

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JACK EUGENE CARON,

Defendant-Appellant.

UNPUBLISHED
February 14, 2003

No. 236167
Ottawa Circuit Court
LC No. 01-024740-FH

Before: Sawyer, P.J., and Jansen and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted as charged of three counts of third-degree criminal sexual conduct, MCL 750.520d, and sentenced to concurrent sentences of 48 to 180 months' imprisonment on each conviction. He appeals as of right. We affirm.

I.

On appeal, defendant first argues that the evidence was insufficient to support his convictions as a matter of law. When reviewing the sufficiency of the evidence in a criminal case, we "view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt." *People v Hoffman*, 225 Mich App 103, 111; 570 NW2d 146 (1997) (citations omitted). All conflicts with regard to the evidence must be resolved in favor of the prosecution. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). We will not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992); *Terry*, *supra*.

Defendant ignores the applicable standard of review when presenting his argument. He claims that the evidence was insufficient because there were inconsistencies in the testimony of the various witnesses and because the jury asked for clarification with respect to whether the victim's testimony needed corroboration. He further argues that the victim's testimony should have been excluded because it was inherently incredible. See *People v Lemmon*, 456 Mich 625, 636-642; 576 NW2d 129 (1998). Defendant also resolves all inconsistencies, and views the evidence, in his own favor. We reject defendant's arguments.

When viewed in a light most favorable to the prosecution, the evidence was sufficient to enable a rational trier of fact to determine beyond a reasonable doubt that three counts of third-degree criminal sexual conduct were proven. MCL 750.520d(1)(a). The victim was fourteen years old at the time of the incident. She testified about three separate acts of penetration: defendant's penetration of her mouth with his penis, defendant's digital penetration of her vagina, and defendant's penetration of her vagina with his penis. The victim's testimony alone, if believed, was sufficient. See *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). Further, we note that the victim's testimony was corroborated in some respects. The victim was able to describe an unusual condition found on defendant's penis. And, within minutes of leaving defendant's apartment, the victim told her friend that she was raped. The following day, the victim told her medical doctor. A subsequent physical examination, performed by a sexual assault nurse on the day after the incident, revealed trauma to the victim's genitalia.

The fact that there were inconsistencies with respect to certain times and details does not require reversal or a new trial. Conflicting testimony is an insufficient ground for granting a new trial. *Lemmon, supra* at 647. Moreover, the inconsistencies were presented to the jury, which decided the issue of credibility. "[A]bsent exceptional circumstances, issues of witness credibility are for the jury." *Id.* at 642. Even when there is directly conflicting evidence and the testimony supporting the verdict is impeached, the credibility of witnesses is for the jury if "it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it." *Id.* at 643. Exceptions include where the testimony contradicts indisputable physical facts or laws, where the testimony is patently incredible or defies physical reality, where the testimony is so inherently implausible that it cannot be believed by a reasonable person, or where the testimony was seriously impeached and the case was marked by uncertainties and discrepancies. *Id.* at 643-644. In this case, defendant has not demonstrated any exceptional circumstance that would render the victim's testimony void of all probative value or that would remove the credibility issue from the jury.

II

Next, defendant claims that he was denied a fair trial on the basis of prosecutorial misconduct. Because defendant did not preserve this issue with the appropriate objections at trial, we thus review it for plain error. In *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001), this Court, citing *People v Carines*, 460 Mich 750, 752-753, 763; 597 NW2d 130 (1999), noted:

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. "It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error " 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocent." [Citations omitted.]

Defendant first challenges the admission of three photographs depicting the genital warts on his penis. To the extent that defendant is challenging the admission of the photographs at the preliminary examination, the issue is not preserved. See *People v Miller*, 130 Mich App 116, 117-118; 342 NW2d 926 (1984) (a motion to quash is a necessary prerequisite to an appellate challenge regarding an alleged deficiency at the preliminary examination). Further, any error at the preliminary examination would not warrant reversal. In *People v Hall*, 435 Mich 599, 602-603; 460 NW2d 520 (1990), the Court ruled that an error at the preliminary examination stage requires reversal of a subsequent conviction only on a showing that the defendant was prejudiced at trial. See also *People v Torres*, 452 Mich 43, 60-61; 549 NW2d 540 (1996), where the Court recognized that a defendant's conviction will only be reversed if an error at the preliminary examination prejudices the outcome of the defendant's trial. In this case, any ruling by the district court at the preliminary examination had no effect on the outcome of defendant's trial. Further, as discussed below, the admission of the photographs at trial did not constitute error.

