

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARL A. PALMER,

Defendant-Appellant.

UNPUBLISHED

December 28, 1999

No. 202465

Recorder's Court

LC No. 95-014024

Before: Smolenski, P.J., and Whitbeck and Zahra, JJ.

PER CURIAM.

A jury convicted defendant Carl A. Palmer of one count of second-degree criminal sexual conduct for sexual contact with a person under thirteen years of age. MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). The trial court sentenced Palmer to six to fifteen years' imprisonment. Palmer appealed as of right, raising prosecutorial misconduct, ineffective assistance of counsel, and sentencing issues. This Court granted Palmer's motion to remand pursuant to MCR 7.211(C)(1) so that he could file a motion for an evidentiary hearing on his claims that (1) counsel was ineffective and (2) the trial court, when sentencing him, considered a nonexistent conviction. On remand, following a *Ginther*¹ hearing, the trial court denied Palmer's motion for a new trial based on ineffective assistance of counsel, but granted his motion for resentencing. The trial court then resentenced Palmer to 610 days to 15 years' imprisonment.² Palmer now appeals as of right.

I. Basic Facts And Procedural History

A. Ineffective Assistance Of Counsel

(1) *Peremptory Challenges*

Palmer argues that he was denied the effective assistance of counsel when counsel failed to use peremptory challenges to remove two jurors, "H" and "W." During voir dire, several jurors did indicate that they would be inclined to penalize Palmer if he failed to testify to his innocence. Juror W initially raised her hand when the trial court's asked, "[W]ho would have a hard time with *this type of case* [i.e., a case involving the sexual assault of a child]?" The only other time Juror W's name is

specifically cited in the voir dire transcript is her response to the trial court's question, "You don't believe [the prosecution's witnesses]. And the defendant does not testify. Are you going to find him guilty anyway?" Juror W responded, "No." Defense counsel asked the potential jurors several times, in different ways, whether any of them would hold it against Palmer if he did not testify. Juror W was never among the jurors who indicated that they would do so.

Juror H did, initially, indicate that he agreed with another prospective juror that "if [defendant] didn't say anything, I would believe the kid." However, after extensive instruction from the trial court regarding Palmer's constitutional right not to testify, Juror H twice indicated that he would not hold it against Palmer if he did not testify:

The Court: . . . Mr. H . . . you haven't changed your opinion any about if the evidence proves beyond a reasonable doubt that he's guilty. You find him guilty? If it doesn't you find him not guilty?

Juror H: . . . That's about it.

* * *

Prosecutor: . . . I . . . don't believe that Mr. H . . . in seat eleven said [that he would hold it against Palmer if he did not testify].

The Court: He initially said it. But after further discussion, I think he understood that we were trying to get him to just wait and listen to see what the evidence meant. Am I incorrect, Mr. H . . . ?

Juror H: That's correct.

Additionally, like Juror W, each time defense counsel asked the potential jurors whether any of them would hold it against Palmer if he did not testify, Juror H did not indicate that he would do so.

At the *Ginther* hearing, Palmer's trial counsel testified that Palmer's trial was the first time he had represented somebody in a criminal sexual conduct case. The following exchange took place on direct examination of Palmer's trial counsel:

Q. I want to steer your attention to the jury selection part of the trial. It appears from the record that your strategy on voir dire was to find people who wouldn't hold it against the defendant if he didn't testify on his own behalf, is that correct?

A. That's correct.

Q. Do you recall that at a certain point a number of jurors indicated that they might be biased against the defendant if he didn't take the stand to explain his story?

