

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CARLOS VALLEJO, JR.,

Defendant-Appellant.

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UNPUBLISHED

November 27, 2001

No. 224829

Wayne Circuit Court

LC No. 98-014089

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b). Defendant was sentenced to a term of six to fifteen years' imprisonment for each count to be served concurrently. We affirm.

I

Defendant alleges prosecutorial misconduct based on two statements made in closing argument which he claims deprived him of a fair trial. However, defendant failed to specifically and timely object to the prosecution's statements. Therefore, this issue is unpreserved and will be reviewed for plain error which affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). A prosecutor may not make a statement of fact that is unsupported by the evidence. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it, as they relate to the theory of the case. *Id.* Although a prosecutor may not vouch for the credibility of a witness, a prosecutor may argue from the facts that a witness, including the defendant, is not worthy of belief. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Moreover, the prosecutor is not required to state the arguments in the blandest possible terms. *Schutte, supra* at 722. The prosecutor's argument in this case was clearly within the bounds of permissible comment.

## A

Defendant first argues that the following statement by the prosecutor constitutes reversible error:

Another reason why [complainant] could be lying is that she loves the defendant now, and she says well, we love each other, Judge, as stepfather, stepdaughter. But let's face it folks, he's not that much older than her. [He's] a whole lot closer to her age than he is to the mother's age, and I think there is some hanky-panky going on there. She liked the attention that this young adult was giving her, and now she feels badly that she reported it was [sic] something she didn't want.

Considered in context and evaluated in light of defense arguments and their relationship to the evidence presented at trial, no error occurred. The prosecutor was merely responding to statements made by defense counsel concerning the possible reasons complainant would fabricate an accusation against defendant of inappropriate sexual contact. The prosecutor's remarks were not inappropriate because the comments were no more than a response to defense counsel's arguments. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). Further, the record indicates the trial court, on three separate occasions, instructed the jury that the arguments of the lawyers were not evidence.

A full review of the prosecutor's closing argument leads to the conclusion that the comments did not deprive defendant of a fair trial because the outcome of trial was not prejudiced. *Carines, supra* at 763. Even if defendant could demonstrate prejudice, reversal is not warranted, as it cannot be shown that error resulted in the conviction of an otherwise innocent person or that the error seriously affected the outcome of the proceedings. *Id.*

## B

Defendant's second claim of prosecutorial misconduct involves the following statement:

Is there corroboration for Anna's testimony? And corroboration is supporting evidence, something that helps you decide whether or not she is telling the truth or not.

Well, there is. In this case you heard testimony from three police officers who interviewed [complainant] and also from her grandfather. While this evidence is not what we call substantive evidence, you can't use it to determine guilt, you can use it to help you decide whether [complainant] or Anna is telling you the truth.

\* \* \*

I'm sure the Judge will explain to you again that what the police officer said [complainant] said is not substantive evidence. You can't take that as true and use that to help find the elements of the offense, but you can use it to help decide whether or not [complainant] is telling the truth in court.

Well, her testimony, the officers' testimony about what [complainant] told them, help corroborate Anna's testimony in court. It supports what Anna told you because it's consistent with what Anna told you. So between Anna and [complainant], clearly Anna is the most credible of the two witnesses.

Defendant argues that the prosecution's statements, in essence, instructed the jury to consider the impeachment evidence of the police officers to substantiate his guilt. Defendant acknowledges that the impeachment evidence was correctly admitted into evidence for the limited purpose of attacking complainant's credibility, but he argues that the prosecution's suggestion to the jury that the impeachment evidence could be used to corroborate the prosecution's eyewitness' testimony, allowed the jury to consider impeachment evidence beyond the limited purpose for which it was admitted, which greatly prejudiced defendant. We disagree.

Defendant claims that the prosecution's closing argument was improper because it eliminated any real difference between substantive and impeachment evidence. To the contrary, we view this part of the prosecutor's closing as clearly delineating between the two types of evidence and the proper purpose to which each is applied.

Defendant's argument also fails because complainant opened the door to rebuttal and impeachment once she testified that her original claims against defendant were fabricated and she denied ever making the accusation against defendant. Rebuttal evidence is admissible to "contradict, repel, explain or disprove evidence produced by a party and tending directly to weaken or impeach the same." *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996).

In addition, the standard in Michigan is that reversible error will be found where the trial court fails to give an instruction cautioning the jury that impeachment testimony cannot be considered as substantive evidence. *People v Jones*, 115 Mich App 543; 321 NW2d 723 (1982). Here, the trial court gave detailed instructions to the jury immediately following closing arguments regarding the consideration of impeachment evidence in its final deliberations.

## II

Defendant also argues that the prosecution failed to present sufficient evidence to support defendant's convictions because the complainant's sister's testimony was uncorroborated. When reviewing a sufficiency of the evidence claim, we must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513-516; 489 NW2d 748, amended 441 Mich 1201 (1992).

To sustain a conviction for criminal sexual conduct in the second degree, the prosecution had to prove the following elements beyond a reasonable doubt: (1) defendant intentionally touched complainant's breast and vagina or the clothing covering complainant's breast and vagina; (2) defendant touched complainant's breasts and vagina for sexual purposes; (3) complainant was between the ages of thirteen and sixteen; and (4) complainant and defendant were living in the same household. MCL 750.520c(1)(b). Criminal sexual conduct is a general intent crime and the defendant's specific intent is not an issue. *People v Piper*, 223 Mich App 642, 646; 567 NW2d 483 (1997).

Complainant's sister testified that she saw defendant reach over from behind a living room couch and grab complainant's breast and, on another occasion, that she saw him touch complainant's vagina as she was sitting on the bed while her mother was in the next room taking a shower. Complainant's sister also testified that she saw complainant push defendant away. Undisputed testimony indicated that, at the time of the assault, complainant was fourteen years old. Viewing these facts in a light most favorable to the prosecution, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant, as a member of the same household, engaged in sexual contact with complainant who was between the ages of thirteen and sixteen.

Defendant also argues that the evidence was insufficient because complainant retracted her accusation against defendant at trial and testified that she fabricated the original claim. However, this Court has held that a complainant's recantation should not alone preclude the prosecution from reaching a jury. *People v Morrow*, 214 Mich App 158, 164; 542 NW2d 324 (1995). Here, the prosecution reasonably concluded that complainant's original account was the truth and argued to the jury that it was corroborated by the evidence apart from complainant's statement. Given the circumstances under which the charged conduct occurred, the jury could reasonably conclude that defendant engaged in sexual contact with complainant for the purpose of sexual arousal or gratification. Viewed in the light most favorable to the prosecution, the evidence was sufficient to support defendant's convictions.

Affirmed.

/s/ Janet T. Neff  
/s/ Kurtis T. Wilder  
/s/ Jessica R. Cooper