

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS SCOTT SMITH, JR.,

Defendant-Appellant.

UNPUBLISHED

August 21, 2007

No. 267942

Ottawa Circuit Court

LC No. 05-029363-FC

Before: Bandstra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions for three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). We affirm, but remand for correction of the presentence investigation report.

Defendant first argues that prosecutorial misconduct denied him a fair trial. We disagree. Defendant did not object to the challenged remarks at trial. “Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Review of unpreserved claims of prosecutorial misconduct is for plain error. *Id.*

Defendant claims that the prosecutor impermissibly argued, in her opening statement, that the jury would hear the details of what the victim told her mother about the assault although the trial court had previously ruled that such details were inadmissible. Defendant contends that the prosecutor’s purpose was to prove the victim’s credibility by offering that her story was consistent over time.

It is true that the prosecution may neither make a statement of fact to the jury that is not supported by evidence presented at trial, nor may she argue the effect of testimony that was not entered into evidence. *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994). We have reviewed the challenged comment. It includes, “For instance, she will tell you, and she told the nurse, and you’re going to hear to [sic] the nurse, right after she disclosed to her mother that he

touched her bad spot with his bad spot and that she [sic] touched her mouth with his bad spot, and she told the nurse he tried to make the white stuff come out but it didn't come out in my mouth but instead went on his belly and shirt.”

This remark is ambiguous. One cannot discern whether the prosecutor meant that the jury would hear the details of the assault directly from the victim, or the details as told by the victim to her mother, or whether the prosecutor meant that the jury would hear the details of the assault as told by the victim to the nurse. We cannot conclude that this remark constitutes prosecutorial misconduct warranting relief. Two other challenged remarks pertain to the prosecution's reference to the fact that the victim told her mother all of the details of the assault. But, the prosecutor did not disclose those details. The details were, in fact, testified to by the victim as well as other witnesses. Again, no relief is warranted. In the unlikely event that any prejudice arose from these remarks, such prejudice could have been cured by a timely objection. See *Callon, supra*. And, to the extent that defendant claims the challenged statements bolstered the victim's credibility, we reject that position. Only the substance of the conversation was barred by the pretrial order, not the fact that it took place.

Defendant also argues that the prosecution improperly gave the jury her personal opinion and bolstered the victim's credibility when she said in her opening statement that she thought the victim was “a very compelling and believable witness.” We disagree. It is true that a prosecutor may not vouch for the credibility of a witness by expressing a personal opinion about the witness' truthfulness or by implying that she has some special knowledge of that truthfulness, *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004), but a prosecutor may argue from the facts that a witness is credible and worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Viewing the prosecutor's remark in context, *Thomas, supra* at 454, the prosecutor was simply arguing that, in light of the fact that the victim described the assaults the same to everyone involved, including giving the same details and using consistent terminology, the victim was worthy of belief. The prosecutor did not argue that she had any particular knowledge other than what the evidence would show. The challenged remark was proper argument. In sum, none of defendant's claims of prosecutorial misconduct warrant appellate relief; defendant received a fair and impartial trial. See *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

Further, defendant's ineffective assistance of counsel claim fails. The remarks were not improper. But, even if any of the challenged remarks were arguably improper, defendant cannot establish that there is a reasonable probability that, but for the error, the result of the proceeding would have been different. See *Stanaway, supra* at 687-688.

Defendant also argues that he challenged the accuracy of the presentence investigation report (PSIR), pursuant to MCL 771.14(6) and MCR 6.425(E)(2), but the trial court improperly failed to order the challenged information deleted. In particular, the PSIR contained reference to several alleged acts of sexual misconduct involving other relatives, but defendant denied that those acts occurred. Following defendant's challenge, the trial court indicated that it was leaving the allegations in the report so that defendant could receive the proper treatment in prison. Because the trial court clearly did not rely on the information for purposes of sentencing, resentencing is not required. See *People v Spanke*, 254 Mich App 642, 649-650; 658 NW2d 504 (2003). Nevertheless, because the court did not take the challenged information into account in

sentencing, the court was required to direct the probation officer to delete the challenged information. MCR 6.425(E)(2)(a).

Affirmed, but remanded for correction of the PSIR. We do not retain jurisdiction.

/s/ Richard A. Bandstra

/s/ Mark J. Cavanagh

/s/ Kathleen Jansen