

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LAURA MARIA STEPHENS,

Defendant-Appellant.

UNPUBLISHED

March 22, 2012

No. 302415

Wayne Circuit Court

LC No. 10-007540-FC

Before: BORRELLO, P.J., and BECKERING and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant Laura Maria Stephens of three counts of first-degree criminal sexual conduct in violation of MCL 750.520b(1)(b)(v)¹ based on evidence that she engaged in a sexual relationship with a 15-year-old student at the school where she worked. The trial court abused its discretion by permitting a police officer to voice his opinion on the stand regarding defendant's credibility. The error was harmless, however, in light of defendant's confession, which was placed on the record. The trial court did err in imposing a lifetime electronic monitoring provision in defendant's judgment of sentence inconsistent with MCL 750.520n(1). Accordingly, we affirm defendant's convictions but remand to the trial court to correct her judgment of sentence.

I. BACKGROUND

In fall 2008, defendant worked as an administrative assistant at a residential academy for teenaged court wards. The Department of Human Services (DHS) removed the then-15-year-old victim from his mother's custody in September 2008 and placed him at the residential academy. Defendant and the victim met during the student registration process. While living at the school, the victim was permitted to spend the weekends with his older brother in Taylor, near defendant's home. During one such visit in late September 2008, the victim attended a local football game and encountered defendant and her four children. Later that same day, the victim

¹ MCL 750.520b(1)(b)(v) proscribes sexual penetration between an actor and a person between the ages of 13 and 16 when the actor is an employee at the school in which the victim is enrolled and the actor uses her "status to gain access to, or to establish a relationship with" the victim.

visited defendant at her home. The victim testified that he then began visiting defendant's home on a regular basis. He also claimed that defendant summoned him from class on a daily basis and brought him to her office to talk. The victim asserted that defendant began writing him letters, which she hand delivered during school hours. The victim testified that he and defendant maintained a sexual relationship between late September and early November 2008. He claimed they engaged in sexual intercourse on numerous occasions at defendant's home. In November 2008, the DHS placed the victim with a foster parent and he transferred to a public high school. Defendant apparently saw the victim only one time after his move.

At some point in early 2010, the victim told his mother about his sexual relationship with defendant. The victim gave his mother defendant's letters and she in turn gave them to the victim's DHS case worker. The DHS worker made a sexual abuse report to the Taylor Police Department and Detective Kenneth May began investigating the claim. The detective arranged for the victim to be interviewed by a child sexual abuse forensic counselor, but the victim told the interviewer that he did not want to discuss the issue. Detective May then interviewed defendant about the allegations. Defendant initially denied having a sexual relationship with the victim, but eventually broke down and confessed to May.

At trial, defendant adamantly denied ever having intercourse with the victim. Defendant claimed that she felt badly for the victim and tried to help him emotionally and financially. The jury disbelieved her claims and convicted her of three counts of CSC-I based on penile-vaginal penetration. The jury acquitted her of two counts of CSC-I based on alleged acts of fellatio.

II. OPINION TESTIMONY REGARDING DEFENDANT'S CREDIBILITY

Defendant challenges the trial court's admission of Detective May's testimony that defendant was not being truthful in giving her initial statement to the police. We review a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010). A trial court abuses its discretion when its decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

The prosecutor played the DVD of defendant's recorded police interview in its entirety to the jury at defendant's trial. In the recorded interview, defendant initially denied having had a sexual relationship with the victim. Detective May told defendant that he knew she was hiding something and accused her of lying. The detective lied and told defendant that the victim had accused defendant of forcing herself upon him. Finally, the detective told defendant that she was not a "predator" because she engaged in a mutual, consensual relationship with the victim. Defendant then broke down and told May that she engaged in penile-vaginal intercourse with the victim on three occasions in her bedroom at her home. Defendant asserted that the victim initiated the relationship and the sexual contacts.

At trial, upon the prosecutor's questioning, May testified that he asked defendant to come voluntarily to the police station for an interview regarding the victim's accusations. May told defendant that she was free to leave at any time. May testified regarding the interrogation techniques he employed when questioning defendant. The prosecutor then changed her line of questioning and the following colloquy ensued:

Q. Now eventually in the interview [defendant] changed from a strong denial that nothing happened to that something did happen; is that right?

A. Correct.

Q. And did you observe any indicators before she came clean with what she said that made you think that initially she wasn't telling you the truth?

A. Yes, I did.

Q. Tell the jury what indicators you saw.

A. Um, based on my interview with her she exhibited both verbal and nonverbal indicators which indicated to me that she was not being completely honest with me.

[Defense Counsel]. Your Honor, I'm going to object to this nature of the [sic] question[.] I believe it's up to the jury to determine whether or not my client was telling the truth.

The officer cannot necessarily render an opinion upon whether or not a person is telling the truth.

The Court. I think he's describing his interrogation techniques.

[Defense Counsel]. No, he's giving an opinion on whether she was telling the truth and I don't think he can do that.

The Court. Well, that's his opinion at the time.

[Defense Counsel]. I mean the ultimate question of fact is to be answered by the trier of fact.

The Court. I agree with you one hundred percent that the jury in this case is the ultimate decider of what the facts and circumstances is [sic] as to all factual aspects of this case.

But again this relates to how he conducted the interrogation and what may have motivated him to do certain things. I think it's appropriate and I'm going to overrule the objection.

* * *

Q. In this case when you suspended [sic] that you were not being given the entire truth what did you do next?

A. I suggested or presented reasons for [sic] excuses to help her psychologically justify the criminal activity or you know to minimize the moral seriousness of the crime.

* * *

Q. When you presented her with these [excuses] did you notice anything about her body language?

A. Yes.

Q. Tell us what you saw?

A. Um, during the [sic] when I presented the theme to her I noticed that she was quiet and listening she shook her head in agreement with acceptance of the theme and verbally indicated she knew there was things that she wasn't telling me.

Q. In your experience does an innocent person nod along with your theme?

A. No, typically the innocent person will reject the theme?

Q. Now there came a point in time when she mad[e] an admission?

[Defense Counsel]. I'm going to object to that line of questioning an innocence [sic] person? Your Honor, this is not proper[.] [T]his is putting a twist to the juries mind an innocent person a guilty person [sic].

He does have no - -

The Court. I think the last question was improper strike the question and the answer.

[Prosecutor]. Okay.

The Court. We're not concerned with what other people do we're concerned with what happened in this case.

“It is generally improper for a witness to comment or provide an opinion on the credibility of another witness, because credibility matters are to be determined by the jury.” *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007), citing *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). The prosecution, however, cites MRE 701 (lay witness opinion testimony), for the proposition that May was merely explaining his interview techniques and giving context to the parties' conversation.

MRE 701 provides for the admission of lay witness opinion testimony as follows:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.

Under MRE 701, a police officer is permitted to testify regarding his or her opinions or inferences based on his or her rational perception as a police officer. See *People v Oliver*, 170 Mich App 38, 49-50; 427 NW2d 898 (1988). In *Oliver*, for example, the court allowed two police officers to testify that they had previously examined vehicles that had been dented by bullet impacts and, based on that experience, they believed the victim's car had been dented by bullets. *Id.* In *People v Daniel*, 207 Mich App 47, 57-58; 523 NW2d 830 (1994), the court permitted a police officer to testify that he had witnessed drug sales in the past and, based on that experience, he believed the defendant's repeated acts of leaving his residence, approaching parked cars, leaning in for a moment and then quickly returning to his residence were indicative of drug sales.

The case before us is different. The prosecutor basically asked May to serve as a "human lie detector," see *Dobek*, 274 Mich App at 70, by recounting his interrogation experience and testifying that he believed defendant was lying and why. May was clearly a skilled police interrogator and could testify generally about his techniques. May could also properly testify about defendant's demeanor during the interview, as long as he did not express a conclusion about her credibility. See *People v McReavy*, 436 Mich 197; 462 NW2d 1 (1990). However, the prosecutor did not elicit proper lay opinion testimony under MRE 701. The prosecutor squarely asked one witness to improperly comment on the credibility of another witness by asking May why he believed defendant was lying.

