STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 25, 1999
v	No. 198503 Washtenaw Circuit Court
JAMES MARK CHATMAN, Defendant-Appellant.	LC No. 94-003401 FC

Before: Wilder, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree murder, MCL 750.317; MSA 28.549, and first-degree child abuse, MCL 750.136b(2); MSA 28.331(2)(2), arising out of the death of Jaylon Jones, the two-year-old son of defendant's friend. Defendant was sentenced to concurrent terms of twelve to twenty years' imprisonment for the second-degree murder conviction and three to fifteen years' imprisonment for the first-degree child abuse conviction. Defendant appeals as of right. We affirm.

Defendant claims that he was denied a fair trial by repeated instances of prosecutorial misconduct. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Claims of prosecutorial misconduct are reviewed on a case by case basis, *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995), and we examine the pertinent portion of the record and evaluate the prosecutor's remarks in context to determine whether the defendant was denied a fair and impartial trial. *Green, supra* at 693.

First, defendant argues that the prosecutor improperly appealed to the jury for sympathy for the victim by visibly and audibly crying during her rebuttal argument, and by her plea for sympathy during voir dire. See *People v Dalessandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988). We disagree.

Initially, we note that, on the record, defendant lodged no more than a general objection to the prosecutor's display of emotion during rebuttal argument. In the absence of a specific objection or a

request for specific relief, appellate review is typically foreclosed absent manifest injustice. See MRE 103(a)(1); *People v Flaherty*, 165 Mich App 113, 120; 441 NW2d 33 (1987).

We conclude that no manifest injustice occurred in this case. Examined in context, the crying and emotional display by the prosecutor, while unprofessional and not to be condoned, cannot be said to have had an improper influence on the jury's deliberations on the issues in this case. Contrary to defendant's assertion, there is nothing in the record to permit this Court to conclude that the prosecutor's display of emotion at the close of her rebuttal argument was deliberately injected with the intent to elicit an emotional response from the jury. Cf. *Dalessandro, supra* at 581. The record does demonstrate that the trial in this case was hard fought over fourteen days, and that closing arguments lasted several hours. Prior to deliberating five and one-half hours over a Friday afternoon and Monday morning to reach a verdict, the jury was instructed by the trial court that sympathy or prejudice must not influence its decision. Furthermore, the record does not show that any of the jurors were visibly affected by the prosecutor's emotional display, or that the prosecutor's conduct disrupted the trial, and the facts simply negate any inference that the prosecutor's emotional display influenced the trial in any meaningful way.

The dissent asserts that because the prosecutor's crying continued even despite a brief pause for a bench conference to permit the prosecutor to regain composure, the level of prejudice of the conduct was such that no objection made by the defendant could have cured the error. We note, however, that no record of what transpired during the bench conference has been submitted to this Court. Our review is limited to the record, MCR 7.210(1), and this Court simply cannot infer the subject matter of the conference or the substance, reasoning, and effect of objections or rulings, if any, made during the conference.

As noted previously, the record shows that defendant lodged only a general objection to the prosecutor's conduct; importantly, he did not move for a mistrial, and he did not request a curative instruction for the jury to disregard the crying or any other specific relief. As mentioned, there is no record of the bench conference, and there is no record of the jury's reaction to the prosecutor's display of emotion or the effect it had on the jurors. Under these circumstances, where the effect or impact of the prosecutor's conduct is not reported in a written record, we defer to the discretion of the trial judge who was present at trial and in the best position to evaluate the prosecutor's conduct, its propriety, and its impact, if any, on the jury, as well as the overall fairness of the proceeding. On this record, we conclude that defendant was not denied a fair trial, and therefore, no manifest injustice occurred.

We note that while there is no Michigan case directly addressing the issue of whether a prosecutor's crying during closing argument denies defendant a fair trial, courts in other jurisdictions have reached similar results. See e.g., *Hill v State of Arkansas*, 64 Ark App 31; 977 SW2d 234 (1998) (prosecutor's emotional display was not an appeal to the jurors' passion that required granting a mistrial); *Gribbins v State*, 229 Ga App 896; 495 SE2d 46 (1997) (the trial court did not err in refusing to grant a mistrial where the prosecutor, the victim and her mother, and other witnesses, cried during closing arguments because the record did not show that their actions disrupted the court or affected the jury); *Coburn v State of Indiana*, 461 NE2d 1154 (Ind App, 1984) (trial court did not

abuse its discretion in refusing to grant a mistrial where the prosecutor cried during defense counsel's closing argument).

In addition, with regard to defendant's claim that the prosecutor made an attempt during jury voir dire to appeal for sympathy for the victim, we conclude that defendant has taken the challenged remarks wholly out of context. When the remarks are viewed in context, *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994), it is clear that the prosecutor was asking the prospective jurors to *set aside* any sympathy they might have for the victim in reaching their verdict in this case. On this record, we find that the prosecutor's remarks were entirely appropriate.

