the prosecutor constituted prosecutorial misconduct. We review claims of prosecutorial misconduct to determine if the alleged misconduct denied defendant of a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 343; ___ NW2d ___ (1995).

First, we held that the prosecutor made remarks during rebuttal that improperly emphasized the prestige of the prosecutor's office. In *People v Bahoda, supra*, the Supreme Court stated that invoking the prestige of the prosecutor's office in the case against a defendant is improper. However, if such comments are made during rebuttal, they may not be improper if they are responsive in nature and if any prejudicial effect could have been eliminated by a curative instruction. *Id.* at 286. During closing argument, defense counsel stated that a social services worker and a police officer did not believe complainant's testimony because complainant changed her story after their initial visit. During rebuttal, in response to this argument, the prosecutor asked the jury why the prosecutor's office and the police would expend their resources on this case if they did not believe the complainant. Defendant did not object to the prosecutor's statement. We find that the prosecutor's statements were responsive in nature and could have been cured by an instruction. Pursuant to *Bahoda*, the statements that mentioned the investigation of the prosecutor's office did not constitute prosecutorial misconduct.

Second, we questioned a comment by the prosecutor during rebuttal that defendant had not supplied any motive for the complainant to lie. Because this statement was made in response to

defendant's argument that complainant lied about defendant's actions, this statement did not constitute prosecutorial misconduct. *Id.* Furthermore, the prosecutor's suggestions that defendant did not supply any motive for complainant to lie amounted to an appropriate rebuttal of defendant's allegations. *People v Fields*, 450 Mich 94; 538 NW2d 356 (1995).

Third, we expressed concern about the prosecutor's comment during rebuttal that complainant "broke down in tears" during her testimony. The trial court instructed the jurors that they should not let sympathy influence their decision. The jurors had already seen the complainant crying on the witness stand. Although this reference by the prosecutor was improper, this statement alone did not deny defendant a fair and impartial trial. *People v Kulick*, 209 Mich App 258, 264; 530 NW2d 163 (1995).

Next, because defense counsel did not object to any of the prosecutor's allegedly improper statements during rebuttal, defendant alleges that he was denied effective assistance of counsel. In order to prove that ineffective assistance of counsel deprived a defendant of a fair trial, the defendant must prove the existence of two elements. First, defendant must show that counsel's performance was deficient. Second, the defendant must show that counsel's errors were so serious as to deprive the defendant of a fair trial. *People v LaVearn*, 448 Mich 207, 213; 528 NW2d 721 (1995). As we mentioned, the prosecutor's statements during rebuttal were not inappropriate in light of defense counsel's statements during his closing argument. The one improper statement did not deny defendant of a fair trial. Therefore, we do not find that defendant was denied effective assistance of counsel.

Finally, defendant argues that the trial court erred when it assessed ten points under Offense Variable Six (OV 6). A court should assess ten points pursuant to OV 6 when more than one victim was placed in danger as a result of defendant's actions. Michigan Sentencing Guidelines (2d Ed, 1988). However, this scoring of OV 6 only applies to situations in which there are multiple victims in the same criminal transaction. Victims of prior, uncharged offenses should not be considered in the calculation of OV 6. *People v Chesebro*, 206 Mich App 468, 471; 522 NW2d 677 (1994). Because the trial court awarded ten points based on uncharged offenses against defendant's other daughters over a period of years, we remand this case to the trial court. On remand, the trial court should determine whether it would impose the same sentence in light of the changed guidelines scoring. *Id.* at 468. A trial court may consider uncharged offenses to determine if it should sentence defendant in excess of the guidelines recommendation. *People v Coulter (Aft Rem)*, 205 Mich App 453, 456; 517 NW2d 827 (1994).

/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell
/s/ Michael R. Smolenski