

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL LEE HENRY,

Defendant-Appellant.

UNPUBLISHED
February 15, 2005

No. 250165
Oakland Circuit Court
LC No. 2003-188534-FC

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), and second-degree CSC, MCL 750.520c(1)(a). He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of fourteen to thirty years for the first-degree CSC conviction and 47 to 270 months for the second-degree CSC conviction. Defendant appeals as of right. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Defendant argues that the prosecutor denigrated defense counsel in closing arguments. Because defendant did not preserve this issue with an appropriate objection at trial, he must show a plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 761-767; 597 NW2d 130 (1999); *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003).

Claims of prosecutorial misconduct are decided case by case and the challenged comments must be considered in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). Here, the challenged comments were responsive to defense counsel's closing argument. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997); *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996). Further, they were focused on the evidence and did not involve a personal attack on defense counsel's veracity. See *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). Considered in this context, the remarks did not amount to plain error.

Defendant also argues that the prosecutor improperly urged the jury to sympathize with the victim. We disagree. The prosecutor's comments were not an obvious plea to the jury to sympathize with the victim. See *Watson*, *supra* at 591. To the extent the remarks could be considered improper, any prejudice could have been cured with a cautionary instruction.

Therefore, reversal is not required. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Defendant also argues that the prosecutor failed to properly establish his status as an habitual offender at the time of sentencing. To prove that defendant had a prior felony conviction, the prosecutor submitted a letter from the chief of the criminal division of the district attorney's office in San Francisco, which stated that defendant had previously plead guilty to possession of 2.4 grams of cocaine, a felony. The prosecutor also submitted a copy of defendant's presentence report for that conviction. These documents were sufficient to show that defendant had a prior felony conviction for purposes of establishing his status as a second felony offender. MCL 769.13(5). See also *People v Green*, 228 Mich App 684, 700; 580 NW2d 444 (1998).

Defendant also argues that his attorney was ineffective for not objecting to the trial court's scoring of the sentencing guidelines. We disagree.

In order for this Court to reverse due to ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant that he was denied the right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994).

Defendant argues that his trial counsel was ineffective for failing to object to the trial court's scoring of offense variables (OV) 4 and 10. Defendant received ten points for OV 4, which are to be scored where "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). For purposes of OV 4, ten points are appropriate if the serious psychological injury *may* require professional treatment. That treatment has not been sought is not conclusive. MCL 777.34(2). Defendant has failed to show that had his attorney objected to the scoring of OV 4, the trial court would have changed the score.

At sentencing, the victim's mother addressed the trial court and explained that "this is scarring her [the victim] for the rest of her [sic] for the rest of her life." Although the record does not indicate whether the victim was receiving treatment for psychological problems, there is sufficient indication that the victim suffered a serious psychological injury as a result of this offense.

Defendant also received ten points for OV 10, which are to be scored if the defendant "exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status." MCL 777.40(1)(b). The term "exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). The record indicates that defendant threatened to give the eight-year-old victim a "whooping" if she did not comply with his command to perform fellatio. The facts were sufficient to show that defendant exploited the victim's youth and abused his authority status for his own selfish purposes.

Because the record supports the trial court's scoring of OV 4 and OV 10, defense counsel was not ineffective for failing to object. See *People v Harmon*, 248 Mich App 522, 531; 640 NW2d 314 (2001).

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen