

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LEON E. JAMES,

Defendant-Appellant.

UNPUBLISHED

December 21, 1999

No. 208800

Recorder's Court

LC No. 97-001564

Before: White, P.J., and Sawyer and Griffin, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of one count of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). Defendant was sentenced to four to fifteen years in prison. We affirm.

Defendant argues on appeal that he was denied a fair trial when the prosecutor commented on defendant's lack of corroborating evidence. We disagree. Prosecutorial misconduct issues are decided on a case by case basis, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v LeGrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). The propriety of a prosecutor's remarks depends on all the facts of the case. Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

It is impermissible for the prosecutor to shift the burden of proof to defendant. *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995). The Michigan Supreme Court held in *Fields*, *supra* at 114-115, that the prosecutor can observe and comment that the evidence against the defendant is uncontroverted or that the defendant has failed to call corroborating witnesses. *Id.* "Where a defendant testifies at trial or advances, either explicitly or implicitly, an alternate theory of the case that, if true, would exonerate the defendant, comment on the validity of the alternate theory cannot be said to shift the burden of proving innocence to the defendant. Although a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *Fields*, *supra* at 115.

In the instant case, the prosecution was commenting on the weakness of defendant's case, not shifting the burden of proof to defendant. The prosecutor was attacking the credibility of defendant based on the fact that he admitted under cross-examination that he was a liar. Given *Fields, supra*, the prosecutor's remarks were entirely permissible. Furthermore, the trial court properly instructed the jury after the closing argument that defendant was presumed innocent and the prosecutor had the burden of proof to prove defendant guilty beyond a reasonable doubt. Given that the prosecutor's comments did not shift the burden of proof and the trial court properly advised the jury of defendant's presumption of innocence and the prosecutor's burden of proof, defendant was not denied a fair and impartial trial.

Defendant next argues that the inclusion of the force or coercion jury instruction was prejudicial. We disagree. Reversal is only required if the inclusion of the jury instruction was prejudicial. Prejudice is determined by the effect of the error on substantial rights or its effect on the verdict. It is prejudicial error if it affirmatively calls into question the validity of the jury's decision. *People v Clark*, 453 Mich 572, 588, 591; 556 NW2d 820 (1996); *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996).

MCR 6.414(F) states:

Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but with the parties' consent, the court may instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate.

In *Clark, supra* at 572, the defendant was charged with involuntary manslaughter when her four-year old died unexpectedly from dehydration. The trial court failed to give a modified jury instruction that was agreed to by the parties. Defense counsel relied on the modified instruction in his closing argument. *Clark, supra* at 578-580. When advising the jury on gross negligence required for manslaughter, defense counsel requested that the phrase "cause death" be replaced with cause "serious injury." *Id.* at 580. The Court held that the error was not a minor one and that defendant was prejudiced by it. *Id.* at 590.

[T]he prejudice requiring reversal was incurred when the judge, after agreeing to a modified instruction, subsequently decided to charge the jury with the unmodified instruction after defense counsel relied on and conformed his closing arguments to the modified instruction. Defense counsel tailored his closing argument to be consistent with the theory that the defendant could not possibly have known that withholding water from the child would lead to his death. This is a far greater threshold of knowledge for the prosecutor to prove than proving merely that the defendant knew her actions would cause serious injury, which was the theory argued by the prosecutor. [*Clark, supra* at 590-591.]

In the instant case, while it was error not to discuss jury instructions before the closing argument, the inclusion of the force or coercion was not prejudicial. Unlike *Clark, supra*, defense counsel here did not give her closing argument relying on any specific instruction because they were not discussed at all. Defense counsel did not object when she was asked to give her closing argument. Instead, she proceeded and then objected when the instructions were discussed. Furthermore, the instruction regarding force or coercion was not prejudicial.

Defendant argues that defense counsel had no knowledge that the instruction for third-degree criminal sexual conduct, force or coercion, would be given. However, force or coercion is an element of first-degree criminal sexual conduct as charged, as well as third-degree criminal sexual conduct. The instruction given stated:

And then the last element is that the defendant used force or coercion to commit the sexual act. Force or coercion means that the defendant either used physical force or did something to make the complainant reasonably afraid of present or future danger.

A definition of sufficient force. It is enough force if the defendant overcame the complainant by physical force. It is enough force if the defendant threatened to use physical force on the complainant and the complainant believed that the defendant has the ability to carry out those threats.

Defendant argues that based on the inclusion of the above instruction, the jury could have concluded that “sex for drugs” was the equivalent of coercion. However, the above instruction clearly states that force or coercion involves physical force or something that would invoke fear of present or future danger. A reasonable jury could not logically interpret that statement to mean that “sex for drugs” in any way involves fear of present or future danger. The above instruction was clear and precise. Defendant fails to show how it could logically be interpreted that “sex for drugs” is the equivalent of coercion. Accordingly, the instruction was not prejudicial and did not call into question the validity of the jury’s decision.

Affirmed.

/s/ Helene N. White
/s/ David H. Sawyer
/s/ Richard Allen Griffin