STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 20, 2004
v XAVIER L. BURTON, Defendant-Appellant.	No. 230894 Wayne Circuit Court LC No. 99-007272
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v XAVIER BURTON, Defendant-Appellee.	No. 239185 Wayne Circuit Court LC No. 99-007272
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	
v XAVIER BURTON, Defendant-Appellee.	No. 245627 Wayne Circuit Court LC No. 99-007272

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

A jury convicted defendant Xavier Burton of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). The trial court sentenced him to three years probation. Defendant was acquitted of a second count of CSC II. In Docket No. 230894, defendant appeals

his conviction as of right. The trial court subsequently granted defendant's motion for a new trial on the grounds of prosecutorial misconduct and ineffective assistance of counsel. In Docket Nos. 239185 and 245627, the prosecution appeals the trial court's grant of defendant's motion by leave granted. These cases were consolidated for purposes of appeal. We affirm the trial court's decision to grant a new trial.

I. Background Facts and Procedural History

On July 5, 1999, Keaura Phillips, an eleven-year-old girl, was swimming at a public pool with Latoya Nash and Adrienne Sledge. The pool was crowded and several people, including Ms. Phillips, were playing a game where the men would dunk the girls. During this game, Ms. Phillips claimed that a man approached her from behind and grabbed her waist. She testified that the man pulled her to him and that she felt his penis on her buttocks. The man then asked her if she was scared. When Ms. Phillips turned to face this person, she stated that the man pulled the bottom portion of her bathing suit over and touched her vagina with his penis. Ms. Phillips then pulled away from him and went to the locker room. Shortly thereafter, she told Ms. Sledge and Ms. Nash about the incident.

Ms. Phillips identified defendant at trial as the individual who molested her. But she admitted on cross-examination that she had previously stated that she did not get a sufficient look at the man's face to identify him. In fact, it was Ms. Nash who originally pointed defendant out to the lifeguard as the perpetrator. Ms. Nash claimed that she observed defendant standing behind Ms. Phillips shortly before Ms. Phillips left the pool and went to the locker room. She admitted, however, that she could not see if defendant touched Ms. Phillips inappropriately under the water. Ms. Phillips was waiting in an office when a lifeguard brought defendant to her. When she saw defendant in the office, Ms. Phillips identified him as the man.

At trial, Ms. Sledge testified that she did not see anything happen to Ms. Phillips at the pool. But she did claim that she saw Ms. Phillips pull away from a man in the pool and that the man did not look like defendant. Both Ms. Phillips and Ms. Nash were able to pick defendant out of a subsequent police line-up. Ms. Phillips testified that she did not know defendant before the incident in question. In a statement to the police, defendant denied touching any little girl.

The jury convicted defendant on the first count of CSC II (vaginal touching). But it found him not guilty of the second count of CSC II (touching of the buttocks). Defendant filed an appeal as of right from his convictions. And thereafter he filed a motion for a new trial on the following grounds: (1) that his conviction was not supported by sufficient evidence and was against the great weight of the evidence; (2) that he received ineffective assistance of counsel; and (3) prosecutorial misconduct. The trial court granted defendant's motion on June 29, 2001, holding that the prosecutor's comments during closing arguments denigrated defense counsel.

The prosecutor appealed the trial court's decision in Docket No. 239185. This Court granted leave and remanded the case to the trial court for an evidentiary hearing and decision on the remainder of the issues raised in defendant's motion for new trial. After the evidentiary hearing, the trial court concluded that a new trial was also necessary because defendant received ineffective assistance of counsel when his trial counsel failed to object to the prosecutor's remarks. The prosecutor appealed this decision in Docket No. 245627.

II. Legal Analysis

The prosecution claims that the trial court erroneously granted defendant's motion for a new trial on the basis of the prosecutor's allegedly improper comments. When examined in context, the prosecution asserts that the comments were not so egregious that they denied defendant an impartial trial. We disagree.

A trial court may grant a new trial on the basis of any ground that would support reversal on appeal, or because it believes that the verdict resulted in a miscarriage of justice.[1] In *People v Cress*, our Supreme Court provided: "[t]his Court reviews a trial court's decision to grant or deny a motion for new trial for an abuse of discretion. A mere difference in judicial opinion does not establish an abuse of discretion. A trial court's factual findings are reviewed for clear error."[2] An abuse of discretion occurs when a decision is so violative of fact and logic that it evidences a perversity of will, a defiance of judgment, and an exercise of passion and bias.[3] The trial court abuses its discretion when its rationale does not provide a legally recognized basis for relief.[4]

Here, the trial court determined that the prosecution's argument as a whole improperly attacked defense counsel and implied that he knew his client was guilty. The trial court also held that the prosecution's comments impermissibly denigrated defense counsel by suggesting that he lacked intelligence. In support of its decision to grant defendant a new trial, the trial court explained, "it is pretty clear from the closing argument of itself, that the prosecutor overstepped his bounds. . . . I do have a very vivid picture of the closing arguments, because at the time, me being a part also of the system, felt that they were pretty offensive." The trial court further stated that the damage caused by these comments could not have been mitigated as the prosecutor's conduct "was so very demeaning and unprofessional that a hush fell over this courtroom . . .. [Defense counsel's] character was just assailed so unfairly that there was no way that [defendant] was going to get out of here having a fair trial."

The trial court specifically cites the following comments by the prosecutor during closing arguments:

> If all you have is nothing, make as much noise as you can with nothing. That's all [defense counsel] is doing. And, as James Brown said, talking loud but ain't saying nothing. He has nothing. So, he starts talking about eastern philosophers. What the—who are these people and what do they have to do with this case. Nothing! *That's because he knows his client was identified and his client is the person who committed this offense*.
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[1] MCR 6.431(B); *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

[2] *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003) (citations omitted).

[3] *People v Werner*, 254 Mich App 528, 538; 659 NW2d 688 (2002).

[4] *Jones*, *supra* at 404.

> And then, of course, I don't know about you, but during the course of [defense counsel's] questioning of all the witnesses, *many of his questions were so unintelligent*, I couldn't understand them.
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> * * *
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> [Defense counsel's] just talking loud and saying nothing. Throughout this case, saying nothing. [Emphasis added.]

A further review of the record reveals that the prosecution suggested that defense counsel was only trying to confuse the jury because he had nothing to work with and that the theory that the identification procedure was tainted was "a fiction of [defense counsel's] imagination."

Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[5] Because defendant failed to timely and specifically object to these comments at trial, he must establish plain error affecting his substantial right.[6] Once this is established, a new trial may be granted if the error resulted in the conviction of an actually innocent person or if it "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence.'"[7]

A prosecutor's ultimate duty is to seek justice and not merely a conviction.[8] When a prosecutor interjects issues beyond the guilt or innocence of the accused at trial the defendant's opportunity for a fair trial may be jeopardized.[9] The law therefore requires a prosecutor to refrain from denigrating the defense with intemperate and prejudicial remarks.[10] The underlying rationale for this directive is that a prosecutor's personal attack on defense counsel may infringe upon the presumption of defendant's innocence.[11] Similarly, a prosecutor may not suggest that defendant's counsel is intentionally trying to mislead the jury.[12] Nevertheless, we note that otherwise improper remarks may not amount to error requiring reversal if the remarks are

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[5] *People v Aldrich,* 246 Mich App 101, 110; 631 NW2d 67 (2001).

[6] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999); *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

[7] *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), quoting *Carines*, *supra* at 763-764 (citations omitted).

[8] *People v Wallace*, 160 Mich App 1, 10; 408 NW2d 87 (1987).

[9] See *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999).

[10] See *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995); *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996).

[11] *Kennebrew*, *supra* at 607.

[12] *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001).

responsive to the defense counsel's argument.[13] A prosecutor is not limited to the blandest of all possible terms during closing arguments.[14]

Reviewing the instant comments in context, however, we agree with the trial court that the prosecution personally and deliberately attacked defense counsel's intelligence. Contrary to the prosecution's assertion on appeal, it is not apparent from the record that these comments were responsive to defense counsel's closing remarks. Rather, the comments were directed to defense counsel himself. The prosecutor effectively argued that defense counsel, who was barely intelligible, should not be listened to because he had to mislead the jury since he did not believe his own client and knew he was guilty.[15] Such an argument has been held to undermine a defendant's presumption of innocence.[16]

Because this case was essentially a credibility contest between defendant and his accusers, we find that the prosecutor's comments during closing argument were especially harmful and undermined the defense. Thus, any comments regarding defense counsel's intelligence or suggestions that he knew defendant was guilty necessarily impacted defendant's right to a fair trial and his presumption of innocence. We find no error in the trial court's assessment that any instruction to the jury in this regard would only have served to highlight the comments without curing the error. Accordingly, we find that the trial court's decision to grant defendant a new trial was not so violative of fact and logic that it amounted to an abuse of discretion.

To the extent defendant may contend that he is entitled to an acquittal because insufficient evidence was presented to support his conviction, we disagree. Considering the evidence presented in the light most favorable to the prosecution, we find that there was sufficient evidence for a rational trier of fact to find that defendant was the perpetrator in this case.[17] We decline to review the remainder of the issues raised by the parties on appeal because our ruling on the new trial is dispositive.

Affirmed.

/s/ Jessica R. Cooper

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[13] *Kennebrew*, *supra* at 608.

[14] See *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

[15] See *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988).

[16] *Id*.

[17] *People v Hunter*, 466 Mich 1, 6; 643 NW2d 218 (2002).