Second, defendant contends that he was denied a fair trial as a result of the prosecutor's conduct toward the defense expert witness, Dr. Ljubisa Dragovic. We disagree. The prosecution's voir dire of Dr. Dragovic constituted proper questioning of his qualifications to render expert opinions in this case. The trial court did not abuse its discretion by observing that Dr. Dragovic was "well able to handle himself" in response to the prosecutor's questions during voir dire and, we add, cross-examination. We further find the trial court correctly determined that the brief references to the controversy over Dr. Dragovic's involvement as an expert witness in the *People v Budzyn* and *People v Nevers* cases during the prosecutor's examination of Dr. Dragovic were relevant to impeach Dr. Dragovic's own statements about his status as a nationally renowned pathologist. Such references were not unduly prejudicial to defendant, and did not deny him a fair trial.

Third, defendant maintains that the prosecutor repeatedly attempted to impugn the integrity of defense counsel. We disagree. A prosecutor may not personally attack the credibility of defense counsel because to do so might infringe upon the defendant's presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, the remarks must be read in context and an otherwise improper remark may not rise to the level of an error requiring reversal when the prosecutor is responding to an argument or issue raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *Kennebrew*, *supra* at 608. Such is the case here. The record reveals that there was a high level of rancor and animosity expressed by both sides in this case, and both parties engaged in intense, sometimes acrimonious, arguments in support of their respective positions on issues raised. However, it does not follow that the trial was not fair. See *Green*, *supra* at 693. The trial court denied defendant's numerous motions for mistrial brought on this basis, finding that the comments by each side constituted vigorous representation. While we believe that *both* sides could have observed more decorum and exhibited more civility toward one another, we conclude that the remarks and conduct of the prosecutor directed at defense counsel did not deprive defendant of a fair trial. *Id.*

Fourth, defendant asserts that the prosecutor made an improper rebuttal argument which was based on facts not in evidence. Specifically, defendant argues that the prosecutor should not have been allowed to explain the reason why she did not show an article to Dr. Michael Caplan, where there was no testimony to that effect during the case-in-chief. Defense counsel, however, opened the door to this issue in closing argument, and the trial court specifically allowed the prosecutor to present the explanation in her rebuttal. Therefore, we conclude that the prosecutor's comment was proper and,

even if error, was not so prejudicial as to deny defendant a fair trial by the remark. *Green, supra* at 693.

Lastly, whether the complained-of instances of prosecutorial misconduct are considered individually or cumulatively, we find that defendant was not so prejudiced by the conduct of the prosecutor that he was deprived of a fair trial. *Green, supra* at 693.

Defendant next claims that he was deprived of a fair trial when the trial court permitted Dr. Stephen Cohle and Sgt. Paul Vaughan to testify as rebuttal witnesses for the prosecution. We disagree. This Court reviews a trial court's decision to admit rebuttal evidence for an abuse of discretion. *People v Figgures*, 451 Mich 390, 398; 547 NW2d 673 (1996).

Dr. Cohle's testimony was admissible in rebuttal to impeach, contradict, and disprove Dr. Dragovic's unexpected testimony that the autopsy photograph did not show that the victim's brain was swollen. *Id.* In addition, the testimony was within the scope of rebuttal expressly allowed by the trial court. Moreover, although the testimony Sgt. Vaughan offered in rebuttal generally affirmed, rather than rebutted, Dr. Dragovic's testimony regarding their meeting after the autopsy had been performed, this did not unduly bolster the prosecution's case and constituted harmless error, if any, as a result of its admission. In any event, Sgt. Vaughan's testimony was primarily offered to identify the autopsy photographs necessary for their admission into evidence. Thus, defendant has not shown that he merits any relief on this basis, and we conclude that the trial court did not abuse its discretion in admitting these witnesses in rebuttal. *Figgures, supra* at 398-399.

Finally, defendant claims that his convictions for both second-degree murder and first-degree child abuse violate the federal and state double jeopardy protections against multiple punishments for the same offense. We disagree.

An alleged violation of the double jeopardy clause is a constitutional issue that this Court reviews de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995). The double jeopardy provisions of the United States Constitution, US Const, Am V, and the Michigan Constitution, Const 1963, art 1, § 15, protect citizens from suffering multiple punishments and successive prosecutions for the same offense. *People v Torres*, 452 Mich 43, 63-64; 549 NW2d 540 (1996); *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993). The intent of the Legislature is the determining factor under the Double Jeopardy Clauses of both the federal and state constitutions. *People v Denio*, 454 Mich 691, 706; 564 NW2d 13 (1997); *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984).

The child abuse statute provides that "[a] person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child." MCL 750.136b(2); MSA 28.331(2)(2). For second-degree murder, the prosecution must establish that there was (1) a death, (2) caused by an act of the defendant, (3) absent circumstances of justification, excuse or mitigation, (4) done with an intent to kill, an intent to inflict great bodily harm, or an intent to create a very high risk of death with the knowledge that the act probably will cause death or great bodily harm. *People v Bailey*, 451 Mich 657, 669; 549 NW2d 325 (1996).

A comparison of the elements of these two offenses reveals that each requires proof of a fact which the other does not. Therefore, under the federal test, we find that defendant has not been subjected to multiple punishments for the same offense. See generally, *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932); *Denio, supra* at 706-707.

Similarly, we conclude that no violation of the state protection against double jeopardy has occurred because the elements of the offenses are different and the two statutes do not protect the same societal interests. *Denio, supra* at 708-709. See also *People v Flowers*, 222 Mich App 732, 734-735; 565 NW2d 12 (1997). Accordingly, we reject defendant's double jeopardy claim.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra