

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRENCE MICHAEL KORBY,

Defendant-Appellant.

UNPUBLISHED
February 10, 2009

No. 282016
Macomb Circuit Court
LC No. 2007-002168-FH

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of third-degree criminal sexual conduct (force or coercion), MCL 750.520d(1)(b). The trial court sentenced defendant to 15 months' to 15 years' imprisonment. We affirm, and decide this appeal without oral argument pursuant to MCR 7.214(E).

I. Factual History

The victim contacted police asserting that she had been raped at a friend's apartment. The victim knew defendant and had interacted with him socially through her friendship and coworker relationship with defendant's sister, Charmaine King. On the evening of the alleged assault, the victim permitted defendant and Charmaine to borrow her vehicle while she worked. When the victim finished her shift, defendant, Charmaine and Charmaine's two sons picked up the victim, and they went to Charmaine's apartment where they all talked for a while.

Later, defendant and the victim departed briefly to the victim's apartment to obtain a change of clothes, and stopped at a party store to purchase alcohol before returning to Charmaine's apartment. The victim phoned another female friend, Jessa, and invited her to join them. At some point, the victim and Jessa ventured out to a local restaurant to procure some food, but returned to Charmaine's apartment where the victim, defendant and Charmaine consumed several alcoholic beverages. The victim estimated that she had drunk a number of "shots" and mixed drinks.

When the victim began to pass out on the couch, Charmaine instructed her to go upstairs to bed, and stated that she would awaken the victim in 20 minutes to go home. The victim passed out on the bed and awoke to find defendant removing her clothing. The victim averred there had been no foreplay and that she did not wish to engage in sexual relations with defendant. The victim asserted she verbally told defendant "no" several times and that she scratched and

pounded him on the chest in an attempt to stop the assault. She contended that at one point, defendant restrained her wrists. The victim testified that defendant penetrated her vagina with his penis, but ejaculated on her stomach. After cleaning herself, the victim dressed and left the apartment. Although the victim acknowledged that she had engaged in some flirtatious behavior and kissed defendant several weeks earlier, she denied having either encouraged or consented to having any sexual contact with defendant, or inviting him to join her in the bedroom, that evening.

In contrast, defendant testified that the sexual contact with the victim was consensual. His depiction of the events that evening coincided closely with the victim's, except his assertions that the victim showed no signs of intoxication, that she seemed in a good mood the entire time, and that they spent the majority of the evening engaged in conversation. According to defendant, when the victim went upstairs he knew that she was going to his bedroom and the victim specifically inquired whether he would join her. Defendant recalled that when he did not immediately follow, the victim returned downstairs indicating that if he did not join her she would go home. When defendant went upstairs, the victim was on the bed and he laid down next to her. Defendant reported that the victim lay across his chest, they began kissing and fondling each other, and the victim removed her sweatshirt and bra as she continued fondling his penis. Subsequently, the victim and defendant each removed the remainder of their own clothing and engaged in intercourse. Defendant denied that the victim had indicated in any manner that she desired him to stop and that the victim had requested that he not ejaculate inside her. Afterward, the victim displayed no distress or concern, instead she kissed him and left indicating she would see him the next day.¹

Charmaine testified that she and the victim socialized outside of work and that defendant was often present. Charmaine added that she worked with the victim at a local restaurant and that, although she did not formally have the title, functioned as a manager. Charmaine described several social encounters involving herself, the victim and defendant occurring in the month before the allegations of rape. Charmaine described open demonstrations of affection by the victim to defendant and verbally suggestive behavior. Charmaine recalled an earlier interaction in which she observed defendant and the victim groping each other and the victim taking defendant's hand and inviting him "upstairs." Regarding the night of the alleged assault, Charmaine recounted events that unfolded consistently with defendant's version, specifically that the victim invited defendant to join her in an upstairs bedroom, was not intoxicated, and did not appear upset when leaving the apartment, except for her utterance of an expletive when checking her cellular phone and finding a number of missed calls.

