

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBIN DALE LIBBEY,

Defendant-Appellant.

UNPUBLISHED

July 19, 1996

No. 161880

LC No. 92-4260-FC

Before: Saad, P.J., and McDonald and Chrzanowski,* JJ

PER CURIAM.

The jury convicted defendant of second-degree criminal sexual conduct, MCL 750.520c(1)(b); MSA 28.788(3)(1)(b). The judge sentenced him to six to fifteen years' imprisonment. Defendant appeals his conviction and sentence: we affirm.

Defendant's conviction arises from his sexual molestation of his fifteen-year-old stepdaughter. The victim testified that defendant began sexually fondling her when she was fourteen years old, and that he had sexual intercourse with her in the woods of September of 1990. State Police who investigated the scene ten days later found physical evidence which corroborated the victims' testimony. The victim did not immediately inform authorities about the sexual assault, and in fact initially refused to testify against defendant and denied that any assault took place. Ultimately, the victim did testify against defendant, and explained that her previous denials were due to pressure from family members.

Defendant and the victim's mother (defendant's wife) both testified for the defense, and asserted that the victim fabricated the sexual assault out of anger over being disciplined by defendant and her mother.

I.

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

Defendant first argues that he was denied a fair trial because the prosecutor introduced improper rebuttal testimony regarding admissions made by defendant. We find no cause for reversal.

Defendant did not argue that the complained-of testimony was outside the scope of rebuttal at trial. Our review is therefore limited to whether admission of the rebuttal evidence resulted in a miscarriage of justice. *People v Kelly*, 423 Mich 261, 281; 378 NW2d 365 (1985). No miscarriage of justice occurred.

At trial, defendant denied (1) ever touching the victim in a sexual manner, (2) admitting such behavior to anyone, and (3) possessing a condom (part of the physical evidence found by State Police) in over twelve years. The prosecutor's rebuttal witness, Nancy Lowing, testified that defendant admitted to her that he was wearing a condom when he attempted to have sexual intercourse with the victim. This testimony expressly contradicted defendant's claims that he never touched his stepdaughter in a sexual manner and had not possessed a condom in twelve years. This testimony was proper rebuttal, and did not result in manifest injustice. *Kelly, supra*, 423 Mich 281.

The prosecutor also presented testimony contradicting defendant's claims that he had not physically abused his wife in over ten years. The victim testified at trial that one of the reasons she recanted her accusations against defendant was because of the abusive relationship between her mother and defendant. When defendant and the victim's mother got along, her mother would pressure the victim to drop the charges. When defendant became physically abusive, the victim's mother would become supportive and encourage her to pursue the charges against defendant. Both defendant and the victim's mother denied any recent physical abuse, thus undermining the victim's credibility. The rebuttal testimony presented by the prosecutor indicated that the abuse was ongoing, thus contradicting the defense witnesses' testimony. This testimony "directly tended to disprove the exact testimony" given by defendant and his wife, and was proper rebuttal. *People v Vasher*, 449 Mich 494, 505; 537 NW2d 168 (1995); *Kelly, supra*.

II.

Defendant next argues that his conviction must be reversed because testimony regarding his history of spouse abuse was improperly admitted for showing bad character in violation of MRE 404(b), 401, and 403. We disagree. Defendant did not object to the complained-of testimony below, and so has failed to preserve this issue for review. We therefore decline to review it. MRE 103(a)(1); *People v Considine*, 196 Mich App 160, 162; 492 NW2d 465 (1992). Moreover, as previously discussed, this evidence was properly admitted to rebut the testimony of defense witnesses, was not presented merely to prove bad character, and was not more prejudicial than probative.

III.

Furthermore, defendant argues that his trial counsel's failure to object to the rebuttal testimony on the bases raised in this appeal denied him effective assistance of counsel. We disagree.

Defendant did not move for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Thus, our review is limited to deficiencies apparent from the record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). Review of the record shows no ineffective assistance of counsel. As previously noted, the complained-of rebuttal evidence was properly admitted. Defendant's trial counsel's performance was not deficient due to his failure to object to the admission of this evidence. *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

IV.

Defendant asserts that his conviction must be reversed because the prosecutor made an improper appeal to the jury's sympathy for the victim in his rebuttal argument. We disagree.

Defendant did not object to the prosecutor's remarks at trial. Review of the prosecutor's remarks in context indicate that they may have been an improper appeal to the jury to sympathize with the victim, but that the comments made were not extreme, and did not result in a miscarriage of justice. Since any slight prejudice which may have resulted from the complained-of comments could have been cured by a timely jury instruction, review is waived by defendant's failure to object at trial. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), *cert den* ___ US ___ (1995).

Defendant further argues that his trial counsel's failure to object to the prosecutor's rebuttal remarks denied him effective assistance of counsel. We find that any prejudicial effect from these remarks was slight, so failure to object could be considered a matter of sound trial strategy, which we will not second-guess on appeal. *People v Pickens*, 446 Mich 298, 324-326; 521 NW2d 797 (1994).

V.

Finally, defendant argues that his six-year minimum sentence was disproportionately severe. We disagree. The sentencing judge's one-year departure from the guidelines' range was justified by the circumstances surrounding defendant and his crime. Defendant's sentence does not violate the principle of proportionality. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Affirmed.

/s/ Henry William Saad
/s/ Gary R. McDonald
/s/ Mary A. Chrzanowski