

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDRE MCKINLEY BELL,

Defendant-Appellant.

UNPUBLISHED

November 20, 2008

No. 279183

Kalamazoo Circuit Court

LC No. 06-000902-FC

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(c), and first-degree home invasion, MCL 750.110a(2). Defendant was sentenced to 17 to 30 years' imprisonment for the CSC-I conviction and 10 to 20 years' imprisonment for the home invasion conviction. We affirm.

On appeal, defendant asserts he was denied a fair trial because the prosecutor improperly elicited testimony and commented on the victim's religious beliefs, bolstering her credibility. Claims of prosecutorial misconduct are reviewed on a case-by-case basis, viewing the prosecutor's comments in context and with regard to the arguments made by the defense and their relationship to evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). The test applied to determine "prosecutorial misconduct is whether a defendant was denied a fair and impartial trial." *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). "Review 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). Because defendant failed to properly preserve the alleged errors by way of contemporaneous objections or a request for curative instructions, this Court reviews only for plain, outcome-determinative error. *Id.* "Reversal is warranted only when the plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of [the] judicial proceedings." *Id.*

Specifically, defendant refers to four acts of alleged misconduct by the prosecutor during trial. The first involved a reference by the prosecutor in her opening statement that defendant "forced [the victim] onto the couch [and] her head fell upon her Bible that she read." Although we acknowledge that the evidence did not support the prosecutor's initial statement that the victim reads her Bible, this reference was transitory and was not so egregious that a curative

instruction could not have corrected any prejudice. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The trial court did subsequently instruct the jury at the conclusion of trial that the arguments of the attorneys did not comprise evidence and that they were only to consider the evidence admitted at trial. “It is well established that jurors are presumed to follow their instructions.” *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). This instruction was sufficient to cure or eliminate any potential prejudice that may have resulted from the isolated comment by the prosecutor in her opening statement. *Thomas*, *supra* at 454.

Next, defendant challenges the elicitation of testimony from the victim in response to the prosecutor’s question, “[W]hat was on your couch at the time[?].” On direct examination the victim indicated that her head landed upon her Bible, which was located on the couch, when defendant forced her to engage in sexual intercourse. Notably, the prosecutor had not finished her inquiry before the victim gave this information. Concurrently, the prosecutor also elicited testimony from the victim that Christmas cards and gifts for her son were on the couch and that the hand weights she regularly used for exercise were nearby but were not within her reach when the assault occurred. In addition, when reviewing the content of photographic exhibits, which were stipulated to by defendant’s counsel for admission into evidence, the victim identified her couch as the site of the assault. In the photograph of the couch the bag with the Christmas gifts and her Bible were also visible. When asked where her head was while on the couch during the assault, the victim indicated on “my Bible.”

A statutory prohibition exists, which precludes the questioning of any witness in reference to “his opinions on the subject of religion.” MCL 600.1436.¹ In *People v Hall*, 391 Mich 175, 180-183; 215 NW2d 166 (1974), our Supreme Court interpreted this statutory language and determined that when religious beliefs and their relationship to the veracity of a defendant or witness have been improperly raised by a prosecutor during trial, reversal is necessitated regardless of whether there is a demonstration of prejudice because of the questioning. Consequently, the issue before this Court is whether the challenged questions and comments by the prosecutor served to improperly interject the victim’s religious beliefs, and the relationship of those beliefs on her truthfulness, into the proceedings.

Following our review of the lower court record, we find that the prosecutor’s questions did not improperly interject the victim’s religious beliefs into the proceedings. At no time, did the prosecutor question the victim about her religious beliefs or assert that she was credible because of her faith. Contrary to defendant’s assertions on appeal, the referenced comments and testimony pertained to a description of the crime scene and comprised evidence relied on by the prosecutor to rebut defendant’s assertion that he and the victim engaged in consensual sex. The questions by the prosecutor were frequently open-ended and do not demonstrate an intention to elicit specific testimony from this witness. Rather the questions served primarily to clarify her testimony and were not used to bolster her credibility. The prosecutor never inquired or sought to have the victim express her opinions and religious beliefs. Although inquiries touch on

¹ Similarly, MRE 610 provides: “Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness’ credibility is impaired or enhanced.”

religious references, if they comprise relevant questioning regarding the actions of a witness during the events of a crime, but do not elicit “opinions on the subject of religion,” error does not occur. *People v Calloway*, 180 Mich App 295, 298; 446 NW2d 870 (1989).

The third alleged act of misconduct involved the elicitation of testimony from the victim regarding her participation in counseling with her priest, after the assault, and the frequency of her church attendance. Specifically, the victim testified that she spoke with her priest regarding the assault and that she “never lied to a priest.” The victim further testified that she attended church “every Sunday morning.”

Notably, as an alternate charge to CSC-I, MCL 750.520b(1)(c) (sexual penetration during commission of another felony), defendant was also charged pursuant to MCL 750.520b(1)(f) (actor causes personal injury and force or coercion is used to accomplish the sexual penetration). An element of this alternate charge is personal injury, which is defined to include mental anguish. MCL 750.520a(n). The prosecutor initially questioned the victim about her post-assault anxiety and decision to reside with friends, and receive counseling with her priest and through the local YMCA. On cross-examination, defense counsel attempted to minimize the victim’s counseling with her priest, because the victim did not schedule a formal appointment with the priest until several months after the crime occurred. The prosecutor clarified, through additional questioning, that the victim went to church regularly and spoke with the priest about the crime on several occasions before she scheduled a more formal appointment to discuss the matter. This evidence was directly relevant to an element of the crime - the existence of mental anguish. MRE 401. But for the fact that the counselor was a priest and the contacts occurred on visits to church, the issue would have no religious significance. In addition, the victim’s assertion that she would not lie to a priest was spontaneous and not elicited by the prosecutor or in any manner further referenced by the prosecutor in an attempt to bolster the victim’s credibility. “A prosecutor’s good-faith effort to admit evidence does not constitute misconduct.” *Dobek, supra* at 70. As such, we cannot conclude that admission of the evidence constituted plain error requiring reversal or denied defendant a fair trial.

The final act of alleged misconduct occurred during closing argument. Although defendant did not object at the time, he now challenges the following statements by the prosecutor:

And the irony of this whole case, ladies and gentlemen, is the very book that she uses and reads and lives her life by is the one that she laid her head on when the defendant committed this vicious assault against her, the assault that the defendant in this case claims was consensual.

Well, ask yourself, ladies and gentlemen, does it make sense that if you’re going to have sex voluntarily, why not do it on the bed? I mean we-she did testify she doesn’t have a lot of furniture, but she does have a bed.

If it was a consensual situation, why not just do it on the bed? Why on the living room couch where she still had-And the photographs will show the black bag that contained the contents of the few Christmas gifts she was going to give her son. It had Christmas cards that she was preparing to give to some of her friends, as well as her Bible. If you are going to have consensual sex, aren’t you

going to move that stuff from the couch so that you can at least make it a little bit more comfortable?

Defendant did not dispute that he engaged in sex with the victim. Rather, defendant contended that intercourse was consensual and not forced. The prosecutor's statements were in response to defendant's position that he did not force the victim to engage in a sexual act by focusing on how the evidence was inconsistent with defendant's statement to police regarding the events and how they transpired. "Although a prosecutor may not argue a fact to the jury that is not supported by evidence, a prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence." *Callon, supra* at 330. Thus, considered in context, the prosecutor's remarks were merely a comment on the evidence and do not necessitate reversal.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot