

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

JASON ALLEN BOISMIER,

Defendant-Appellee.

UNPUBLISHED

December 28, 2010

No. 291642

Wayne Circuit Court

LC No. 08-012562-01

Before: SHAPIRO, P.J., and SAAD and SERVITTO, JJ.

PER CURIAM.

A jury convicted defendant of one count of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a) (sexual penetration with a person at least 13 years old but less than 16), and one count of selling/furnishing alcohol to a minor, MCL 436.1701(1). Thereafter, the trial court granted defendant's motion for a new trial on the ground that the prosecutor improperly asked defendant during cross-examination whether he admitted to his neighbor, or anyone else, that he had consensual sex with the complainant. The prosecution appeals by leave granted and, because the prosecutor properly exercised the right of cross-examination, we reverse.¹

The complainant, who was 14 years old at the time of the incident, testified at trial that, on the evening of April 25, 2008, defendant bought alcohol for her and her friends and, after she became intoxicated, defendant had sex with her without her consent. At trial, defendant admitted that he bought alcohol for the girls, but he denied that he had sex with the complainant.

¹ This Court reviews a trial court's decision regarding a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). With regard to the underlying claim of prosecutorial misconduct, if there is no allegation that the misconduct violated a specific constitutional right, preserved prosecutorial misconduct claims are reviewed under the nonconstitutional error standard. *People v Blackmon*, 280 Mich App 253, 262, 270; 761 NW2d 172 (2008). Under the preserved, nonconstitutional error standard, a defendant has the burden to establish that it is more probable than not that the error undermined the reliability of the verdict, thereby making the error outcome determinative. *Id.* at 270.

During her cross-examination of defendant, the prosecutor asked him whether he told his neighbor, David Gasidlo, that he had consensual sex with the complainant. Defendant said he did not. Defense counsel did not object on the record to the prosecutor's line of inquiry. Later that day, defense counsel complained to the trial court that the prosecutor lacked a good faith, factual basis for asking defendant the question. The trial court suggested that, if defense counsel believed the prosecutor acted unethically, he should file a claim with the Attorney Grievance Commission and the court did not otherwise act on defense counsel's complaint. However, after defendant's conviction, the court granted defendant a new trial on the ground that the prosecutor's question "tainted the entire trial," and, indeed, violated a direct and specific court order.

We hold that the prosecutor's question was not improper. In light of defendant's denial that he engaged in any sexual activity with the complainant, the prosecutor could properly ask defendant whether he told anyone that he engaged in consensual sexual activity with the complainant to elicit relevant evidence, or to test his credibility, memory, or veracity. Cross-examination by the prosecutor, as well as by the defense, may be piercing and aggressive — this is the nature of cross-examination in our adversarial system of justice. See *People v Gray*, 466 Mich 44, 48; 642 NW2d 660 (2002) ("[a] defendant in a criminal case has a right to present a defense, but that right is not cloaked with protection from vigorous cross-examination").

The record also reflects that, before trial, the prosecutor, in the presence of other witnesses,² spoke to Mr. Gasidlo's daughter, Starr, who told the prosecutor that defendant had told her father that he had consensual sex with the victim. Though Mr. Gasidlo denied that defendant told him he had sex with the complainant, because of this information from Starr, the prosecutor had additional reasons to ask defendant about his admissions generally and, thus, about the alleged statement in particular. Based on the record at the time, there is no evidence that the prosecutor lacked a good faith basis to ask defendant about his alleged statement to Mr. Gasidlo. *People v Taylor*, 110 Mich App 823, 834-835; 314 Mich App 398 (1981).³

² In an affidavit filed on appeal, the prosecutor stated that Detective Lieutenant Gerald LaPointe and Wayne County Prosecutor's Office Victim Advocate Jessica Griglio were present at her meeting with Starr Gasidlo.

³ The concurrence incorrectly assumes that, because the prosecutor knew that Mr. Gasidlo denied what Starr earlier told the prosecutor and two other witnesses, the prosecutor had no reasonable or good faith basis to ask defendant whether he told Mr. Gasidlo that he had consensual sex with the complainant. The concurrence also unfairly imputes to the prosecutor an intent to inject an improper suggestion that the prosecutor had evidence of such an admission. Again, the prosecutor had a statement from Starr that she was aware that defendant told her father that he had sex with the complainant. And, as of the time of trial, Starr did not revoke this statement to the prosecutor. Even if Starr denied making the statement to defense counsel in a private, off the record conversation, this does not show that the prosecutor lacked a good faith belief about Starr's statement to the prosecutor, Lieutenant LaPointe, and Jessica Griglio. We cannot impute knowledge on the part of the prosecutor of information only allegedly known to defense counsel. In any case, if Starr offered conflicting versions of what occurred, it was well within the prosecutor's duties to clarify the point with defendant on the record.

