

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICK ALAN BROWNRIGG,

Defendant-Appellant.

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UNPUBLISHED

November 20, 2007

No. 270303

Saginaw Circuit Court

LC No. 05-026641-FH

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(b). Defendant was sentenced to 20 months to five years' imprisonment. We affirm.

This matter arises from a complaint by defendant's former wife alleging defendant raped her on January 9, 2004.<sup>1</sup> The victim stated that defendant appeared uninvited at her home wanting to take the minor children to school. She denied defendant's request. When the victim returned home she went into the basement to use a tanning bed. When leaving the room that contained the tanning bed she saw defendant in the basement. Defendant blocked the victim's exit from the room, exposed himself and suggested they should engage in sexual intercourse. She verbally refused and managed to get past defendant and went upstairs. In the kitchen, defendant pinned the victim between a table and cupboard and held her by the wrist. Despite physical efforts to resist defendant and her verbal refusals, defendant forced the victim to touch his penis and managed to pull her pants partially down. Defendant then inserted his finger into her vagina and touched his penis to her stomach. At this moment, defendant ejaculated on the victim and the floor. Defendant told her that he would leave if she kissed him. The victim complied and defendant left the home.

That evening, the victim informed her sister of the encounter with defendant, but did not immediately file a police report. She did obtain a personal protection order (PPO) against defendant that was served January 16, 2004. Defendant then began to repeatedly telephone the

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<sup>1</sup> Defendant and his former wife were married in 1987 and a judgment of divorce was entered March 1, 2005.

victim, which led to her complaining to police about violation of the PPO and her report of the January 9, 2004 assault. While not specifically admitting that the encounter with the victim involved sexual contact, defendant purportedly acknowledged in a telephone conversation with his sister that he had “forced [her] and she said no.”

At trial, defendant denied sexually assaulting the victim. Defendant asserted the parties attempted to reconcile after he was arrested and that their divorce proceedings were placed “on hold.” Defendant asserted, even after issuance of the PPO, that he would frequently have dinner at the victim’s home, pick up the children from that location to take them to school and that the victim would phone and request his assistance with home repairs. Defendant testified that this pattern of interaction continued after the divorce was finalized, until the victim obtained another PPO precluding contact with her in June 2005 due to defendant’s alcohol use.

Defendant was arraigned on September 21, 2005. On December 29, 2005, defendant filed a motion in limine seeking to introduce evidence that he and the victim “had prior and subsequent [to the charged act] consensual sexual relations” and had “during the course of their marriage, engaged in acts similar to those which form the basis of the charges.” Defendant asserted that the victim acknowledged having consensual sexual relations with him in December 2003 and that he would testify that they “continued to have consensual sexual intercourse until December 2004.” In contrast, the victim acknowledged having consensual sexual relations with defendant in early 2003, but asserted the incident that occurred December 24, 2003 was not consensual. The victim asserted that she permitted defendant to stay overnight on Christmas Eve to enable him to watch the children open their Christmas gifts. When defendant tried to initiate sexual contact the victim pushed him away but due to fear of awakening and frightening the children asleep in a room nearby, did not engage in loud or aggressive protests against defendant’s behavior. She denied that this contact was consensual. The victim asserted that the January 9, 2004 incident, which was the basis for defendant’s arrest was also against her will and denied engaging in any consensual sexual acts with defendant after the early months of 2003.

The trial court conducted an in camera review of defendant’s motion in limine. The victim and counsel were in attendance, but defendant was not permitted to be present. The trial court explained its exclusion of defendant, stating:

Because some of the evidence may be more prejudicial than probative, and I’m trying to sort out which is probative, he will hear that evidence, and the prejudicial. But evidence that is irrelevant I don’t believe he’s entitled to.

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We’re going to come out and then make a record of those things that are going to be up for further consideration, but we’re just trying to sort out what may come in and what may not, and then we’ll take further argument on whether they should or they shouldn’t.

At the conclusion of the in camera review, the trial court denied defendant’s motion, ruling in relevant part:

[M]erely being married and having children does not give a license otherwise to rape. While such evidence is a fair amount – has a fair amount of probative value that the alleged sexual assault never occurred, we also believe that the danger of misleading the jury’s focus away from the night in question is significant.

On appeal, defendant first contends that the trial court’s exclusion of evidence of the alleged prior consensual sexual act under MCL 750.520j was improper and denied him a fair trial. Defendant implies that the prior act of consensual sexual contact cast doubt on the victim’s credibility regarding her allegation of rape. A trial court’s decision to preclude evidence under the rape-shield statute is reviewed by this Court for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). Defendant further contends that his exclusion from the in camera review regarding the admissibility of this evidence impacted his substantial rights and denied him due process. Whether defendant was denied due process is reviewed by this Court de novo. *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001).

MCL 750.520j provides, in relevant part:

(1) Evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim’s past sexual conduct with the actor.

“A complainant’s sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant.” *Adair, supra* at 481, citing MRE 401. The rape-shield law precludes all evidence of a victim’s sexual activity or history that is not incident to the alleged rape, *id.* at 478, including evidence of specific instances of the victim’s sexual conduct, as well as opinion and reputation evidence regarding the victim’s sexual conduct. MCL 750.520j(1). A recognized exception to this exclusionary rule involves a victim’s sexual conduct with the defendant himself, MCL 750.520j(1)(a), when presented as evidence of consensual sexual encounters between defendant and the victim that are probative of a defendant’s assertion that the alleged incident was also consensual. *Adair, supra* at 482. However, any evidence must be material to a fact that is at issue in the case and its inflammatory or prejudicial nature cannot outweigh its probative value. MCL 750.520j(1).

The trial court did not abuse its discretion in excluding the evidence that defendant and the victim allegedly had consensual sex before the alleged assault because it was immaterial to any fact in issue. Although defendant argues that the victim testified during an in camera hearing that “she had sex with [d]efendant[] on December, 24, 2003, which she did not object to,” and even characterizes the incident as “consensual,” the complainant adamantly denied that the incident was consensual. Notably defendant never disputed the victim’s allegation that she pushed him away during this prior encounter. Instead, defense counsel implied that the act of pushing defendant away did not preclude a later consensual sexual act. While arguing in favor of admitting the evidence of past sexual relations, defense counsel asserted that it was “probative

in the sense that what happens between these parties . . . , and what no means, and when no means no and when it doesn't mean no." However, defendant did not argue at trial that the act on January 9, 2004 was consensual and the result of his understanding that the complainant's "no" was ambivalent or part of the parties' normal sexual encounters. Rather, defendant denied that the encounter happened. As noted by *Adair*, "the fact that the couple engaged in . . . sexual activity . . . before the alleged sexual assault is not probative of the defense theory that the alleged events on the night in question never occurred." *Adair, supra* at 488 (emphasis in original).

Defendant also implies that "[t]he fact that they had consensual sex only days before [the alleged assault] casts considerable doubt on [the complainant's] credibility." Even assuming that the incident was consensual, defendant does not explain how having consensual sex several days before the alleged assault would be probative of the victim's propensity for truthfulness. As discussed by the Court in *Adair*, "a witness' sexual history is usually irrelevant as impeachment evidence because it has no bearing on character for truthfulness." *Adair, supra* at 481, citing MRE 608. Moreover, "[t]he rape-shield statute was aimed at thwarting the . . . practice of impeaching the complainant's testimony with evidence of the complainant's prior consensual sexual activity." *Id.* at 480.

Even if defendant's argument is understood as not being limited to evidence regarding the incident on December 24, 2003, but encompassing evidence of alleged consensual sexual activity occurring after the charged assault, the trial court did not abuse its discretion in excluding the evidence. In *Adair, supra* at 487, our Supreme Court reasoned that evidence of consensual sexual activity after the alleged assault could be excluded, stating:

[T]he trial court could find that there may be other human emotions intertwined with the relationship that may have interceded, leading to consensual sexual relations in spite of an earlier sexual assault. Depending on the circumstances, the trial court may find that these other considerations have intensified the inflammatory and prejudicial nature of subsequent consensual sexual conduct evidence and properly conclude that it should be precluded or limited.

The trial court specifically referenced this passage in its ruling regarding the admissibility of the challenged evidence and found that such "intertwined" human emotions were at play. It cannot be said that such a conclusion was erroneous given the testimony of the victim regarding defendant's alcoholism, emotional abuse and instability and her acknowledged difficulties in dealing with the situation.

Ultimately, defendant's assertion of error regarding the exclusion of evidence of prior consensual sexual relations between the parties is merely a red herring. Undoubtedly, being married for 18 years and having several children together permitted the jury to presume that the parties had previously engaged in consensual sexual relations. However, the mere fact that the parties had engaged in prior consensual acts is irrelevant with regard to whether the incident of January 9, 2004 was consensual. The victim denied the consensual nature of the act and defendant asserted that the incident never occurred. As a result, the issue is one of credibility between the victim and defendant, not the consensual nature of the alleged act. Based on the

verdict, the jury found the victim to be more credible. “This Court will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of witnesses.” *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005).