A. That's also correct.

- Q.* Were jurors H . . . and W . . . part of that group?
- A.* From reviewing the transcript, it appears they were.
- Q.* Why did you believe they were biased?
- A.* I don't specifically remember those two jurors, but after reading the transcript it appeared that they would hold it against Mr. Palmer if he didn't testify.
- Q.* Okay and do you recall moving to exclude those jurors for cause?
- A.* I recall moving to exclude many jurors for cause and after reading the transcript it appeared that they were among them.
- Q.* Now I take it that you did want them off the panel then?
- A.* It appears so, yes.
- Q.* Then why did you not move—exercise a peremptory challenge to strike them?
- A.* I couldn't tell you, I do not specifically remember those two individuals and it appears from reviewing the transcript, it appears that at some point they understood the Judge's instruction that they weren't supposed to hold it against Mr. Palmer if he didn't testify, but I don't remember them, I couldn't tell you why I didn't use my challenges or not.
- Q.* But you did make the motion to exclude for cause and after the Judge had asked them follow-up questions, isn't that correct?
- A.* Yes.
- Q.* So you had already, they had already been rehabilitated to whatever extent they were going to be before you made your motion for cause?
- A.* I didn't feel they were acceptable that's why I moved for cause.
- Q.* But yet you didn't exercise peremptory challenges to remove them?
- A.* Apparently I didn't, why I didn't, I don't remember.
- Q.* Okay and you—the record indicates you only used one peremptory challenge. Is there any reason you have to doubt that?
- A.* If that's what the record reflects, that's what happened.
- Q.* How many challenges did you have?

A. I believe I had nine.

The trial court denied Palmer's motion for a new trial, holding that Palmer had not been prejudiced by his trial counsel's assistance:

[When] the potential jurors [are asked], would you hold it against the defendant . . . if the defendant did not testify[,] I can, I just sit and wait to see how many hands are going to go up. And generally it's two or three hands that will go up and what happens is that the defense attorneys and the prosecutors and the Judge have to do some educating of the potential jurors because their natural response generally is, especially in the last couple of years, is we want to hear from the defendant. If the defendant doesn't testify, but then when we proceed through voir dire the entire process and we get down to the final 14 who are going to hear and try the case, generally this Court is satisfied that the jurors have been sufficiently educated as to what the rules of law are, they have been told that they must follow the law whether they agree with it or not, and usually they don't agree with that one that says if the defendant doesn't take the stand, but I think that they do do their best and follow the judge's instructions [Most jurors] come in now saying that he must have done something wrong because he's sitting there. They start off that way and if he doesn't testify or she doesn't testify, that's the way they start, but by the time we finish the voir dire process, I think the ones who are left are fair and they do follow the law and I think they did in this case.

* * *

So I really don't think that the defense attorney was ineffective. He was reasonably, he had to reasonably, under the circumstances and if he didn't act reasonably, I think it was his client who kept him distracted from being more effective than he was. I think under the circumstances he was competent, he was zealous and he was very concerned about his client's well being.

So I'm going to deny the motion for the new trial.

(2) *The Decision Not To Have Palmer Testify*

Palmer argued in his original appellate brief that trial counsel's advice that he not testify constituted ineffective assistance. Palmer argued that he was entitled to a *Ginther* hearing on this issue and the prosecution concurred. At the *Ginther* hearing, however, Palmer did not raise this issue, and the only evidence presented in this regard was trial counsel's testimony that "[Palmer] was an injury client with a closed head injury and that was my reason for not putting him on the stand."

(3) *The Prosecutor's Comments And Questions*

At the *Ginther* hearing, the following exchange took place on direct examination of Palmer's trial counsel:

Q. The next area I want to move on to would be the trial itself. Did there come a time when the prosecutor argued to the jury that the complainant was a good girl, that she got good grades, a smart kid, do you remember that?

A. From reviewing the transcript, yes.

Q. Did you believe that that was a proper argument?

A. No.

Q. So why did you not object?

A. I couldn't tell you why, because I don't remember hearing it, I may have been distracted by Mr. Palmer. At the time I was thinking of my argument, probably listening to him speaking to me, listening to her at the same time. If I had heard it, I would have objected but I don't remember.

Q. Are you guessing as to why you might not have heard it, or do you know that?

A. I don't know why I didn't hear it, but I do know that I would have objected had I heard it.

Q. Okay.

The Court: This was in argument.

Defense Counsel: In opening argument and in closing argument.

The Court: Opening statement and closing argument.

Q. That's correct. And I also—just a quick follow-up to that, the prosecutor, the record indicates the prosecutor asked questions of both the complainant and her aunt . . . along those lines, asking her questions about did she get good grades, did she have trouble at home and so forth. Do you recall that part of the transcript?

A. I remember some of that.

Q. Why did you not object at that point to those questions?

A. I couldn't tell you why. I read the transcript, I remember that in the transcript, Mr. Palmer did speak to me, whisper in my ear a lot, I don't remember if I heard it, missed it or what.

Q. The point is did you have any strategic reason for not objecting?

A. Other than not hearing it, no.

Q. Similarly, there's one other area where the prosecutor argued that the complainant told the same story to the police, to her aunt and so forth. A prior consistent statement in other words, do you remember that part?

A. Only from reading the transcript and included with your motion.

Q. Do you believe that that was a proper argument for the prosecutor to be making?

A. No.

Q. So why did you not object to that?

A. Again I don't remember that part of the trial, I didn't hear it I would speculate.

Q. But no intentional reason for not objecting?

A. No.

On cross-examination of Palmer's trial counsel by the prosecutor, the following exchange took place:

Q. Now you indicated on direct examination . . . that at times you were speaking with your client Mr. Palmer, is that correct?

A. I came to remember that, yes.

Q. Was Mr. Palmer speaking to you quite a bit during trial?

A. He did have some moments, but it was all so, I was more concerned about his demeanor and how he was holding himself, I was trying to remind him to sit straight and to try to keep him focused on the case too.

Q. Did you feel you had to do that as part of representing him?

A. Yes, I think I did.

Q. Did you feel that that was extremely important to do that?

A. With Mr. Palmer specifically it was important.

Q. Why is that?

A. Mr. Palmer was an injury client with a closed head injury and that was my reason for not putting him on the stand and feel he would make a good witness. His

attention span was short and if you saw him drifting off it would look like he didn't care or wasn't paying attention.

Q. So that's what you wanted to do was make sure he was paying attention during the course of trial so the jurors would—

A. Either answering questions or reminding him to sit straight and look forward, it was either trying to correct him or answer questions. I do remember doing that throughout the trial.

Q. So that was part of your strategy?

A. It wasn't my strategy to remind him, I just felt I needed to.

Q. Did you base that on the prior meeting you had with Mr. Palmer, that you had to keep a kind of check?

A. Yes.

Q. And is it your testimony then that during those times that you were reminding Mr. Palmer of certain things and trying to give a certain presence to the jury during the trial that you may have missed some questions and answers by the prosecution and the witnesses?

A. I would have to speculate as to that, but that could be a reason. Specifically certain questions were asked, I don't remember those questions. Why I don't remember, I don't know, but I am trying to say that there were times when I had to yell at Mr. Palmer and had I heard some of those questions I would have chimed in.

The trial court denied Palmer's motion for a new trial, holding that Palmer had not been prejudiced by his trial counsel's assistance:

I remembered [this case] because it was a case where the defense attorney was very much preoccupied trying to give his client the appearance of, or make his client appear serious about what was taking place. And it was a major preoccupation, it was not a minor one. Until he said that about this case, I didn't remember this case, but I do remember it now. I do remember that even if the question had not been asked, what are your grades that there was likely going to be a conviction here. Based on the credibility of the complainant. She was very credible and any question that they asked her and I'm sure the transcript bears that out, pretty good, she got confused a little bit, she was pretty clear about her answers and about her thoughts. So if those questions had not been asked, I don't know that the outcome would have been any different. We don't know but I'm not sure about that because she was quite convincing.

So I really don't think that the defense attorney was ineffective. He was reasonably, he had to reasonably, under the circumstances and if he didn't act reasonably, I think it was his client who kept him distracted from being more effective than he was. I think under the circumstances he was competent, he was zealous and he was very concerned about his client's well being.

So I'm going to deny the motion for the new trial.

B. Prosecutorial Misconduct

(1) *Improper Argument Concerning Facts Not In Evidence*

Palmer objects to the following comments of the prosecutor, made during closing argument:

You heard [the victim] testify. . . . She told you that she has had to talk to her aunt about what happened. And she told her aunt the story at least twice. She's had to talk to the police and give the police a written statement. She testified in court, once before, in front of a different judge. And now she's told you what happened.

