

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS LEE LECHE, JR.,

Defendant-Appellant.

---

UNPUBLISHED

May 15, 2008

No. 275476

Calhoun Circuit Court

LC No. 2006-003251-FC

Before: Wilder, P.J., and O’Connell and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree home invasion, MCL 750.110a(2), and first-degree criminal sexual conduct, MCL 750.520b(1)(c).<sup>1</sup> The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent sentences of 320 to 600 months’ imprisonment for the first-degree home invasion, and 750 months to 100 years’ imprisonment for the first-degree criminal sexual conduct. Defendant appeals of right. We affirm defendant’s convictions and sentences, but vacate the order requiring defendant to repay the county for the cost of his court-appointed attorney, and remand for an assessment of defendant’s ability to pay.

The victim testified as follows. In July 2006, the victim met defendant at a bar. Defendant later asked her for a ride home, and the victim agreed. But defendant would not exit the car when they arrived. The victim then drove home, but defendant followed her onto the porch, forced her into the home, and subsequently raped her. Later the victim went to the police station and was examined by the sexual assault nurse, who observed numerous bruises and scratches on her arms and legs, as well as reddened areas on the victim’s genitalia and cervix.

In an interview with a police detective, defendant claimed that on the night in question, he, the victim and a third person (one Ostrander) smoked crack cocaine, and that the victim later consented to sex. Defendant testified similarly at trial. At trial, Ostrander confirmed that the three of them smoked crack cocaine, before defendant and the victim left the house where they were smoking the drug.

---

<sup>1</sup> A mistrial was declared on a second count of first-degree criminal sexual conduct.

Defendant first claims on appeal that he was denied a fair trial both when the prosecution asked the jury to sympathize with the victim, and when it vouched for the credibility of the victim. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

We review claims of prosecutorial misconduct on a case-by-case basis, examining the prosecutor's comments in context and in light of the defendant's arguments and the evidence presented. *People v Odom*, 276 Mich App 407, 413; \_\_ NW2d \_\_ (2007). It is well established that a prosecutor may not appeal to the jury to sympathize with the victim. See *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). Defendant argues that the prosecutor made such improper appeals on several occasions. We disagree.

During jury voir dire, the prosecutor asked a potential juror if she believed that rape victims suffered. Later the prosecutor stated that rape victims "suffer[]" by submitting to a sexual assault examination.

"The purpose of jury voir dire is to elicit information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994) (opinion by Mallett, J.). See also *People v Sawyer*, 215 Mich App 183, 186-187; 545 NW2d 6 (1996). Thus, in voir dire, the prosecutor, along with defense counsel, asks the potential jurors questions in an effort to uncover any bias that could prevent them from fairly deciding the case. *Tyburski, supra*.

Reviewing the prosecutor's question and statement in context, we find that the prosecutor was not appealing to the jury to sympathize with the victim. The prosecutor did not mention the victim's name, or inform the jury that the victim had undergone a sexual assault examination. The prosecutor's question and statement were part of a line of questioning regarding whether the prospective jurors could believe or understand that a rape victim may be reluctant to report the incident to the police. Accordingly, the purpose of the prosecutor's question and statement was to elicit information regarding whether the prospective jurors could fairly decide the present case. *Tyburski, supra*. The prosecutor's question and statement were not improper.

During trial, the prosecutor questioned the victim, along with the examining nurse, about the details of the victim's sexual assault examination. He also elicited testimony from the nurse that the victim, during the examination, was "tearful but very cooperative." Defendant argues that such questioning was irrelevant, and designed solely to evoke sympathy. But defendant fails to cite authority to support his relevancy assertion, and accordingly, has abandoned that issue. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

More, the testimony was relevant. Defendant's theory was that the victim, on the morning of July 16, 2006, with "a more sober head on [her] shoulder," suffered "buyer's remorse" about engaging in sexual intercourse with defendant. Thus, the victim's demeanor at the examination, that she was tearful, yet cooperative, had a tendency to make defendant's theory less probable. MRE 401. In addition, because the victim testified that, when she reported the incident to the police, she would have to undergo a sexual assault examination, the details of what the examination included also make it less probable that the victim simply suffered

“buyer’s remorse.” MRE 401. Accordingly, the testimony of the victim and nurse about the sexual assault examination was proper.

Next, the prosecutor, in his opening statement and closing argument, told the jury that the victim underwent a sexual assault examination. In his opening statement, the prosecutor merely informed the jury that he would present evidence that the victim underwent a sexual assault examination. Because the purpose of an opening statement is to inform the jury of the facts an advocate intends to elicit at trial, *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), the prosecutor’s comment in his opening statement was proper.

In his closing argument, the prosecutor argued that, even though the victim did not immediately report the rape to the police, she was still a credible witness, because numerous and reasonable factors, including the knowledge that she would have to submit to a sexual assault examination, made her reluctant to report it. A prosecutor may argue from the evidence that a witness is credible. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Accordingly, the prosecutor’s comment during closing argument was proper. The prosecutor did not deny defendant a fair trial by appealing to the jury to sympathize with the victim.

Defendant also argues that the prosecutor improperly vouched for the credibility of the victim in his opening statement and closing argument. A prosecutor may not vouch for the credibility of a witness, nor suggest that the government has special knowledge that a witness is testifying truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). According to defendant, the prosecutor, in his opening statement, vouched for the credibility of the victim. Defendant claims that the prosecutor told the jury that the victim made a pretrial statement that defendant was standing so close to her in the Pin Seekers Bar that he was blowing his bad breath in her face, and that this pretrial statement led the prosecutor to believe that the victim was telling the truth. Our review of the pertinent portion of the record reveals that, rather than vouching for the credibility of the victim, the prosecutor was merely informing the jury of the facts that he intended to elicit from the victim about why she chose to answer her cellular telephone outside of the bar. Accordingly, we find the prosecutor’s comment was proper. *Moss, supra*.

Defendant also argues that the prosecutor, in his closing argument, vouched for the credibility of the victim by suggesting that, had she not been a rape victim, she would not have endured the process of reporting the rape. While the prosecutor made the alleged suggestion, he did not suggest that he held a personal belief that the victim was telling the truth. Rather, he argued that, even though the victim did not immediately report the rape, there was a reasonable explanation for the delay, and because the victim chose to endure the consequences of reporting it, she was a credible witness. A prosecutor may argue from the evidence that a victim is credible. *Knapp, supra*. We conclude that the prosecutor did not deny defendant a fair trial by vouching for the credibility of the victim.

Defendant next claims on appeal that his federal constitutional right to counsel was infringed, because his appointed counsel was ineffective for failing to object when the prosecutor appealed to the jury to sympathize with the victim, and vouched for the victim’s credibility.

Because defendant failed to move for a new trial or for a *Ginther*<sup>2</sup> hearing below, our review is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

Effective assistance of counsel is presumed, and defendant bears the burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). To succeed on such a claim, the defendant must show that, but for an error by counsel, the result of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant bears a “heavy burden” on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). “This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel’s competence with the benefit of hindsight.” *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant has failed to establish that any objection by counsel during voir dire, the prosecutor’s questioning of the victim or nurse, or the prosecutor’s opening statement and closing argument, would have been meritorious. Counsel is not ineffective for failing to make a futile or meritless objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Accordingly, defendant has failed to establish that counsel’s performance fell below an objective standard of reasonableness. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Defendant’s sixth amendment right to counsel was not infringed.

Defendant finally claims on appeal that the trial erred in ordering him to reimburse the county \$400 for the cost of his court-appointed attorney without first determining whether he had the ability to pay. Because defendant did not object below, we review defendant’s claim of error for plain error affecting his substantial rights. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004).

A trial court may not order an imprisoned indigent defendant to reimburse the county for the cost of his court-appointed attorney, without first assessing his ability to pay. *Dunbar, supra* at 253-255. Here the trial court failed to assess defendant’s ability to pay. The trial court stated that, because such repayment was “standard,” defendant would be required to reimburse the county for the cost of his court-appointed attorney. Contrary to the prosecutor’s argument on appeal, MCL 769.1k(b)(iii) does not eliminate *Dunbar*’s requirement that a trial court consider defendant’s ability to pay. Therefore, we vacate the portions of the reimbursement order and judgment of sentence requiring defendant to pay attorney fees, and remand for a decision on attorney fees that considers his ability to pay now and in the future. *People v Arnone*, 478 Mich 908; 732 NW2d 537 (2007).

---

<sup>2</sup> *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973).

Affirmed, but we vacate the reimbursement order, and remand for further proceedings consistent with this opinion (including an assessment of defendant's ability to pay). We do not retain jurisdiction.

/s/ Kurtis T. Wilder

/s/ Peter D. O'Connell

/s/ William C. Whitbeck