

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD D. JOHNSON,

Defendant-Appellant.

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UNPUBLISHED  
October 20, 2000

No. 209660  
Livingston Circuit Court  
LC No. 97-009732 FH

Before: Doctoroff, P.J., and O’Connell and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant was sentenced to seven to fifteen years in prison. We affirm.

**I. Prosecutorial Misconduct**

Defendant argues that he was denied a fair trial by several instances of alleged prosecutorial misconduct throughout trial. Specifically, defendant claims that the prosecutor improperly vouched for the credibility of the complaining witness, misstated testimony, referred to facts not in evidence, and denigrated defense counsel and defendant. However, defendant failed to object to the alleged prosecutorial misconduct at trial, and thus, this issue is not preserved for appellate review. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court will only review unpreserved claims of prosecutorial misconduct if the alleged misconduct was so egregious that a curative instruction would not have eliminated the prejudicial effect, or if failure to review the issue would result in manifest injustice. *Id.*; *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). When reviewing alleged prosecutorial misconduct, we examine the pertinent portion of the record and evaluate the prosecutor’s remarks in context, *People v Green*, 228 Mich App 684, 692-693; 580 NW2d 444 (1998), to determine whether the defendant was denied a fair and impartial trial. *People v Fields* 450 Mich 94; 538 NW2d 356 (1995).

*A. Vouch for the credibility of witnesses*

Defendant argues that the prosecutor improperly vouched for the credibility of the victim during opening and closing arguments, as well as during trial. Defendant challenges the following remarks made by the prosecutor during opening argument:

This case basically hinges upon the testimony of the victim in whether or not you find her statement to be credible or not.

Some of you were asked questions of how do you tell if someone's lying? And someone said eye contact. Someone else said body language or demeanor. I want you to take into account in this particular case the person's maturity—the victim's maturity, how old she is and the subject matter.

And, think about talking in front of all of you being strangers about this very private and personal matter.

This is a crime of secrets. And, oftentimes it comes down to the credibility of witnesses.

A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has some special knowledge that a witness is testifying truthfully. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). However, a prosecutor may argue from the facts that a witness is not worthy of belief. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). The challenged remarks do not show that the prosecutor improperly vouched for the credibility of the victim. The prosecutor was simply arguing that the facts and evidence demonstrate that the witness was credible. *Avant, supra*. The prosecutor's suggestion that the jury consider the age of the victim, the difficulty of testifying in open court for someone so young, and the nature of the crime when deciding whether the victim was a credible witness was entirely proper.

Defendant also argues that the following colloquy between the prosecutor and the victim at trial demonstrates that the prosecutor improperly vouched for the credibility of the victim:

*Q.* Okay. And, you've had to testify before--

*A.* Yes.

*Q.* -- at the preliminary exam?

*A.* Yes.

*Q.* And, you had to testify in front of a judge at that time?

We do not find that this line of questioning was improper or that the prosecutor improperly vouched for the credibility of the victim. Contrary to defendant's contention, the prosecutor was not implying that because the victim had previously testified before a judge, the jury must find her testimony truthful. Rather, he elicited testimony from the victim that she had previously testified under oath as an indicia of her credibility (i.e., to suggest that the victim was not contriving the story since she asserted the

same allegations before.) The prosecutor was simply asking the jury to note the consistencies in the victim's testimony when considering her credibility. Accordingly, we find no error.

Defendant also argues that the prosecutor vouched for the credibility of the victim during closing argument by the following comments:

It is a crime of secrets. It's not something you sit down and talk about. It becomes increasingly difficult when it's a relative or even there was a relationship involved. Because this is something that the – you're not only embarrassed to talk about in front of your mother, a counselor or something like that, but then you have to come and you have to testify in front of a judge.

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[I]t's obvious her demeanor, her maturity. Did you feel as though she was attempting to tell you the truth or although she was deliberately lying?

Because this isn't a half-full thing. This is all or nothing. Either you believe her or you don't. Either you believe this act occurred or you don't.

As noted above, a prosecutor may argue from the facts that a witness is credible. *Avant, supra*. Moreover, the mere statement of the prosecutor's belief in the honesty of the complainant's testimony does not constitute error requiring reversal where, as a whole, the remarks were fair. *People v McElhaney*, 215 Mich App 269, 284; 545 NW2d 18 (1996). We find nothing improper with the prosecutor's request that the jury consider the victim's demeanor and the nature of the offense when assessing her credibility.

#### *B. Reference to facts not in evidence*

Defendant claims that the prosecutor improperly referenced facts not in evidence during closing argument:

The crime itself is a very personal crime, but having to discuss what happened to you makes it increasingly difficult. What increases is a victim's guilt that comes along with the crime. [The victim] told you that she did this act. There was no gun to her head. How do you think that that makes her feel when she has to come before you and say that there was no gun to her head? But yet, she did feel compelled to do it.

\* \* \*

Children feel compelled to do something that an adult wants them to do. They do it for different reasons. Sometimes it's done for love. And, they'll do it for any kinda [sic] love they can get.

Defendant argues that these statements were improper because there was no evidence that the victim experienced guilt as a result of her participation in the sexual activity, or that “there was any compulsion that caused her to act.”

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Stanaway, supra* at 686. However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *People v Roberson*, 167 Mich App 501, 509; 423 NW2d 245 (1988). Here, the prosecutor argued during closing argument that the victim should be believed because of the courage and maturity she demonstrated in overcoming feelings of guilt and intimidation in order to testify against defendant. The prosecutor’s theory was based on reasonable inferences that were supported by the evidence presented at trial. Although the victim did not specifically testify that she felt guilty, it was clear from the record that she had difficulty testifying and that she knew the sexual conduct was improper. The victim further testified that although she was not threatened to perform the sexual act, she did not have a choice in the matter because she “was little.” The victim also stated that the improper sexual conduct was a routine between her and defendant, and that she feared defendant because he used to hit her as a means of punishment. She admitted that she feared defendant would hit her if she did not cooperate with him in engaging in the sexual conduct. The prosecutor reasonably inferred from this testimony that the young victim was feeling guilty for submitting to an act she knew to be improper and that she felt compelled to perform. Accordingly, we reject defendant’s contention that the prosecutor presented her theory of the case during closing argument by referring to facts not in evidence.

Defendant also claims that the prosecutor referred to facts not in evidence when he stated during closing argument that “defendant used his role in the household to take control over [the victim’s] life.” Evidence at trial established that defendant was the victim’s step-father, and although defendant was not residing in the same household as the victim at the time of the offense, the victim spent considerable time with defendant and she treated defendant as though he was her father. Therefore, it was not unreasonable for the prosecutor to infer that defendant used his status as a father-figure to exercise control over the victim during the sexual activity. While the prosecutor may have overstated the inference, there is no duty on the part of the prosecutor to state arguments or inferences in the blandest of all possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Reading the comments in context, we conclude that the prosecutor was simply arguing the evidence and drawing reasonable inferences arising from the testimony, which is entirely permissible during closing arguments. *People v Kelly*, 231 Mich App 627, 641; 588 NW2d 480 (1998).

### *C. Misstate the evidence*

Defendant argues that the prosecutor engaged in misconduct during closing argument by misstating testimony from Doug Marchyok. The prosecutor related that “Doug Marchyok was the first to interview the [d]efendant. The defendant said he didn’t remember being at the Matthews’ around Christmas time.” Defendant claims that Marchyok actually testified that defendant admitted to living with the Matthews during that time. A review of the record reveals that Marchyok initially testified that defendant told him that he did not recall living with the Matthews in December 1992. However, on cross-examination, Marchyok testified that defendant did recall living with the Matthews during this

time. In view of Marchyok's contradictory testimony, we cannot conclude that the prosecutor's statement is unsupported by the evidence. In any event, any misleading inference caused by the prosecutor's statement could have been dispelled by a cautionary instruction from the trial court noting Marchyok's contradictory testimony. *Stanaway, supra* at 687. Accordingly, we find no error warranting reversal.

*D. Denigrate defense counsel and defendant*

Defendant contends that the prosecutor denigrated defense counsel during her rebuttal argument by the following remarks:

Mr. Gatesman is an advocate for the defendant. He doesn't know what happened in December or Christmas time in 1992 at this residence. He doesn't know. I was not there. He was not there. We are advocates. Don't be fooled by him making statements about vouching as to who to believe. This is your decision.

It's one big reason why [the victim] would not want to tell anybody about this whole thing. She doesn't live with her mom anymore. She lives with her boyfriend. Now, Mr. Gatesman seems to think that that somehow—he kinda, I don't know under-handed statement there about living with her boyfriend.

A review of these remarks, in context, reveals that the prosecutor's comment about defense counsel was made in response to defense counsel's remarks during closing argument that he could not "think of a time when [he had] seen a witness be more forthright" than Dorinda Matthews. We find nothing improper with the prosecutor's comments. In any event, because an instruction from the trial court could have cured any prejudicial error caused by these statements, we decline to reverse defendant's conviction on this basis. See *People v Kent*, 157 Mich App 780; 404 NW2d 668 (1987).

Defendant next argues that the prosecutor denigrated defendant during closing argument:

You can't even imagine touching a child in that manner. But, this is not a normal mindset. There are, and I'm sure you have all read about it, there are pedophiles. There are people that like to touch children for different reasons. And, you say oh, my God. How does someone get sexual gratification from touching a baby? I mean that's just something that we say no, no, no.

That's just not believable. This is not normal mindset. You can't think in terms of yourself because we don't believe that. We couldn't get sexual gratification from a baby.

And, while it's difficult to understand, you do know that there are pedophiles out there.

We agree with defendant that the prosecutor's statement referring to persons who enjoy touching children for sexual gratification as "pedophiles" was improper. "Pedophilia" is a "psychosexual disorder in which an adult's arousal and sexual gratification occur primarily through

sexual contact with prepubescent children.” *Encyclopedia Britannica* (1999-2000). The term “pedophile” is defined as a “sexual desire in an adult for a child,” *Random House Webster’s College Dictionary* (1995), or as “a preferential child molester whose major characteristics include ‘1) [a] long-term and persistent pattern of behavior, 2) children as preferred sexual objects, 3) well-developed techniques in obtaining victims, and 4) sexual fantasies focusing on children.’” *People v Russo*, 439 Mich 584, 599, n 24; 487 NW2d 698 (1992), quoting Lanning, *Child Molesters: A Behavioral Analysis* (Quantico, Va: National Center for Missing & Exploited Children, 1987), p 11.

Here, there was no evidence presented at trial establishing that defendant was subjected to a psychological evaluation during which a professional clinician diagnosed defendant as a pedophile. Nor was evidence presented establishing that defendant’s activities, albeit reprehensible under the law, met the clinical diagnostic criteria for pedophilia, as distinguished from a child molester who engaged in inappropriate sexual activity. Therefore, counsel’s reference to pedophilia during closing argument was improper.

However, as noted above, defendant failed to object to the prosecutor’s statement at trial and, thus, we review this unpreserved issue only to avoid manifest injustice. *Stanaway, supra* at 687; *Launsburry, supra* at 361. In view of defendant’s failure to request a curative instruction that would have eliminated the prejudicial effect of the statement, in conjunction with the other evidence substantiating defendant’s guilt, we find the error harmless. MCL 769.26; MSA 28.1096; MCR 2.613(A). Further, the trial court instructed the jury that questions and arguments asserted by the attorneys were not evidence and should not be considered during deliberations. Accordingly, we find no manifest injustice.

Finally, with respect to all of the alleged misconduct, we note that the trial court in this case instructed the jury that neither the lawyers’ statements nor their questions to the witnesses were evidence, and that they must not be considered in reaching a verdict. The court also instructed the jury that it must not let sympathy or prejudice influence its decision, and that it was the duty of the prosecutor to prove every element of the crime beyond a reasonable doubt. Because defendant has not demonstrated that the prosecutor engaged in any misconduct that could not have been cured by an instruction from the court, we find no manifest injustice. *Avant, supra*.

## II. Discovery

Defendant argues that the trial court erred in denying his motion for a new trial because the prosecutor violated MCR 6.201(B)(3) by not disclosing a statement allegedly made by defendant to Marie Johnson, the victim’s mother and defendant’s ex-wife, prior to trial. We disagree.

At trial, Marie Johnson testified that on the night of the instant offense, defendant told her that the Matthews, with whom defendant was living at the time of this incident, were not going to be home when he took the victim back to their house. Defense counsel objected on the grounds that the prosecutor should have disclosed this statement during discovery. The trial court overruled defendant’s objection, and subsequently denied defendant’s motion for a new trial on the basis of an alleged discovery violation.

The trial court has broad discretion in ruling on a motion for new trial, and that decision will not be reversed absent a clear abuse of discretion. *People v Jones*, 236 Mich App 396, 404; \_\_\_ NW2d \_\_\_ (1999). An abuse of discretion occurs when the decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997).

MCR 6.201(B)(3) provides in pertinent part:

Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

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(3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial.

Detective Stephen Conlin testified at the hearing on the motion for new trial that he provided the prosecutor with all “the recorded statements that were made to [him]” regarding this case. Defendant has presented no evidence to refute Conlin’s testimony or to establish that the challenged statement was written or recorded. Moreover, the statement was not exculpatory because it bolstered the testimony of the victim that the Matthews were not home on the night of the incident. Thus, because defendant failed to establish that the statement was either written, recorded, or exculpatory, the trial court did not abuse its discretion by denying defendant’s motion for a new trial. See *People v Tracey*, 221 Mich App 321; 561 NW2d 133 (1997) (pursuant to MCR 6.201, the introduction into evidence at trial of a statement that was not written or recorded, and was not exculpatory, did not represent a discovery violation)

Defendant also contends that the trial court’s refusal to admit a supplemental report written by Detective Conlin reflecting an interview with Mr. Matthews, during which Mr. Matthews stated that defendant was not allowed to be alone in his house, was error requiring reversal. Conlin testified that he recorded Mr. Matthews’ statement in a supplemental report that was turned over to the prosecution prior to trial. Defendant denied receiving this report, and the report was not contained in the prosecutor’s files. The trial court refused to find a discovery violation under MCR 6.201(B)(1) by the prosecutor’s failure to turn over the report because defendant admittedly had no evidence that the prosecutor withheld the supplemental report. We find no abuse of discretion in the trial court’s ruling. Defendant did not show that he was unduly prejudiced or surprised by not having the report, see *People v Taylor*, 159 Mich App 468; 406 NW2d 859 (1987), and the challenged information (i.e., that defendant was not allowed to be alone in the Matthews’ home) was ultimately introduced at trial by defendant through the testimony of Dorinda Matthews. Accordingly, we find no error.

### **III. Sentencing**

Defendant raises several issues challenging the validity of his sentence. First, defendant argues that the sentencing court erred in its rescoring of the offense variables on the sentencing information

report. Our Supreme Court has stated that “there is no juridical basis for claims of error based on alleged misinterpretation of the guidelines, instructions regarding how the guidelines should be applied, or misapplication of guideline variables.” *People v Mitchell*, 454 Mich 145, 176-177; 560 NW2d 600 (1997). “Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior records to determine if they were correctly applied.” *Id.* at 178. “A putative error in the scoring of the sentencing guidelines is simply not a basis upon which an appellate court can grant relief.” *People v Raby*, 456 Mich 487,499; 572 NW2d 644 (1998). Although the Court did recognize a limited exception to this rule where the challenge is directed at the factual basis of the scoring, *Raby*, *supra* at 497-498; *Mitchell*, *supra* at 177, because defendant in the present case does not challenge the factual basis of the scoring, we decline to review the scoring of the offense variables.

Next, defendant argues that the sentencing court failed to articulate an adequate explanation for its decision to sentence defendant outside the guidelines range, and claims that the sentencing court’s departure was based on factors that were already considered in the guidelines.

When a sentencing court departs from the recommended guidelines because of the special characteristics of the offense or the offender, it must specifically explain those characteristics on the record. *People v Fleming*, 428 Mich 408, 426; 410 NW2d 266 (1987); *People v Coulter (After Remand)*, 205 Mich App 453, 456-457; 517 NW2d 827 (1994). In the present case, the sentencing court found that the deviation was justified because “the victim in this case was subject to abuse more than the incident that’s just prosecuted here.” Moreover, the sentencing court noted that the guidelines were inadequate given the “family relationship between defendant and the victim and the length of the exploitation.”

A deviation from the guidelines range may be based on factors already considered in the guidelines calculations, but such a deviation must be made only with caution. *Milbourn*, *supra* at 660, n 27; *Coulter*, *supra* at 456. Contrary to defendant’s contention, the relationship between a defendant and victim is an important factor not included in the guidelines calculations. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). A family relationship between the defendant and the victim is “an archetype justification for departure” from the guidelines. *Id.* Here, the court expressly stated that it was departing from the guidelines because of the family relationship between defendant and victim, as well as the existence of a history of assault. The sentencing court’s departure from the guidelines was justified because the case presented circumstances not adequately embodied in the guideline variables. *Milbourn*, *supra* at 659-660.

Defendant next contends that the sentencing court improperly based its sentence upon defendant’s lack of remorse and assertion of innocence. The record does not support this contention. The sentencing court clearly stated that its sentence was based on the history of abuse and the family relationship between defendant and the victim. Although the sentencing court did mention that defendant maintained his innocence, the statement, when read in context, reflected the sentencing court’s admonition to defendant that as long as he continues to deny his guilt, he will not get the help he needs. The reference to defendant’s denial of his guilt was in the context of encouraging defendant to seek help in order to deter future acts of antisocial, felonious behavior. See *People v Antoine*, 194

Mich App 189, 191; 486 NW2d 92 (1992). There is no indication in the record that defendant's denial of guilt was the basis for his sentence or that the sentence was based on improper considerations.

Lastly, defendant argues that the trial court abused its discretion in imposing a seven to fifteen year sentence on defendant. This Court reviews a sentencing court's imposition of sentence for an abuse of discretion. *People v Odendahl*, 200 Mich App 539, 540-541; 505 NW2d 16 (1993). A sentencing court abuses its discretion when it violates the principle of proportionality. *People v Milbourn*, 435 Mich 630, 635-636, 654; 461 NW2d 1 (1990). A sentence must be proportionate to the seriousness of the offense and the defendant's prior record. *Id.* at 635-636. When determining an appropriate sentence, a sentencing court may consider the nature of the crime and the circumstances surrounding the criminal behavior. *People v Ross*, 145 Mich App 483, 495; 378 NW2d 517 (1985).

In this case, the guidelines' sentence range was two to five years. The sentencing court sentenced defendant to a minimum of seven years in prison. Given the serious nature of the crime, the familial relationship between defendant and the victim, *Houston, supra*, and the evidence suggesting a history of abuse, defendant's seven year minimum sentence was not disproportionate. *Milbourn, supra*.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Kurtis T. Wilder