You have not heard that she has said anything inconsistent about the touching, throughout this proceeding. Now, you can bet that if she had been inconsistent about what happened in that basement, [Palmer's trial counsel] would have told you about it.

He would have asked her, well didn't you tell the police that such and such happened in the basement? Didn't you tell the other judge that such and such happened in the basement? But he didn't do that. The only thing he shows you that she's inconsistent about is what her aunt . . . did after it was all over.

I submit to you that the child, in her mind, what happened after it was all over wasn't a critical thing. That's not what traumatized her. She remembers what happened in the basement. That was crucial. And you've heard that she's been entirely consistent about that.

(2) *Improper Questions And Comments*

Palmer argues that the following questions, posed by the prosecutor to the victim, were improper:

Q. How are you doing in school this year?

A. Fine.

Q. Have you had a report card lately?

A. Yes.

Q. Can you tell the jury how you did, without looking at it? Wait. Without looking at it, how did you do?

A. Good.

Q. What kind of grades are you getting?

A. A's and B's and one C.

Q. And what did you get the C in?

A. Art.

Q. And do you behave yourself at school?

A. Yes.

Q. Do you behave yourself at home?

A. Yes.

Palmer additionally argues that the prosecutor improperly commented on this evidence during her opening statement and closing argument:

You will hear testimony that [the victim] is a really smart and a really good kid. She'll tell you that she just received a report card last week. That she got all A's and B's and one C in art.

She'll tell you that she doesn't get into trouble at school or at home and she follows her mother's rules most of the time.

* * *

You heard [the victim] testify. You heard that she's a good kid. She behaves herself at school and at home. She gets good grades.

II. Ineffective Assistance Of Counsel

A. Preservation Of The Issue

Palmer properly preserved this claim for appeal by moving for a *Ginther* hearing and a new trial on the basis of ineffective assistance of counsel. *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998).

B. Examining Ineffective Assistance

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Leonard*, 224 Mich App 569, 592; 569 NW2d 663 (1997). To establish that his right to the effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel’s representation fell below an objective standard of reasonableness and that the representation so prejudiced him as to deprive him of a fair trial. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To find prejudice, a court must conclude that there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. *Pickens, supra* at 312.

C. Peremptory Challenges

We hold that Palmer has not sustained his burden of establishing that his trial counsel’s failure to use peremptory challenges to remove Jurors H and W from the jury pool was below an objective standard of reasonableness according to prevailing professional norms. *Pickens, supra* at 302-303; *People v Plummer*, 229 Mich App 293, 307; 581 NW2d 753 (1998). As we outlined above, Palmer’s trial counsel testified at the *Ginther* hearing that he did not remember why he had failed to challenge these jurors, and no other evidence was presented. Accordingly, Palmer has not overcome the strong presumption that his trial counsel’s assistance might be considered sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Moreover, Jurors H and W indicated that they would not penalize defendant for his failure to testify. Accordingly, Palmer has not established that a reasonable probability exists that, had trial counsel exercised peremptory challenges to excuse these two jurors, the outcome of the proceedings would have been different. *Pickens, supra* at 302-303.

D. The Decision Not To Have Palmer Testify

Palmer argues that trial counsel’s advice not to testify constituted ineffective assistance. As we outlined above, at the *Ginther* hearing Palmer did not raise this issue. Accordingly, Palmer has not overcome the presumption that his trial counsel’s advice might be considered sound trial strategy. *Stanaway, supra* at 687.

E. The Prosecutor’s Comments And Questions

Palmer argues that his trial counsel’s failure to object to the prosecutor’s allegedly improper comments and questions constituted ineffective assistance. Although trial counsel testified at the *Ginther* hearing that he would have objected to the prosecutor’s allegedly improper questions and comments if he had heard them, the questions and comments themselves were proper. Trial counsel was not required to raise meritless objections. *People v Torres (On Remand)*, 222 Mich App 411, 425; 564 NW2d 149 (1997). Accordingly, trial counsel’s failure to object did not fall below an objective standard of reasonableness. *Pickens, supra* at 302-303. Furthermore, in light of trial counsel’s testimony regarding Palmer’s behavior during trial—which the trial court remembered as being “distract[ing]”—trial counsel’s failure to hear and object to some of the prosecutor’s statements cannot be regarded as unreasonable. Moreover, Palmer has failed to establish that, had trial counsel objected

to the prosecutor's relatively innocuous questions and comments, the jury would have had a reasonable doubt about his guilt. *Id.* at 312. Accordingly, Palmer was not denied a fair trial due to the ineffective assistance of trial counsel. *Id.*

