STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LLOYD RAYMOND BRUEGGEMAN,

Defendant-Appellant.

UNPUBLISHED
January 30, 1998

No. 192087
Kalkaska Circuit Court
LC No. 95-001476-FC

Before: Fitzgerald, P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Defendant Lloyd Raymond Brueggeman appeals as of right his convictions by jury of first-degree criminal sexual conduct ("CSC I"), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant to 300 to 500 months' imprisonment for his CSC I conviction, consecutively to a two-year term of imprisonment for his felony-firearm conviction. The complainant was defendant's wife at the time of the alleged sexual assault. We affirm.[1]

The complainant testified that she and defendant argued because he wanted to have sex, while she did not want to have sex with him.[2] Later, according to the complainant, defendant pointed a shotgun at her. Then, he spread open her legs and said that "he oughta kill [her]." After that, defendant inserted the shotgun into the complainant's vagina. The complainant testified that the shotgun was inserted into her about six inches and that, after the insertion, defendant said "how does that feel"[3] and "I oughta just blow you away. How would you like your pussy to come flyin' out your mouth."

The complainant indicated that for probably about "a couple" or three minutes, defendant "was usin' the gun on [her]." She started saying a prayer. She described herself as feeling a "relief come over" her like someone was saying to "[j]ust make him happy." The complainant testified that she told him "go ahead and use the gun for a dildo and I'll suck on you if that's what makes you happy." Thereafter, defendant removed the gun from the complainant's vagina, and she performed oral sex on him. After that was over, the complainant testified that defendant told her, "Isn't it amazing what you'll do when you're fuckin' scared to death."[4]

I

Defendant first argues that the trial court abused its discretion by excluding specific evidence of the complainant's past sexual contacts with him, referencing in part his own statements at sentencing regarding "[t]hat shotgun; she asked for it and used that for a dildo before." This argument is without merit. The rape-shield law states, in pertinent part:

> (1) Evidence of specific instances of the victim's sexual conduct . . . shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor. [MCL 750.520j(1); MSA 28.788(10)(1).]

Defendant appears to argue on appeal that he should have been allowed to cross-examine the complainant regarding prior instances of their consensual sexual activity where a gun or a "penis-shaped dildo" was allegedly used as a sexual device. First, contrary to defendant's position, the trial court was never asked to rule and never did rule that defense counsel could not question the complainant about whether she had consented during prior sexual activity with defendant to being sexually penetrated with a gun. Thus, defendant has established no error on that basis.

However, the trial court did preclude cross-examination of the complainant regarding whether she had participated in sexual activity with defendant involving a "penis-shaped dildo" as evidence concerning the issue of whether the complainant consented to being vaginally penetrated with the shotgun during the incident:

> Q Didn't you previously say under oath that you had voluntarily done dildo games prior to that, prior to the 15th – I'm sorry, prior to the 12th, with –
>
> A No. I –
>
> Q – an actual dildo, a penis-shaped dildo?
>
> A I did not say that it was games.
>
> Q What was – did you –
>
> A Will – would – will you repeat that?
>
> Q – ever use it – did you ever actually use a dildo?
>
> A I'd like to know if this is irrevelant (sic) to the case.
>
> *The Court:* Just ask the ques—answer the questions.

[*The prosecutor:*] Your Honor, I'll interpose an objection here as to the relevance of – of this particular inquiry.

The Court: Where are you going, [defense counsel]?

[*Defense counsel:*] That – on – on the issue of, not only did it happen, but if it did happen, was it consensual.

The Court: That's too far astray. And I'll uphold the objection.

With regard to this ruling by the trial court, we find the decision of the Michigan Supreme Court in *People v Adair*, 452 Mich 473; 550 NW2d 505 (1996) to be instructive. In that case, which was an interlocutory appeal, the defendant was bound over for trial on two counts of third-degree criminal sexual conduct based on allegations that he engaged in digital-anal and digital-oral penetration of his wife against her will. *Id.* at 475-476. At a pretrial evidentiary hearing, the complainant wife in *Adair* stated that digital-anal sexual activity had been a common practice in the couple's marriage. *Id.* at 476-477. In ruling on a defense motion in limine, the trial court precluded introduction at trial of evidence that digital-anal sexual activity was a common practice during the marriage. *Id.* at 477. The Michigan Supreme Court held that the trial court did not abuse its discretion by precluding introduction of such evidence. *Id.* at 488-489. We find the following comments to be controlling in the case before us:

> The defendant argues that evidence of the couple's marital digital-anal sexual activity is relevant to show that on prior occasions the complainant was not offended or humiliated by digital-anal sexual activity and that, if the alleged sexual assault had indeed occurred as suggested by the complainant, this would have been normal sexual activity for the couple. However, the victim's offense or humiliation is not an element of third-degree criminal sexual conduct.[5] Moreover, the fact that the couple engaged in digital-anal sexual activity during their marriage *before* the alleged sexual assault is not probative of the defense theory that the alleged events on the night in question never occurred. "The right to confront and cross-examine is not without limits. It does not include a right to cross-examine on irrelevant *issues*." Exclusion of this evidence will not violate the defendant's constitutional rights. [*Id.* at 488-489 (citation omitted; emphasis in original).]

