STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL ALLEN DREW, JR.,

Defendant-Appellant.

UNPUBLISHED
November 10, 2009

No. 286825
Oakland Circuit Court
LC No. 2008-219534-FH

Before: Murphy, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with intent to commit criminal sexual conduct in the second degree, MCL 750.520g(2). The trial court sentenced defendant as a second-offense habitual offender, MCL 769.10, to serve a term of imprisonment of three to seven and one-half years. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

I. Facts

Complainant identified herself as 14 years old and in the eighth grade. She identified defendant as her father, who was divorced from her mother. Complainant testified that, while she was in the fifth grade, she was visiting defendant at the home of her aunt, and she and defendant were sitting on a couch watching a movie, when defendant began rubbing her stomach area, then went progressively higher. Complainant stated that she blocked defendant's access to her upper chest, because defendant "would have touched me in a way I didn't want to." According to complainant, defendant later suggested that they keep their "little secret." The witness specified that defendant twice tried, but failed, to force her arms out of his way. Complainant additionally testified that, while lying side-by-side on the couch with defendant, she felt something on her "butt," then specified that it was defendant's "penis," while defendant was "[k]ind of like scooting forward," making her very uncomfortable.

Complainant testified that on a subsequent visit defendant again started rubbing her stomach area, in response to which she telephoned her mother and asked to come home. Complainant recounted that after she got home she told her mother of defendant's inappropriate touching, and that she then ceased seeing defendant.

Defendant was charged with criminal sexual conduct in the second degree[1] along with assault with intent to commit criminal sexual assault in the second degree, but the jury found him guilty of only the latter.

II. Prosecutorial Misconduct

Defendant argues that certain arguments from the prosecuting attorney denied him a fair trial. Defendant raised no objections at trial to the prosecutorial arguments of which he now makes issue, thus leaving such issues unpreserved. Our review is thus limited to ascertaining if there was plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). Moreover, even if such an error is shown, the reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764. This Court has held that "'[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or failure to review the issue would result in a miscarriage of justice.'" *People v Unger*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008), quoting *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

Defendant first argues that the prosecuting attorney improperly attempted to elicit sympathy for the victim by way of the following passage from the opening statement:

> And she is going to tell you that in many respects, she wished those visitation[s] never happened, because the man that she wanted to know, the man that she loved, the man who was her biological father, instead of reconnecting with her, chose to use that time to sexually molest her.

Defendant asserts that the prosecuting attorney underscored the impropriety in closing argument:

> And that excitement and the joy of being able to connect with her father, was torn apart when the defendant, instead of engaging in behavior that is loving and kind and caring, decided to use a time when they were lying on the couch watching television, to satisfy his own deviant desires.

A prosecutor may not urge a jury to convict out of sympathy for the victim. See *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988), and *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, a prosecutor is free to argue from the evidence, including all reasonable inferences arising from it. *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989), remanded on other grounds sub nom *People v Thomas*, 439 Mich 896 (1991). A prosecutor need not confine argument to the "'blandest of all possible terms.'" *Marji*, *supra* at 538, quoting *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). Accordingly, minimal argument that may tend to arouse sympathy for the victim is not prejudicial where, as here, the bulk of the prosecutor's arguments was properly tied to the evidence and applicable law. See *People v Siler*, 171 Mich App 246, 258; 429 NW2d 865 (1988), superceded on other grounds as stated in *People v Orr*, 275 Mich App 587 (2007) ("[a] prosecutor's closing argument

[1] MCL 750.520c(1)(a).

should be considered in its entirety"). We conclude that the commentary here challenged fairly reflected the prosecutor's theory of the case, and had little potential to cause undue sympathies for the victim. Further, the trial court instructed the jury not to let sympathy or prejudice influence its decision. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). For these reasons, these prosecutorial statements warrant no appellate relief.

Defendant also protests that the prosecuting attorney improperly argued that complainant's testimony was "uncontradicted as it relates to what happened on that couch in the defendant's aunt's home," on the ground that only defendant could have contradicted complainant's account, and thus that the prosecuting attorney improperly used defendant's decision not to testify in arguing for guilt.

Although commentary to the effect that the prosecution's evidence went unrebutted can act as a reminder that the defendant chose not to testify, such comments should be reviewed in context to determine whether they were "manifestly intended to be . . . of such a character that the jury necessarily took them to be a comment on the failure of defendant to testify." *People v Guenther*, 188 Mich App 174, 179; 469 NW2d 59 (1991). Our review of the entire argument reveals that the prosecutor's remarks about complainant's account's being uncontroverted did not at all focus attention on defendant's silence. Instead, the argument emphasized the strength of the prosecution's case, not any weakness on the part of the defense. Further, the trial court instructed the jury that defendant had an absolute right not to testify, and that it must not allow his exercise of that right in this instance to affect the verdict in any way.

For these reasons, we reject defendant's unpreserved claim of prosecutorial misconduct.

III. Offense Variable 13

Defendant argues that the trial court improperly scored Offense Variable (OV) 13. The trial court assessed defendant 25 points for OV 13, which concerns continuing patterns of criminal behavior. This is the total prescribed where the offense in question "was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(c).

At sentencing, defense counsel objected to that score, protesting that defendant had only two crimes against a person, which should bring a score of zero. A person identified as a probation officer, presumably the one who prepared defendant's presentence investigation report, replied, "the defendant was convicted of the one crime in question. It was additionally reported that she reported to authorities that he touched her in the same way on two separate occasions, totaling three." The court overruled the defense objection without elaboration.

"This Court will uphold the trial court's scoring of the guidelines if there is evidence to support it." *People v Phillips*, 251 Mich App 100, 108; 649 NW2d 407 (2002), aff'd 469 Mich 390 (2003). Information relied upon may come from various sources, including some that would not be admissible at trial, e.g., a presentence investigator's report. *People v Potrafka*, 140 Mich App 749, 751-752; 366 NW2d 35 (1985). See also MRE 1101(b)(3) (the rules of evidence do not apply to sentencing proceedings).

Defendant asserts, without elaboration or citation of authority, that "the two separate charges constitute only one scorable charge." Defendant is mistaken. "For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a). Complainant described two separate occasions where defendant rubbed her suggestively, with designs on reaching her breasts, and reported that on one of those occasions he pressed his erect penis against her rectal area. The trial court did not err in counting both incidents for purposes of scoring OV 13. See *People v Wilkens*, 267 Mich App 728, 743-744; 705 NW2d 728 (2005); *People v Harmon*, 248 Mich App 522, 532; 640 NW2d 314 (2001).

At the preliminary examination, complainant described the same kind of improper contacts coming from defendant, stated that she had visited defendant "[a]bout four" times, and added that "it happened every time I was over there." Defendant argues that such innuendoes concerning how many times he engaged in improper behavior with her, beyond the matters over which he was charged, were insufficient to conclude for purposes of sentencing that he had committed three or more crimes against a person in the specified period. We need not decide that question, however, because an adequate basis for the scoring of OV 13 is apparent on the record without recourse to additional allegations of sexual misconduct by defendant against his daughter.

At sentencing, defense counsel stated that defendant's presentence investigation report was "factually accurate," and thus that the defense proposed "no additions or deletions." That concededly accurate report lists among defendant's earlier convictions one for resisting or assaulting a police officer, dating from 2002. That, plus the two offenses underlying the instant proceedings, add up to three crimes against a person within a five-year period.

For these reasons, we reject defendant's challenge to the trial court's decision to assess 25 points for OV 13.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Jane M. Beckering