

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD DEWAYNE WILSON,

Defendant-Appellant.

UNPUBLISHED
February 20, 2007

No. 265455
Oakland Circuit Court
LC No. 2005-200959-FC

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(f). We affirm.

On February 8, 2005, defendant argued with his girlfriend, Sandra Bradford, with whom he lived. The argument escalated into a physical assault. Defendant choked her with both hands around her neck, hit her with closed fists on both sides of her head, and threatened to beat her until she was unrecognizable. According to Bradford, he also engaged in forced sexual intercourse with her. The next morning, Bradford's face was bruised, her lip was swollen, and she had ligature-like bruises on her neck. She also had numerous scratches on her breasts and under her arms and had deep scratches on her inner thighs where defendant dug his fingernails into her as he ripped off her panties before engaging in sexual intercourse.

Bradford reported the assault to police, but did not inform the responding officer that she was sexually assaulted until they were on the way to the hospital for treatment. Defendant was subsequently arrested for assaulting Bradford after defendant went to the police station to report that he was assaulted by Bradford's brother. During his police interview, defendant first denied arguing with Bradford. He claimed that he was "chillin" when Bradford's brother "came up and socked him." Defendant later admitted that he and Bradford had a "little" argument, but he claimed that the marks on her neck were from holding her back so she would not hit him. Defendant also ultimately admitted to engaging in sexual intercourse with Bradford, but he claimed that it was consensual "make-up" sex.

Defendant argues on appeal that several remarks by the prosecutor during her closing argument were improper and that the prosecutorial misconduct denied him a fair trial. Defendant did not object to the challenged remarks at trial. Generally, a claim of prosecutorial misconduct is reviewed de novo as a constitutional issue. *People v Bahoda*, 448 Mich 261, 266-267; 531

NW2d 659 (1995). However, “[r]eview of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice.” *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). Thus, because defendant did not object to the prosecutor’s closing remarks at trial, our review is limited to plain error that affected defendant’s substantial rights. *Id.*

A prosecutor has an obligation to insure justice, not merely convict a defendant. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003). A prosecutor may vigorously argue the case, and although he must avoid “inflaming the prejudices of a jury, there is no requirement that he phrase his argument in the blandest of all possible terms.” *People v Cowell*, 44 Mich App 623, 628-629; 205 NW2d 600 (1973). We examine the pertinent part of the record and evaluate challenged remarks in context to determine if defendant was denied a fair trial. *Bahoda, supra*. The remarks are read as a whole and evaluated in light of defense arguments and their relationship to the evidence and testimony at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). Reversal is not required if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction. *People v Williams*, 265 Mich App 68, 70-71; 692 NW2d 722 (2005).

Defendant argues that the prosecutor improperly bolstered Bradford’s credibility by remarking, “It takes a lot of courage for a victim of sexual assault to come forth. A lot of courage to go through and tell the first detective – first officer, tell the detective, tell the nurse, take off your clothes” The prosecutor also argued, “Thus, what was her motivation? What motivation, in the world, could she have to say that she was a rape victim? To go through that?” When read in context, it is clear that the prosecutor’s argument is less about courage than it is about truthfulness: Bradford was telling the truth because it is unlikely she would subject herself to the ordeal if it were not true. A prosecutor may not vouch for a witness’ credibility in a closing argument or imply that he or she has “special knowledge of the witness’ truthfulness.” *Bahoda, supra* at 276. “But a prosecutor may comment on his own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of the defendant’s guilt depends on which witnesses the jury believes.” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). A remark that a witness has no reason to lie is proper as long as the prosecutor does not express his or her personal belief of the truthfulness of the witness, and the comments are responsive to defense arguments. *Id.*

In this case, defendant’s theory at trial was that Bradford made up the sexual assault because she was afraid her brother would get into trouble for assaulting defendant. Defendant’s statement to police that the sexual intercourse was consensual was in evidence, as were his denials of sexual assault on the tapes of telephone calls he made to Bradford from jail. The credibility of defendant and Bradford was the key issue in the trial. The prosecutor’s argument was simply “responsive to defendant’s theory of the case.” *Id.* at 454. Further, the prosecutor did not comment on how truthful she believed Bradford was, and she did not imply that she had special knowledge of Bradford’s claim or honesty. Thus, the prosecutor did not improperly bolster Bradford’s credibility.

We also reject defendant’s claim that the challenged remarks were intended to invoke sympathy for Bradford or that they improperly injected an issue into trial beyond the defendant’s guilt or innocence. Even though a prosecutor may argue that a witness should be believed, it is

improper to appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, if a comment is isolated, not a blatant appeal for sympathy, and not so inflammatory as to prejudice the defendant, it is not improper. *Watson, supra*. In *People v Siler*, 171 Mich App 246, 256; 429 NW2d 865 (1988), we held that a reference to the twenty-nine-year-old victim who would “never smell flowers, see his family, or do anything again because defendant snuffed out his life” was not an improper appeal to sympathy. Rather, because the prosecutor asked the jury to convict only if, after all the evidence was considered, the defendant was guilty beyond a reasonable doubt, it was not improper. *Id.* at 258.

