STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2008
v	No. 277714 Wayne Circuit Court
TYRANT DESHAWN MCGEE, Defendant-Appellant.	LC No. 05-008641-01

Before: Whitbeck, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

Defendant Tyrant McGee appeals as of right his jury trial conviction for first-degree criminal sexual conduct (CSC I).[1] The trial court sentenced McGee to 9 to 15 years in prison. We affirm.

I. Basic Facts

In this case, the complainant was the sister of McGee's girlfriend. The complainant was 12 years old at the time of the assault. The complainant testified that McGee found her alone in her sister's basement, approached her and told her not to be scared. He then pulled the complainant's underwear away from her vagina, unbuttoned his own pants, exposed his penis, and "started going into [her]." According to the complainant, McGee was rocking his body and his penis moved in and out of her vagina. The complainant testified that it hurt "inside her." She cried and pleaded with McGee to stop. He abruptly stopped and left. The complainant underwent a medical examination over 24 hours later. The examination did not uncover any evidence of vaginal trauma.

II. Insufficient Evidence

A. Standard Of Review

McGee argues that there was insufficient evidence to prove his guilt beyond a reasonable doubt. This Court reviews de novo claims of insufficient evidence, viewing the evidence in the

[1] MCL 750.520b(1)(a) (sexual penetration with a person under 13 years of age).

light most favorable to the prosecution, to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[2] Further, this Court must defer to the fact-finder's role in determining the weight of the evidence and the credibility of the witnesses.[3] "[C]onflicts in the evidence must be resolved in favor of the prosecution."[4]

B. Elements Of The Crime

"A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [t]hat other person is under 13 years of age."[5] Sexual penetration means "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, but emission of semen is not required."[6]

C. Penetration

McGee argues that there was insufficient evidence to establish penetration. Although the medical evidence does not disclose any evidence of force or trauma, such a disclosure is not necessary in order to demonstrate penetration. Sexual penetration of the vagina need only be slight.[7] Further, testimonial evidence is sufficient to prove the elements of the crime.[8] It is the duty of the jury to make credibility determinations and weigh the inferences arising from the evidence.[9] Here, the complainant's testimony that McGee's penis went inside her vagina and hurt her inside is sufficient to establish sexual penetration. Therefore, we conclude that a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt.[10]

III. Prior Bad Acts

A. Standard Of Review

McGee argues that a nonresponsive answer by one of the prosecution's witnesses improperly introduced evidence of his prior bad acts. This Court reviews a trial court's decision

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[2] *People v Hawkins*, 245 Mich App 439, 457; 628 NW2d 105 (2001).

[3] *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004).

[4] *Id*. at 562-563.

[5] MCL 750.520b(1)(a); *People v Elston*, 462 Mich 751, 774; 614 NW2d 595 (2000).

[6] MCL 750.520a(p); *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

[7] *Wilkens*, *supra* at 738-739.

[8] MCL 750.520h; see *People v Smith*, 205 Mich App 69, 71; 517 NW2d 255 (1994).

[9] *Fletcher*, *supra* at 562.

[10] *Hawkins*, *supra* at 457.

to admit or deny evidence for an abuse of discretion.[11] Nevertheless, an erroneous evidentiary ruling does not require reversal unless it "'affirmatively appear[s]' that it is more probable than not that the error was outcome determinative."[12]

B. The Stepmother's Testimony

Here, the prosecutor asked the complainant's stepmother, "Before this happened, . . . how did you feel about [McGee]?" She responded, "I felt okay until my other daughter, the one that's dating him, had told me some things." In response to defense counsel's immediate objection, the trial court stated, "I'll allow 'some things,' period." The subject was not pursued any further. McGee argues that this answer introduced evidence of his prior bad acts, in contravention of MRE 404(b) and unfairly prejudiced the jury against him.

We note that the stepmother's statement gives no indication of any specific misconduct by McGee, let alone criminal conduct related to the instant charge. There is nothing in the statement that would tempt a reasonable juror to draw an impermissible inference that McGee has a propensity for wrongdoing.[13] The inadvertent introduction of inadmissible testimony only merits reversal where it is more probable than not that it would have an impact on the outcome of the trial.[14] That is not the case here. Therefore, we conclude that McGee's argument on this issue is without merit.

