

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE JOHN HERNANDEZ,

Defendant-Appellant.

UNPUBLISHED

April 12, 2002

No. 229175

St. Clair Circuit Court

LC No. 99-002759-FC

Before: Zahra, P.J., and Neff and Saad, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(b) (sexual penetration with a person, related by blood or affinity, who is at least thirteen but less than sixteen years of age), and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(b) (sexual contact with a person, related by blood or affinity, who is at least thirteen but less than sixteen years of age). Defendant was subsequently sentenced to seventy months' to fifteen years' imprisonment on the CSC I count and fifty-seven months' to fifteen years' imprisonment on the CSC II count. We affirm.

I. Basic Facts and Procedure

The victim, age 14 at the time of the assaults, is the niece of defendant. The victim testified that the assaults occurred during an evening in January 1999, while her uncle visited her home. The victim reported the assault to her father the following evening, and the victim's father called defendant to confront him with the allegations. Defendant went to the victim's home to talk to his brother (the victim's father). At trial, the victim's father testified as follows:

Q: How would you characterize your emotions at this time?

A: Excuse me?

Q: Your emotions, how are you feeling at this time?

A: Hurt, angry.

Q: And so you asked him again –

A: Very angry, yeah.

Q: And what happened then?

A: He turned around and he – when I was cussing at him I said: Tell me the truth. And he fell to his knees, he says: I don't know what happened, man. I don't know what got into me. Please don't call the cops. He says: You'll ruin my life. I says: Well, you son-of-a-bitch, what do you think you did to my . . . daughter, . . . I'll kill you. Why Joe? Why'd you do that to my daughter, man?

Defense counsel objected and the trial court instructed the witness to answer only the questions asked. The victim's father responded by stating, "I'm sorry, your Honor. It's just two heartbreaks at one time." The court took a recess. Outside the presence of the jury, the court admonished the witness and again instructed him to answer only the questions asked.

With respect to the victim's testimony, defense counsel cross-examined her regarding the time frame in which the incident took place:

Q: Did you tell the officer the day after it happened that he put his hand up her shirt and that he lifted up your bra covering right breast and fondled her right breast only for what seemed just like a few moments to her, under ten seconds. Were you that specific with the officer?

* * *

A: No.

* * *

Q: All right. So if the officer put this in the report and told him that you said it, he's wrong because you never said that?

A: I wasn't specific in any time.

Q: I didn't, I didn't hear you.

A: I said I wasn't specific in any time. It's not like I was watching my watch the whole time that he was fondling and playing with me and acting like I was a . . . toy.

The jury was immediately excused and defense counsel moved for a mistrial based on the outbursts of the witness. The court denied the motion. When the jury returned, the court instructed the jury to ignore unresponsive answers.

After the victim was excused from the courtroom, defense counsel renewed his motion for mistrial, stating that the victim was heard from the courtroom screaming and crying, and when taken in conjunction with the other outbursts, it prejudiced the jury. The court again denied this motion for mistrial.

During the prosecution's closing argument, defendant twice objected. The Court overruled both objections but recalled the jury at the start of deliberations to charge them that attorneys are not permitted to vouch for the truthfulness of their witnesses.

II. Analysis

Defendant first argues the trial court abused its discretion when it denied defendant's multiple motions for mistrial based on repeated outbursts by the victim and her father during trial. This Court reviews a trial court's decision regarding a motion for mistrial for an abuse of discretion. *People v Griffin*, 235 Mich App 27, 36; 597 NW2d 176 (1999). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id.*, quoting *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995).

"[A]n unresponsive, volunteered answer to a proper question is not cause for granting a mistrial." *People v Gonzales*, 193 Mich App 263, 266-267; 483 NW2d 458 (1992), quoting *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988). A mistrial should be granted only when an error is so egregious that the prejudicial effect cannot be removed any other way. *Id.* at 266.

The outbursts made by the victim and her father during their respective testimonies were unresponsive, volunteered answers to properly asked questions. The trial court took all the necessary steps to minimize the effect of the outbursts on the jury by continuously admonishing the witnesses to answer only the questions asked and to refrain from giving any additional narrative and by instructing the jury to disregard unresponsive answers. The unresponsive answers were given spontaneously and were unsolicited, and did not introduce any evidence that was not already before the jury. Further, in regard to the victim's conduct outside the courtroom after her testimony, there is no evidence that defendant was prejudiced by this alleged outburst or that the jury even heard it. Defendant has not shown prejudice warranting a mistrial. Thus, the trial court did not abuse its discretion by denying defendant's motions for mistrial.

Defendant next argues the prosecutor's misconduct during closing arguments denied him a fair trial. Specifically, defendant claims the prosecutor impermissibly interjected her own personal belief in defendant's guilt and impermissibly vouched for the credibility of witnesses. On appeal, we review de novo a claim of prosecutorial misconduct. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

The test of prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided case by case and this Court must examine the pertinent portions of the record and evaluate the prosecutor's remarks in context. *Id.*; *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). The comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant first directs this Court's attention to various comments made by the prosecutor during closing arguments, arguing that the prosecutor impermissibly interjected her own personal belief in defendant's guilt. A prosecutor cannot make a statement of fact to the jury that is not

supported by the evidence, but may argue the evidence and all reasonable inferences arising from the evidence. *Schutte, supra*. A prosecutor cannot place the prestige of her office behind her witnesses. *People v Reed*, 449 Mich 375, 398; 535 NW2d 496 (1995). The complained of statements in this case include the prosecutor stating, “I don’t believe there can be any doubt,” “You didn’t do it. He did it,” and “it’s the truth.”

In taking the prosecutor’s complete closing argument into context, it is clear the prosecutor merely argued that the evidence showed defendant’s guilt. There is no evidence that the prosecutor attempted to persuade the jury with anything beyond the evidence presented. Reviewing the complained-of portions of the prosecutor’s closing argument in context, we conclude that the prosecutor did not interject her own personal beliefs of defendant’s guilt.

Defendant next directs this Court’s attention to various other comments made by the prosecution, arguing that the prosecutor improperly vouched for the credibility of its witnesses. A prosecutor cannot vouch for the credibility of her witnesses to the effect that she has some special knowledge concerning the witness’ credibility. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). As this Court stated in *People v Flanagan*, 129 Mich App 786; 342 NW2d 609 (1983):

The general rule is clear. It is impermissible for the prosecutor to vouch for the credibility of his witnesses. However, the prosecutor is permitted, as an advocate, to make fair comments on the evidence, including arguing the credibility of witnesses to the jury when there is conflicting testimony and the question of defendant’s guilt or innocence turns on which witness is believed. However, in every case, the remarks of the prosecutor must be viewed with reference to the prosecutor’s duty of fairness. [*Id.* at 795-796 (internal citations omitted).]

As in most CSC cases, the testimony in this case was conflicting and the jury had to decide the credibility of the witnesses. Considering the litigants’ closing arguments as a whole, we conclude that the prosecution did not vouch for the credibility of any witness. Rather, the complained of portion of the prosecution’s closing argument merely explained the evidence.

Moreover, at defense counsel’s request the court gave a cautionary instruction after counsel had concluded their closing arguments, which instructed the jury that counsel could not vouch for the credibility of the witnesses. Thus, we conclude defendant was not denied a fair trial.

Affirmed.

/s/ Brian K. Zahra
/s/ Janet T. Neff
/s/ Henry William Saad