

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UNPUBLISHED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.

SHAPIRO, P.J., (*dissenting*).

Contrary to the lead opinion, I would not, based on this record, conclude that the trial court erred in finding prosecutorial misconduct. Further, contrary to the concurrence, I would not find the misconduct to be harmless. Finally, I would not find that the trial court abused its discretion in granting a new trial.

The claimed misconduct concerned a question posed by the prosecutor in cross-examination of defendant. Defendant was charged with sexual penetration of a girl between 13 and 16 years of age. Defendant denied that any such sexual encounter occurred. When cross-examining defendant, the prosecutor suggested to the jury that defendant had told his neighbor, David Gasidlo, that he had sex with the girl, but that she had consented. The prosecutor asked, “Isn’t it true that you told Mr. Gasidlo that you had consensual sex with [the victim]?” When defendant responded, “No,” the prosecutor reiterated the inquiry, “Did you tell anybody that you had consensual sex with [the victim]?” On defense counsel’s request, the attorneys then approached the bench and a sidebar conference was conducted off the record. Immediately following the sidebar, the prosecutor again asked, “Did you tell anyone that you had consensual sex with [the victim]?” When defendant again answered, “No,” the prosecutor indicated that she had concluded her cross-examination.

Later on the same day, defense counsel indicated that he wanted to put “something on the record regarding the side-bar conversation” and claimed that the assistant prosecutor had asked a question that she knew was misleading and false. The trial court recommended that defense counsel raise the issue with the attorney grievance commission; but despite repeated requests from defense counsel, the court declined to rule on counsel’s request for a curative instruction specifically addressing the prosecutor’s final questions. Moreover, the trial court did not give the standard instruction that the attorney’s questions are not evidence.

After the defendant was found guilty, the defense filed a motion for new trial asserting, among other things, that the prosecutor's repeated asking of the question regarding statements to the neighbor constituted misconduct. The trial court, despite having missed the opportunity to give the jury a curative instruction, granted the motion and stated:

"I think that there, as a result of direct disobeying of a Court order, not order as such, but a conference that was had between all the lawyers and the Court instructing the lawyers on how to proceed with the questioning of the defendant as it relates to accusation and information, I think that this rises to prosecutorial misconduct. I think that in this particular case there was a strict direction that was given to the prosecution on how to approach the cross-examination. It was, in my mind, intentionally violated. And, as such, I think tainted the entire trial."

The prosecution sought leave to appeal. We remanded to the trial court with direction to conduct a hearing "to resolve whether the prosecution had a good-faith basis for asking the questions, and if not, to address whether defendant was prejudiced and denied a fair trial as a result." We further directed that the trial court should "explain on the record the substance of the conversation between the court and the attorneys during their side-bar conference."

The trial court did not conduct an evidentiary hearing, but did make a record as to its own recollections of off-the-record conversations. The court explained that the prosecutor had sought to endorse David Gasidlo on the date of trial as a late witness asserting that he would testify that defendant told him that defendant had had consensual sex with the victim. The court indicated it would rule on the motion after the defense had been allowed to interview Gasidlo, after which the court would rule. The court went on to explain that at a sidebar that occurred while "the prosecution as winding up its case,"¹ he was told that "[the prosecution] had interviewed or re-interviewed Mr. Gasidlo and that during his interrogation, [Gasidlo] revealed that [defendant], had never told him that he had had consensual sex with [the complainant] and now [the prosecution] was moving to withdraw their motion to endorse [him]." Per the court's recollection, "defense counsel then asked me to instruct the prosecution to not ask [defendant] any questions regarding any admissions to consensual sex with [the complainant] because it had never happened and there was no good-faith reason to ask a question that they knew the answer to because it wouldn't do anything but plant a seed that perhaps [defendant] had told Ms. [sic] Gasidlo something and was just denying it on the witness stand I granted the motion to withdraw the witness and ordered the prosecution not to ask any questions regarding an admission that was never made. After being ordered not to ask any questions, the prosecutor, during the cross-examination of [defendant] asked [the prohibited question]." The court went on to note that the prosecutor asked the question a third time even after being "warned again" during the sidebar that occurred during the cross-examination of defendant.

The court concluded that "the prosecution violated a direct order of the Court . . . [a]nd by violating this order given, because the plaintiff's own investigation revealed no admission of

¹ This therefore was a different sidebar than the one that occurred during the defendant's testimony later in the trial.

consensual sex . . . there existed absolutely no good-faith basis for asking these questions. As a result of the prosecutor's deliberate and premeditated actions, this Court finds that, indeed, because they had no good-faith basis for asking the question, it can only be deemed as bad faith to try to implant a doubt as to the credibility of [defendant]. The deliberate actions of the prosecution then denied [defendant] his right to a fair trial. . . . And because there was not one iota of evidence other than the credibility issue of the complainant in this case, to inject that question was only for the purpose of crashing into the credibility of the witness in an area where there certainly was nothing to base that question on. . . . [T]he People just chose not to listen to what the Court had directed them to do, not as a suggestion, but as an order, violated the order and had absolutely no good faith for it."

Following the remand, the prosecution filed a motion in this Court to expand the record in order to include an affidavit from the trial prosecutor. We granted that motion. The defense then filed a similar motion in order to include affidavits from David Gasidlo, the witness at issue, and his daughter, Starr Gasidlo, to whom the prosecutor's affidavit referred. We granted that motion as well.

The prosecutor's affidavit stated that on the first morning of trial she interviewed Starr Gasidlo in the presence of a police officer and the prosecutor's office victim advocate. According to the prosecutor's affidavit: (1) Starr and her parents had previously refused to provide a written statement or to speak with the police about the case; (2) during the interview on the morning of trial, Starr told the prosecutor that her father (David Gasidlo) had told her (Starr) that defendant told him that defendant had had consensual sex with the victim; (3) the prosecutor informed defense counsel of these statements and made Starr available to defense counsel for questioning; (4) the police department located David Gasidlo and he denied making the statement attributed to him by his daughter; (5) the prosecutor then advised defense counsel and the court that David Gasidlo had denied making the statement attributed to him; and advised defense counsel and the court that the prosecution would not be calling David Gasidlo as a witness; and that (6) the prosecutor had no further out-of-court contact with Starr Gasidlo.

The prosecutor's affidavit also spoke to events in the courtroom and sharply contradicted the trial court's findings on remand. She attested that, "Before the beginning of the cross-examination of Defendant, I was not ordered by the Court not to ask any questions regarding admissions of consensual sex," and maintained, "After I asked two questions regarding consensual sex, a sidebar was held. The Court immediately asked me whether I intended to ask the defendant whether he admitted to President Obama that he had consensual sex with the victim. I replied no, of course not and the sidebar ended."

The prosecutor's affidavit also stated that after this Court remanded the case, she requested a hearing and was advised by the court's clerk that no hearing was going to be scheduled and that the court would make its findings on the record on an undisclosed date without the parties present.

The affidavit signed by Starr Gasidlo and submitted by the defense after remand recounted the pre-trial events quite differently. She attested that she did have a conversation with the prosecuting attorney and a police officer on the morning of trial, but that, "Regardless of what they have said, I never informed them that my father had told me that Mr. Boismier had admitted to having consensual sex with [the victim]." She went on to state, "I told them that I

overheard my father talking to Mr. Boismier, but I did not tell them anything specific about what my father indicated Mr. Boismier said to him during that conversation.”

In the affidavit signed by David Gasidlo and submitted by defense counsel, Mr. Gasidlo avers that: (1) he does not believe that the prosecutor’s affidavit is accurate; (2) he never stated to anyone, including his daughter, Starr, that he had had conversations with Jason Boismier about the sexual assault charge or the events giving rise to it; (3) he never told anyone, including his daughter that defendant told him that defendant had had consensual sex with the victim; and (4) during the trial, police officers came to his home and he told them these facts.

With this record², we are now asked to determine whether the trial court abused its discretion in granting the motion for new trial. A new trial may be granted “for any cause for which by law a new trial may be granted or when it appears to the court that justice has been done.” MCL 770.1.

The lead opinion would hold that the prosecutor’s questions concerning whether defendant made the incriminating statements to David Gasidlo did not constitute misconduct. The lead opinion suggests that the general rule that cross-examination “may be piercing and aggressive” is sufficient to permit the questioning. I disagree for two reasons.

First, according to the trial court, the prosecutor asked these questions despite being specifically directed by the court not to do so in an off-the-record sidebar. The lead opinion seems to adopt the view that the trial court’s statements, made on the record, about the sidebar events are not credible. While one may reasonably question the trial court’s recollection, particularly in light of the prosecutor’s affidavit, I do not see how we can simply ignore or overrule on-the-record statements of a trial judge concerning what occurred in his or her presence in the courtroom. Had the lead opinion held that a further hearing was required to determine the actual events, I would likely have concurred. However, for our Court to overrule a trial court simply by implying that the trial judge intentionally misstated the truth would make many rulings of this court difficult to justify since we routinely rely upon the veracity of the trial court. Moreover, as I read the record, the trial court’s description of the events is not unreasonable on its face and is, with the exception of precisely what was said at the side-bar(s), largely consistent with the prosecutor’s version of events.

Second, in my view, the lead opinion picks and chooses among the affidavits and acts as a fact-finder. The opinion states that the concurrence “unfairly imputes to the prosecutor an intent to inject an improper suggestion that the prosecutor had evidence of such an admission.” Putting aside the central fact that such an intent was found by the trial court to whose findings we must defer, the lead opinion fails to address the affidavits of Starr and David Gasidlo and simply assumes the truth of the prosecutor’s affidavit. The lead opinion states that to accept David Gasidlo’s affidavit is to deny what Starr told the prosecutor and two witnesses. However, that

² The prosecution did not submit affidavits from the two other persons it asserts heard Starr’s statement on the morning of trial nor did the defense submit an affidavit from defense counsel as to his recollections of the relevant events.

assumes that Starr made the statements attributed to her by the prosecutor. In fact, Starr's affidavit states that she never made those statements and implies that the prosecutor's statements are false. Hence, the discrepancy is not between what Starr told the prosecutor and David's affidavit, but rather between what the prosecutor says Starr told her, and the affidavits of both Starr and David, which indicate that Starr never said what the prosecutor said she did. The lead opinion also states that Starr "did not revoke this statement" about defendant's alleged inculpatory remarks to her father. However, Starr is not under any obligation to "revoke" a statement that she never made, and she asserted in her affidavit that she never made it.

