

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY D. DANIELEY,

Defendant-Appellant.

UNPUBLISHED

October 4, 1996

No. 185136

LC No. 94-002880

Before: Cavanagh, P.J., and Murphy and C.W. Simon, Jr.,* JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2); and four counts of second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3). Defendant was sentenced to consecutive sentences of six to fifteen years on each first-degree criminal sexual conduct count, and two to fifteen years on each second-degree criminal sexual conduct count. We affirm.

On appeal, defendant first contends that the trial court abused its discretion by not admitting into evidence an alleged prior occurrence of sexual contact between a third person and complainant which defendant claimed was relevant to a material issue in this case. We disagree.

This Court reviews the lower court's decision to admit or exclude evidence under an abuse of discretion standard. *People v Watkins*, 176 Mich App 428, 430; 440 NW2d 36 (1989). Here, where MCL 750.750j; MSA 28.788(10), the rape shield statute, lists only limited exceptions to the general inadmissibility of a victim's prior sexual conduct, the lower court did not abuse its discretion in denying the admittance of this evidence. Further, as defendant had alternate methods by which to attempt to prove that complainant knew she should report this type of sexual conduct, and that she may have been confusing the perpetrator's identity, the lower court adequately protected defendant's constitutional right to confrontation. *People v Haley*, 153 Mich App 400, 403; 395 NW2d 60 (1986).

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

Defendant next contends on appeal that the prosecution should not have been allowed to add a late-endorsed witness to its witness list. We disagree.

The standard of review for a trial court's decision to allow a late endorsement of a witness is abuse of discretion. *People v Canter*, 197 Mich App 500, 563; 496 NW2d 336 (1992). Here, although the prosecution was in noncompliance with the provisions of MCL 767.40a; MSA 28.980(1), which allows for the addition of a witness for good cause shown, the lower court adequately protected defendant's rights by giving defendant the opportunity to interview the proposed witness. *People v Lino*, 213 Mich App 89, 90-92; 539 NW2d 545 (1995). After the interview, defendant neither asked for a continuance nor demonstrated that a continuance could produce any evidence that would rebut the witness' testimony. Therefore, the trial court did not abuse its discretion in permitting the late endorsement.

Lastly, defendant contends that prosecutorial misconduct denied him a fair trial. As defendant did not object to the alleged misconduct at trial, he failed to properly preserve the issue for appellate review and we will reverse only for manifest injustice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1993). We do not find manifest injustice here.

Defendant first argues that prosecutorial misconduct occurred when the prosecutor improperly induced the jury to rely on his office and render a decision in accordance with that reliance in both voir dire and closing argument. We disagree. Examining the alleged improper remarks in context demonstrates that the prosecutor was merely explaining his duty to seek justice and not merely to convict when he stated that he represented everyone in the courtroom, with the responsibility to represent the community fairly. See *People v O'Quinn*, 185 Mich App 40, 43; 460 NW2d 264 (1990). Further, the prosecutor's remarks that he was familiar with the evidence and thought he had proven his case were simply introductory statements to his summation of the evidence he had presented to the jury.

Defendant's next contention, that the prosecutor's conduct was improper because he interjected his own opinion by commenting on the credibility of several witnesses is erroneous. A prosecutor is permitted to comment on the testimony in a case, and can argue that a witness is not worthy of belief or is lying as long as he does not support the argument with the authority or prestige of the prosecutor's office or the prosecutor's personal knowledge. *People v Gilbert*, 183 Mich App 741, 745-746; 455 NW2d 731 (1990); *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). The prosecutor's comments were not inappropriate.

Defendant's next claim of prosecutorial misconduct, that the prosecutor improperly vouched for complainant, also lacks merit. The mere statement that the prosecution believes in the honesty of the complainant does not constitute error requiring reversal if the remarks as a whole are fair. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). We find the prosecutor's remarks here to be fair.

Defendant's final claim of prosecutorial misconduct is also meritless. Defendant argues that the prosecutor committed misconduct by arguing that complainant had no knowledge of sexual behavior because nothing like this had happened to her before, when in fact the prosecutor had argued to keep the occurrence of a past sexual experience out of evidence under the rape shield statute. However, comparing the alleged prior act of a third person touching the complainant's genitals to the acts of cunnilingus, fellatio and ejaculation described by complainant here, we find the prosecutor did not misstate a material fact.

Affirmed.

/s/ Mark J. Cavanagh

/s/ William B. Murphy

/s/ Charles W. Simon, Jr