Defendant also argues that the photographs were improperly admitted at trial, contrary to court order and, therefore, their admission constitutes prosecutorial misconduct. There is no merit to this argument. At trial, the trial court admitted the photographs into evidence after defense counsel specifically indicated that he had "no objection." As the trial court noted, when denying defendant's motion for a new trial, there were no conditions attached to the admission of the photographs. We therefore reject defendant's argument that the photographs were presented by the prosecutor in violation of a court order.

Second, we reject defendant's arguments that the photographs were both irrelevant under MRE 401 and inadmissible under MRE 403. Defendant's trial counsel acceded to the admission of the photographs at trial. He clearly did not believe they were unfairly prejudicial, and he used them to argue that the victim was not credible. Defense counsel argued that the victim incorrectly described the size of the warts and incorrectly referred to them as "sores" when they were obviously warts. Counsel also asked the jury to believe that the victim must never have seen the condition of defendant's penis. In making these arguments, counsel reminded the jury that they had seen the pictures. A defendant is not allowed to assign error on appeal to something his own counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). There was no plain error in the admission of the photographs. Moreover, because the admission of the photographs was part of defendant's trial strategy, counsel was not ineffective for failing to object to the photographs. See *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002) (decisions regarding evidence are matters of trial strategy and this Court will not substitute its judgment for that of counsel regarding trial strategy).

In addition, defendant argues that the prosecutor committed misconduct when he told the jury that Sherry Stelpstra's testimony was more consistent with the victim's testimony and should be believed. Defendant argues that this constituted improper bolstering of the victim's testimony. In making this argument, defendant improperly relies on testimony from the preliminary examination, which was not evidence at trial.

At trial, defendant testified that the victim was in his apartment for ten minutes. The victim testified that she was in the apartment for thirty-five or forty minutes. Stelpstra testified that she went to defendant's apartment twenty minutes after the victim went there. Stelpstra knocked on the door. When she received no answer, she went to the victim's apartment and talked to the victim's mother. The prosecutor argued:

What else supports her [the victim's] testimony. If you think about the accident that happened to her on that day and think about the timing and how long it took, the discussion, the actual sexual acts, and her getting up and leaving, is that consistent with someone that was only at the apartment for ten minutes, as the defendant would want you to believe, or is it more consistent with what her friend [Stelpstra] said, she was gone for 20 minutes.

And I went over to knock on the door, there was no response, I went back to her mother's house, and it wasn't until I dropped the kids off and started to leave her mother's house that then [the victim] came. So we're talking 20 minutes plus. Now which is more consistent for these acts to have occurred. I would submit to you it's the 20 minutes plus, as her friend testified to.

Prosecutors are "free to argue the evidence and reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (quotation omitted). "A prosecutor may not vouch for witness credibility or suggest that the government has some special knowledge that a witness will testify truthfully." *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). "A prosecutor may, however, argue from the facts that a witness is credible or that the defendant or another witness is not worthy of belief." *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997) (citations omitted). We find that the prosecutor's argument was a permissible comment on the evidence and reasonable inferences drawn from it. The prosecutor was entitled to argue that defendant's testimony was not as credible as the victim's testimony when Stelpstra's statements are considered. There was no improper vouching. Therefore, we find no plain error requiring reversal. *Carines, supra*.

Finally, defendant argues that the prosecutor erroneously described the burden of proof to the jury during voir dire. Defendant's argument is deemed abandoned by his failure to cite any authority to support his position that the prosecutor improperly misstated the burden of proof during jury voir dire. Where a defendant fails to provide supporting authority, the issue need not be considered. *People v Connor*, 209 Mich App 419, 430; 531 NW2d 734 (1995). We nevertheless note that the issue has no merit. The prosecutor made the following statement to the potential jurors:

Now, this is a serious crime. And the People have alleged the defendant [sic] of three Counts of criminal sexual conduct in the third degree. But the burden of proof is the same as if the defendant was sitting here being charged with stealing a pack of gum, okay. So all that I ask is that you apply the burden the Judge instructed you on, will you all do that?

Contrary to defendant's argument, the prosecutor did not dismiss the seriousness of the charges by making this statement. Further, he did not describe the burden of proof at all when making the challenged comment. Before deliberations, the jury was properly instructed on the burden of proof, and when the jury later asked for clarification, they received it. There was no plain error requiring reversal. *Carines, supra*.

Affirmed.

/s/ David H. Sawyer
/s/ Kathleen Jansen
/s/ Pat M. Donofrio