

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DENNIS MICHAEL QUIMBY,

Defendant-Appellant.

UNPUBLISHED

June 18, 1996

No. 183999

LC No. 94-025718-FC

Before: Doctoroff, C.J., and Neff and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced defendant to seven to fifteen years' imprisonment. Defendant appeals as of right, claiming he was denied a fair trial based on prosecutorial misconduct and improper polling of the jury. Defendant also argues that the trial court failed to state its reasons for its departure from the sentencing guidelines. We affirm, but remand for articulation of the basis for exceeding the recommended maximum sentence.

Defendant argues that several instances of prosecutorial misconduct denied him a right to a fair trial. We disagree. The test for prosecutorial misconduct is whether the defendant was denied a fair trial by the prosecutor's actions. *People v Hermiz*, 207 Mich App 449, 452; 526 NW2d 1 (1994). Issues of prosecutorial misconduct are decided on a case-by-case basis. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 520 (1994).

First, defendant asserts that the prosecutor improperly vouched for the credibility of witnesses and injected facts not in evidence into the proceedings by making arguments concerning the victim's reaction to the crime. At trial, defendant failed to object to these statements by the prosecutor. Therefore, our review is foreclosed unless the alleged misconduct would result in a miscarriage of justice. *People v Slocum*, 213 Mich App 239, 241; 539 NW2d 572 (1995). After a careful review of the record, we conclude that no miscarriage of justice will result from our refusal to review these issues.

Second, defendant asserts that the prosecutor improperly argued that there was no evidence that anyone but defendant penetrated the victim. However, the prosecutor's comment merely noted that the evidence of penetration by defendant was uncontradicted. Such remarks are proper. *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). Defendant also contends that the prosecutor erred in stating that the victim's previous denial of a molestation by defendant was "not a big issue." Again, this was a proper comment regarding the weight the jury should give to the evidence. *Id.* at 178.

Third, defendant asserts that the prosecutor improperly commented on defendant's failure to produce documentation that he bowled six nights a week. At trial, defendant claimed that he could not have committed the crime because he was bowling when the alleged act occurred. Testimony at trial indicated that defendant's bowling activity was recorded by league secretaries, yet defendant failed to produce this documentation. The prosecutor's remark noted defendant's failure to "take advantage of available opportunities to pursue matters relevant to his alibi defense." *People v Fields*, 450 Mich 94, 116; 538 NW2d 356 (1995). Such comment was proper. *Id.* at 106-107, 116.

Fourth, defendant asserts that, at trial, the prosecutor improperly stated that the victim had a low IQ though no evidence regarding the victim's intelligence was admitted. Although no facts regarding the victim's intelligence were admitted into evidence, we find that the trial court's instruction to the jury to disregard the prosecutor's statement alleviated any prejudice to defendant. *People v McAlister*, 203 Mich App 495, 504; 513 NW2d 431 (1994).

Fifth, defendant asserts that he was denied a fair trial when the prosecutor cautioned a witness to avoid mentioning matters which were excluded from evidence. Contrary to defendant's assertions on appeal, the prosecutor's remark was merely an attempt to ensure that inadmissible evidence was not inadvertently injected into the proceedings. Moreover, the trial court cured any error by informing the jury that the court had not precluded questioning regarding defendant's statements and by instructing the jury to disregard the prosecutor's remark. *Id.*

Defendant next argues that the trial court violated his right to a fair trial when it held an ex parte meeting with the jurors before they could be polled. Because defendant failed to object to the trial court's meeting with the jury or its subsequent polling, this issue is waived for appellate review absent manifest injustice. *People v Todd*, 186 Mich App 625, 632; 465 NW2d 380 (1990). Any error caused by the trial court's failure to poll the jurors before meeting with them could have been corrected had the oversight been brought to the trial court's attention. *People v Lewis*, 98 Mich App 142, 145; 296 NW2d 209 (1980). We find no manifest injustice based on the ex-parte meeting.

Finally, defendant claims that the trial court erred in imposing a sentence beyond the guidelines' recommended range without properly stating its reasons for the departure. We agree and remand for an articulation as to the basis for departure from the guidelines' recommendation.

If a trial court determines that the recommended sentence does not fit the seriousness and circumstances of the crime, the trial court may depart from the recommended minimum sentence. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). However, where a sentencing court departs from the guidelines' range, it must articulate its reasons both on the record at sentencing and on the sentencing information report. *People v Abbett*, 199 Mich App 334, 340; 501 NW2d 177 (1993), citing *People v Fleming*, 428 Mich 408, 428; 410 NW2d 266 (1987). Possible reasons for a departure from the guidelines include: exploitation of the family relationship, defendant's exploitation of the victim, misconduct by the defendant while in custody and lack of remorse. *People v Houston*, 448 Mich 312, 325; 532 NW2d 508 (1995). In this case, the trial court departed from the guidelines' recommended range stating:

[T]he Court feels that it must, in this instance, in order to protect the children of this community, sentence you to prison. And to sentence you to prison in (sic) a period somewhat in excess of the sentencing information report's sentencing guideline range.

We find that the trial court's stated reasons for the sentence failed to demonstrate any "special characteristics of the offense or offender necessitating a departure" from the recommended range. *Fleming, supra* at 426. When a sentencing court fails to properly state its reasons for departure from the guidelines' recommended range, remand for an articulation of the basis for departure is appropriate. *People v Johnson*, 187 Mich App 621, 630-631; 468 NW2d 307 (1991).

A panel of this Court recently found that a remand for articulation was unnecessary where the trial court failed to state the "magic words 'I am departing from the sentencing guidelines' recommendation.'" *People v Kreger*, 214 Mich App 549, 554; ___ NW2d ___ (1995). The *Kreger* Court found that "[t]he trial court's articulation of the reasons for departing from the guidelines was sufficient under the circumstances." *Id.* Unlike in *Kreger*, the trial court in this case failed to sufficiently articulate its basis for departure. Our Supreme Court has specifically held that "reasons for departure from the recommended sentencing guidelines must be articulated at sentencing and placed on the record." *Fleming, supra* at 428. Accordingly, we remand for such an articulation.

Defendant's conviction is affirmed, but we remand for an articulation of the basis for the departure from the recommended range of the sentencing guidelines.

/s/ Martin M. Doctoroff

/s/ Janet T. Neff

/s/ E. Thomas Fitzgerald