

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP WAITS,

Defendant-Appellant.

UNPUBLISHED

July 23, 1996

No. 177615

LC No. 93-008676

Before: Wahls, P.J., and Young and H.A. Beach, * JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f), and guilty plea to habitual offender, second offense, MCL 769.10; MSA 28.1082. Defendant was sentenced to a term of ten to thirty years of imprisonment for his criminal sexual conduct conviction. This sentence was vacated, and defendant was sentenced to twelve to thirty-five years of imprisonment as an habitual offender. We affirm.

Defendant first contends that he was denied a fair trial by the improper admission of rebuttal testimony concerning statements he allegedly made to police. Defendant failed to object below and therefore, did not preserve this issue. *People v Hoffman*, 205 Mich App 1, 20; 518 NW2d 817 (1994). As such, we will only grant relief if failure to review the issue would result in manifest injustice. *Id.* Defendant argues that the rebuttal testimony was improperly used to impeach defendant on a collateral matter. We disagree. On cross-examination, defendant denied making the following statements while in police custody: (1) that he did not know the complainant's name; (2) that the complainant hit her head on a bed post; and, (3) that he liked rough sex. To rebut defendant's denial, the prosecution introduced the testimony of a detective who interviewed defendant while in police custody. The detective testified that defendant made the statements.

We find that the testimony was not improperly used to impeach on a collateral matter because it was directly related to a central issue at trial. *People v Rosen*, 136 Mich App 745, 749; 358 NW2d

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

584 (1984). At trial, defendant maintained that his sexual activity with the complainant was consensual and did not involve force or coercion. However, according to the detective, defendant made the above-referenced statements while in police custody. These statements are inconsistent with defendant's claim that complainant consented to sexual intercourse and also demonstrate a consciousness of guilt. See *People v Cowell*, 44 Mich App 623, 626; 205 NW2d 600 (1973). The rebuttal testimony offered by the prosecution impeached defendant on a central issue at trial, and thus was properly admitted. Moreover, it did not violate the rule that the prosecutor may not divide the evidence on which he rests his case because it was offered to contradict defendant's testimony when he denied making the statements. *People v Vasher*, 449 Mich 494, 505-506; 537 NW2d 168 (1995). Accordingly, manifest injustice would not result from a failure to review this issue.

Defendant next argues that the prosecutor's questioning of a witness regarding defendant's refusal to give a written statement infringed upon his right to remain silent. US Const Am V; Const 1963, art 1, § 17. Defendant did not object to this testimony below. Although a failure to object at trial normally precludes review on appeal, review is nevertheless appropriate where a significant constitutional question is involved. *People v Alexander*, 188 Mich App 96, 101; 469 NW2d 10 (1991). Upon review of the questioning, we find no error.

This is not a case in which the prosecution attempts to impeach a defendant with his post-arrest silence after being advised of his constitutional rights, in reliance on the assurance that his silence would not be used against him. See *Doyle v Ohio*, 426 US 610, 618-619; 96 S Ct 2240; 49 L Ed 2d 91 (1976). Defendant voluntarily spoke with police after being mirandized, and thus, was not induced to remain silent. *Anderson v Charles*, 447 US 404, 408; 100 S Ct 2180; 65 L Ed 2d 222 (1980). On redirect, defendant testified that he was not advised of his rights and that the police "slapped him around." As a rebuttal witness, the detective, who interviewed defendant when he was in police custody, testified that defendant was advised of his rights and signed and initialed the waiver of rights form. The detective stated that defendant then agreed to speak with him but refused to give a written statement. The prosecutor continued, asking the detective to discuss the statements made by defendant. She did not emphasize defendant's refusal to give a written statement during the questioning or in her closing argument. "The questions were not designed to draw meaning from silence," and hence were proper in response to defendant's testimony. *Anderson, supra*, 447 US 409.

Defendant alternatively argues that he was denied effective assistance of counsel because defense counsel failed to object to the introduction of this testimony. In order for this Court to reverse due to the ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Since a significant constitutional claim may be reviewed on appeal, absent objection, defendant was not prejudiced by trial counsel's error. Accordingly, defendant received effective assistance of counsel. *Pickens, supra*.

Defendant next contends that he was denied a fair trial by numerous remarks made by the prosecutor during closing argument. Because defendant did not object to these errors at trial, the issue may only be reviewed on appeal if a special instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Upon review of the prosecutor's closing and rebuttal argument, we find that no miscarriage of justice would result from the failure to review this issue. The prosecutor extensively discussed the evidence and properly directed the jury to consider all the evidence in conjunction with the complainant's testimony as well as permissible inferences that could be drawn from the evidence. See *People v Jansson*, 116 Mich App 674, 693; 323 NW2d 508 (1982). Moreover, if the prosecutor's references to the law were confusing to the jury, this error could have been cured by a timely objection and curative instruction. *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). We note that the jury was properly instructed on the law, and thus, we find no miscarriage of justice.

Defendant's final arguments on appeal relate to his sentencing. As an initial matter, we find that the trial court sufficiently articulated the reasons for defendant's sentence, and note that remand for further articulation is unnecessary because the trial court expressly relied on the sentencing guidelines recommendation. *People v Dukes*, 189 Mich App 262, 266; 471 NW2d 651 (1991).

Defendant also claims that that the trial court enhanced defendant's sentence after concluding that he suborned perjury. At sentencing, the court discussed the possibility that one of the witnesses may have perjured himself. However, the record indicates that defendant's sentence was enhanced in accordance with the habitual offender statute. MCL 769.10; MSA 28.1082. The statute allows a sentencing judge to enhance a sentence up to one-and-a-half times the sentence imposed for the convicted offense. The trial court sentenced defendant to ten years of imprisonment for the criminal sexual conduct conviction, a sentence which fell at the low end of the guidelines recommendation. Since the habitual offender statute would have allowed the court to impose an enhanced sentence of up to fifteen years, his twelve year sentence as an habitual second offender was a proper enhancement of the sentence.

Defendant also contends that the presentence investigation report was inaccurate *by reference* to a misstatement by the prosecutor at sentencing. By failing to challenge the alleged inaccuracy at sentencing, defendant has not preserved this issue for review. *People v Gezelman (On Rehearing)*, 202 Mich App 172, 173-174; 507 NW2d 744 (1993). Still, defendant's claim of inaccuracy is confusing. The prosecution erroneously attributed one of defendant's statements that was made to the police as defendant's trial testimony. In response, defense counsel objected and correctly stated defendant did not make this statement in his trial testimony. It appears the trial court accepted defense counsel's action as sufficient correction of this error. Significantly, this issue was not relevant to the court's sentencing decision. These statements were made after the court finished reviewing the guidelines scoring with both parties. Because defendant was ultimately sentenced according to the guidelines recommendation as modified at sentencing, it is reasonable to conclude that the court did not rely on the prosecution's misstatement when sentencing defendant. Therefore, since these statements

were not relevant to the court's sentencing decision, remand is unnecessary because any error was harmless. *People v Daniels*, 192 Mich App 658, 674; 482 NW2d 176 (1991).

Finally, we conclude that defendant's sentence as an habitual offender is proportionate. The underlying sentence was valid, see *People v Broden*, 428 Mich 343, 354-345; 408 NW2d 789 (1987), and the trial judge enhanced the sentence as required by the habitual offender statute, MCL 769.10; MSA 28.1082. *People v Williams*, 191 Mich App 685; 479 NW2d 36 (1991).

Affirmed.

/s/ Myron J. Wahls

/s/ Robert P. Young, Jr.

/s/ Harry A. Beach