

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVIN BROADUS STONE,

Defendant-Appellant.

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UNPUBLISHED

April 9, 2002

No. 224547

Isabella Circuit Court

LC No. 99-008843-FH

Before: Cavanagh, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction, following a jury trial, of one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a) (sexual penetration with a person at least thirteen years of age and under sixteen years of age). Defendant was sentenced as a third habitual offender, MCL 769.11, to a term of thirteen to twenty years’ imprisonment. We affirm.

Defendant first argues that the prosecutor improperly shifted the burden of proof by questioning defendant’s failure to produce evidence to corroborate his claim of innocence and by stating that defendant’s testimony was presumptively untruthful by virtue of his status as a criminal defendant. We disagree.

The test for determining prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Issues of prosecutorial misconduct are decided on a case-by-case basis, and the reviewing court must examine the pertinent portion of the record and evaluate the prosecutor’s remarks in context. *Id.* The propriety of a prosecutor’s comments depend on the facts of an individual case. *People v Johnson*, 187 Mich App 621, 625; 468 NW2d 307 (1991). Further, 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 Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). Because defendant did not raise timely objections to the alleged misconduct in the lower court, we review for plain error affecting defendant’s substantial rights. *Id.* at 720.

As defendant recognizes in his brief on appeal, “[a] fundamental pillar of our legal system is that a person is presumed innocent until proven guilty.” *People v Rosales*, 160 Mich

App 304, 312; 408 NW2d 140 (1987). Accordingly, the prosecution may not shift its burden of proving beyond a reasonable doubt that the defendant is guilty and obligate the defendant to prove his innocence. *Id.* However, the prosecutor may argue on the basis of the facts of the case that a witness is credible, or that the defendant or another witness is unworthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997).

In the instant case, the prosecutor expressly acknowledged during closing argument that the burden of proof regarding the elements of the charged offense lay with the prosecution.<sup>1</sup> Moreover, a review of the prosecutor's comments in context reveals that the prosecutor's argument hinged on discussing what was essentially a credibility contest between defendant and the complainant. In this regard, the prosecutor noted that the complainant was worthy of belief because her version of the pertinent events was corroborated by other witnesses at trial. In this vein, the prosecutor further noted inconsistencies in defendant's version of events, his motivation to lie, and that his side of the story was not corroborated. Under the circumstances, we are not persuaded that the prosecutor's action constituted plain error affecting defendant's substantial rights.

Defendant next argues that the prosecutor improperly vouched for the complainant's credibility and highlighted defendant's lack of credibility. We disagree. A prosecutor may not vouch for the credibility of a witness to the extent that it is suggested that he has special knowledge that the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, as previously noted, a prosecutor may argue from the facts that the defendant or another witness is not worthy of belief, and is not required to state inferences and conclusions in the blandest possible terms. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

We are not persuaded that the challenged prosecutorial comments amounted to impermissible vouching for the complainant's credibility. The prosecutor did not suggest that he had some special knowledge that the complainant was testifying truthfully. Moreover, the comments were clearly made in response to defense counsel's opening argument questioning the complainant's credibility and inferring that she was a liar. Further, the prosecutor properly argued his position regarding the credibility of the witnesses in relation to his theory of the case and on the basis of evidence presented during trial. Indeed, the challenged comments constituted fair commentary on the evidence and inferences drawn therefrom. We therefore find no plain error affecting defendant's substantial rights. *Schutte, supra* at 722.

Defendant next argues that reversal is warranted because the prosecutor impermissibly appealed to the jury's sense of civic duty. We disagree. Although we recognize that prosecutors are not permitted to resort to civic duty arguments to appeal to the jury's fears and prejudices, we must review such comments in context to determine if error requiring reversal occurred.

<sup>1</sup> Moreover, the trial court specifically instructed the jurors that it was their duty to determine the credibility of the witnesses and that the attorneys' statements and arguments should not be considered evidence. Jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The court also instructed that the burden of proof lay with the prosecution and that it was the obligation of the prosecution to prove its case to the jury beyond a reasonable doubt.

*Bahoda, supra* at 282-283. In the present case, a review of the prosecutor's rebuttal argument in context reveals that it was responsive to defense counsel's closing argument. For instance, during his closing argument defense counsel discussed that defendant was a college student with good grades. Defense counsel went on to emphasize defendant's community work, the fact that defendant volunteered to mentor students at a local school, and that he was well-liked and popular with the students. In response, the prosecutor argued that defendant used his position of trust as a mentor to develop his relationship with the complainant and groom her for a sexual relationship. On this record, we do not agree with defendant that the prosecutor improperly advanced a civic duty argument to appeal to the jurors' fears and prejudices.