III. Prosecutorial Misconduct

A. Preservation Of The Issue And Standard Of Review

In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must object at trial on the same ground asserted on appeal. *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999). Palmer did not object to any of the allegedly improper comments. Therefore, this issue is not preserved for appellate review. Accordingly, this Court will only review this issue if the failure to consider the issue would result in a miscarriage of justice. *Stanaway, supra* at 687; *Avant, supra* at 512. A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999).

B. Improper Argument Concerning Facts Not In Evidence

Palmer objects to the prosecutor's comments, made during closing argument, to the effect that Palmer had not shown that the victim's statements to various people regarding the sexual assault had been inconsistent. A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, *Stanaway, supra* at 686, and may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge, *People v Ignofo*, 315 Mich 626, 633-636; 24 NW2d 514 (1946); *People v Fuqua*, 146 Mich App 250, 254; 379 NW2d 442 (1985). However, a prosecutor is free to argue the evidence and all reasonable inferences therefrom as it relates to the prosecution's theory of the case. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

We disagree with Palmer's contention that the prosecutor's comments were not supported by the evidence. When reviewing instances of alleged prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecutor's remarks in context. *Avant, supra* at 508. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *Id.* When viewed in context, it is clear that the prosecutor was simply arguing that the victim's testimony was believable. Such an argument was supported by the evidence and was therefore proper. *Bahoda, supra* at 282. Moreover, the prejudicial effect of the prosecutor's statements, if any, could have been cured by a timely instruction to the jury. Further, the trial court instructed the jury that "[t]he lawyer's statements and arguments are not evidence." Accordingly, a miscarriage of justice will not result from this Court's failure to further review this issue. *Mayhew, supra* at 122-123.

C. Improper Questions And Comments

Palmer contends that the prosecutor improperly elicited testimony from the victim that she had received good grades on her most recent report card and that she "behaved [her]self" at home and school. Palmer further argues that the prosecutor improperly relied on this "character" evidence during

opening statement and closing argument. We note that, although this evidence might have properly been objected to as irrelevant, it was not “character evidence” pursuant to MRE 404(a) and that Palmer has failed to explain how the victim’s testimony regarding her grades and behavior comprises evidence of a trait of character proving action in conformity therewith. We further conclude that the prosecutor’s comments during opening statement and closing argument were not improper. While a prosecutor may not vouch for the credibility of his or her witnesses to the effect that the prosecutor has some special knowledge concerning a witness’ truthfulness, *Bahoda, supra* at 276, the prosecutor may argue from the facts that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). The allegedly improper statements made by the prosecutor in the instant case did not suggest that she had any special personal knowledge of the victim’s truthfulness. Moreover, a timely instruction to the jury would have cured any prejudicial effect of the prosecutor’s comments. Accordingly, a miscarriage of justice will not result from this Court’s failure to further review this issue. *Mayhew, supra* at 122-123.

Affirmed.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Brian K. Zahra

¹ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

² Palmer’s original sentencing information report inaccurately stated that he had a prior sexual misconduct conviction in Texas. After contacting a district attorney in Texas, the prosecutor determined that Palmer had never been convicted; rather, he had been given a “deferment of adjudication,” a probationary period which was subject to revocation if probation was violated. Because Palmer was originally sentenced based on the erroneous conclusion that he had a previous CSC conviction and that, therefore, a minimum five-year sentence was mandatory, MCL 750.520f; MSA 28.788(6), his motion for resentencing was granted. Palmer was resentenced to 610 days to fifteen years’ imprisonment, with credit for 610 days served. Accordingly, the sentencing issue originally raised on appeal is moot.