

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MATTHEW PAUL MCLAREN,

Defendant-Appellant.

UNPUBLISHED

September 28, 2004

No. 247610

Wayne Circuit Court

LC No. 03-000356

Before: Murphy, P.J., and O’Connell and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (person under thirteen years of age). The trial court sentenced defendant to five to fifteen years in prison for each conviction. We affirm.

The victim in this case is a seven-year-old girl whose aunt frequently babysat her. Defendant, who was twenty four, was married to the victim’s aunt during the time in question. The victim spent every other weekend at defendant’s house, sometimes spending time alone with defendant, perhaps on twenty occasions. At trial, the victim testified about many instances of sexual contact. Once, defendant initiated a game of “truth or dare” with the victim in a basement bedroom of his house. Defendant dared the victim to go into a closet, remove her pants, and come out of the closet. The victim did as she was told. Defendant then dared himself to do the same, returning naked from the waist down. Defendant then instructed the victim to touch his penis twice, and the victim complied.

Additionally, the victim testified that defendant had rubbed her genital area under her underwear and touched her on her chest and buttocks under her clothes. These incidents usually occurred in the basement bedroom, but sometimes in defendant’s bedroom. Once, the victim got into bed with her aunt and defendant when she woke them up, and defendant touched her on her genital area under the bedcovers. Another time, defendant touched the victim under her clothes on her “private area” and her chest in the basement bedroom. After each of these encounters, defendant told the victim not to tell anyone and threatened to “come after” her. The victim’s aunt subsequently divorced defendant because she believed that he had cheated on her.

Defendant made a written statement to the police and testified at trial, denying the victim’s allegations. Defendant admitted that he tickled and wrestled with the victim regularly. Defendant claimed that the victim initiated the “truth or dare” game and dared defendant to go

into the closet, pull down his pants, and pull up his pants. Defendant complied, but he was not sure whether the victim saw him because the closet door had remained closed. Defendant then dared the victim to do the same, and she complied. Defendant admitted that he may have accidentally brushed up against her vagina one time when he was tickling her thigh. Defendant also testified that the victim would sometimes come into his bedroom to wake him up in the morning. Defendant told the police that on one of these occasions, the victim was playing around and hit his penis. Defendant also told the police of another instance when the victim touched his penis under the bedcovers. Defendant told the police that he once awoke to the victim on top of him, kissing his nipple. Although defendant testified that he complained of these instances to his wife, she did not recall any such complaints.

Defendant argues that the prosecutor committed misconduct by arguing facts not in evidence during closing arguments. Defendant challenges the following excerpt from the prosecutor's closing argument:

I think a very interesting point, [defendant's wife] told us that the reason for the break up was because he was seeing a sixteen year old.

Do you see a pattern here [sic]. He's twenty-four at the time. He's seeing a sixteen year old.

That makes me think of my brother when he was twenty-four, and he was an attorney.

You're sixteen, you're probably a Junior in high school.

What would a twenty-four year old be doing with a Junior in high school?

Met that girl over the internet. The pattern. He's interested in young girls.

He can dominate them. He can control them.

It's a power thing.

And is so proud there, up on the stand, when he talked about how he met this girl on the internet, and he was married, and he went out with her even though he was married.

Because defense counsel failed to object to the prosecutor's statements at trial, this issue is unpreserved and will be reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). To avoid forfeiture of the issue defendant must show: (1) that an error occurred; (2) that the error was plain, i.e., clear or obvious; and (3) that the plain error affected substantial rights. *Carines*, *supra* at 763. We will only reverse defendant's convictions if he is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764. Where a curative instruction could have alleviated any prejudicial effect, this Court will not find error requiring reversal. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003).

Defendant first challenges the prosecutor's comments about his sixteen-year-old girlfriend. A prosecutor may not argue the effect of testimony that was not entered into evidence at trial. *Stanaway, supra* at 686. The age of defendant's girlfriend was not in evidence, but the prosecutor stated that defendant's girlfriend was sixteen years old. These remarks were therefore plain error.

Where a curative instruction could have alleviated any prejudicial effect, this Court will not find error requiring reversal. *Ackerman, supra* at 449. A trial court's careful and explicit jury instructions that the lawyers' statements are not evidence cures any unfair prejudice created by the prosecutor's comments. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Because the trial court provided the jury with this instruction, the statements regarding defendant's sixteen-year-old girlfriend do not require reversal. *Ackerman, supra* at 449; *Green, supra* at 693.

Defendant next challenges the prosecutor's remarks about him engaging in controlling relationships and dominating young girls. Although a prosecutor may not argue facts not in evidence or mischaracterize the evidence presented, the prosecutor may argue reasonable inferences from the evidence. *People v Watson*, 245 Mich App 572, 588; 629 NW2d 411 (2001). The evidence demonstrates that defendant took advantage of the control he had over the victim when she was left in his care. We find that the prosecutor's statement about defendant being interested in engaging in controlling relationships and dominating young girls is a reasonable inference from the evidence. Accordingly, we conclude that no plain error occurred, and any error would have been cured by the trial court's instruction that the lawyers' statements are not evidence and that the jury may only consider facts in evidence. *Green, supra* at 693.

Finally, defendant challenges the prosecutor's statement that defendant admitted to committing the crimes. A prosecutor may argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Schultz*, 246 Mich App 695, 710; 635 NW2d 491 (2001). Defendant admitted to playing "truth or dare" with the victim, pulling his pants down, tickling the victim's bare thigh, and accidentally touching her vagina. Defendant also admitted to obtaining an erection when he awoke with the victim on top of him. Because these admissions corroborate the victim's testimony, no plain error occurred. Furthermore, any error would have been cured by the trial court's instruction that the lawyers' statements are not evidence and that that the jury may only consider facts in evidence. *Green, supra* at 693.

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Hilda R. Gage