Defendant also argues that excluding the evidence denied him his due process right to present a defense.<sup>2</sup> However, defendant was not denied a substantial defense by the trial court’s ruling regarding the inadmissibility of this evidence. Defendant had the ability to assert that the charged act was consensual even without testimony regarding the prior incident. In addition, this argument is specious based on defendant’s denial that the charged incident ever occurred. Exclusion of evidence of alleged prior consensual sexual activity is not material to such a defense. *Adair, supra* at 488-489. “The right to confront and cross-examine . . . does not include a right to cross-examine on irrelevant issues.” *Id.* at 488 (citation omitted).

In a related argument, defendant asserts the trial court’s exclusion of him from the in camera review violated his right to be present at a critical stage of the proceedings. “[A]n accused’s right to be present at trial is impliedly guaranteed by the federal and state Confrontation Clauses, US Const, Am VI; Const 1963, Art 1, § 20 . . . , the Due Process Clauses, US Const, Am XIV; Const 1963, Art 1, § 17 . . . , and the right to an impartial jury, Const 1963, Art 1, § 20 . . . .” *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984). See also MCL 768.3 (“No person indicted for a felony shall be tried unless personally present during the trial . . . .”). “A defendant has a right to be present during . . . any . . . stage of trial where the defendant’s substantial rights might be adversely affected.” *People v Parker*, 230 Mich App 677, 689; 584 NW2d 753 (1998) (citation omitted). “Often courts distinguish defendant’s right to be present when substantive matters are discussed from defendant’s discretionary presence when matters of procedure or law are discussed.” *People v Bowman*, 36 Mich App 502, 510; 194 NW2d 36 (1971).

While we agree his exclusion from the in camera hearing was error, there is no reasonable possibility that defendant’s absence from the in camera hearing prejudiced him. Defendant argues that because the cross-examination concerned private sexual relations with the victim, defendant was in the best position to assist counsel. However, defendant failed to specify what information would have been contributed or how counsel could have been more effective in questioning the victim had defendant been present. In addition, defendant was not precluded from access to the testimony secured during the in camera review. The in camera review was transcribed, providing defendant an opportunity to review the testimony and to assist his attorney in questioning witnesses at trial. Because the proffered evidence was clearly inadmissible defendant’s substantial rights could not have been affected rendering any alleged error harmless.

Finally defendant asserts he was denied a fair trial based on the alleged misconduct of the prosecutor when questioning the venire pool. Defendant contends the prosecutor improperly asked the venire pool whether it is possible for a person to rape their spouse and asked members of the jury for their personal definition or understanding of the term “reasonable doubt.”

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<sup>2</sup> US Const, Ams V, VI, and XIV; Const 1963, art 1, § 17 and § 20.

Defendant contends that such inquiries served to improperly instruct the jury on the law and encouraged jurors to form opinions about evidence that had not yet been introduced. The trial court did not specifically rule that the prosecutor erred in making these inquiries, but did explain to the prospective jurors that the court would be instructing on the law and that they should disregard statements by “the attorney” that are not “in accordance with my instructions.” The trial court determined that the prosecutor’s questions regarding reasonable doubt constituted a proper line of inquiry because the court had already instructed the jury on the presumption of innocence.

In general, a claim of prosecutorial misconduct is reviewed de novo. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). Defendant’s counsel did not object to questions posed to the jury based on his assertion on appeal that the prosecutor’s questions encouraged jurors to form an opinion before hearing evidence. “[A] defendant’s unpreserved claims of prosecutorial misconduct are reviewed for plain error. In order to avoid forfeiture . . . , the defendant must demonstrate plain error that was outcome determinative.” *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (citation omitted). “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

“The propriety of a prosecutor’s remarks depends on all the facts of the case.” *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). 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 Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005).

Defendant argues the prosecutor improperly questioned the jury about whether a person could criminally sexually assault a spouse and their definition of reasonable doubt. Because these questions were not designed or likely to influence the jury and were reasonable attempts to determine possible bias and whether the jurors could apply the law to the facts, the questions do not amount to prosecutorial misconduct. Further, before jury selection, the trial court instructed the jury pool that defendant was presumed innocent and that the presumption would continue throughout the trial. Immediately after jury selection, the trial court told the jury members to refrain from making any decision until deliberation. The trial court also informed the jury throughout the selection process and at the close of evidence that the court would instruct the jury on the applicable law and indicated that the lawyer’s questions were not to be construed as evidence. We must, therefore, assume the jury followed these directives as, “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant quotes two statements from prospective jurors made in response to voir dire questions regarding their opinion on whether sexual assault was over or under reported. Defendant did not argue in the trial court or in his appellate brief that the prosecutor engaged in misconduct when asking these questions. Accordingly, defendant’s reason for citing these

excerpts is unclear. “A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim.” *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

Affirmed.

/s/ Michael J. Talbot  
/s/ Kirsten Frank Kelly