Any arguable relevance of past use of a "penis-shaped dildo," an item plainly intended for use as a sexual device, in consensual sexual activity between the complainant and defendant to whether she consented to the insertion of another type of object, a shotgun, in her vagina during the incident was plainly even less than the alleged relevance in *Adair* of the prior consensual digital-anal sexual activity. Further, regardless of whether the complainant at prior times engaged in consensual sexual acts with defendant that included the insertion of inanimate objects into her vagina, the version of events set forth in her testimony regarding the incident underlying the convictions in this case involved defendant forcibly inserting a shotgun into her vagina after she expressly informed him that she did not want to have sex with him. Thus, under *Adair*, we conclude that any evidence of whether the complainant previously consented to having defendant insert objects into her vagina was not probative of the truthfulness of her

testimony that defendant vaginally penetrated her with a shotgun by force. Such evidence was "not probative of the defense theory that the alleged events on the [date] in question never occurred." *Adair*, *supra* at 488. The trial court did not abuse its discretion, *id*. at 489, by precluding cross-examination on this matter.

II

Defendant raises the issue of prosecutorial misconduct, arguing that he was denied a fair trial because the prosecutor argued that the complainant's testimony was uncontradicted. Because no objection was made, we do not review unless our failure to consider the issue would result in a miscarriage of justice or "if a curative instruction could not have eliminated the prejudicial effect." *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Specifically, defendant challenges the following remarks made by the prosecutor near the end of his rebuttal argument:

> Last point that [defense counsel] made was that the evidence is consistent with not guilty. That's quite a claim to make in light of what you've seen. All of the testimony you have heard – and that's what you should go by, what you hear from here, not what he says, not what I say; what was said there – [the complainant] explained what happened. *This is not contradicted*. [Emphasis supplied.]

However, defendant fails to note the remainder of the prosecutor's rebuttal argument which provide a fuller context for the challenged remarks:[6]

> The police, I mean, all they did was accept what she told them, accept the evidence and send it to the lab and have her story corroborated. That's what they did. And there's been no suggestion that anything that she told them did not turn out to be true. She shot her husband. She used that gun. She tried to kill him. And she explained why. And a lot of it had to do with this sexual assault that she told you folks about yesterday. And I would ask that you consider that carefully and find the defendant guilty of both of these offenses.

A prosecutor may not comment on a defendant's failure to testify. *People v Perry*, 218 Mich App 520, 538 (Opinion of Batzer, J.), 545 (Opinion of O'Connell, J., concurring with Judge Batzer's opinion); 554 NW2d 362 (1996); *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). However, a statement by a prosecutor that certain inculpatory evidence is undisputed does not constitute a comment regarding a defendant's failure to testify, especially where someone other than the defendant could have provided contrary testimony. *Perry*, *supra* at 538. In this case, Connie Swander, a scientist with the Michigan State Police, testified to her determination that body fluid was found on the shotgun with which the complainant said that she was vaginally penetrated and that this body fluid was probably vaginal fluid. Swander further indicated that the fluid was found to be consistent with that emanating from someone with type A blood, which was the complainant's blood type. This tended to corroborate the complainant's testimony that she was vaginally penetrated with the

shotgun. The remarks by the prosecutor set forth above permissibly highlighted aspects of the complainant's testimony that could conceivably have been contradicted by Swander if they were false, but also presumably emphasized the fact that Swander's testimony was consistent with the complainant's allegation of sexual assault. *Perry, supra*. In context, the prosecutor's reference to the complainant's testimony as being uncontradicted was not an improper reference to defendant's decision not to testify. Rather, it was a response to defense counsel's attack on the complainant's credibility, with proper argument in support of that credibility. See *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997) (prosecutor was not appealing to jury for sympathy, but responding to defense counsel's argument that a witness who cried while testifying was insincere). The reference did not violate defendant's constitutional right not to testify.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ William C. Whitbeck

[1] The testimony in this case was, to say the least, graphic. We reluctantly include verbatim portions of that testimony on the basic and important elements of the factual circumstances presented to the jury at trial.

[2] The complainant indicated that she did not want to have sex with defendant because she believed that he had engaged in sexual activity with their daughter a few days earlier. In *People v Brueggeman*, unpublished per curiam opinion of the Court of Appeals, issued November 22, 1996 (No. 187724), we affirmed defendant's conviction of CSC I for sexually assaulting that child.

[3] The complainant provided the following chilling description of how it "felt":

> I felt like I was gonna pass out. I felt like I was turnin' white. I wasn't sayin' anything. I was just thinkin' that I was gonna die. I was just imagining what it was gonna be like havin' myself just blowed all apart right there.

[4] Defendant was charged with the offenses at issue in the wake of an incident in which the complainant shot him with the same shotgun that she testified was used to sexually penetrate her. The complainant testified that she was convicted of a charge based on that incident and served time in jail.

[5] Neither is it an element of the CSC I charge in this case.

[6] In reviewing claims of prosecutorial misconduct, we examine the pertinent portion of the record to evaluate the challenged remarks in the context in which they were made. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996).