We find an analogous Washington Court of Appeals case instructive. In *State v Jones*, 117 Wn App 89, 91; 68 P3d 1153 (2003), the trial court allowed the investigating police officer to testify that, during the defendant's interrogation, the officer kept insisting that the defendant knew about the gun used in the offense because the officer "just didn't believe him." The appellate court rejected the prosecutor's claim that the officer was "simply explain[ing] his 'interrogation technique' to the jury." *Id.* The Court held:

We find no meaningful difference between allowing an officer to testify directly that he does not believe the defendant and allowing the officer to testify that he told the defendant during questioning that he did not believe him. In either case, the jury learns the police officer's opinion about the defendant's credibility. And clothing the opinion in the garb of an interviewing technique does not help . . . [A]n officer's accusation that a defendant is lying constitutes inadmissible opinion evidence. [*Id.* at 92.]

Just as in *Jones*, the trial court clearly abused its discretion in permitting the prosecutor's line of questioning.

Although the trial court abused its discretion by allowing May to testify that he believed defendant was lying during her police interview, the error was harmless and relief is not warranted. The improper admission of evidence warrants relief only where the evidence was "more probably than not . . . outcome determinative." *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). Defendant does not challenge the admission of the taped interrogation into the record. Through that video recording, the jurors witnessed defendant's demeanor and decided for themselves whether defendant credibly denied the allegations against her. Most importantly, the jurors witnessed defendant break down and admit that she had sexual intercourse with the

victim on three separate occasions in her bedroom at her home. The jurors heard defendant describe the relationship as a “15-day lapse of judgment” and express her disbelief that the victim would claim force. Given defendant’s confession played before the jury, there is no reasonable likelihood that the jury would have acquitted her even without May’s accompanying testimony. Accordingly, despite the court’s error, we affirm defendant’s convictions.

III. PROSECUTORIAL MISCONDUCT

Defendant next accuses the trial prosecutor of engaging in misconduct by improperly shifting the burden of proof to defendant, vouching for the credibility of Detective May, and evoking sympathy for the victim. “Generally, a claim of prosecutorial misconduct is a constitutional issue, that is reviewed de novo” to determine “whether the defendant was denied a fair and impartial trial.” *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). We must examine the prosecutor’s remarks in context to determine if the line has been crossed. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). To preserve her claim, a defendant must raise a contemporaneous objection or request a curative instruction. *Brown*, 279 Mich App at 134. When a defendant does not preserve her claim, our review is limited to plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). If “a curative instruction could have alleviated any prejudicial effect,” there is no reversible plain error. *Callon*, 256 Mich App at 329-330.

We reject defendant’s contention that the prosecutor improperly shifted the burden of proof. At trial, defendant testified that the hallway near her office was monitored by a security camera and the camera’s footage would have rebutted the victim’s claim that she brought him to her office on a daily basis. The prosecutor asked defendant, “So of course when you got accused of this crime you immediately saw to it that they preserve the tape, right?” Defense counsel objected that it was not defendant’s responsibility to collect evidence. The court ruled, “It may not be her responsibility but she can answer the question.” The prosecutor continued her line of questioning as follows:

The Witness. At the time the [sic] Detective May contacted me I had not worked for that school for over six months and I had not had contact with I mean with the defendant or the complainant whatever Mr. Walker.

Q. Well, that didn’t stop you from going to the school and asking them to preserve the video tapes, would it?

A. Why would I do that[,] I was told by the Judge not to go to the school, not to have any contact with the school, you were there.

Q. So did you tell your lawyer that there may be video tapes clearing you of these allegations and maybe he should go get them?