Defendant also essentially argues that the effect of several cumulative errors denied him of his right to a fair trial. It is possible for the cumulative effect of a number of errors to constitute error warranting reversal. *People v Dilling*, 222 Mich App 44, 56; 564 NW2d 56 (1997). However, in analyzing the effect of errors, only actual errors are accumulated to determine any prejudicial effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999).

To the extent that defendant argues that the prosecutor improperly referred to the fact that defendant altered his birth date on his driver's license, it is clear that the prosecutor did so only as a method of impeaching defendant's credibility. Moreover, during direct examination defense counsel raised this issue as well, asking defendant whether he had altered his driver's license. Further, during cross-examination, in response to the prosecutor's query whether defendant lied to the complainant about his age, defendant responded that he was unsure whether he had. Because defendant's credibility was a central issue at trial, evidence concerning his attempts to lie about his age were directly relevant to his credibility. Likewise, there is nothing in the record to indicate that the jury was informed that altering a driver's license is an offense, and the evidence was not offered in violation of MRE 404(b)(1).

Similarly, to the extent that defendant suggests that the prosecutor engaged in misconduct by attempting to introduce evidence concerning a police report the complainant's father filed against defendant, and that the complainant had sexual contact with defendant on occasions other than the incident for which he was charged, there is no indication that the prosecutor sought to introduce this evidence in bad-faith. "[P]rosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Defendant also argues that his counsel was ineffective in failing to object to the prosecutor's questioning of various witnesses throughout trial. Defendant also maintains that defense counsel introduced extrinsic evidence concerning the complainant's father's religious background during the questioning of the witness.<sup>2</sup> We have reviewed each of defendant's

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<sup>2</sup> Defendant's reliance on this Court's recent decision in *People v Leshaj*, \_\_\_ Mich App \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 223746, issued January 29, 2002) as support for his ineffective assistance of counsel claim is misplaced. In *Leshaj*, this Court reversed the defendant's conviction of CSC III on the basis of prosecutorial misconduct. In *Leshaj*, the complainant testified at length about her religious beliefs and convictions. During closing argument, the prosecutor in *Leshaj* improperly vouched for the complainant's credibility, "advising the jury (continued...)

allegations in this regard, and conclude that defendant has failed to overcome the well-settled presumption that trial counsel's actions were the product of sound trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v Avant*, 235 Mich App 499, 507-508; 597 NW2d 864 (1999).

Finally, in his supplemental brief filed with this Court on March 15, 2002, defendant argues that his conviction of CSC III violates double jeopardy principles because it arose from the same transaction as a previous civil action apparently filed by the complainant's parents, as well as a previous criminal matter where defendant apparently pled guilty to making harassing phone calls. Moreover, defendant argues that his prosecution for CSC III was barred by principles of collateral estoppel. Both issues are unpreserved because defendant did not raise them in the lower court. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Further, our review of these issues is hindered by the lack of relevant documentation in the lower court file. In this regard, defendant has improperly attempted to broaden the scope of the record on appeal by including documentation not included in the lower court file. MCR 7.210(A)(1).

In any event, after reviewing each issue we are not persuaded that either has merit. Specifically, we reject defendant's claim that the CSC III conviction, the previous conviction and the civil action arose from the "same transaction" or involved identical issues to the extent that double jeopardy or collateral estoppel principles are applicable. *People v White*, 390 Mich 245, 258; 212 NW2d 222 (1973); *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001); *Eaton Co Bd of Rd Comm'rs v Schultz*, 205 Mich App 371, 376-377; 521 NW2d 847 (1994). There is no indication that the previous conviction, the civil action and the CSC III conviction leading to the present appeal, which arose from defendant's performing oral sex on a fifteen-year-old student that he met through a mentoring program at her school, were part of the same criminal act, episode, or occurrence or involved identical issues. *White, supra* at 254; *Eaton Co, supra* at 376-377.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ David H. Sawyer  
/s/ Peter D. O'Connell

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(...continued)

that the complainant should be believed because of her Christian religious beliefs." *Id.*, slip op at 2. Because the case hinged on a credibility contest between the complainant and the defendant, this Court ruled that the prosecutor's misconduct denied the defendant of a fair trial.

In the instant case, a review of the record reveals that defense counsel inquired of the complainant's father about his occupation as a pastor. However, the complainant's father did not testify at length about his religious beliefs, and the prosecutor and defense counsel did not subsequently argue that the complainant or her father were more credible than defendant because of religious beliefs. Thus, *Leshaj* is distinguishable and does not provide a basis for reversal.