On appeal, defendant submitted an affidavit in which Starr stated that she overheard her father talking to defendant, but she denied that she told the prosecutor about the substance of the conversation. However, were we to accept Starr's post-conviction assertion as true, defendant was not prejudiced by the prosecutor's questioning. Far from "taint[ing] the entire trial," defendant simply denied making any admission to Mr. Gasidlo, defense counsel did not belabor the point, and the prosecutor did not suggest that she had any special knowledge that defendant was testifying falsely. *Id.* Further, during his closing argument, defense counsel voluntarily emphasized the point that the prosecutor presented no evidence that defendant told anyone that he had consensual sex with the complainant. Moreover, the trial court instructed the jury that the remarks of the attorneys did not constitute evidence in the case and jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Accordingly, though again, the prosecutor's questioning was entirely appropriate, if we were to find any error, any possible prejudice to defendant was eliminated by both defense counsel and the trial court. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). We hold that the prosecutor's pointed cross-examination of defendant in no way prejudiced defendant or denied him a fair trial. Therefore, the trial court abused its discretion when it ordered a new trial.

With regard to the trial court's assertion that it ordered the prosecutor not to ask defendant whether he made the admission to Mr. Gasidlo, if the court made such a ruling, it would have been error for the reasons already stated. Moreover, based on the record before us, the only indication of a violation of a court order was by the trial court judge in failing to address this matter on remand as directed by this Court. Before this Court granted the prosecutor's application for leave to appeal, it ordered the trial court to conduct a hearing to determine whether the prosecutor had a good faith basis to ask defendant about his alleged statement to Mr. Gasidlo and to settle what occurred during a sidebar conference when the court allegedly ordered the prosecutor not to ask defendant about any statements about consensual sex. This Court also ordered the court to provide a transcript of the hearing to this Court and to address the fact that defense counsel discussed the matter during his closing argument. The trial court failed to hold a hearing, failed to address the substance of the disputed sidebar discussion and defense counsel's closing argument and, outside of the presence of the parties and counsel, and in derogation of this Court's instructions, simply stated on the record its reasons for granting the motion for a new trial.

Not only did this violate this Court's direct order, the trial record simply does not support the trial court's explanation for its ruling. According to the trial court judge, he told the prosecutor not to ask the questions during an off-the-record, side-bar ruling near the close of the prosecutor's case when the prosecutor decided not to endorse Mr. Gasidlo as a witness. However, the discussion about Mr. Gasidlo's endorsement occurred on the record on the first day of trial. Further, when the prosecutor withdrew the endorsement, the trial court made no ruling about what questions the prosecutor could or could not ask. An off-the-record side-bar discussion did occur during the prosecutor's cross-examination of defendant, near the end of the prosecutor's case:

Prosecutor: And isn't it true that you told Mr. Gasidlo that you had consensual sex with [the victim]?

Defendant: No.

Prosecutor: Did you tell anybody that you had consensual sex with [the victim]?

Defendant: No.

Defense Counsel: Your Honor, may we approach the bench?

The Court: Sure.

(Discussion at bench at 12:01 p.m., not on record, outside hearing of the jury.)

[Prosecutor Continuing]

Prosecutor: Do you know what the word “consent” means?

Defendant: Yes.

Prosecutor: Did you tell anyone that you had consensual sex with [the victim]?

Defendant: No.

Prosecutor: I have no further questions.

Defense counsel then conducted his redirect examination of defendant. Not only did the trial judge fail to hold a hearing or even comment on the substance of the above side-bar discussion, the excerpt in no way indicates that the trial court ordered the prosecutor to discontinue her questions. Indeed, immediately after the side-bar, the prosecutor continued the same line of questioning without comment by defense counsel or the trial court. Had the prosecutor blatantly violated the court’s alleged order immediately after the ruling, it is improbable at best that the trial judge or defense counsel would have remained silent. Moreover, as noted, when defense counsel later raised the concern that Mr. Gasidlo denied making the statement, the trial court challenged defense counsel to report the prosecutor to the Attorney Grievance Commission if he believed she acted improperly during her cross-examination. If the trial court believed that the prosecutor violated a direct order of any kind, it would have, at the very least, admonished the prosecutor rather than choosing to rebuke defense counsel for raising the issue.

We agree with the prosecutor that the trial court had no basis after defendant’s conviction for holding that the prosecutor lacked a good faith basis for asking defendant about an alleged discussion with Mr. Gasidlo. Simply stated, the trial court’s explanation of its ruling is disingenuous and inconsistent with the record. The trial court violated this Court’s order to fully address the questions raised in this matter and nothing in the existing record suggests that the prosecutor asked the disputed questions after the trial court ordered her not to do so. The trial court clearly abused its discretion when it ordered a new trial and, therefore, we reverse.

/s/ Henry William Saad