IV. Prosecutorial Misconduct

A. Standard Of Review

McGee argues that the prosecutor committed multiple instances of misconduct. This Court reviews unpreserved claims of error for plain error affecting substantial rights.[15] To warrant reversal, the error must result in the conviction of an actually innocent defendant or seriously affect the fairness, integrity, or public reputation of judicial proceedings.[16] Further, reversal is only warranted if curative instructions would not have eliminated prejudice to the defendant.[17]

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[11] *People v Pattison*, 276 Mich App 613, 615; 741 NW2d 558 (2007).

[12] *People v Lukity*, 460 Mich 484, 488, 495-496; 596 NW2d 607 (1999), quoting MCL 769.26; see also MCR 2.613(A) and MRE 103.

[13] MRE 404(b); *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993).

[14] *Lukity*, *supra* at 495-496; *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

[15] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[16] *People v Unger*, ___ Mich App ___; ___ NW2d ___ (Docket No. 272591), issued March 20, 2008, slip op, pp 12-13.

[17] *Id.*; *People v Hall*, 396 Mich 650, 655; 242 NW2d 377 (1976).

B. Opinion Testimony

McGee argues that the prosecutor improperly elicited the stepmother's opinion of the complainant's credibility. In fact, the prosecutor asked her whether the complainant had ever varied her account of the incident *to* the stepmother. McGee's primary theory in his defense was that the complainant fabricated her story. Defense counsel made this point in his opening statement and cross-examined the complainant in service of this same point. The prosecutor's line of questioning is a reasonable attempt to respond to this line of defense. While credibility determinations are properly within the province of the jury, we cannot conclude that the prosecutor's questions were an improper attempt to invade that role.[18]

C. Facts Not In Evidence

McGee argues that the prosecutor argued from facts not in evidence during his closing argument. A prosecutor may not make any statements of fact to the jury that are unsupported by the evidence.[19] He may, however, argue all reasonable inferences arising from facts in evidence.[20] Further, "[a] prosecutor need not limit her arguments to 'the blandest possible terms.'"[21]

McGee attempts to characterize some of the prosecutor's statements out of context, but they must be reviewed in their totality.[22] With the exception of one statement, we conclude that the prosecutor's statements were supported by the evidence and reasonable inferences arising therefrom.

The prosecutor's statement that McGee "couldn't maintain an erection," is, however, not supported by the evidence. When viewed in context, this statement is an attempt to posit a narrative of McGee's state of mind, as ascertained from the complainant's testimony. This statement, however, bears no reasonable relationship to any evidence or to the prosecutor's theory of the case.[23] A prosecutor should refrain from making such denigrating comments about a defendant.[24] Nevertheless, the very irrelevance of this statement renders it highly unlikely to have had a prejudicial effect on jurors. Further, an instruction cautioning that the statement was unsupported by evidence would have cured any possible prejudice.[25]

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[18] See *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007).

[19] *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007).

[20] *Id*. at 178-179.

[21] *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005), quoting *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004).

[22] *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995).

[23] *Id*. at 282.

[24] *Id*. at 283, 288.

[25] See *Unger*, *supra* at 13.

D. Improper Expression Of Opinion

McGee argues that the prosecutor improperly expressed an opinion to the jury regarding a witness's credibility. The prosecutor stated:

> [S]he has no incentive to lie. What does she have to gain by saying this happened? . . . So when you look at all of it, do we meet the first element of the crime? And if you believe [the complainant], we did. And based on the reasons I gave you, you should believe [the complainant]. She was being truthful.

