STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW JAMES VANMETER,

Defendant-Appellant.

UNPUBLISHED
October 8, 1996

No. 182624
LC No. 94-132245-FC

Before: Markman, P.J., and McDonald and M. J. Matuzak,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f); MSA 28.788(2)(1)(f). He subsequently pleaded guilty to habitual offender, third offense, MCL 769.11; MSA 28.1083, and was sentenced to thirty to sixty years' imprisonment. He appeals as of right. We affirm.

Defendant argues that he was denied a fair trial due to numerous improper comments by the prosecutor. Because defendant failed to object to any of the alleged instances of prosecutorial misconduct, appellate review is precluded unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Issues of misconduct by a prosecutor are decided case by case. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Kulick*, 209 Mich App 258, 260; 530 NW2d 163, remanded on other grounds 449 Mich 851 (1995).

First, defendant claims that during his opening statement the prosecutor expressed his personal belief that defendant was guilty. A prosecutor may not express a personal belief in the defendant's guilt. *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659, reh den 448 Mich 1225 (1995). Reviewed in context, the comment of the prosecutor was not an expression of a personal belief that defendant was guilty. Rather, the prosecutor indicated that he "pledge[d]" that using the evidence, he

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

would prove beyond a reasonable doubt that defendant was guilty. This comment did not amount to misconduct.

Defendant also contends that the prosecutor erroneously stated his opinion that defendant's testimony regarding whether he spoke with the victim's husband on the telephone was inconsistent and that defendant's version of the facts was unbelievable. However, viewed in context, the prosecutor was not expressing his personal belief of defendant's guilt, but was attempting to impeach defendant by questioning him about previous statements he made and about his version of the facts, inquiring why the victim would have left in such a hurry following sex if the act had been consensual. Impeachment of a witness' credibility through the witness' prior inconsistent statements is proper. See *People v Stanton*, 190 Mich App 558, 562; 476 NW2d 477 (1991). In addition, in asking whether defendant tailored his story, the prosecutor was, in effect, impeaching defendant's credibility Again, we find no impropriety in the prosecutor's comments.

Next, defendant argues that during his closing statement, the prosecutor commented on facts not in evidence and shifted the burden of proof to defendant. A prosecutor may not argue facts not entered into evidence. Furthermore, a prosecutor may not suggest that a defendant must prove something, because such an argument tends to shift the burden of proof. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991), lv den 439 Mich 945 (1992). However, the prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *People v Bahoda, supra* at 282.

When the prosecutor stated that sperm was "forcefully deposited" into the victim just moments before the victim put on her panties, he was properly arguing his theory of the case based on the evidence. The prosecutor pointed out that there was no sperm on the items of clothing that the victim had been wearing all day prior to her assault. He concluded that because there was sperm found on the underwear she put on at the McGhee's, she must have had sex immediately before that. The fact that the prosecutor used the words "forcefully" and "violently" did not create a miscarriage of justice, because he was merely arguing his theory that defendant had raped the victim.

Additionally, the prosecutor did not shift the burden of proof to defendant by asking the jury to hold him to a reasonable explanation of the event. Read in context, the prosecutor was merely asking the jury to consider the likelihood that sperm was somehow deposited on the panties worn by the victim *after* the assault and instead to conclude that defendant had raped her shortly before that as the victim had alleged. The prosecutor did not tell the jury that defendant had the burden of proof or that he needed to be proven innocent. Moreover, the court instructed the jury that a person accused of a crime is presumed innocent until proven guilty beyond a reasonable doubt by the prosecution. Further, the prosecutor's theory as to why the police did not find the victim's pants when they went to the McGhee's was supported by the evidence. Again, the prosecutor was relaying his theory of the case based on facts in evidence and reasonable inferences drawn from those facts. We find no error in these remarks and arguments.

Defendant also argues that the prosecutor made improper comments during rebuttal closing argument by criticizing defense counsel, who had speculated as to why there were no witnesses that saw the victim run across the street from the church to the McGhee's, and then giving his own opinion regarding evidence. However, the prosecutor was merely responding to comments made by defense counsel here. A comment made by the prosecutor that might otherwise be improper may be considered proper if made in response to an issue raised by defense counsel. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695, lv den 432 Mich 910 (1989). We find nothing improper here in the prosecutor's remarks. In addition, the court instructed the jury that attorney comments are not evidence.

Defendant next argues that the victim's testimony in which she identified defendant as being the person who called and spoke with her on the telephone was inadmissible because a foundation was not laid to show that she had sufficient knowledge of his voice to make an identification. However, in order to preserve an evidentiary issue for appellate review, the opposing party must object at trial and specify the same grounds for objection as it asserts at trial. MRE 103(a)(1); *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Because defendant did not object at trial to the identification of defendant's voice over the telephone by the victim, but only objected to testimony regarding the contents of the telephone conversation as being hearsay, he has not preserved this claim for appeal. In any event, an adequate foundation was established at trial that, as a result of the rape episode, the victim had been sufficiently exposed to defendant to enable her to identify his voice. MRE 901(b)(5). Therefore, the trial court did not abuse its discretion in admitting her testimony identifying defendant as the person who called and spoke with her on the telephone.[1]

Finally, defendant argues that his sentence was disproportionate to the offense. The sentences imposed upon criminal defendants are reviewed for an abuse of discretion. *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). A sentence constitutes an abuse of discretion if it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *Id.* The imposition of the maximum minimum sentence of thirty years fell within the guidelines range of fifteen to thirty years or life, and therefore is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987); *People v Eberhardt*, 205 Mich App 587, 591; 518 NW2d 511 (1994). Moreover, there were no unusual circumstances presented that would make the sentence disproportionate. *Milbourn, supra* at 661. There was evidence that defendant forcefully struck the victim in the face at least four times. Her face was red and swollen and she had a cut on her cheekbone. The victim testified that she thought defendant was going to kill her. He then forced her to have sex with him. Although defendant argues that the court did not consider rehabilitation or that he had a supportive family, the court explicitly stated that it did not believe defendant could be rehabilitated.

Defendant committed a serious offense for which neither the jury nor the court found any mitigating circumstances. Accordingly, the trial court did not abuse its discretion in sentencing defendant to thirty to sixty years because his sentence fell within the guidelines range and was proportionate to the seriousness of the offense and the offender.

Affirmed.

/s/ Stephen J. Markman
/s/ Gary R. McDonald
/s/ Michael J. Matuzak

[1] Moreover, it is hard to see the materiality of this claim. Defendant admitted to having sex with the victim and to calling her subsequently on the telephone. The principal issue at trial was whether or not she consented. The absence of such consent was demonstrated at trial, not by any aspect of the telephone call, but by such evidence as her physical injuries, her actions in running from the church to a house across the street without her pants and underwear and her post-incident demeanor.