In this case, the challenged remarks were not an improper appeal to sympathize with the victim. The remarks were directed to Bradford’s motive to lie, and the prosecutor did not ask the jury to convict defendant on the basis of sympathy. As a whole, her argument asked the jury to weigh the evidence, determine the truthfulness of testimony, and convict on the basis that each element of the crime was proved beyond a reasonable doubt. See *id.* Further, the trial court instructed the jury that it “must not let sympathy or prejudice influence your decision.” Thus, any perceived appeal to its sympathy was dispelled by that instruction. See *Watson, supra* at 592. Reversal is not required.

Defendant next argues that the prosecutor used the prestige and power of her office to appeal to the jury’s sense of civic duty. She argued:

This is the People of the State of Michigan v the Defendant. Sandra Bradford didn’t bring this case. The People of the State of Michigan did. It’s a criminal case. The Defendant wanted Sandra Bradford to drop the charges. Victims don’t get to do that in Michigan because it’s the People of the State of Michigan v the Defendant. When a criminal act occurs, the Prosecutor’s office takes over, after an investigation by the police.

A prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor’s personal knowledge or the prestige of his office. *People v Ignofa*, 315 Mich 626, 631-636; 24 NW2d 514 (1946). Nor may a prosecutor urge jurors to convict the defendant as part of their civic duty. *Bahoda, supra* at 282; *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Such arguments are condemned because they inject issues into the trial which are broader than a defendant’s guilt or innocence and because they encourage the jurors to suspend their own powers of judgment. *Id.*

In *People v Humphreys*, 24 Mich App 411, 418; 180 NW2d 328 (1970), we held that the prosecutor’s remarks were an improper appeal to civic duty and use of the prestige of the office when he stated: “I can assure you this: That if the defendant in the opinion of the police and in my opinion were innocent of this charge, we would not be here right now.” The statement “may well have led the jury to suspend its own power of judgment” in deciding the case, and to rely instead upon the judgment of the prosecutor. *Id.* at 419. In contrast, when the prosecutor remarked to the jury that it was the jury’s role to be the factfinder and to provide justice, we held that the argument was not an improper appeal to civic duty because it “persuasively emphasized the gravity of the crime more than it urged a result based on civic duty.” *Williams, supra* at 71.

Here, plaintiff did not argue that the fact that charges were brought by the state of Michigan, not Bradford, proved defendant's guilt. Rather, the argument was made because defendant repeatedly asserted that Bradford should drop the charges. When we consider the remarks in that context and in light of the entire closing argument, it is clear that the prosecutor did not encourage the jury to suspend its own critical analysis and judgment and defer to the judgment of the police and prosecutor. See *Abraham, supra*. Moreover, the jury was instructed that counsel's statements are not evidence, and, as we noted in *Thomas, supra* at 456, to the extent the prosecutor's "comments crossed the line into a civic duty argument, any minimal prejudice was cured by the trial court's instructions that the jury had to decide the case on the evidence and that the remarks of counsel were not evidence."

We additionally reject defendant's argument that plaintiff improperly injected personal opinion and character evidence into trial by calling defendant a "liar" and "manipulator" in closing argument. A prosecutor may "argue the evidence and all reasonable inferences for the evidence as it relates to their theory of the case," *Bahoda, supra* at 282, including that the defendant or another witness is worthy or not worthy of belief. *Thomas, supra* at 455; *Humphreys, supra* at 414. It is not prejudicial to call defendant a "liar," if the remark is related to the evidence presented at trial. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). In this case, the prosecutor's statements that defendant was a liar and a manipulator were followed by a recitation of evidence that showed defendant's untruthfulness. The prosecutor argued the facts to show defendant was not worthy of belief. And, the relative credibility of Bradford and defendant was an issue in the case. Because the remarks were related to the theory of the case and were supported by the evidence presented at trial, they were proper. See *Cowell, supra*.

In sum, we hold that the challenged remarks were proper responses to the evidence and testimony presented at trial and that they supported the prosecutor's theory of the case. They did not deprive defendant of a fair trial. Moreover, the jury was properly instructed that the attorneys' arguments were not evidence and that sympathy should not affect its decision. Thus, even if there was any impropriety, it was cured by the instructions.

Defendant's second claim on appeal is that his counsel's failure to object the prosecutor's remarks prevented him from receiving a proper curative instruction, and thus, a fair trial. He claims that his constitutional right to effective assistance of counsel was violated. This argument is without merit. The prosecutor's remarks did not rise to the level of prosecutorial misconduct. Thus, counsel was not deficient for failing to object. Counsel is not ineffective for "failing 'to advocate a meritless position.'" See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter