# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>December 20, 2002 |
| v | No. 235923<br>Wayne Circuit Court |
| ANDREW OLIVE,<br><br>Defendant-Appellant. | LC No. 00-013331 |

Before: Kelly, P.J. and Jansen and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC 1), MCL 750.520b(1)(e) (weapon used). The trial court sentenced defendant to two concurrent sentences of fifteen to thirty years' imprisonment. We affirm.

## I. Basic Facts

In May 1995, the victim was living at the Grandwood Hotel where, according to her, all occupants were drug users. The victim, who sold crack cocaine in the Grandwood, routinely overcharged people, used crack herself and admittedly stole from her clients.

On May 18, 1995, the victim encountered defendant, whom she knew as an acquaintance. The victim sold defendant a nickel rock of crack for $5. A few minutes later, defendant returned asking for more crack. The victim and defendant went to make the purchase and returned to the hotel. The victim did not want anyone to see her passing the crack to defendant, so they went into defendant's hotel room. On her way out of the room, the victim took a hit of crack from her pipe. After making a few more transactions, the victim went back to her room where she and her boyfriend consumed alcohol. Defendant, accompanied by a prostitute, came to the victim's door asking for more crack. The victim, who knew the prostitute and thought she was a "snitch," stated that she did not sell drugs.

Awhile later, defendant called the victim on the telephone. The victim met defendant in the lobby and they went around the corner to buy some more crack. After buying the crack, defendant asked the victim to come back to his room so he could use her stem to smoke the crack. As the victim entered the room, defendant pushed her causing her head to hit the sink. As she tried to stand up, defendant put a screwdriver to her stomach saying, "Sit down and shut up." He instructed her to light the crack and then he put a knife to her side saying, "I'm going to f---

you all night." He then ordered her to remove her pants and engaged in vaginal intercourse with her two separate times. After defendant fell asleep, the victim ran into the bathroom. However, defendant got up and tried to pull the door open and "stick [her]." The victim shouted that the police were coming and defendant stopped pulling on the door. When the victim opened the door, she saw defendant in the corner going through her pocket book. She grabbed her clothes and ran out.

After escaping to the lobby, the victim asked the front desk clerk to call the police. When the police arrived, she told them that defendant raped and tried to kill her. The victim also went to the hospital. At trial, the victim described her examination at the hospital and her meeting with a rape counselor. Later, Highland Park police called her and asked her to come to the station. She went to the station and made a written statement.

At trial, the victim testified that she used crack for thirteen years, but no longer uses the drug. Although her previous attempts had failed, the victim began a program four months before trial and believed that it was working. The victim testified extensively about the changes she made in her life and the spiritual effects of these changes.

Frank Ross, a Highland Park public safety officer, testified that on May 18, 1995, he was instructed to pick up a rape kit from Henry Ford Hospital. The rape kit was under the names of defendant and the victim. Melinda Jackson, a forensic scientist with the Michigan State Police, testified that her laboratory received a rape kit in May 1995 under defendant's and the victim's names. The laboratory report indicated that sperm was detected on the vaginal and rectal smears. Tests were not performed to determine the semen source.

Jimmie Wright, a Highland Park public safety officer testified that on May 18, 1995, he was called to the Grandwood at 5:20 a.m. to take a rape report. After Wright spoke with the victim, she was transported by EMS. When Wright went to the apartment where the incident occurred, he did not locate any weapons and did not gather any witnesses. He approached defendant in the hallway; defendant did not run. Officer David Bragg testified that on May 18, 1995, he and his partner received instruction to arrest defendant at the Grandwood. They made the arrest and placed defendant in a jail cell.

Charles Hackney testified that he released defendant after three days because they were unable to locate the victim to obtain a statement. Approximately one week after the incident, they located the victim and obtained a statement. Based on the statement, they obtained a warrant. The warrant was entered into the Law Enforcement Information Network (LEIN). Defendant was not arrested until sometime recently before trial.

## II. Prosecutorial Misconduct

### A. Standard of Review and Applicable Law

Allegations of prosecutorial misconduct are reviewed de novo. *People v Pfaffle,* 246 Mich App 282, 288; 632 NW2d 162 (2001). Defendant complains of several instances of prosecutorial misconduct of which some are preserved and some are not. In order to avoid forfeiture of an unpreserved claim of prosecutorial misconduct, the defendant must demonstrate plain error that affected the defendant's substantial rights. *People v Schutte,* 240 Mich App 713,

720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). If such an error is found, then this Court should reverse only if the defendant is actually innocent or the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* Preserved issues of prosecutorial misconduct are reviewed by this Court by evaluation of the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996).

Claims of "prosecutorial misconduct are decided case by case with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Prosecutorial comments must be read as a whole and evaluated in light of the arguments and the relationship they bear to the evidence admitted. *Schutte, supra* at 721.

B. Improper Bolstering of Testimony

Defendant first argues that the prosecutor improperly bolstered the victim's credibility with her testimony that she had stopped using drugs and was engaged in a rehabilitation program. The testimony of which defendant complains reads:

> *Q.* And in the past five years are you still using crack cocaine?
>
> *A.* No, I'm not.
>
> *Q.* Have you tried to stop? How would you have stopped?
>
> *A.* Well, I tried to stop before, and it didn't never [sic] work, but this time I stopped. I have been clean four months now. I had a spiritual awakening. It [sic] like I never used drugs before. I'm a different person today.
>
> *Q.* Between '95 and now you said you tried to stop before?
>
> *A.* Yes.
>
> *Q.* How many times do you think you tried to stop?
>
> *A.* A hundred times.
>
> *Q.* And how would you go about trying to stop? What would you do?
>
> *A.* I go into rehabilitation or just try to do it myself. Just it didn't never [sic] work.
>
> *Q.* Why would it be important that you try to stop?
>
> *A.* I didn't like the way I was living. I didn't like my life. I didn't like myself.
>
> *Q.* This time you think it's working?
>
> *A.* I know it's working.

[DEFENSE COUNSEL]: Object to relevancy, your Honor.

[PROSECUTOR]: I think it goes to her ability to testify how [sic], your Honor.

THE COURT: I agree. I'll overrule the objection.

*Q*. (By [the prosecutor] continuing) You say you know it's working?

*A*. Yes.

*Q*. Are you in some kind of program, or what are you doing?

*A*. I am in a program.

*Q*. What does that program involve?

*A*. Teaching. It's learning different things because when you have used drugs so long, you be out of everything. You have to start all over again to learn how to live different. You don't know things, different things. It's great. It's great. It's a lot of steps you have to take.

*Q*. How long has this process been going on now this time?

*A*. Four months.

*Q*. So did you enroll in that program? Is it a live-in? Is it a live-out?

*A*. I enrolled in a program.

*Q*. Did you do it on your own?

*A*. Yes. I just walked away and was just crying to God, praying, and I just surrendered and I went downtown and everybody just rushed me, helping me. Just I was just like I am crying, "help me, anybody" you know.

*Q*. So it has been four months?

*A*. It has been four months. Yes.

To begin with, it should be noted that defendant did not object on the basis that this was improper bolstering, but more generally, that the evidence was not relevant. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The prosecution argued that the testimony went to the victim's "ability to testify." This Court is not clear on what the prosecutor meant by "ability." However, it appears that she meant to show that the victim was not under the influence of drugs while on the stand.

This appears to go to the question of competence which is a proper inquiry pursuant to MRE 601.[1]

To the extent that the testimony exceeded relevant inquiry, we must determine if defendant was denied a fair and impartial trial by the testimony. *Truong*, *supra* at 336. We conclude that the victim's testimony did not deny defendant a fair and impartial trial. Although defendant argues that the case was a credibility contest between defendant and the victim, defendant did not testify. Even without the complained of testimony, the evidence presented at trial supported a finding of defendant's guilt. The victim described the incident in detail and testified that she immediately called the police after the incident. Police testimony corroborated that that they were called to the scene. The victim also testified that she went to the hospital and underwent an exam. Lab technicians confirmed that they tested samples taken from a rape kit with defendant's and the victim's name on it. The testing found semen in the victim's vagina. Although the victim's credibility was called into question on cross-examination, questions of credibility are left to the trier of fact to resolve. *People v Avant,* 235 Mich App 499, 506; 597 NW2d 864 (1999). We find that this case was not as even-sided as defendant suggests that it was merely a credibility contest. In fact, defendant did not present any witnesses or proffer any evidence. Therefore, even if the victim's testimony was improper bolstering, defendant was not denied a fair and impartial trial.

C. Improper Vouching for Credibility

Defendant next argues that the prosecutor improperly vouched for the victim's credibility in closing argument. Because defendant did not object, to avoid forfeiture, he must demonstrate plain error that affected his substantial rights. *Schutte, supra* at 720. While the prosecutor may comment on the evidence and all reasonable inferences therefrom, it is improper to vouch for the credibility of a witness. *Id.* at 721; *People v Bahoda,* 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor may argue a witness' credibility based on the facts. *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996). In particular, defendant complains of the prosecutor's remarks in rebuttal:

> She hopes for better things for herself. What is her motive to now relive what happened five years ago to just make up something about something five years ago if it didn't happen? She's telling you the truth when she tells you the experience she had.

We find that the phrase, "She's telling you the truth when she tells you the experience she had" was an argument based on the evidence that the victim was truthful about being a drug dealer/user and thus was not trying to cover up other motives that she may have had for pursuing defendant's conviction. Therefore, this comment was not improper. Additionally, this rebuttal argument was responsive to defense counsel's closing argument that the victim sought defendant's prosecution because she was scorned or hustled by him. Because defendant has failed to show plain error, this claim is forfeited.

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[1] However, we note that, pursuant to MRE 601, questions regarding competency are posed by the trial court.

D. Improper Denigration of Defense

Defendant next argues that the prosecutor improperly denigrated the defense. Because defendant did not object, to avoid forfeiture, he must demonstrate plain error that affected his substantial rights. *Schutte, supra* at 720. Although a prosecutor may not denigrate defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), a prosecutor may denigrate the defense if it is inconsistent with the evidence presented at trial, see *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). The portion of rebuttal argument that defendant objects to is as follows:

> Oh, we couldn't hear about impeachment. Mr. Rutledge told you. He told you that in opening statement. He told you that. Now you're not going to be able to believe her story because she said other things before.
>
> What did she say different. What's this Mr. Rutledge pointed out that she said different before?
>
> I told the officer before I smoked a piece off of two rocks. And in front of you I said I smoked a piece off one rock. Oh, my gosh that's scathing. Walk him out the door. That's just like her, all unbelievable.
>
> He also points out in her transcript. This is the big difference in her testimony. When you're talking about were you treated, when she said she had a little scratch from the screw driver [sic] in her stomach, were you stuck? Where he stuck the knife in your side did not penetrate the skin; correct? No. And you were not treated for any wound to your stomach? No. He sits down.
>
> Let's read just a little bit further. Okay.
>
> "On your side? No. All right. They wiped that little scar. They wiped it and cleaned it." That's what she told you here on the stand that they put a little alcohol on it. They wiped it and cleaned it. That was her idea of being treated. So is that so horrendous?
>
> Now we're going to say she is a liar just like that? That's silly. Those are the big impeachment issues. Those are the big inconsistencies in her testimony here today from what she said before.

Defendant specifically argues that with this rebuttal, the prosecutor suggested that defense counsel was trying to mislead the jury. Defendant argues "the prosecutor unquestionably denigrated defense counsel personally by sarcastically mocking not only his theory and argument, but also his demeanor."

The prosecutor may not question defense counsel's veracity. *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). 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. *Id.* 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.*

Prosecutors cannot make statements of fact unsupported by the evidence; however, a prosecutor need not confine argument to the "blandest of all possible terms," but has wide latitude and remains free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), citing *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

Viewed in context, the prosecutor did not argue that defense counsel lied or was trying to intentionally mislead the jury concerning the facts. The prosecutor merely responded to defense counsel's arguments and the defense theory of the case. The prosecutor did not personally attack defense counsel or shift the jury's focus from the evidence to defense counsel's personality. *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2 487 (1996). Because defendant failed to show plain error, this claim is forfeited.

E. Improper Appeal to Jury's Sympathy

Defendant finally argues that the prosecutor improperly appealed to the jury's sympathy for the victim. Because defendant did not object, to avoid forfeiture, he must demonstrate plain error that affected his substantial rights. *Schutte, supra* at 720. Although a prosecutor may argue that a witness should be believed, he may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *People v Delassandro*, 165 Mich App 569, 581; 419 NW2d 609 (1988); *Wise, supra* at 104.

Specifically, defendant argues on appeal, "Because the prosecutor's case alleged an humiliating rape, jurors were likely to feel at least somewhat sympathetic toward this otherwise tainted complainant. Instead of mitigating this situation, the prosecutor exacerbated it by appealing to the jurors to sympathize with the complainant." The portion of rebuttal argument that defendant complains of is as follows:

> She's exposing herself to admitting to illegality and illegal behavior. Nonetheless she stands up, and she admitted or she shows, I have been raped. I'm a victim. Do something five years later because nothing was ever done on that warrant. It's just out there. Nobody makes any effort to do anything.
>
> She still comes in, and she says I was the victim. I have been raped. Give me a voice. Somebody hear me and do something about it. And you got to decide what is her motive to lie.
>
> * * *
>
> I want to read something to you. The opposite of love is not hate. It's indifference. The opposite of art is not ugliness. It's indifference. The opposite of faith is not heresy. It's indifference, and the opposite of life is not death, it's indifference.
>
> That was Eli Wessell (sic). He's known for writing about the Holocaust and the horrors of the Holocaust. He has been called a voice for the voiceless. That hate is indifference. Ugliness is indifference. Heresy is indifference, and death is indifference.

> Give her a voice. Be the voice for the voiceless is what I'm asking you to do. Don't ignore her cry. Don't ignore what happened to her just because she's one of those people, just because other people who use crack sell their bodies for sex, just because that's the nature of those people.
>
> Listen to what she has to say and evaluate what she has to say. I'm asking you to be her voice and find this man guilty.

This rebuttal argument was proper in response to defense counsel's closing argument that included suggestions that because the victim was a drug user and possibly a prostitute, that she had a motive for bringing charges against defendant and was not really a rape victim. Defense counsel argued:

> [W]hen you're dealing with people in this class, you have to use your common sense in determining was it rape? Was it consensual, or were the allegations of some vindictive nature?
>
> * * *
>
> The evidence. "Hell hath no fury like a woman's scorn." What could be a reasonable inference to be drawn from the evidence as to why she came in and told you a false story? Maybe did the hustler get hustled?
>
> * * *
>
> And more pertinent we're dealing with woman who admits that every woman she knows addicted to crack cocaine will trade sex for drugs but her. An if you believe that, I got some property on Belle Isle I would like to sell you.

The prosecutor's closing argument was also proper based on the evidence that the victim was a drug dealer/user and her testimony that she was not a prostitute. The evidence also showed that the warrant was outstanding for five years before charges were brought against defendant. Additionally, as indicated above, emotional language may be used during closing argument and is an important weapon in counsel's forensic arsenal. *Ullah, supra* at 679. Because defendant failed to show plain error, this claim is forfeited.

## III. Ineffective Assistance of Counsel

### A. Standard of Review and Applicable Law

This Court reviews de novo claims alleging ineffective assistance of counsel. *People v Toma*, 462 Mich 281, 310; 613 NW2d 694 (2000). Because defendant failed to request an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), we review defendant's claim of ineffective assistance of counsel only to the extent that defense counsel's mistakes are apparent on the record. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993).

A claim of ineffective assistance of counsel must be examined under *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984) and *People v Pickens*, 446

Mich 298, 309-327; 521 NW2d 797 (1994). A defendant must satisfy a two-pronged test to establish an ineffective assistance of counsel claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. [*Strickland, supra* at 687.]

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Trial counsel is not ineffective for failing to advocate a meritless position. *People v Snider*, 239 Mich App 393, 424-425; 608 NW2d 502 (2000).

B. Analysis

In this case, defendant argues that he was denied effective assistance of counsel because defense counsel failed to challenge incorrect sentencing guidelines offense variables, which resulted in defendant being sentenced based on inaccurate information. Specifically, defendant argues that OV 7 and OV 12 should have been scored at zero points instead of five and twenty-five respectively.

The Supreme Court's sentencing guidelines apply to defendant's sentence because the offense was committed before January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 254; 611 NW2d 316 (2000). A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. *People v Derbeck*, 202 Mich App 443, 449; 509 NW2d 534 (1993). "Scoring decisions for which there is any evidence in support will be upheld." *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996).

With respect to OV 7, five points are appropriate if the "Offender exploits the victim through a difference in size/strength, or because the victim was intoxicated, under the influence of drugs, asleep, or unconscious." In this case, there was evidence that the victim had used crack and alcohol prior to and near the time of the rape. Defendant argues that this does not show that she was "under the influence" at the time of the rape. However, it is a reasonable inference based on the evidence that she was. Additionally, defendant makes much of the testimony that the victim was six feet tall weighing approximately 180 pounds while defendant was merely five feet nine inches tall weighing approximately 160 pounds. However, it is not unreasonable to conclude that defendant, a man, would be able to overpower a woman even if she was somewhat larger than him. In fact, the evidence in this case indicates that defendant was able to overpower the victim when he pushed her onto the ground causing her to hit her head. Therefore, we find that the trial court's scoring of OV 7 is supported by the evidence.

With respect to OV 12, defendant argues that zero points should have been assessed because the penetrations serving as a basis for the convictions should not be counted. The sentencing guidelines indicate, "In CSC 1st and CSC 3rd do not score the one penetration that

forms the basis of the conviction offense." The evidence indicates that defendant penetrated the victim twice. Defendant was convicted to two counts of CSC 1. Therefore, it appears that the trial court improperly scored twenty-five points for OV 12.

However, a successful challenge to this score would not have had an effect on defendant's sentencing range. Even with OV 12 being scored at zero points, the total offense variable would be fifty. The prior record score is sixty. These combined score still put defendant's sentence within the 240 to 480 months sentencing guidelines range.

We note that the trial court sentenced defendant well below the sentencing guidelines range by imposing a minimum sentence of 180 months (fifteen years). The trial court stated, "The sentencing guidelines are very high in this particular matter. I do take that into account. I also take into account [defendant's age]." Defendant urges us to consider that if the offense variable scores had been challenged, the trial court may have departed from the guidelines range even further. However, there is no basis for this conjecture. Because the proceedings would not have been different but for defense counsel's failure to challenge the trial court's scoring of the offense variables, we find that defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Judge Kirsten Frank Kelly
/s/ Judge Kathleen Jansen
/s/ Judge Pat M. Donofrio