

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRADFORD D. LANCE,

Defendant-Appellant.

UNPUBLISHED

December 15, 1998

No. 204304

Oakland Circuit Court

LC No. 96-149017 FC

Before: O'Connell, P.J., and Gribbs and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b), and sentenced as an habitual offender, MCL 769.10; MSA 28.1082, to 20 to 40 years in prison. He now appeals as of right. We affirm.

Defendant first argues that the failure of his trial counsel to object to the admission of certain testimony denied him his constitutional right to the effective assistance of counsel. We disagree. We review a claim for ineffective assistance of counsel to see if defendant's representation fell below an objective standard of reasonableness and whether this was so prejudicial to defendant that he was denied a fair trial. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). Although defendant raised the issue below in conjunction with his motion for a new trial, there was no evidentiary hearing and our review is limited to details that are in the record. *People v Ullah*, 216 Mich App 669, 684; 550 NW2d 568 (1996).

Defendant complains that his counsel should have objected to the complainant's testimony concerning uncharged instances of her sexual abuse by defendant. The evidence was properly admitted and there is not merit to defendant's claim. Here, the prosecution asserted as early as the preliminary examination that the evidence was offered to illustrate the relationship between defendant and the complainant and to explain the complainant's delay in coming forward. The prosecution also gave notice to defendant of its intention to introduce this testimony, pursuant to MRE 404(b)(2), for the purpose of helping the jury assess complainant's credibility. Evidence of prior acts of uncharged abuse by the defendant against the complainant can help put the charged activity in context by enabling the jury

to better understand the dynamics of the relationship. *People v Daoust*, 228 Mich App 1, 13; 577 NW2d 179 (1998).

Moreover, because defendant argued that the complainant had a recent motive to fabricate an allegation of sexual abuse, the prosecution had a legitimate need to introduce prior consistent accusations by the complainant. Since the probative value of this evidence was not substantially outweighed by unfair prejudice, it was admissible. Accordingly, defendant was not prejudiced by his counsel's failure to object to admissible evidence.

For these same reasons, the testimony of a doctor, who repeated some of the complainant's prior consistent statements, was admissible. Defendant cannot establish the requisite prejudice merely by pointing out his counsel's failure to place an objection in the record.

Defendant further asserts that his counsel was ineffective for not objecting to three minor references, by prosecution witnesses, to defendant's battering of the complainant's mother. In each instance, the prosecutor was pursuing a proper line of questioning, and did not capitalize or otherwise develop the testimony. An unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). Counsel's decision to play down any such reference does not indicate objectively poor performance, nor does it establish that defendant was prejudiced.

Defendant also argues that the prosecutor argued facts not in evidence when she asked the jury to consider whether the complainant's promiscuity was not inconsistent with sexual abuse. While a prosecutor is not permitted to argue facts which are not in evidence, she may argue all reasonable inferences that can be drawn from the evidence. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). Because defendant failed to make a contemporaneous objection, our review is limited to a determination if there was a miscarriage of justice in that the remarks denied defendant a fair and impartial trial. *People v Fisher*, 220 Mich App 133, 156-161; 559 NW2d 318 (1996).

In response to defense counsel's argument regarding the promiscuity of the complainant, the prosecutor asked the jury "knowing what we know about children victims of sexual abuse . . . is it shocking to think that she might have had sex with somebody else?" The prosecutor here did not make an unsupported assertion, but merely called upon the jury to use its collective experience and common sense to evaluate the validity of defense counsel's previous comment. *Lee, supra* at 255. Additionally, a prosecutor's remarks must be considered in light of defense arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). A conviction will not be overturned based on improper closing remarks by the prosecutor which, as here, are deemed to be an "invited response" to remarks made in defense counsel's closing. *People v Smyers*, 398 Mich 635, 642-643; 248 NW2d 156 (1976). See also *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998).

Moreover, whatever the jury may have understood from the prosecutor's remark, a contemporaneous objection followed by a remedial instruction could have dispelled any unfair inference. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *Green, supra* at 693.

In fact, any such inference most likely was cured when the trial court instructed the jury that the statements and arguments of the lawyers are not evidence. In any event, the remark did not deny defendant a fair and impartial trial and there was no miscarriage of justice.

Affirmed.

/s/ Peter D. O'Connell

/s/ Roman S. Gibbs

/s/ Michael J. Talbot