STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NORMAN LLOYD BOELTER,

Defendant-Appellant.

UNPUBLISHED
September 26, 1997

No. 197423
Missaukee Circuit Court
LC No. 96-101153-FC

Before: Griffin, P.J., and Wahls and Gribbs, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by jury of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). Defendant was sentenced to concurrent terms of twelve to twenty-five years' imprisonment on each count. We affirm.

Defendant first argues that the trial court erred by admitting testimony from the complainant about alleged prior sexual acts between himself and defendant. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McElhaney*, 215 Mich App 269, 280; 545 NW2d 18 (1996). The trial court properly admitted this evidence because aspects of the complainant's other testimony might have appeared incredible without being placed in this context. *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973); see also *People v Smith*, 211 Mich App 233, 234; 535 NW2d 248 (1995). The testimony at issue provided an explanation for the complainant's assertion that, during the charged incident, he knew that defendant wanted him to engage in fellatio when he saw defendant expose and "dangle" his penis. This testimony was directly relevant to the complainant's credibility, and was not admitted to establish that defendant had a propensity to commit criminal sexual conduct crimes against children or against the complainant in particular. Therefore, MRE 404(b) did not require its exclusion, *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), amended on other grounds 445 Mich 1205 (1994), and the trial court did not abuse its discretion by admitting this testimony.

Next, defendant argues that Russell Nelson's testimony that the complainant said "[t]hat his dad made him suck his penis" should not have been admitted under MRE 803(2), the excited utterance

exception to the hearsay rule. The admission of this testimony was subject to the trial court's discretion. *People v Kowalak (On Remand)*, 215 Mich App 554, 558; 546 NW2d 681 (1996). To fall within the excited utterance exception, a statement must meet three criteria: (1) the statement must arise out of a startling occasion; (2) the statement must be made before there has been time to contrive and misrepresent; and (3) the statement must relate to the circumstances of the startling occasion. *People v Straight*, 430 Mich 418, 425; 424 NW2d 257 (1988); *People v Gee*, 406 Mich 279, 282; 278 NW2d 304 (1979); *Kowalak, supra* at 557. Defendant challenges only part of the first criterion -- whether the sexual incident forming the basis of the instant charges could be considered startling enough to produce nervous excitement. Defendant argues that the statement was not made after a startling event based on the complainant's testimony that sexual acts had occurred between himself and defendant for a long period of time before the charged incident. In view of the complainant's testimony that defendant engaged in sexual activity with the complainant was not startling in the strict sense of being completely unexpected. However, that is not the standard. It is enough that the event was sufficiently startling to produce nervous excitement. *Straight, supra* at 424; *Gee, supra* at 282, n 4. Nelson indicated that the complainant acted scared and nervous when he made the statement. Further, our Supreme Court has stated: "Few could quarrel with the conclusion that a sexual assault is a startling event." *Straight, supra* at 425. Accordingly, we conclude that the trial court properly determined that this event was startling enough to constitute a startling event for purposes of MRE 803(2). The trial court did not abuse its discretion by admitting Nelson's testimony.

Defendant claims that the prosecutor improperly vouched for the complainant's credibility by stating "and that means that [the complainant] was the truthful one and I ask you to come back with a guilty [verdict.]" This remark was made at the end of the prosecutor's rebuttal argument. A prosecutor is generally free to argue the evidence and all reasonable inferences therefrom as they relate to the prosecution theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). More specifically, a prosecutor may argue the credibility of witnesses, although such argument may not be supported with the authority or prestige of the prosecutor's office or the prosecutor's personal knowledge. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). Further, a prosecutor's remarks must be read in context. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Earlier in his rebuttal argument, the prosecutor mentioned that defendant had provided different accounts regarding whether he had ejaculated on a towel before the towel was recovered from the family residence. In context, the prosecutor's remark was a proper summary of his argument, based on the evidence, that defendant's account at trial was not credible.

Finally, defendant argues that the trial court misscored Offense Variable 12. However, under *People v Mitchell*, 454 Mich 145, 175-176, 178; 560 NW2d 600 (1997), which was decided after the filing of defendant's brief on appeal, appellate review of this claim is precluded.

Affirmed.

/s/ Richard Allen Griffin
/s/ Myron H. Wahls
/s/ Roman S. Gribbs