

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS TYRONE CARTER,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2014

No. 310865

Wayne Circuit Court

LC No. 10-013036-FH

Before: CAVANAGH, P.J., and OWENS and M.J. KELLY, JJ.

PER CURIAM.

Defendant, Thomas Tyrone Carter, appeals as of right his jury trial convictions for kidnapping, MCL 750.349, first-degree criminal sexual conduct, MCL 750.520b(1)(c), and second-degree criminal sexual conduct, MCL 750.520c(1)(c). Defendant was sentenced as a third-offense habitual offender, MCL 769.11, to 25 to 50 years' imprisonment for the kidnapping conviction, 25 to 50 years' imprisonment for the first-degree criminal sexual conduct conviction, and 10 to 15 years' imprisonment for the second-degree criminal sexual conduct conviction. We affirm.

Defendant's convictions arise out of the kidnapping and sexual assault of a 16-year-old female that occurred in an abandoned house while the victim was walking to school. A rape kit examination performed on the victim revealed DNA that was later matched to defendant. The victim also identified defendant as the assailant in a lineup. At trial, defendant claimed the sexual encounter was consensual, asserting that the victim had exchanged sex for money to pay for an abortion. A jury, however, found defendant guilty of kidnapping, first-degree criminal sexual conduct, and second-degree criminal sexual conduct.

**I. JURY INSTRUCTIONS**

Defendant first argues that he was entitled to a jury instruction on consent as a defense to kidnapping. At trial, defense counsel expressed satisfaction with the jury instructions as given, thereby waiving this claim of instructional error. Consequently, there is no error to review. *People v Kowalski*, 489 Mich 488, 503-505; 803 NW2d 200 (2011). Nonetheless, a review of the record establishes that the jury instructions fairly presented the issues to be tried and sufficiently protected defendant's rights. *People v Milton*, 257 Mich App 467, 475; 668 NW2d 387 (2003). Specifically, the trial court gave a consent instruction and addressed the lack of consent as an element of kidnapping and criminal sexual conduct.

## II. RIGHT TO SELF-REPRESENTATION

Defendant next argues that he is entitled to resentencing because the trial court erred in denying his request to waive representation of counsel at the sentencing hearing. We review de novo questions of law and whether a defendant has waived his Sixth Amendment right to be represented by counsel, and we review for clear error the trial court's factual findings. *People v Williams*, 470 Mich 634, 640; 683 NW2d 597 (2004). A finding is clearly erroneous if we are left with a definite and firm conviction that a mistake was made. *People v Reese*, 491 Mich 127, 139; 815 NW2d 85 (2012).

Although a criminal defendant has a constitutional right to counsel at all critical stages of the legal process, US Const, Am VI; Const 1963, art 1, § 20, a defendant may choose to waive representation and represent himself. *Williams*, 470 Mich at 641-642. "The right of self-representation under Michigan law is secured by Const 1963, art 1, § 13 and by statute, MCL 763.1." *Id.* at 642. "The United States Supreme Court has stated that courts should indulge every reasonable presumption against waiver [of counsel]." *Id.* at 641 (internal quotation marks and citations omitted). "The United States Constitution does not, however, force a lawyer upon a defendant . . ." *Id.* A defendant may waive his right to counsel, as long as it is unequivocal and "knowingly, intelligently, and voluntarily" made. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976). The trial court must also ensure that the defendant's self-representation will not disrupt, unduly inconvenience, or pose a burden to the court. *Id.* Additionally, the court must comply with the procedures set forth in MCR 6.005(D)(1), which require the court to advise the defendant of the charge, the maximum possible sentence, any mandatory minimum sentence, and the risks involved in self representation. *Williams*, 470 Mich at 642-643.

In this case, although the trial court failed to make the necessary findings pursuant to *Anderson* and MCR 6.005(D)(1) before ruling on defendant's request to represent himself, we find that defendant was not denied his constitutional right to self-representation because his "request was not timely and granting the request at that moment would have disrupted, unduly inconvenienced, and burdened the administration of the court's business." *People v Hill*, 485 Mich 912; 773 NW2d 257 (2009). Specifically, defendant made his request at the sentencing hearing, which had already been adjourned once. Further, defendant sought to represent himself so he could file a motion for a new trial and claim ineffective assistance of counsel. The trial court correctly concluded that those were issues for appeal and told defendant that he could do that after the sentencing hearing and that it would appoint defendant appellate counsel if he desired. In doing so, the trial court did not foreclose defendant's opportunity to represent himself to file his motion for a new trial as he requested. See *id.* Thus, defendant's constitutional right to self-representation was not violated.

## III. SCORING ERROR

Defendant next argues that the trial court erred in scoring OV 10 at 15 points for predatory conduct on his kidnapping conviction. When reviewing a scoring decision, the trial court's "factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence." *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute,

i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo.” *Id.*

OV 10 provides that 15 points should be scored if “[p]redatory conduct was involved.” MCL 777.40(1)(a). “Predatory conduct” is defined as “preoffense conduct directed at a victim for the primary purpose of victimization.” MCL 777.40(3)(a). Under the statute, predatory conduct is “behavior that is predatory in nature, precedes the offense, [and is] directed at a person for the primary purpose of causing that person to suffer from an injurious action. . . .” *People v Kosik*, 303 Mich App 146, 159; 841 NW2d 906 (2013), quoting *People v Huston*, 489 Mich 451, 463; 802 NW2d 261 (2011) (alteration in original). “The timing of an offense, including watching the victim and waiting until a victim is alone before victimizing him or her, may be evidence of predatory conduct.” *Kosik*, 303 Mich App at 160.

In this case, there was evidence that defendant waited until the victim was alone to perpetrate the assault. The victim testified that she exited the public bus and walked toward her high school. She explained that there were two other people walking nearby, “a little boy” in front of her who turned down a street and “somebody” behind her who also turned onto a different street. She also testified that she felt as though she was being watched. Defendant continued to pursue the victim, walking faster as she began to increase her pace. Ultimately, once the victim was alone, defendant grabbed the victim and dragged her inside the abandoned house where he sexually assaulted her. Accordingly, we find sufficient evidence to support the trial court’s determination that defendant’s conduct was predatory and conclude that the trial court did not clearly err in scoring OV 10 at 15 points.

#### IV. STANDARD 4 BRIEF

Defendant also raises several additional issues in a supplemental brief filed in propria persona pursuant to Supreme Court Administrative Order No. 2004–6, Standard 4.

##### A. ADMISSIBILITY OF EVIDENCE

Defendant argues that the trial court erred in refusing to admit medical evidence of the victim’s alleged prior abortions. We review defendant’s preserved evidentiary issue for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). A preserved claim of evidentiary error “does not warrant reversal unless after an examination of the entire cause, it shall affirmatively appear that it is more probable than not that the error was outcome determinative.” *People v Burns*, 494 Mich 104, 110; 832 NW2d 738 (2013) (quotation marks and citation omitted). Furthermore, a ruling on a close evidentiary question generally cannot be an abuse of discretion. *Aldrich*, 246 Mich App at 113.

There is no indication that the redacted portion of the victim’s medical records showed prior abortions; thus, defendant has failed to establish the factual predicate for his claim, and we need not address it. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Nevertheless, evidence of the victim’s prior abortions would be inadmissible under the rape-shield statute, MCL 750.520j, because they are “specific instances of the victim’s sexual conduct” that did not involve defendant or show “the source or origin of semen, pregnancy, or disease.”

Defendant also argues that the trial court erred in admitting recordings of telephone conversations defendant had with his mother while in prison. As an initial matter, defendant argues that the prosecution did not lay a proper foundation for admission of the recorded telephone conversation. Under MRE 901(a), “[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.” Evidence may be authenticated by “[t]estimony that a matter is what it is claimed to be.”<sup>1</sup> MRE 901(b)(1). At trial, defendant’s mother identified her voice, along with the voice of defendant and her brother, on a recorded call. Thus, there was evidence that the conversation was what the prosecution purported it to be, namely a verbal interaction between defendant and his mother following his arrest. Accordingly, the evidence was sufficiently authenticated.

Defendant additionally argues that the recorded call was inadmissible as immaterial because the subject of the phone conversation was a funeral, not defendant’s case. The prosecution, however, introduced the recorded call to impeach the trial testimony of defendant’s mother. Under MRE 613(b), extrinsic evidence of a witness’s prior inconsistent statement is admissible if the witness is “afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon.” Defendant’s mother testified that she did not have a conversation with anyone, including defendant, about this case. Although she claimed she was talking to her son about the funeral of a friend, the record reflects that the recording contained a conversation about an alibi. The record reveals that the prosecution complied with MRE 613(b), and therefore, it was not an abuse of discretion for the trial court to admit the recorded evidence at trial.

## B. INVALID ARREST WARRANT

Defendant next argues that the arrest warrant was invalid because it was obtained based on improperly collected DNA evidence. Defendant has waived this issue for appellate review because he did not object to the validity of the arrest warrant until appeal, and the trial court had obtained jurisdiction over defendant by the filing of an information and an appearance by defendant. *People v Hill*, 44 Mich App 308, 317; 205 NW2d 267 (1973), overruled in part on other grounds, *People v Mayberry*, 52 Mich App 450; 217 NW2d 420 (1974).

## C. PROSECUTORIAL MISCONDUCT

Defendant next argues that the prosecution committed misconduct and denied defendant a fair trial during its closing argument. We review these unpreserved issues of prosecutorial misconduct for “plain error that affected [defendant’s] substantial rights.” *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). “The test for prosecutorial misconduct is whether, after examining the prosecutor’s statements and actions in context, the defendant was denied a fair and impartial trial.” *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003).

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<sup>1</sup> Although MRE 901(b)(6) enumerates how a telephone conversation may be authenticated, it is “[b]y way of illustration only, and not by way of limitation.” MRE 901(b).

First, defendant argues that the prosecutor committed misconduct and denied defendant a fair trial by inserting the elements of the offenses into its closing argument. Although it was improper for the prosecution to begin to instruct the jury on the elements of the crime of kidnapping, see *People v Breidenback*, 489 Mich 1, 13; 798 NW2d 738 (2011), the trial court *sua sponte* advised the prosecution to refrain from doing so and the prosecution immediately ceased. Further, the trial court instructed the jury that it must follow the law as the court provides it, not as counsel states it. Thus, the trial court's instructions were sufficient to alleviate any prejudice caused by the prosecution's error, and defendant received a fair and impartial trial. *People v Callon*, 256 Mich App 312, 330-331; 662 NW2d 501 (2003).<sup>2</sup>

Next, defendant argues that the prosecution vouched for the credibility of a witness and expressed a personal belief of defendant's guilt when it stated the following during closing argument:

What make[s] sense here is that the defendant is guilty of criminal sexual conduct first degree. Criminal sexual conduct second degree and kidnapping. . . . But ladies and gentlemen, when you go back there and you decide[] this case please consider all of [the] evidence use your common sense and find the defendant guilty.

It is true that a prosecution may not "vouch for the credibility of a witness or suggest that she has some special knowledge concerning a witness's truthfulness. Nor may the prosecutor express a personal belief in defendant's guilt." *People v Laidler*, 291 Mich App 199, 201; 804 NW2d 866 (2010), rev'd in part on other grounds 491 Mich 339 (2012) (citation omitted). However, "[p]rosecutors are typically afforded great latitude regarding their arguments and conduct at trial. They are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *People v Unger (On Remand)*, 278 Mich App 210, 236; 749 NW2d 272 (2008) (citations omitted).

Here, the record indicates that the prosecution addressed the evidence presented at trial and the conclusions that reasonably could be inferred from it. The comments defendant references follow the prosecution's summary of the testimonial evidence and physical evidence and relate to the jury's ultimate determination based on viewing all the evidence as a whole. It was not improper for the prosecution to argue that the jury should convict defendant because the evidence showed that he was guilty.

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<sup>2</sup> We decline to address defendant's brief argument that his trial counsel was ineffective for failing to object to the prosecution's statement regarding the elements of the offense, because it was not raised in the statement of questions presented. MCR 7.212(C)(5); *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). However, we note that given that the trial court *sua sponte* instructed the prosecution to cease, any objection by counsel would have been futile. See *People v Ericksen*, 288 Mich App 192, 201; 793 NW2d 120 (2010) ("Failing to advance a meritless argument or raise a futile objection does not constitute ineffective assistance of counsel.").

Next, defendant argues that the prosecution vouched for the credibility of its witness where it argued that “the testimony of [the victim] alone establishes all of the elements of the crimes here ladies and gentlemen.” Again, a prosecutor may not vouch for the credibility of the witnesses by implying that he or she has some special knowledge concerning a witness’s truthfulness, *Laidler*, 291 Mich App at 201, but “a prosecutor may comment on his or her own witnesses’ credibility, especially when credibility is at issue. The prosecutor is free to argue from the evidence and its reasonable inferences in support of a witness’s credibility.” *People v Bennett*, 290 Mich App 465, 478; 802 NW2d 627 (2010) (citations omitted).

The record does not support the assertion that the prosecution vouched for the credibility of its witness by implying that it had some special knowledge of her truthfulness. Rather, the record shows that the prosecution was commenting on its own witness’s credibility during closing argument where defendant offered conflicting evidence, and the determination of defendant’s guilt was dependent on which witnesses the jury believed. When read in context, the prosecution was also emphasizing that corroborating evidence existed. Therefore, the prosecution’s comments regarding the victim did not constitute prosecutorial misconduct.

Finally, defendant claims error in the prosecution’s statement concerning defendant and his mother. The prosecution argued on rebuttal, “And I would submit to you that [defendant’s and his mother’s] testimony was incredible.” Regarding defendant’s mother specifically, the prosecution asserted, “She’s here because she wants to make sure her son doesn’t get in trouble. She loves her son and she’s going to do anything she can to make sure she keeps him out of trouble even getting up here and lying.”

“A prosecutor may argue from the facts that a witness is credible or that a witness is not worthy of belief.” *Unger*, 278 Mich App at 240. The prosecution’s statement relating to the credibility of defendant and his mother is asserted along with an argument emphasizing their conflicting testimony. Therefore, it does not constitute prosecutorial misconduct. Regarding the prosecution’s statement that defendant’s mother was lying, any witness who testifies may have her credibility impeached and her testimony questioned. *People v Fields*, 450 Mich 94, 110; 538 NW2d 356 (1995). Additionally, prosecutors are not required to confine their argument in the blandest possible terms. *Unger*, 278 Mich App at 239. Thus, the prosecution’s statement regarding the mother’s motive for testifying was not improper.

In sum, defendant has failed to show that the prosecution committed misconduct as to deny him a fair and impartial trial. Additionally, because defendant has failed to show any instances of prosecutorial misconduct that warrant reversal, we reject defendant’s argument that reversal is warranted based on cumulative error. See *People v Dobek*, 274 Mich App 58, 107; 732 NW2d 546 (2007).

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Donald S. Owens  
/s/ Michael J. Kelly