At trial, the prosecutor produced several witnesses to testify positively regarding the victim's reputation for truthfulness. In particular, a coworker of both the victim and Charmaine testified positively regarding the victim, but asserted that Charmaine was an untruthful person

¹ A photograph of defendant was presented at trial that showed some abrasions and scratches on his chest. Although Jessa was present at the apartment on the night of the assault, she did not remain for a sufficient period of time to observe the interactions between defendant and the victim later in the evening, but did opine that the victim seemed very drunk.

and no longer worked at the restaurant because of her difficulty in getting along with others. In addition, the parties' counsel highlighted discrepancies between the testimony of defendant and Charmaine and their written statements to police. The police officers present for the statements denied that they provided the witnesses with instructions regarding the statements or limited the scope of their potential responses.

During the prosecutor's closing argument, he asserted that Charmaine lacked credibility and noted the failure of defendant to call any rebuttal witnesses to testify regarding her truthfulness or honesty. In the prosecutor's rebuttal argument, he compared the demeanor of the victim and her witnesses to defendant and his witness, specifically referencing that "defendant ... had four people kicked out of the courtroom by the Judge, grandmother, mother, sister and friend. Let's compare the credibility of these people." Defense counsel did not object to these statements. The jury found defendant guilty.

II. Standard of Review

Defendant raises prosecutorial misconduct objections that his counsel did not specifically and timely raise at trial. This Court reviews properly preserved claims of prosecutorial misconduct according to the following standards:

Prosecutorial misconduct issues are decided case by case, and the reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence, but they are free to argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. 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 Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), criticized on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354, 1371; 158 L Ed 2d 177 (2004).]

This Court reviews alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). But appellate review of improper remarks by the prosecutor is generally precluded absent an objection by defense counsel because a failure to object deprives the trial court of an opportunity to cure the alleged error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *Schutte*, *supra* at 720. No error requiring reversal exists if a timely instruction could have cured the prejudicial effect of the prosecutor's remarks. *Id.* at 721.

III. Analysis

On appeal, defendant argues that the prosecutor improperly shifted the burden of proof by referencing his failure to call witnesses to testify regarding his sister's reputation for truthfulness. Specifically, the prosecutor emphasized that Charmaine was not credible, that she had lied about her work situation, that the prosecution had called several rebuttal witnesses to testify about the

victim's truthful reputation, and that the defense had called no one to testify in support of Charmaine's reputation for truthfulness.

A prosecutor may not attempt to shift the burden of proof by commenting on a defendant's failure to present evidence. *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003). However, a prosecutor may argue from the facts that a witness is not credible or not worthy of belief. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Here, the prosecutor properly argued that Charmaine's testimony lacked credibility, and permissibly suggested that the jury disbelieve defendant's explanation of events because it coincided with Charmaine's assertions regarding the events. The prosecutor did, however, exceed the boundaries of proper argument when he briefly referenced defendant's failure to present witnesses to testify regarding Charmaine's reputation for truthfulness. Despite this error, we find that the challenged comments were not so prejudicial that they could not have been cured by a contemporaneous objection. *Stanaway*, *supra* at 687. In addition, the trial court cured any potential prejudice by instructing the jury that the prosecution's argument did not constitute evidence. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001). Therefore, the prosecutor's closing argument did not deprive defendant of a fair trial.

Defendant also submits that the prosecutor improperly commented in rebuttal argument that defendant lacked credibility because four of his family members were evicted from the courtroom. We agree that the prosecutor improperly suggested to the jury it could consider facts outside of the evidence. But because this error could also have been corrected by a contemporaneous instruction to the jury, and because the trial court's final instructions to the jury directed that the attorneys' statements and arguments do not constitute evidence, any impropriety during the prosecutor's rebuttal argument did not operate to deprive defendant of a fair trial. *Stanaway*, *supra* at 687.

Affirmed.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher