

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALLEN WILLIAMS,

Defendant-Appellant.

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UNPUBLISHED  
October 26, 1999

No. 208350  
Calhoun Circuit Court  
LC No. 97002243

Before: O’Connell, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). He was sentenced to twelve to twenty-five years’ imprisonment, with credit for 156 days served, and was required to pay a \$150 forensic fee. Defendant was further ordered to pay for any counseling for the victim, which amounted to \$860. We affirm.

This case arises from allegations that defendant sexually penetrated a twelve-year-old girl while she and her two younger sisters were at their father’s house. Before trial, the defense filed three alibi notices, each depicting different versions of where defendant was on the night in question and with whom. The issue on appeal, as framed by defendant, is whether the prosecutor violated defendant’s due process rights and denigrated the defense by questioning defense witnesses concerning the contents of the three alibi notices filed by defense trial counsel. Essentially, defendant’s issue raises two separate questions: 1) did the trial court abuse its discretion when it allowed plaintiff to cross-examine defense witnesses using defendant’s notices of alibi; and 2) did plaintiff’s remarks during closing arguments deny defendant a fair and impartial trial.

The admission or exclusion of evidence is within the discretion of the trial court, and “[a]n abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made.” *People v Malone*, 180 Mich App 347, 354; 447 NW2d 157 (1989). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). This Court decides issues of prosecutorial misconduct on a case-by-case basis, examining the pertinent portion of the record and evaluating the prosecutor’s remarks in context to ascertain whether

the defendant was denied a fair and impartial trial. *People v LeGrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Pursuant to MCL 768.20; MSA 28.1043, a defendant proposing to offer alibi testimony at trial is required to file a notice describing his whereabouts and witnesses, and is under a continuing duty to promptly disclose additional witnesses which come to the defense's attention after the initial filing. In general, where a defendant presents an alibi defense, a prosecutor may use alibi notices for impeachment. *People v Holland*, 179 Mich App 184, 190; 445 NW2d 206 (1989); *People v Von Everett*, 156 Mich App 615, 624; 402 NW2d 773 (1986). If the defendant's alibi testimony is inconsistent with the allegations in the alibi notice, impeachment under MRE 801(d)(2)(C) is permitted. *Id.* Further, a superseded pleading containing an admission against the interest of the pleader is admissible, and therefore the original and amended notices of alibi may be admitted into evidence. *People v Nickopoulous*, 26 Mich App 297, 302; 182 NW2d 83 (1970). Once a defendant presents an alibi defense, the prosecution is permitted to attack such by commenting on the weakness of the alibi testimony. *Holland, supra* at 191.

Defendant claims on appeal that he was denied his constitutional rights to due process and a fair trial because plaintiff's questioning and comments not only attacked the credibility of defense witnesses with regard to their familiarity with the listed but uncalled alibi witnesses, but highlighted defense trial counsel's filing of three different alibi notices, of which none of the witnesses had knowledge. Defendant further argues that plaintiff's questioning served to penalize and denigrate defendant for his trial counsel's attempt to "cover the bases" by including in the notices every potential alibi witness or alibi.

In a similar case, *Malone, supra* at 353, the defendant contended that the prosecutor's use of the defendant's alibi notice to impeach the defendant denied the defendant a fair trial. In *Malone*, the alibi notice listed witnesses, but the defendant testified that he did not see or did not know them on the date of the offense. *Id.* Over the defendant's objection, the trial court permitted the prosecutor to impeach the defendant's credibility by use of the notice of alibi. In *Malone*, we held that the trial court did not abuse its discretion in allowing the prosecutor to impeach the defendant with his notice of alibi because such was relevant to both the defendant's credibility and that of his alibi defense. *Id.*

Following *Malone*, we conclude that the trial court did not abuse its discretion when it allowed plaintiff to impeach defendant with his notices of alibi. See also *Van Everett, supra* at 615. Upon review of the testimony in question with regard to defendant's two alibi witnesses, we further conclude that the trial court did not abuse its discretion because such was relevant to their credibility, the notice was a party-opponent admission under MRE 801(d)(2)(C), see *Malone, supra* at 354, and defense witnesses' testimony was inconsistent with the information on the notices and with each other's testimony.

We also find that plaintiff's remarks during closing argument were not improper. A prosecutor may challenge the credibility of testimonial evidence elicited by the defense in support of the defendant's theory of the case. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767 (1999). A prosecutor may argue from the facts that a witness is credible; likewise, he may argue that the defendant or another

witness is not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Plaintiff's remarks during closing dealt with the credibility of the defense witnesses, including defendant. We conclude that defendant was not deprived of a fair and impartial trial.

Affirmed.

/s/ Peter D. O'Connell

/s/ Michael J. Talbot

/s/ Brian K. Zahra