

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JEFFREY BARWICK,

Defendant-Appellant.

UNPUBLISHED

April 13, 1999

No. 199584

Oakland Circuit Court

LC No. 94-136192 FH

Before: Gribbs, P.J., and Griffin and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c) (incapacitated victim). Defendant was sentenced to four to fifteen years' imprisonment. Defendant now appeals as of right. We affirm.

On appeal, defendant argues he was denied a fair trial by alleged prosecutorial misconduct during closing arguments. We disagree. Defendant failed to properly preserve this issue for appeal with a timely objection or request for a curative instruction. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Where a defendant fails to object, appellate review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction, or failure to review the issue would result in a miscarriage of justice. *Id.* at 687; *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

Defendant claims that the prosecution acted improperly when it denigrated defense counsel. Specifically, defendant challenges certain statements made during closing argument in which the prosecution argued that the evidence defendant introduced regarding his and Gobbell's smoking of crack cocaine on the night of the charged incident was irrelevant to the case the jury had to decide. Defendant argues that the prosecution's argument improperly touched on credibility which was a core issue in the case.

Contrary to defendant's argument, credibility is a proper subject for closing argument, especially when there is conflicting evidence and the question of defendant's guilt or innocence turns on which witness is to be believed. *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983). In

this case, the prosecution's remarks did not personally attack defense counsel or shift the jury's focus from the evidence to defense counsel's personality. *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996). The prosecution simply argued that the issue in this case was whether defendant committed third-degree criminal sexual conduct and whether the complainant was a credible witness, not whether the complainant's fiancé and defendant smoked crack cocaine together. Accordingly, the prosecution's closing argument did not denigrate defense counsel and was not otherwise improper.

Defendant next argues that the prosecutor improperly appealed to the jury's religious duties when he stated during closing argument that defendant coveted the complainant, who was defendant's best friend's fiancé, contrary to the Ten Commandments.

In closing argument, emotional language is an important weapon in counsel's forensic arsenal. *People v Mischley*, 164 Mich App 478, 483; 417 NW2d 537 (1987). Although the prosecutor may not appeal to the jury's religious duties in calling for a conviction, we find that the prosecutor in this case did not appeal to the jury's religious duties, but merely used the biblical reference as an illustration. *Id.* Indeed, the reference was not used to inflame the passions of the jury. *Id.* Moreover, although this Court has previously registered disapproval with prosecutorial references to the Ten Commandments, it has been held that any error such a reference may have imposed could have been cured by a cautionary instruction to the jury. *People v Sutherland*, 149 Mich App 161, 166; 385 NW2d 637 (1985). Finally, the trial court instructed the jury that the lawyers' statements and arguments were not evidence and were not to be considered in reaching a verdict. Accordingly, we find that defendant was not denied a fair and impartial trial by virtue of the challenged remarks and, there being no manifest injustice, further review of this issue is foreclosed.

Next, defendant argues that he is entitled to resentencing because the trial court improperly considered defendant's prior misdemeanor convictions in the State of California, which were obtained without the benefit of counsel, in its sentencing decision. We disagree. This Court reviews challenges to the presentence investigation report de novo. See *People v Britt*, 202 Mich App 714, 718; 509 NW2d 914 (1993).

This Court has recently held that defendants have no right to counsel under either the federal or state constitution if their misdemeanor convictions do not result in incarceration. *People v Daoust*, 228 Mich App 1, 19; 577 NW2d 179 (1998); *People v Richert*, 216 Mich App 186, 195; 548 NW2d 924 (1996). See *Nichols v United States*, 511 US 738; 114 S Ct 1921; 128 L Ed 2d 745 (1994). Accordingly, a sentencing court may consider a defendant's previous uncounseled misdemeanor conviction as long as it did not result in a sentence of imprisonment. *Richert*, *supra* at 195; *People v Hamm*, 206 Mich App 270, 273 n 1; 520 NW2d 706 (1994).

Here, defendant's misdemeanor convictions did not result in incarceration; rather, defendant was sentenced to probation and was ordered to pay restitution and fines. As a result, defendant's 1985 misdemeanor convictions were properly considered by the trial court in imposing sentence in this case and defendant is not entitled to resentencing.

Affirmed.

/s/ Roman S. Gibbs
/s/ Richard Allen Griffin
/s/ Kurtis T. Wilder