

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADLEY DALE BURTON,

Defendant-Appellant.

UNPUBLISHED

March 3, 1998

No. 191400

Kalkaska Circuit Court

LC No. 95-001496-FC

Before: Griffin, P.J., and Holbrook, Jr. and Neff, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of criminal sexual conduct in the first degree, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and criminal sexual conduct in the second degree, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant now appeals as of right. We affirm.

I

Defendant first argues that the prosecutor created error requiring reversal by eliciting testimony that defendant decided to remain silent following the administration of *Miranda* warnings, and not to take a lie detector test. We find that, by making some statements, defendant waived his Fifth Amendment right to remain silent. *People v McReavy*, 436 Mich 197, 221; 462 NW2d 1 (1990). The facts do not suggest that defendant subsequently was induced to revoke his waiver by implicit assurances contained in *Miranda* warnings. *Id.* at 218-219. It was therefore proper for the prosecutor to question defendant regarding his lack of cooperation with the investigating officers.

Defendant did not object when the prosecutor first asked a police officer about defendant's refusal to submit to additional questioning. Absent a timely objection, we must consider if the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). We find that defendant did not suffer prejudice that could not have been cured by a timely instruction.

Although the prosecutor's question might have signified to defendant an implicit reference to a lie detector test, it was defendant who first mentioned the term "lie detector." Then, given the

opportunity, defendant failed to give the simple explanation that he refused to take it on the advice of counsel. Moreover, the isolated reference was brief, and the court immediately ruled that the subject was irrelevant, not admissible, and totally out of order. We find no prosecutorial error.

II

Defendant next argues that the trial court's instruction on reasonable doubt consistently denigrated the standard by including a burden shifting requirement that the jury "assign a true, substantive reason" to any doubt before acquitting defendant. We review de novo a claim of instructional error. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). We find that the judge's instructions, when read in their entirety, did not shift the burden that had to be satisfied, but rather, properly advised the jurors of the prosecutor's burden of proof and required them to have a reason to doubt defendant's innocence. *Id.* at 488.

III

Defendant argues next that the trial court abused its discretion and deprived defendant of the right to present his defense when it barred the testimony of an expert witness on the appropriate interviewing protocols for investigating claims of sexual abuse of children. The qualification of a witness as an expert and the admissibility of his testimony are in the trial court's discretion and will not be reversed on appeal absent an abuse of that discretion. *People v Gambrell*, 429 Mich 401, 407; 415 NW2d 202 (1987).

A witness may be qualified to give expert opinion testimony where the witness' "skill, knowledge, training, experience, or education" will assist the trier of fact. MRE 702. Here, the trial court did not abuse its discretion when it determined that the proposed expert testimony would not assist the jury. We agree that the jury was qualified to evaluate the defense theory that the children were coached, asked inappropriately leading questions, and otherwise subjected to suggestive interviewing techniques, without the assistance of an expert witness. We further note that our Supreme Court has held that expert references to the truthfulness of children's testimony go beyond that which is allowed under MRE 702. *People v Peterson*, 450 Mich 349, 376; 537 NW2d 857 (1995). The trial court did not abuse its discretion by excluding the proposed expert testimony, which had the main purpose of explaining why the complainants' testimony was likely not to be truthful.

IV

Defendant next argues that the prosecutor deprived defendant of a fair trial by evoking sympathy for the alleged victims and by denigrating the legitimate efforts of defense counsel. We review claims of prosecutorial misconduct case by case, examining the record and evaluating the alleged improper remarks in context. The test is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defense counsel did not object to the remarks he now claims were an improper attempt to evoke sympathy for the victims. Therefore, appellate review is precluded unless a curative instruction

could not have eliminated the prejudicial effect or the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Our review of the record reveals that the prosecutor urged that in light of the victim's age and the passing of time, it was understandable for the young victims to give somewhat inconsistent versions of the events at issue. The prosecutor also argued that the victims' demeanor on the witness stand demonstrated their truthfulness. Moreover, the prosecutor expressly urged the jury not to allow sympathy for the victims or prejudice against the defendant to enter its deliberations. We conclude that the prosecutor did not commit error that could not have been cured by a cautionary instruction upon a proper request from defense counsel. *Id.*

Regarding defendant's challenge to the prosecutor's comment that defendant had defense counsel "try to confuse the kids," we find this isolated comment, though improper, did not deny defendant a fair trial. *Paquette, supra* at 342. Accordingly, reversal is not warranted here.

V

Defendant next argues that the trial judge demonstrated a pattern of bias toward the prosecution through its instructions, remarks, and rulings, which resulted in a denial of a fair trial. Although a trial judge has wide discretion and power in matters of trial conduct, *People v Collier*, 168 Mich App 687, 698; 425 NW2d 118 (1988), a criminal defendant has the right to expect a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). "The test is whether the judge's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case," thereby depriving defendant of due process and a fair trial. *Id.*

We have carefully reviewed each of defendant's challenges to the trial judge's conduct and comments during trial, and find that the record as a whole fails to demonstrate bias on the part of the trial judge. Consequently, we hold that the trial judge's conduct and comments did not influence the jury to the extent that it deprived defendant of a fair and impartial trial.

VI

Defendant's final argument is that the thirty to sixty year sentence in this case was disproportionate, a doubling of the guidelines maximum recommended minimum range for reasons scored in the guidelines, and based upon psychological assumptions for which the trial court had no evidence. We review a trial court's decision to depart upward from the sentencing guidelines for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636, 657 n 25; 461 NW2d 1 (1990).

The key test of proportionality is not whether the sentence departs from or adheres to the recommended guidelines range, but whether it reflects the seriousness of the matter. *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). In the present case, defendant abused his position of trust and authority, as the boyfriend of the victims' mother and occasional caretaker of the two girls. This relationship between defendant and his victims is an important factor not included in the guidelines calculations. *Id.* at 323. The trial court also noted, correctly, that group activity such as

defendant's sexual abuse of the girls in each other's presence was not reflected in the guidelines.¹ We further note that the judge's factual predicates that a child has less resilience than an adult in dealing with sexual matters and that children suffer psychological injury from sexual exploitation by an adult are neither materially false or wholly unsupported. In sum, we find that the trial court appropriately departed from the guidelines and that defendant's sentence does not violate the principle of proportionality.

Affirmed.

/s/ Richard Allen Griffin

/s/ Donald E. Holbrook, Jr.

/s/ Janet T. Neff

¹ Although the guidelines make provision for multiple victims in OV 6, the guidelines do not necessarily reflect a situation presented here, where sexual abuse is performed with multiple children, indeed sisters, in each other's presence.