

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK VENARD WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

February 17, 2005

No. 252543

Wayne Circuit Court

LC No. 03-003584-01

Before: Kelly, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b, assault with intent to rob while armed, MCL 750.89, first-degree home invasion, MCL 750.110a, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of thirty-five to sixty years each for the first-degree CSC and assault convictions, thirteen to twenty years for the home invasion conviction, and three to five years each for the felon in possession and CCW convictions, and a consecutive two-year term for the felony-firearm conviction. He appeals as of right his conviction and sentence. We affirm.

I. Basic Facts

Defendant's convictions arise from allegations that he sexually assaulted the victim in her home. The victim testified that, as she was cleaning snow off her car, defendant approached her, brandished a gun, and ordered her into her house. The victim's thirteen-year-old daughter testified that she saw defendant approach her mother, and saw her mother crying as she entered the house. The victim's daughter and young son were directed into a bedroom, and defendant demanded the telephones and money. From the bedroom, the victim's daughter called 911. In the meantime, the victim searched the house for money to give to defendant. Defendant ultimately directed the victim into the basement and forced her to engage in sexual intercourse. The victim's daughter indicated that she heard her mother's cries from the basement, and called her aunt, Yvette Johnson, and 911 again. Johnson testified regarding the information that the victim's daughter relayed to her while the complainant was being sexually assaulted. Johnson also called 911.

The victim's daughter indicated that defendant came upstairs, and then her mother came upstairs partially clothed, "shaking and crying," and "screaming that she got raped." According to the victim and her daughter, defendant left their house, and walked down the street. When the police arrived, the victim and her daughter pointed at defendant, who was still walking down the street. Defendant attempted to elude the police and fled to his nearby house, where he was apprehended. In a statement to the police, defendant claimed that he offered the victim \$75 to have sex with him, that they engaged in consensual sex, and that the victim became angry after he did not pay her.

On the second day of trial, defense counsel moved for a mistrial or, alternatively, a new jury, arguing that defendant's family members had heard the victim discussing the case and making disparaging remarks about defendant in the vicinity of the prospective jurors on the previous day. Defense counsel also indicated that they saw the prosecutor interact with jurors during a break.

Outside the presence of the jury, the trial court conducted a hearing on the matter. Defendant's mother testified that she saw the prosecutor speaking with a dismissed juror, but could not hear their conversation. The prosecutor admitted that a dismissed juror approached him in the hallway and expressed her disappointment about being dismissed. The prosecutor told the juror that it was "nothing personal," but denied that they discussed the case.

Defendant's mother also testified that she saw the victim and her family speaking with the same dismissed juror, and heard the victim say that "mother fuc***" was going to jail for raping her. She assumed the prospective jurors heard the victim's comments because they were nearby. The victim testified that, while in the hallway, she told her family that she was tired of coming to court and was ready to "get her life back." But at that time, the jurors were inside the courtroom. The victim denied speaking with jurors, or making comments near any jurors. The prosecutor indicated that he was in the hallway with the victim and her family, but they did not discuss the case.

The trial court denied defendant's request for a mistrial or new jury panel. The jury found defendant guilty as charged.

II. Motion for Mistrial

Defendant first argues that the trial court abused its discretion by denying his motion for a mistrial, after the jury was allegedly exposed to extraneous influences. We disagree.

This Court reviews a trial court's ruling on a motion for a mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.* (citation omitted).

A defendant has a right to a fair and impartial jury. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). The jury is required to consider only the evidence received in open court, and is not permitted to consider extraneous facts not introduced in evidence. *Id.* To warrant relief, a defendant must show that the jury was exposed to extraneous influences that

“created a real and substantial possibility that they could have affected the jury’s verdict.” *Id.* at 88-89.

We agree with the trial court that defendant failed to demonstrate a basis for a mistrial. First, we are not persuaded that the jury was exposed to extraneous facts. Furthermore, even if the jurors overheard the victim commenting that she wanted defendant to go to jail, it is unclear what, if any, negative effect the comments could have had on defendant’s trial. It is a fair assumption that the victim desired defendant’s conviction. Moreover, the trial court instructed the jury to consider only the evidence properly admitted in court and, before deliberations, reminded the jury that it took an oath to decide the case based only on the properly admitted evidence and the law as instructed by the court. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Therefore, the trial court did not abuse its discretion by denying defendant’s motion for a mistrial.

Defendant also contends that he is entitled to a new trial because defense counsel was ineffective for failing to “demand an inquiry” of the jurors to determine whether they overheard the victim’s comments. But because defendant cannot demonstrate that the victim’s comments were prejudicial, he cannot establish a claim of ineffective assistance of counsel. “Trial counsel is not required to advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

III. Prosecutorial Misconduct

Next, defendant claims that he is entitled to a new trial because the prosecutor denigrated him, and appealed to the jurors’ civic duty. We review defendant’s unpreserved claims of prosecutorial misconduct for plain error affecting defendant’s substantial rights. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). This Court must examine the pertinent portion of the record and evaluate a prosecutor’s remarks in context. *People v Bahoda*, 448 Mich 261, 267; 531 NW2d 659 (1995).

A. Denigration of Defendant

Defendant claims that the prosecutor denigrated his character by “highlight[ing] the graphic nature of [his] statement,” and using the terms “senseless,” “vile,” and “terrible” to describe him. A prosecutor “must refrain from denigrating a defendant with intemperate and prejudicial remarks.” *Bahoda, supra* at 283. However, the prosecutor used the term “senseless” in the context of refuting defense counsel’s suggestion during closing argument that defendant was innocent because it would be inconsistent with “common sense” for him to rape a neighbor and then return to his nearby house. In rebuttal argument, the prosecutor stated that he could not explain why defendant would rape a woman who lived around the corner and then run to his house, but he was “under no duty to make sense out of the senseless, and he’s senseless.” “Otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel.” *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

Furthermore, viewed in context, the prosecutor’s use of the terms “vile” and “terrible” in characterizing the explicit nature of defendant’s own description of his encounter with the victim was not improper. It was responsive to defense counsel’s closing argument, in which he

acknowledged that defendant used “vulgarity” when talking to the police about the incident. A prosecutor is not required to phrase arguments in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

To the extent the prosecutor’s remarks could be considered improper, they involved only a brief portion of his rebuttal argument, and were not so inflammatory that defendant was prejudiced. Additionally, the trial court instructed the jurors that the lawyers’ comments are not evidence, and that the case should be decided on the basis of the evidence. The instructions were sufficient to dispel any prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

B. Civic Duty Argument

Defendant also claims that the prosecutor improperly appealed to the jurors’ civic duty when he stated:

Albert Einstein once said the world is a dangerous place, not because of those that do evil but because of those who stand by and let it happen. Now that this case has been proven to you beyond a reasonable doubt, I trust you won’t let it happen.

A prosecutor may not urge the jurors to convict the defendant as part of their civic duty. *Bahoda, supra* at 282. However, the prosecutor’s comment was made during rebuttal argument, occurred after a lengthy and detailed discussion of the evidence, was isolated, and was not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 122-123; 600 NW2d 370 (1999). Moreover, the trial court’s instructions that the jury should not be influenced by sympathy or prejudice, 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 prejudice. *Long, supra*. In light of our determination that prosecutor’s conduct did not deny defendant a fair trial, we also conclude that counsel’s failure to object to the prosecutor’s comments did not deprive defendant of the effective assistance of counsel. *Snider, supra* at 425.

IV. Sentence

We also reject defendant’s final claim that he is entitled resentencing because his thirty-five-year minimum sentences for first-degree CSC and assault with intent to rob while armed are disproportionate to the circumstances of the offense and the offender. Defendant concedes that his minimum sentences are within the applicable statutory sentencing guidelines range. Under the sentencing guidelines statute, this Court must affirm sentences within the applicable guidelines range absent an error in the scoring of the guidelines or reliance on inaccurate information in determining the sentence. MCL 769.34(10); *People v Kimble*, 470 Mich 305, 310-311; 684 NW2d 669 (2004). Defendant has not presented any argument that the guidelines were erroneously scored or that the trial court relied on inaccurate information in determining his sentence. Therefore, we must affirm defendant’s sentence.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Henry William Saad
/s/ Michael R. Smolenski