# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 15, 2005 |
| v | No. 251051<br>Macomb Circuit Court |
| CHARLES FELIX GAMBONE,<br><br>Defendant-Appellant. | LC No. 2003-000125-FC |

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

PER CURIAM.

Following a jury trial, defendant was convicted of five counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), twelve counts of second-degree criminal sexual conduct (CSC), MCL 750.520c(1)(a), and four counts of child sexually abusive activity, MCL 750.145c(2). He was sentenced to concurrent prison terms of sixteen to thirty years' imprisonment for each first-degree CSC conviction, ten to fifteen years' imprisonment for each second-degree CSC conviction, and ten to twenty years' imprisonment for each child sexually abusive activity conviction. In this appeal as of right, defendant challenges the sufficiency of the evidence and raises four claims of prosecutorial misconduct. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

## I. Sufficiency of the Evidence

When ascertaining whether sufficient evidence was presented at trial to support a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992). This Court will not interfere with the trier of fact's role of determining the weight of evidence or the credibility of witnesses. *Id.* at 514.

### A. Second-degree CSC

Defendant contends that the evidence was insufficient to sustain his convictions for ten counts of second-degree CSC against DM. As it relates to this case, to sustain a conviction of second-degree CSC under MCL 750.520c(1)(a), the prosecution was required to prove that the defendant intentionally touched the victim's intimate parts for sexual arousal or gratification and

that the victim was under the age of thirteen at the time of the act. See *People v Piper*, 223 Mich App 642, 645; 567 NW2d 483 (1997).

Defendant concedes that there was sufficient evidence to sustain his convictions of nine counts of second-degree CSC against DM, namely, four acts of rubbing oil on her breasts, and five acts of rubbing oil on her genital area. But DM also testified that defendant reached underneath her shirt, rubbed her breasts with a dildo, and subsequently used the dildo on his own genital area. From this evidence, a jury could reasonably infer that defendant intentionally touched DM's intimate parts for sexual purposes. Therefore, viewed in a light most favorable to the prosecution, the evidence was sufficient to sustain defendant's convictions for the ten counts of second-degree CSC against DM.

B. Child Abusive Activity

We reject defendant's claim that MCL 750.145c is limited to conduct involving the production or depiction of sexually abusive material and, therefore, the evidence was insufficient to sustain his convictions of child sexually abusive activity. Among the conduct expressly proscribed by MCL 750.145c(2) is "arrang[ing] for . . . any child sexually abusive activity *or* child sexually abusive material." (Emphasis added.) Defendant relies on *People v Ward*, 206 Mich App 38, 42-43; 520 NW2d 363 (1994), wherein this Court observed that "[t]he purpose of the statute is to combat the use of children in pornographic movies and photographs, and to prohibit the production and distribution of child pornography." But the Court also observed that the statute "focuses on protecting children from sexual exploitation, assaultive or otherwise." *Id*. Further, contrary to defendant's implication, the prosecution charged that defendant "did arrange for . . . child sexually abusive *activity*," not child sexually abusive material. (Emphasis added.) For these reasons, defendant's claim that the evidence was insufficient because the photographs that he took of the victims did not depict "erotic nudity" is inapposite. We, therefore, reject this claim of error.

II. Prosecutorial Misconduct

Because defendant failed to object to the prosecutor's conduct below, we review his unpreserved claims for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

We reject defendant's claim that the prosecutor impermissibly vouched for the victims during closing argument. A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Viewed in context, the prosecutor did not convey that he had special knowledge that the victims were testifying truthfully, and the remarks were plainly focused on refuting defense counsel's assertions made during trial that the adolescent victims were not credible. As such, the remarks were not improper. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

We also reject defendant's claim that the prosecutor impermissibly denigrated defense counsel and his defense. A prosecutor may not personally attack the credibility of defense counsel. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, the challenged remarks here simply conveyed the prosecutor's contention that, based on the

evidence, the defense was a pretense and unreasonable, which is not improper. See *People v Fisher,* 220 Mich App 133, 156; 559 NW2d 318 (1996). Further, a prosecutor is not required to phrase arguments and inferences in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant also argues that the prosecutor impermissibly argued facts not in evidence when he stated that the victims testified about "their first sexual experience." See *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994) (a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence). The victims were between the ages of seven and nine when defendant allegedly abused them. When making the challenged remark, the prosecutor noted their young ages. In addition to the unsophisticated terminology exhibited by the victims when testifying, DM indicated that she learned certain terms from defendant. Because it was reasonable to infer from the evidence that the victims had not previously had sexual experiences, the prosecutor's comments were not improper. *Fisher*, *supra*.

Lastly, defendant claims that the prosecutor improperly denigrated his character by twice referring to him as a "pedophile." A prosecutor "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Although there was no evidence that defendant was diagnosed with pedophilia, the remarks involved only a brief portion of the prosecutor's argument, and were not so inflammatory that defendant was prejudiced. Moreover, the trial court's instructions that the lawyers' comments are not evidence, and that the case should be decided on the basis of the evidence, were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). There was no plain error that affected defendant's substantial rights.

Affirmed.

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