STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID DANIEL WILLIS,

Defendant-Appellant.

UNPUBLISHED
July 9, 1996

No. 163085
LC No. 92-000041

Before: Wahls, P.J., and Young and H.A. Beach,* JJ.

PER CURIAM.

Defendant was convicted by a jury of two counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), unarmed robbery, MCL 750.530; MSA 28.798, and habitual offender, second offense, MCL 769.10; MSA 28.1082. He was sentenced to serve 15 to 22 1/2 years in prison. He appeals as of right and we affirm.

Defendant first argues that he was denied a fair trial due to prosecutorial misconduct. Because defendant failed to object to any of the alleged instances of misconduct by the prosecutor, appellate review is precluded unless failure to review the issue would result in a miscarriage of justice or if a cautionary instruction could not have cured the prejudicial effect. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

During his closing argument, the prosecutor used facts and statistics introduced at trial regarding DNA and serological results, as well as general population characteristics, to conclude that a total of twenty-eight males in the tri-county area could have been the rapist. The prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to his theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Although the prosecutor properly used facts in evidence to perform his calculations, there was no evidence presented regarding the appropriateness of the method used by the prosecutor to exclude members of the population who could not be possible sources of the semen. While the experts testified to the individual numbers that the prosecutor used in his equation, they did not testify that the method and calculations used by the prosecutor would or could

* Circuit judge, sitting on the Court of Appeals by assignment.

yield correct statistics. Since the prosecutor did not introduce evidence to establish that it was appropriate to use the method to calculate the number of possible rapists, his statement that there were only twenty-eight possible men who could have been the source of the semen was improper. However, a curative instruction would have eliminated the prejudicial effect of the prosecutor's conduct had defendant objected to the prosecutor's improper comment. Indeed, the jury was instructed that the parties' closing arguments were not evidence.

Moreover, a miscarriage of justice will not result given the evidence supporting that defendant was the rapist. Only one in six hundred people in the general Caucasian population could have matched the DNA profiles of the semen sample taken from the victim's vaginal swab. Defendant was one of those people. Defendant's blood type, PGM enzyme type and secretor status matched that of the semen taken from the victim. One of the hairs found in the pubic combings was consistent with defendant's hair. Defendant was carrying a condom in his wallet and one in his pocket at the time of his arrest. The suspect took a condom out of his wallet at the time of the rape. The victim identified defendant as her rapist based on his build, hair color, eyes and voice, and testified that there was no question in her mind that defendant was the rapist. Defendant's alibi was that at the time the assault occurred, he was applying for jobs at some factories. However, he could not recall the names of any businesses that he had visited. Defendant was found with the victim's stolen car, which had been driven away by the suspect. Finally, the court instructed the jury that the arguments made by counsel were not evidence. Therefore, even without the prosecutor's improper comments during closing argument, the jury would have likely convicted defendant based on the evidence presented.

Defendant also claims that the prosecutor shifted the burden of proof by highlighting that defendant did not produce corroborating evidence that he was collecting job applications at the time of the rape. A prosecutor may not suggest in closing argument that a defendant must prove something because such an argument tends to shift the burden of proof. However, nothing precludes a prosecutor from using the evidence presented to discredit a defense. *People v Guenther*, 188 Mich App 174, 180-181; 469 NW2d 59 (1991). Furthermore, a prosecutor is permitted to comment on a defendant's failure to produce corroborating witnesses if the defendant takes the stand and testifies in his own behalf. *People v Spivey*, 202 Mich App 719, 723; 509 NW2d 908 (1993).

During cross-examination, defendant told the prosecutor that on the day of the rape, he was visiting factories to look for a job. When the prosecutor asked if defendant filled out any applications, defendant replied that he did not complete any applications, but brought them all home with him. The prosecutor's comment did not shift the burden of proof. The prosecutor did not indicate that the defendant had any burden of proof or that the prosecution's burden was less than reasonable doubt. Nor did the prosecutor indicate that defendant was required to prove anything. Rather, the prosecutor was properly commenting on defendant's failure to produce corroborating evidence. In addition, the court instructed the jury that the prosecution had the burden of proving each element of the crime beyond a reasonable doubt. Because the comment was not improper, a miscarriage of justice will not occur if this Court declines to review this issue.

Defendant also argues that he was denied effective assistance of counsel when his counsel did not object to the preceding statements in the prosecutor's closing argument. However, defendant failed to preserve this claim for appeal by moving to remand for an evidentiary hearing or making a motion for a new trial pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Moreover, defendant did not cite any authority in support of his argument of ineffective assistance of counsel and it is therefore deemed abandoned. *People v Simpson*, 207 Mich App 560, 561; 526 NW2d 33 (1994).

Defendant next argues that the trial court abused its discretion in denying his motion for mistrial on the basis that the prosecutor's comment in his opening statement that the Roseville police went looking for defendant after speaking with a Clinton Township detective was in violation of the court's order granting defendant's motion in limine to exclude evidence of his prior CSC conviction. The trial court's denial of a motion for a mistrial will not be disturbed on appeal unless the denial constituted an abuse of discretion. *People v Vettese*, 195 Mich App 235, 245-246; 489 NW2d 514 (1992).

The court did not abuse its discretion in denying defendant's motion for a mistrial because the prosecutor did not inform the jury that defendant had a prior conviction for criminal sexual conduct. Instead, he merely stated that after speaking with a Clinton Township Detective, the Roseville police went looking for defendant. The prosecutor did not refer to defendant's prior convictions, nor would his statement necessarily lead one to conclude that defendant had a prior conviction. Thus the court's granting of the motion in limine to exclude evidence of defendant's previous convictions was not violated.

Finally, defendant claims that the prosecutor compounded the prejudicial effect of his comment that the police went looking for defendant, by indicating that the second foreign hair found on the victim could have come from a person whom defendant had sex with before her. However, this argument is without merit since this comment is in no way related to defendant's prior conviction. Moreover, the prosecutor was properly commenting on facts in evidence and arguing a reasonable inference based on his theory of the case. *Bahoda, supra*, p 282.

Affirmed.

/s/ Myron H. Wahls
/s/ Robert P. Young,, Jr.
/s/ Harry A. Beach