We can avoid all of this debate, however, because the prosecutor concedes that the only thing providing a "good faith" basis for the question was that Starr had told the prosecutor of a hearsay statement by her father – *a statement that the prosecutor knew had been denied by her father, the alleged declarant, before the prosecutor ever asked the subject questions of the defendant*. Thus, even if the prosecutor's statements concerning her conversation with Starr are presumed to be true, I do not believe that the prosecutor's hope that the hearsay statement reported to her by Starr was accurate could serve as a good faith basis to ask the subject question once she was advised by the police that the alleged declarant denied making the statement. It might be different had she obtained this information from the declarant rather than as a report of hearsay by his 14-year-old daughter who is a friend of the victim.

The concurrence concludes that while the prosecutor's question constituted misconduct, a new trial is not required. However, I believe the concurrence is mistaken in its conclusion that "[n]o one dwelled on the single question and both the trial court and defense counsel addressed the issue, thus eliminating any potential prejudice to defendant." In fact, the prosecutor did dwell on the question by asking it three times in a row and then emphasized its importance by ending her cross-examination on that note. As I noted above, the trial court failed to give a curative instruction despite the urging of defense counsel, and its reading of the standard instructions on questions by counsel was incomplete on a critical point. Rather than giving the standard instruction on evidence, CJI2d 3.5, the trial court gave its own evidence instruction. Notably this instruction did not include the directive in the standard instruction that, "The lawyers' questions to witnesses are also not evidence. You should consider these questions only as they give meaning to the witnesses' answers." Instead, the trial court simply told the jury, "The arguments of the . . . prosecution and the defense attorney is [sic] not evidence. Again, their opening statements were to tell you what they thought the evidence was and how it was consistent with the theory they wish you to accept, and that's what their closings were." The court made no reference to statements of the attorneys outside of opening and closing statements, let alone a specific reference to the evidentiary import of questions.

I agree that there was significant evidence of guilt in the testimony of the victim and the circumstantial evidence testified to by her friends, particularly concerning the 26-year-old defendant's presence with the victim behind a locked bedroom door and the defendant's provision of alcohol to underage girls with whom he then shared a hot tub. Indeed, defendant's CSC conviction could properly have been based solely upon the testimony of the victim despite the fact that she testified that much of her memory of the night in question was hazy due to

extreme intoxication.³ However, we must also consider that there was no physical evidence of sexual contact and no witness testified that they observed sex acts or even significant physical contact between the defendant and the victim.⁴ The case was in large measure a question of whether the jury believed the victim's testimony or the defendant's testimony. Therefore, questions suggesting that defendant had made inculpatory statements to a good friend – indeed had confessed to the crime – cannot be dismissed as simply window dressing. Indeed, it is unlikely they would have been asked if the prosecutor viewed them as such.

While one may question some of the trial court's conclusions, it is difficult to argue with its conclusion that the prosecutor asked the questions for the purpose of causing the jury to think that defendant had confessed to the crime or at least that his testimony at trial should not be considered credible. These questions effectively constituted the last evidence the jury heard before the close of proofs and appear to have been timed for maximum impact. It is certainly reasonable to conclude that the prosecutor's questions led the jury to believe that the prosecutor was privy to some information supporting the contention that defendant had confessed the crime to his neighbor.

Finally, I agree with the lead opinion that the trial court did not comply with the spirit, if not the letter, of our remand order. The order was intended to require the trial court to take testimony and determine whether in fact the prosecutor had a good faith belief for her questions. The trial court did not do so and according to the prosecutor, intentionally refused to take evidence or even to conduct the hearing in the presence of the parties. This is disturbing, as is the trial court's refusal to rule on defense counsel's repeated request for a curative instruction. Had the trial court given that instruction, which was so plainly appropriate, my disagreements with the lead opinion and concurrence would never have arisen. Nevertheless, the fact remains that it was the trial court that sat through the trial and observed the proceedings, the demeanor of the witnesses and the conduct of counsel. Despite the trial court's failings in this case, I do not believe that we should substitute our judgment as to whether or not the improper questions were harmless, particularly in the context of a trial court's grant of a new trial which we review on an abuse of discretion standard. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008)

Accordingly, I would affirm.

/s/ Douglas B. Shapiro

³ The complainant testified that defendant committed two separate acts of penetration upon her, separated by a significant period of time and defendant was charged with two counts. Curiously, the jury convicted defendant of one count and acquitted him of the other. While a jury may properly reach inconsistent verdicts, the acquittal on one of the counts makes it more difficult, in my view, to reach the conclusion that the improper questioning was harmless.

⁴ The only testimony as to witnessed physical contact was two witnesses' testimony that they thought the victim was sitting close to or leaning on the defendant in the hot tub.