

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

JOSE MARIA PENA,

Defendant-Appellant.

UNPUBLISHED

May 4, 2001

No. 222310

Allegan Circuit Court

LC No. 99-011173-FC

Before: Talbot, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of criminal sexual conduct involving penetration of his seven-year-old granddaughter contrary to MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced as a third habitual offender, MCL 769.11; MSA 28.1083, to enhanced concurrent prison terms of twenty to forty years. Defendant appeals as of right. We affirm.

Defendant first challenges the trial court's denial of his motion in limine for the appointment of an expert medical witness. Defendant sought to elicit testimony regarding the physical consequences that might be expected from full intercourse involving an adult male and a seven-year-old child. We review evidentiary rulings for an abuse of discretion. *People v Smith*, 456 Mich 543, 549-550; 581 NW2d 654 (1998). See also *People v Jacobsen*, 448 Mich 639, 641-642; 532 NW2d 838 (1995); MRE 702. Defendant also argues that he should have been permitted to demand a gynecological examination of the victim. Because defendant did not ask the trial court to order a medical examination of the victim, this latter issue is not preserved. Accordingly, we review this question only for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The trial court may appoint an expert witness if necessary for a defendant to present a defense at trial. *Jacobsen, supra* at 641-642; *People v Leonard*, 224 Mich App 569, 581-582; 569 NW2d 663 (1997). See MRE 706; MCL 775.15; MSA 28.1252. Due process in a criminal trial does not require the appointment of an expert on demand. *Leonard, supra* at 581-582. Defendant is entitled to the appointment of an expert at public expense only if he cannot otherwise proceed safely to trial without the expert. *Id.* at 582. Defendant must demonstrate the need for an expert in relation to the facts of the case. *Jacobsen, supra* at 641; *Leonard, supra* at

582. Defendant must “show a nexus between the facts of the case and the need for an expert.” *Id.*

Defendant sought to present expert medical testimony regarding the physical effects that would be consistent with sexual penetration of a young child by an adult male. At the hearing on defendant’s motion, the prosecution stated that the victim had never undergone a medical examination as a result of the incident. Further, defense counsel agreed that there would be no testimony at trial about the actual physical condition of the victim. Defendant intended to argue that the lack of a medical examination would suggest that the prosecution did not do its job. In light of the many years that elapsed between the incident and trial, and the absence of medical evidence at trial, we conclude that the trial court did not abuse its discretion in denying defendant’s request for an expert medical witness. Nor has defendant demonstrated plain error affecting substantial rights with respect to the trial court’s failure to order the victim to undergo a medical examination.

Next, defendant claims he was denied a fair trial when the prosecutor argued facts unsupported by evidence and improperly vouched for the credibility of the victim. In the present case, timely objection was not raised. “Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant’s claim for plain error.” *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). We conclude that no prosecutorial misconduct occurred. Further, a curative instruction would have cured any prejudice if defendant had timely objected. *Id.* at 720-721.

When reviewing claims of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. *Schutte, supra* at 721; *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The propriety of a prosecutor’s remarks will depend upon the particular facts of each case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Further, a prosecutor’s comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *Schutte, supra* at 721.

Defendant contends that the prosecutor’s argument to the jury that the victim “faked sleep” while defendant allegedly assaulted her was unsupported by the evidence. We disagree. The victim testified that she pretended to be asleep during the incident. The prosecutor’s argument on that point was adequately supported by the evidence.

Defendant also claims that the prosecutor vouched for the credibility of the victim by arguing she testified “straight from [her] heart . . . through the eyes of a seven year old.” See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659. The prosecutor’s comment must be reviewed in context. *Noble, supra* at 660. The prosecutor first noted that the jury was being asked to determine whether the victim fabricated the complaint, and then posed the rhetorical question: “What causes one to think strongly that that didn’t happen [fabrication] and this came straight from [the victim’s] heart, is that [the victim] told you what happened through the eyes of a 7 year old, and that’s what makes the difference.” The prosecutor followed this rhetorical juxtaposition by pointing out such traditional factors as appearance, demeanor, and the detail in her testimony that indicated the second alternative was supported by the evidence. Thus, in

context, the prosecutor asked the jury to exercise its traditional factfinding role by using traditional factors to determine credibility. *People v Lemmon*, 456 Mich 625, 646; 576 NW2d 129 (1998).

The prosecutor's comment "through the eyes of a 7 year old" must also be viewed in context and in relation to the facts and circumstances of the case. The prosecutor emphasized to the jurors that although they saw a fourteen-year-old adolescent testify, the victim was testifying based on the memories and perceptions of a seven-year-old child. The prosecutor asked the jurors to apply their own common sense that a child would perceive things differently than an adult. Finally, the prosecutor's comment that the victim expanded her testimony "to what the truth was" was consistent with her theory of the case that the victim initially did not tell everything that happened to her and minimized the extent of the sexual assault out of fear of what her father might do. The prosecutor's theory was supported by the victim's testimony, by the testimony of her mother, and by her father's reaction to the "touching" revelation. Even defendant's testimony that he stayed away from the victim's family because he did not want to "stick [his] head in a chopper" or "commit suicide" supported the prosecutor's theory. We conclude that the prosecutor did not improperly vouch for the credibility of the victim.

Defendant also claims that the prosecutor improperly argued facts that were not in evidence. Defendant challenges the prosecutor's suggestion that defendant believed that "somebody set her up." On cross-examination, defendant was asked if he thought that "the reason all this came about is that the family is mad at [him]?" Defendant answered, "I have no idea what their purpose is. It seems that way to me." In light of defendant's testimony, the prosecutor permissibly drew a reasonable inference from the evidence. *Schutte, supra* at 721. Further, the prosecutor's assertion that defendant hugged and kissed the victim was made in the context of asking the jury to apply common sense regarding a typical relationship between a grandfather and his granddaughter and in light of defendant's testimony that he did not hug the victim.

Defendant maintains that the prosecutor misrepresented the testimony by arguing that the victim told her parents about the incident "almost right away." The testimony of the witnesses varied regarding whether the victim waited one or two weeks, or as long as a few months, to divulge what had happened to her. The prosecutor's statement that the victim told her parents "almost right away" must be viewed in the context of this case which was brought seven years after the incident. Viewed in this light, the prosecutor did not misrepresent the testimony. Further, the prosecutor's statement regarding the duration of the incident merely called upon the jurors to exercise their own common sense and experience in considering a child's perception of time. Similarly, the prosecutor's rhetorical question regarding defendant's opportunity to commit this offense asked the jury to consider whether it was reasonable that the victim's parents may have gone to bed and left the victim with defendant. Although there was evidence to the contrary by the victim's mother who testified that it was her habit to retrieve the children from defendant's room, a curative instruction would have removed any prejudice. Finally, although the prosecutor's statement that the victim experienced nausea was not specifically supported by the evidence, any prejudice resulting from this remark could have been easily eliminated by a timely objection and a curative instruction. Additionally, the trial court instructed the jury that the attorneys' arguments are not evidence. We are not persuaded that our failure to further

review defendant's unpreserved claims of prosecutorial misconduct will result in manifest injustice. *People v McAllister*, 241 Mich App 466, 473; 616 NW2d 203 (2000).

Defendant next claims the evidence was insufficient to sustain his conviction. This Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found all of the elements of the offense proven beyond a reasonable doubt. *Jackson v Virginia*, 443 US 307, 319; 99 S Ct 2781; 61 L Ed 2d 560 (1979); *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), modified 441 Mich 1201 (1992); *People v Lee*, 243 Mich App 163, 167; 622 NW2d 71 (2000). This Court must resolve conflicts of evidence in favor of the prosecution and should not interfere with the jury's determination of witness credibility or the weight to be given to the evidence. *Id.*; *People v McFall*, 224 Mich App 403, 412; 569 NW2d 828 (1997).

In the present case, the victim testified that when she was seven years old her grandfather sexually penetrated her with his fingers and his penis during the same incident. The victim's testimony alone was sufficient to convict defendant of two counts of first-degree criminal sexual conduct. MCL 750.520b(1)(a); MSA 28.788(2)(1)(b); *People v Yarger*, 193 Mich App 532, 536-537; 485 NW2d 119 (1992). The testimony of a criminal sexual conduct victim need not be corroborated. MCL 750.520h; MSA 28.788(8); *Lemmon, supra* at 632 n 6. Although defendant denied the allegations and the defense pointed out inconsistencies in the victim's testimony, credibility was for the jury to determine. *Lemmon, supra* at 642. Having made its determination on the credibility of the witnesses, the jury's verdict should not be disturbed on appeal. *McFall, supra* at 412.

Finally, defendant argues the sentence imposed by the trial court is tantamount to a life sentence because of his age, seventy-three, and his poor health. Defendant contends that his sentence violates both the federal and state constitutional prohibitions against cruel and unusual punishment. US Const, Am VIII; Const 1963, art 1, § 16. We disagree.

Defendant's claim that his sentences constitute unusually excessive punishment is premised on a belief that his age and health make his sentence disproportionate. *People v Milbourn*, 435 Mich 630, 654; 461 NW2d 1 (1990). To be proportionate, a sentence need not be tailored to a defendant's age nor calculated to afford the defendant the likelihood of parole. *People v Lemons*, 454 Mich 234, 258-259; 562 NW2d 447 (1997). Here, the sentences imposed are proportionate to the circumstances of the offense and the offender. *Milbourn, supra* at 635-636; *People v Crear*, 242 Mich App 158, 170; 618 NW2d 91 (2000). Because the sentences are proportionate, they cannot violate the prohibition against cruel and unusual punishment. *People v Terry*, 224 Mich App 447, 456; 569 NW2d 641 (1997).

Affirmed.

/s/ Michael J. Talbot
/s/ David H. Sawyer
/s/ Jane E. Markey