

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JANAE MARIE SOLTESZ,

Defendant-Appellant.

UNPUBLISHED
February 10, 2009

No. 279275
Oakland Circuit Court
LC No. 2006-210181-FC

Before: Saad, C.J., and Davis and Servitto, JJ.

PER CURIAM.

Defendant appeals as of right her jury trial convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under 13 years of age) (CSC I), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under 13 years of age) (CSC II). Defendant was sentenced, as a second habitual offender, MCL 769.10, to 9 to 30 years in prison for each count of CSC I and 9 to 22 ½ years in prison for each count of CSC II. Because there was no prosecutorial misconduct, defendant was not denied the effective assistance of counsel, and there was sufficient evidence to convict defendant of the charged offenses, we affirm.

Defendant first argues that the prosecutor committed misconduct by eliciting improper testimony from an expert witness and making improper arguments to the jury about the expert witness testimony during her closing argument. We disagree.

Because defendant did not object or request curative instructions in response to the challenged testimony, this issue is unpreserved. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). An unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Unger, supra* at 235. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Further, [this Court] cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id.* at 329-330.

A question about whether testimony is properly elicited is "as much an evidentiary issue as it is a prosecutorial misconduct matter." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d

546 (2007). As such, this Court's review focuses on whether the testimony was elicited in good faith. *Id.* at 71.

An expert may not vouch for the veracity of a victim. *Id.* An expert is permitted, however, to testify regarding symptoms and behavior of child sexual assault victims for the purpose of explaining a victim's behavior. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995). Credibility determinations are to be made by the jury. *Dobek, supra* at 71.

Amy Allen testified as an expert in forensic interviewing and characteristics of children who have reported sexual assault. The victim in this case was 11 years old at the time of the assault. Allen testified that children often delay reporting sexual assaults and described some of the psychological reasons why a child might delay. Allen also testified that children rarely falsely report a sexual assault; they are more likely to be mistaken about what constitutes sexual contact. However, this latter testimony was precipitated by defense counsel's question regarding whether children ever make false reports. Allen responded affirmatively. The prosecutor followed up by asking how often false reports are made and Allen responded that it was rare. While defendant alleges that the purpose of eliciting this testimony was to show that Allen was vouching for the victim's credibility, this exchange was clearly initiated by defense counsel and had nothing to do with the victim, personally. The fact that Allen had never interviewed the victim was presented to the jury. There is thus no reason to conclude that the prosecutor's follow-up question to Allen deprived the jury of its proper role in making credibility determinations or served as vouching for the victim's credibility.

Defendant next argues that the prosecutor improperly argued to the jury that Allen's testimony was corroborative of the victim's testimony. While the prosecutor did use the word "corroborate," when the challenged statements are taken in context, it can be seen that the prosecutor simply argued that Allen's expert testimony helped explain the victim's story that she delayed reporting the assault and that she was very close with defendant before the assault. The prosecutor is free to argue from the evidence and its reasonable inferences. *People v Ackerman*, 257 Mich App 434, 450; 669 NW2d 818 (2003). Defendant has not provided any basis to conclude that the prosecutor was not simply arguing directly from the evidence.

Defendant also argues that she was denied the effective assistance of counsel because defense counsel failed to object to these alleged errors. Because there was no error introduced by the prosecutor's conduct, defense counsel was not ineffective for failing to object or request curative instructions at trial. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (counsel not ineffective for failing to raise futile objection).

Defendant next argues that there was insufficient evidence to prove one count of CSC II. We disagree.

This Court reviews claims of insufficient evidence de novo, viewing the evidence in the light most favorable to the prosecutor, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Further, this Court must defer to the fact finder's role in determining the weight of the evidence and the credibility of the witnesses. *People v Fletcher*, 260 Mich App 531, 561; 679 NW2d 127 (2004). "[C]onflicts in the evidence must be resolved in favor of the prosecution." *Id.* at 562. Circumstantial evidence and reasonable

inferences arising therefrom may constitute proof of the elements of the crime. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001).

The elements of CSC II are (a) sexual contact, (b) with a person under 13 years of age. MCL 750.520c(1)(a); *People v Lemons*, 454 Mich 234, 253; 562 NW2d 447 (1997). Sexual contact is the intentional touching of the victim's intimate parts or the clothing covering the victim's intimate parts if the "touching can reasonably be construed as being for the purpose of sexual arousal or gratification" or done for a sexual purpose or in a sexual manner. *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997); MCL 750.520a(q). Intimate parts "includes the primary genital area, groin, inner thigh, buttock, or breast." MCL 750.520a(e).

Defendant argues specifically that the victim's testimony regarding whether defendant intentionally touched the victim's buttock for the purpose of sexual arousal or gratification was equivocal and did not establish that the touching was done intentionally, let alone for a sexual purpose. On the contrary, the prosecutor asked the victim if anything ever happened with her buttocks and the victim responded, "She touched it." From the victim's testimony it is clear that this touching occurred on the same day as and during the timeframe in which defendant had the victim take her pants off, rubbed up and down on her body, kissed the victim's bare breasts and vagina, penetrated the victim's vagina with her finger and her tongue, stimulated herself with a vibrator, and asked the victim if she was "horny" and if she wanted to have an orgasm. It is a reasonable inference that defendant's touching of the victim's buttock was part of this course of conduct. Reasonable inferences may constitute proof of the elements of a crime. *Schultz, supra* at 702. There was sufficient evidence that a rational jury could conclude beyond a reasonable doubt that defendant intentionally touched the defendant's buttock and did so with a sexual intent or purpose. *Tombs, supra* at 459.

Defendant finally argues that her sentencing information report (SIR) does not accurately reflect the scoring of her sentencing guidelines and that this matter should be remanded for the ministerial task of correcting the SIR. The plaintiff responds that the error alleged by defendant has already been corrected and remand is thus unnecessary. Plaintiff has, in fact, attached an SIR accurately reflecting the scoring, specifically, that PRV 6 is scored at zero. It would appear, then, that the alleged error has been corrected and that remand is unnecessary.

Affirmed.

/s/ Henry William Saad

/s/ Alton T. Davis

/s/ Deborah A. Servitto