A prosecutor may not vouch for the credibility of his own witness "to the effect that he has some special knowledge concerning a witness' truthfulness."[26] A prosecutor may, however, argue that a witness should be believed.[27] Here, nothing in the prosecutor's statement indicates to the jury that the prosecutor possesses "special knowledge" regarding the complainant's truthfulness. While the brief statement, "She was being truthful," may appear to be an expression of the prosecutor's opinion, it does not evince any special knowledge. This comment must be viewed in the context of the prosecutor's entire statement, which clearly argues that the evidence proves McGee's guilt.[28]

E. Civic Duty

McGee argues that the prosecutor made a civic duty argument to the jury when he implored the jury to "find the truth" and "do what [it] feel[s] is right." A prosecutor should avoid making arguments that appeal to the fears and prejudices of jurors or inject issues that are broader than guilt or innocence into the trial, implying that the jury should convict because of its civic duty.[29] However, here, the prosecutor never injected any broader issues into his argument, and McGee does not allege one on appeal. Taking the argument in its entirety, the prosecutor clearly argued that the jury could convict McGee based simply on the evidence presented at trial.[30]

V. Ineffective Assistance Of Counsel

A. Standard Of Review

McGee argues that he was denied the effective assistance of counsel at trial. Because McGee did not request an evidentiary hearing, this issue is unpreserved and this Court's review is limited to mistakes apparent on the record.[31] Whether a defendant has been denied effective

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[26] *Bahoda*, *supra* at 276.

[27] *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

[28] *Bahoda*, *supra* at 283.

[29] *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005).

[30] See *Matuszak*, *supra* at 56.

[31] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

assistance of counsel is a mixed question of fact and law.[32] This Court reviews a trial court's findings of fact for clear error and reviews questions of constitutional law de novo.[33]

B. Legal Standards

Generally, counsel is presumed effective and the defendant must show that: (1) counsel's performance fell below an objectively reasonable standard, and (2) that the defendant was so prejudiced by counsel's deficiency that there is a reasonable probability that, without the error, the outcome would have been different.[34] Further, the defendant must demonstrate that "the attendant proceedings were fundamentally unfair or unreliable."[35] In order to demonstrate that an attorney's performance was substandard, a defendant must also overcome a strong presumption that the attorney's trial strategy was sound, even if the strategy is ultimately unsuccessful.[36]

C. Applying The Standards

McGee first argues that defense counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct set out above. But because, as stated above, we have found no such misconduct that resulted in prejudice to McGee, we conclude that defense counsel was not ineffective for failing to make futile objections or raise meritless arguments.[37]

McGee next argues that defense counsel was ineffective for failing to obtain the testimony of the physician who examined the complainant, or, in the alternative, failing to properly investigate whether doing so would have been beneficial. Because McGee did not request an evidentiary hearing, it is impossible for us to determine to what extent defense counsel failed to investigate the possibility of this testimony. Further, "[i]n order to overcome the presumption of sound trial strategy, the defendant must show that his counsel's failure to call [this witness] deprived him of a substantial defense that would have affected the outcome of the proceeding."[38]

Here, the registered nurse that observed the physician's examination of the complainant testified at trial that a full, invasive examination was not conducted because it was more than 24 hours after the incident and the complainant had bathed. She also testified that there was no evidence of vaginal injury in the limited examination that was performed. Further, there was no visible blood in the complainant's underwear, although a chemical analysis later indicated the

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[32] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[33] *Id*.

[34] *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

[35] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

[36] *Id*. at 715.

[37] *Mack*, *supra* at 130.

[38] *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

presence of some blood. Nothing indicates that further testimony regarding the absence of vaginal trauma would have differed substantively from the nurse's testimony. It is not evident, nor does McGee demonstrate, what testimony the physician could have presented to bolster McGee's defense. McGee cites authority regarding the failure to call expert witnesses in sexual assault cases, but there are no grounds to suggest that the examining physician was an expert in such cases or would have been qualified to testify to anything beyond her own perceptions.[39] Therefore, we conclude that defense counsel was not ineffective for failing to call this witness.

VI. Cumulative Error

McGee argues that reversal is required because of the cumulative effect of the foregoing errors. In order to merit reversal on the basis of cumulative error, "the effect of the errors must have been seriously prejudicial in order to warrant a finding that defendant was denied a fair trial."[40] There must be multiple actual errors to find a cumulative effect creating serious prejudice.[41] We conclude that this case presents no such circumstance.

Affirmed.

/s/ William C. Whitbeck
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly

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[39] MRE 702.

[40] *People v Knapp*, 244 Mich App 361, 388; 624 NW2d 227 (2001).

[41] *Dobek*, *supra* at 106-107.