

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PHILLIP RAYMOND HERNANDEZ,

Defendant-Appellant.

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UNPUBLISHED

November 16, 2010

No. 293263

Ingham Circuit Court

LC No. 08-000690-FC

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1) (multiple variables).<sup>1</sup> The circuit court sentenced defendant as a fourth-offense habitual offender, MCL 769.12, to serve 264 to 480 months in prison with credit for 331 days already served. We affirm.

Defendant argues on appeal that he was denied his right to a fair trial by the prosecutor's misconduct. Defendant failed to preserve this issue by raising specific and timely objections to the conduct now challenged, or by requesting a curative instruction. *People v Unger*, 278 Mich App 210, 234-235; 774 NW2d 272 (2008). Therefore, our review is limited to identifying a plain error that affected defendant's substantial rights. *Id.* at 235. Even if found, reversal is not required unless the error "resulted in the conviction of an actually innocent defendant" or "'seriously affected the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence" *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999), quoting *United States v Olano*, 507 US 725, 736; 133 S Ct 1770; 123 L Ed 2d 508 (1993).

Defendant asserts that the following sequence of questions and answers constituted impermissible vouching by the prosecution:

*Prosecutor:* But all of the officers who testified as to their observations about what you did and what you said were completely accurate, correct?

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<sup>1</sup> Defendant was found not guilty of first-degree home invasion, MCL 750.110(a)(2).

*Defendant:* I guess. I don't know.

*Prosecutor:* Do you have a dispute with anything that Officer Hon testified that you said to him?

*Defendant:* No.

*Prosecutor:* Do you have a dispute as to anything that Officer Hon said he observed based on what you said to him?

*Defendant:* No.

*Prosecutor:* What about Officer Larabee? She didn't speak with you, but do you have any objection to what she testified to based on the statements you made?

*Defendant:* No.

*Prosecutor:* What about Sergeant Green, did you, in fact, call him over?

*Defendant:* I could have.

*Prosecutor:* Did you tell Sergeant Green you never touched anybody?

*Defendant:* Yes.

*Prosecutor:* And you don't have any other dispute with anything Sergeant Green said about what you said to him?

*Defendant:* No.

*Prosecutor:* You don't have any dispute with Sergeant Green's testimony about what he did based on that, do you?

*Defendant:* No.

*Prosecutor:* And the same thing would be true of Officer Smith?

*Defendant:* No.

*Prosecutor:* No, it would not be true?

*Defendant:* Yes, it would be true.

At no time during this exchange can it be said that the prosecutor personally vouched for the credibility of the named police witnesses, placed the prestige of his office behind any of the witnesses, or even came close to suggesting that the government, in the person of the prosecutor, possessed special knowledge regarding a witness's truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). Moreover, we see nothing in the record to throw in question the presumption that the jury followed the court's instructions regarding its role in evaluating the evidence and

determining witness credibility. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003) (“Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.”).

There is an important difference between asking about where a latter witness might disagree with a former witness’s testimony (particularly with respect to what the former had stated the latter had said and done) and asking whether the latter would characterize the former as generally not being worthy of belief. In many circumstances, the testimony of the witnesses will be in dispute. It is not misconduct to ask a witness to identify the areas of dispute, or as here, to highlight that despite the differing versions of events between defendant and the complainant, the testimony of the police was consistent with defendant’s presentation (although not his explanation of why he spoke as he did).

Defendant also argues that the prosecutor impermissibly shifted the burden of proof. Due process of law requires a jury to find the defendant guilty beyond a reasonable doubt. *People v Fields*, 450 Mich 94, 113; 538 NW2d 356 (1995). This fundamental requirement is violated if the burden of proof is improperly shifted to the defendant. *People v Hudson*, 123 Mich App 624, 625; 333 NW2d 12 (1982). Defendant argues that the prosecutor did just this when implying during cross-examination of defendant that he was required to present other witnesses to the jury. Defendant focuses on the following sequence of questions and answers:

*Prosecutor:* What is Bill’s last name?

*Defendant:* I couldn’t tell you.

*Prosecutor:* Where does Bill live?

*Defendant:* Right kitty-corner from Ms. Cotton’s old place.

*Prosecutor:* Is Bill here?

*Defendant:* No.

*Prosecutor:* What is Bill’s girlfriend’s name?

*Defendant:* I think Rhonda.

*Prosecutor:* Is Rhonda here?

*Defendant:* No.

*Prosecutor:* But they saw these things that you’ve testified to here today, correct?

*Defendant:* Yes.

*Prosecutor:* And were they the only people that were present, other than Eric, on the night that you claim Ms. Cotton escorted you out of the house?

*Defendant:* Yes.

*Prosecutor:* And it is your testimony here under oath that when Ms. Cotton fell and broke her arm, you took her to her trailer and dropped her off there?

*Defendant:* Yes.

Defendant argues this questioning suggested that he did not produce witnesses that he claims could have corroborated his version of events.

However, our Supreme Court has observed that “when a defendant advances an alternate theory or alibi, ‘the prosecution, by commenting on the nonproduction of corroborating alibi witnesses, is merely pointing out the weaknesses in defendant’s case’ and not ‘improperly shifting the burden of proof to the defendant.’” *Fields*, 450 Mich at 112, quoting *People v Shannon*, 88 Mich App 138, 145; 276 NW2d 546 (1979). Thus, because “Bill and Rhonda” allegedly possessed facts that would have corroborated defendant’s version of events, his failure to produce them was appropriately subject to inquiry and comment by the prosecutor.

Accordingly, defendant has not shown that any error, plain or otherwise, occurred that would warrant reversal.

Affirmed.

/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald  
/s/ Henry William Saad