STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 26, 2002
v	No. 224823 Wayne Circuit Court
MICHAEL R. WILLSON, Defendant-Appellant.	Criminal Division LC No. 99-004468

Before: Neff, P.J., and Fitzgerald and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316, second-degree murder, MCL 750.317, assault with intent to commit murder, MCL 750.83, and three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(c), (e) and (f). He was sentenced to life imprisonment for each of the murder convictions and to forty to sixty years' imprisonment for each of the remaining convictions, all sentences to be served concurrently. We vacate defendant's second-degree murder conviction and one of the first-degree CSC convictions, but affirm in all other respects.

I. Prosecutorial misconduct

Defendant argues that misconduct by the prosecutor deprived him of a fair trial. In those instances where defendant did not object to the challenged conduct, we review the issue for plain error affecting defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). This requires a showing that a clear or obvious error prejudiced defendant, i.e., affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). Defendant bears the burden of persuasion with respect to prejudice. *Id.* 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 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).

A. Comments about the DNA evidence

Defendant argues that it was improper for the prosecutor to remark that it was probable that the blood of both victims was on the jacket because no such conclusion was warranted based on the evidence. Defendant did not object to this remark below.

A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, but he is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case. *Schutte, supra* at 721.

Here, we agree that comments suggesting that it was probable that the blood of both victims was on the jacket were improper, given that there was no evidence concerning probabilities that this was the case. See *People v Coy*, 243ch App 283, 296-303; 620 NW2d 888 (2000). However, the error was not outcome determinative considering the other evidence in the case and the defense theory that defendant did not participate in the offenses.

Defendant also complains about the prosecutor's remarks in rebuttal, to which he objected. While the prosecutor's remark was not based on the evidence, it was responsive to defendant's argument in summation. Considered in this context, the remark does not require reversal. *Schutte*, *supra* at 721. Further, the brief remark did not deny defendant a fair trial because the court instructed the jury that the attorney's statements were not evidence and that it was to base its decision only on the evidence. *People v DeLisle*, 202 Mich App 658, 671; 509 NW2d 885 (1993).

B. Shifting of the burden of proof

We disagree with defendant's claim that the prosecutor improperly shifted the burden of proof. 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 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. *Id*.

Here, the prosecutor was merely commenting on the validity of defendant's theory and did not shift the burden of proof. By offering a defense that was contingent on his credibility, defendant invited arguments by the prosecutor about the validity and weight of the evidence in support of his theory. *Id*. at 118.

C. Misrepresentation of the element of premeditation

Defendant argues that the prosecutor used a faulty analogy to illustrate the concept of premeditation. There was no objection to the prosecutor's remarks during voir dire or summation in which the prosecutor discussed the concept of premeditation. While the example used by the prosecutor may not have exactly comported with the law, any error was not outcome determinative because the court properly instructed the jury on the concept of premeditation and deliberation and directed the jury to base its verdict on its instructions. Moreover, we disagree that the prosecutor erred by suggesting that defendant had conceded the element of premeditation because defendant did in fact suggest that he was not contesting that element of the crimes.

D. Remark about victim's intuition

Defendant complains that the prosecutor argued facts not in evidence by commenting on the victim's intuition. Defendant failed to object to the prosecutor's remarks at trial. It is

apparent that the prosecutor was merely arguing the evidence and all reasonable inferences arising from it as they related to his theory of the case, and properly responding to the defense arguments. *Schutte, supra* at 721. Plain error has not been shown.

E. Use of the gruesome photograph

At trial, the prosecutor questioned defendant about its exhibit 10, a picture depicting the crime scene. On appeal, defendant complains that the prosecutor made an improper appeal to sympathy, *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984), when he repeatedly questioned defendant about what he saw in it and then, in summation, told the jury that the reasons for asking these questions were to see if defendant recognized his "signature" on the photo and/or whether he saw his own work.

Defendant did not object below. Considered in context, the prosecutor was merely arguing that defendant was the perpetrator. The remarks were not an improper appeal for sympathy.

F. Violation of the court's sequestration order

Defendant next argues that the prosecutor violated the trial court's sequestration order by failing to have some of his witnesses leave the courtroom before his opening statement. Even assuming that the sequestration order was violated, defendant has not shown that he was deprived of a fair trial. The trial court denied defendant's motion for a mistrial in connection with this issue, noting the lack of apparent prejudice to defendant. *People v Griffis*, 218 Mich App 95, 100; 553 NW2d 642 (1996). On appeal, defendant does not indicate what witnesses the opening statement improperly influenced, nor has he shown how he was prejudiced by the witness' presence during opening statement.

In sum, defendant has not sustained his claim of prosecutorial misconduct.

II. Double Jeopardy

A double jeopardy issue presents a question of law that is reviewed de novo on appeal. *People v Clark*, 243 Mich App 424, 429; 622 NW2d 344 (2000). However, because defendant did not raise this issue below, we review the issue for plain error affecting defendant's substantial rights. *Carines, supra* at 774.

A. The murder convictions

The double jeopardy guarantees in the federal and state constitutions protect a defendant from multiple punishments for the same offense. *Clark, supra* at 429. Multiple murder convictions arising from the death of a single victim violate double jeopardy. *Id*. Because the judgment of sentence reflects that defendant was convicted and sentenced for both first-degree murder and second-degree murder for the death of a single victim, we vacate the second-degree murder conviction and affirm the first-degree murder conviction. *Id*. at 429-430.

B. The criminal sexual conduct convictions

Defendant also claims a double jeopardy violation because of the multiple criminal sexual conduct convictions. One sexual penetration, even if accompanied by more than one of the aggravating circumstances listed in MCL 750.520b, may give rise to only one conviction and sentence. *People v Johnson*, 406 Mich 320, 330-331, 279 NW2d 534 (1979). However, where there is more than one penetration, each may be punished separately. *People v Dowdy*, 148 Mich App 517, 521; 384 NW2d 820 (1986).

Here, there was evidence at trial that defendant penetrated the victim twice, once while on the couch and once while on the chair. On appeal, defendant acknowledges that the jury **could** have found two penetrations (emphasis supplied by defendant), but complains that it cannot be determined from the record whether the jury actually found that multiple penetrations were committed because (1) the issue of multiple penetrations was not specifically brought to the jury's attention by the court or prosecutor; (2) the jury "was never instructed to convict for each instance of penetration it found"; and (3) the verdict does not clarify whether defendant effected penetration twice.[1] However, because defendant did not raise this issue below with an appropriate objection to the court's instructions or verdict, we review this issue for plain error. Because, factually, there was evidence of two separate penetrations and, legally, a defendant may be convicted and punished for each separate act of penetration, defendant has failed to show that allowing two of the CSC convictions to stand would constitute plain error. However, because defendant was convicted of three separate counts of penetration and because there was evidence of only two penetrations at trial, we agree that one of defendant's CSC convictions must be vacated as being violative of double jeopardy.

We vacate defendant's second-degree murder conviction and one of the first-degree criminal sexual conduct convictions, and affirm in all other respects.

/s/ Janet T. Neff
/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

[1] Defendant's brief, p 34.