

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

PHYTHRONIA LEE COLES, JR.,

Defendant-Appellant.

UNPUBLISHED

March 19, 2002

No. 226393

Oakland Circuit Court

LC No. 99-166674-FC

Before: O'Connell, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree home invasion, MCL 750.110a(2), unarmed robbery, MCL 750.530, unlawfully driving away a motor vehicle (UDAA), MCL 750.413, and first-degree criminal sexual conduct, MCL 750.520b. He was sentenced as a second habitual offender, MCL 769.10, to concurrent prison terms of 6-1/2 to 30 years for the home invasion conviction, three to fifteen years for the unarmed robbery conviction, 3 to 7-1/2 years for the UDAA conviction, and twenty-one to fifty years for the first-degree CSC conviction. He appeals as of right, and we affirm.

Defendant first argues that he was deprived of a fair trial by the admission of the complainant's hearsay statements to Officer Florendo and Dr. March. The decision whether to admit evidence is left to the discretion of the trial court. *People v Taylor*, 195 Mich App 57, 60; 489 NW2d 99 (1992). This Court will find an abuse of discretion only when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling. *Id.*

The record reveals that the complainant's statements to Officer Florendo related to a startling event, i.e., a sexual assault. Further, the statements were made within a couple of hours of the assault and, according to Officer Florendo, the complainant appeared to be in a state of shock when she made the statements. We conclude that a sufficient foundation existed to admit the statements under the excited utterance exception to the hearsay rule. MRE 803(2); *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998).

Defendant failed to object to the testimony concerning the complainant's statements to Dr. March. Therefore, this issue is not preserved and we limit our review to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000). According to Dr. March,

the complainant was still emotionally upset when she spoke to him. Also, during her interview with the nurses immediately before the examination, she was tearful and visibly shaken. In light of this testimony, the record does not clearly demonstrate that the complainant's statements to Dr. March would not have qualified as an excited utterance. Additionally, Dr. March testified that the complainant's statements were limited to those aspects that were relevant to his medical examination, thus supporting a conclusion that the statements were admissible under MRE 803(4) (statements made for the purpose of medical diagnosis or treatment). Thus, defendant has not shown that the admission of the complainant's statements to Dr. March constituted plain error. Finally, we disagree with defendant's claim that the testimony amounted to improper bolstering, given that admission of these prior consistent statements was otherwise proper.

Next, defendant argues that misconduct by the prosecutor deprived him of a fair trial. Defendant did not object to each of the alleged instances of misconduct at trial. With regard to those matters that were not preserved with an appropriate objection, we review for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Otherwise, questions of misconduct by the prosecutor are decided case by case. On review, this Court examines the pertinent portion of the record and evaluates the prosecutor's remarks in context in order to determine whether the defendant was denied a fair and impartial trial. *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994).

Defendant argues that the prosecutor improperly elicited sympathy for the complainant in both his opening statement and closing argument. It is improper for the prosecutor to appeal to the jury to sympathize with the victim. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

Although some of the prosecutor's remarks may be characterized as improper appeals for sympathy, defendant did not object to the remarks at trial and a curative instruction could have cured any prejudice caused by the remarks. Additionally, in light of the entire record, we are satisfied that defendant's substantial rights were not affected.

Defendant also argues that the prosecutor improperly denigrated both defense counsel and defendant. The prosecutor may not question defense counsel's veracity. *Wise, supra* at 101-102. When the prosecutor argues that defense counsel is intentionally trying to mislead the jury, it is tantamount to arguing that counsel does not believe his own client. This type of argument undermines the defendant's presumption of innocence and impermissibly shifts the focus from the evidence itself to defense counsel's personality. *Id.* at 102. Although the prosecutor may have breached this rule by stating that defense counsel invented a defense, this isolated reference was brief and we are satisfied that it did not affect defendant's substantial rights, particularly considering the evidence against him. With regard to the other challenged comments, the prosecutor was merely arguing that counsel had inaccurately summarized the evidence. This did not constitute an improper attack on counsel. *People v Phillips*, 217 Mich App 489, 498; 552 NW2d 487 (1996).

To the extent the prosecutor engaged in improper name-calling, *People v Sterling*, 154 Mich App 223, 232; 397 NW2d 182 (1986), defendant has not satisfied the plain error standard to warrant relief for this unpreserved issue. Also, the reference to defendant's testimony as a "bad joke" was a comment on defendant's credibility and was not improper. *People v Stacy*, 193 Mich App 19, 37; 484 NW2d 675 (1992).

Defendant also argues that the prosecutor shifted the burden of proof during his questioning of the investigating police officer and his cross-examination of defendant. It is improper for the prosecutor to suggest that defendant must prove something because this would tend to shift the burden of proof. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). Here, the prosecutor's questioning established that, before trial, defendant never came forward with his claim that he was having a sexual relationship with the complainant. 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 proof. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). Although a defendant does not have the burden of producing evidence, once he advances evidence or a theory, argument on the inferences created does not shift the burden of proof. *Id.*

In the instant case, the prosecution's questioning was meant to establish the weakness of defendant's case, not to shift the burden of proof to defendant. The prosecutor's cross-examination properly explored an inherent weakness in the defense theory. *Id.* at 117. By offering a defense that was contingent on his credibility, defendant invited cross-examination and arguments by the prosecutor about the validity and weight of the evidence in support of his theory. *Id.* at 118.

The prosecutor's remark in rebuttal was a proper response to defense counsel's argument and a proper comment on defendant's failure to produce corroborating witnesses. *People v DeLisle*, 202 Mich App 658, 671; 509 NW2d 885 (1993).

Defendant also argues that the prosecutor's questioning was an improper comment on his right to remain silent. It is impermissible for the prosecutor to comment upon an accused's exercise of his constitutional right to silence. *People v McReavy*, 436 Mich 197, 201; 462 NW2d 1 (1990); *People v Gallon*, 121 Mich App 183, 187; 328 NW2d 615 (1982). Here, however, because the record does not indicate that defendant's silence was attributable to an invocation of his Fifth Amendment privilege or a reliance on *Miranda*¹ warnings, defendant has not established that there was a violation of this rule. *McReavy*, *supra* at 201.

Next, defendant argues that reversal is required because the trial court refused to allow him to cross-examine the complainant about her prior sexual contact with him. We find no reversible error. Cross-examination of the complainant regarding prior sexual relations with defendant would not have violated the rape-shield statute, MCL 750.520j(1). However, the court focused on the failure to comply with the notice provisions of the statute, as well as the substance of the testimony. Defendant admittedly did not comply with these provisions. Additionally, defendant did not request that he be permitted to cross-examine the complainant regarding the relationship; rather, he stated that he intended to have his client testify regarding the matter.² The prosecution did not object to defendant so testifying, and he was permitted to do so.³

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

² Defense counsel explained that he did not comply with the notice requirement because he did not know at the time that his client would raise the defense of consent. He went on to explain:

(continued...)

Finally, defendant argues that the trial court abused its discretion in refusing to admit a Valentine's card that he received from the complainant's granddaughter, who sometimes stayed at the complainant's house. Defendant asserted that he had a sexual relationship with the granddaughter and that he had snuck into the house through a window to visit with the granddaughter without the complainant's knowledge. He explained that this would explain the presence of his fingerprints on the window, and that it also explained why he did not admit being in the house (he was protecting the granddaughter.) On direct examination, the granddaughter denied that defendant was her boyfriend.

Although it appears that the Valentine card was, in fact, relevant, we conclude reversal is not warranted. The granddaughter was impeached with a prior statement wherein she referred to defendant as her boyfriend. The Valentine card would have added little in the way of additional impeachment. Further, defendant's real defense was that he had had a prior consensual sexual relationship with the complainant, and that the sexual intercourse at issue was consensual, and the Valentine card was unrelated to that issue. Under the circumstances, any error in refusing to admit the evidence did not affect the outcome of the trial and was harmless. *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999).

Affirmed.

/s/ Helene N. White
/s/ Jessica R. Cooper

I concur in result only.

/s/ Peter D. O'Connell

(...continued)

I'm not going to ask the alleged victim as to any prior sexual activity, but I believe my client is going to testify as to that.

³ The prosecution briefly questioned the complainant regarding a prior sexual relationship with defendant, which she denied. Defendant did not revisit the issue with the court at that time, and it seems clear that the complainant would not have admitted any prior relationship on cross-examination.