A. That's conversations that I had with Mr. Evans[,] that's Mr. Evans but you see he's no longer my attorney.^[2]

Defendant contends that the prosecutor improperly shifted the burden of proof by commenting on her failure to secure the video tape evidence. "A fundamental pillar of our legal system is that a person is presumed innocent until proven guilty. Accordingly, the prosecution may never shift its burden to prove that defendant is guilty beyond a reasonable doubt and obligate the defendant to prove his innocence." *People v Rosales*, 160 Mich App 304, 312; 408 NW2d 140 (1987). However, defendant opened the door to the prosecutor's questions. Defendant testified on direct examination that cameras faced her office and that the cameras would have captured the victim visiting her office if the victim was telling the truth. On cross examination, the prosecutor queried about the absence of those allegedly exculpatory video tapes. The prosecutor was not shifting the burden of proof, but merely asking fair questions based on a defense theory posited by defendant on the stand. See *People v Fields*, 450 Mich 94, 109-111; 538 NW2d 356 (1995). See also *People v Harris*, 113 Mich App 333, 337-338; 317 NW2d 615 (1982) (holding that the prosecutor "merely pointed out the weaknesses in defendant's case" where the prosecutor commented on the defendant's failure to produce an allegedly exculpatory witness identified during the defendant's testimony).

Defendant also accuses the prosecutor of vouching for the credibility of Detective May in closing argument. Specifically, defendant challenges the following argument:

Then next Detective May, did he coerce this false confession from the defendant or was the confession true? You watched that video yesterday[,] this man has to be the nicest cop in the history of the world.

This man never raises his voice, never pulls a gun, never is abusive to her or mean and to the contrary he's incredible [sic] nice.

"The prosecutor cannot vouch for the credibility of a witness or suggest that she has some special knowledge concerning a witness's truthfulness." *People v Laidler*, 291 Mich App 199, 201; 804 NW2d 866 (2010). The prosecutor's argument was simply responsive to defendant's earlier trial testimony. The prosecutor asked defendant on cross examination why she "finally admitted" to having a sexual relationship with the victim during her police interview.

Q. And you want this jury to believe that you were coerced into saying that, right?

A. What I want the jury to believe is that when you've never been in trouble before and you've never dealt with a police officer and you've never had anything over a parking ticket that when you come in contact in a closed room

² Defendant originally retained Marlon Evans as her counsel. On September 14, 2010, two months before trial, Evans filed a motion to withdraw because of a breakdown in the attorney-client relationship and the court appointed replacement counsel.

with a Detective and you're being asked the same question for an hour and 20 minutes that yes, you do break down and say things that you otherwise wouldn't say.

The prosecutor's comments were directly responsive to defendant's claim that she was frightened into confessing. The comments are based on a reasonable view of the videotaped interview shown to the jury. The comments are also consistent with defendant's own testimony that May was kind to her and treated her well during the interview. A prosecutor does not engage in misconduct when she argues the evidence and reasonable inferences arising from that evidence. *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995).

Defendant further accuses the prosecutor of evoking sympathy for the victim in closing argument through the following comments:

You know in the end it's clear that the defendant picked on a really vulnerable kid. Here's a kid who is placed in a residential treatment program through no fault of his own, born to a mother that apparently had some problems.

The Court took him away from her and puts him in this treatment center. And here's a kid that probably needed and wanted love and attention and she was more than happy to give it to him.

She took a kid who had issues, who was vulnerable and used him for her own selfish reasons.

A prosecutor may not to appeal to the jury's sympathy for the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). The quoted comments are certainly an attempt to evoke the jury's sympathy for the victim. Defendant did not contemporaneously challenge the prosecutor's comments, however, and our review is limited to plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764. Relief would only be warranted if the prosecutor's comments "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *People v Abraham*, 256 Mich App 265, 274-275; 662 NW2d 836 (2003). Given defendant's confession to engaging in penile-vaginal intercourse with the victim on three occasions, we cannot conclude that the prosecutor's comments resulted in the conviction of an innocent person. It also does not appear on the record that defendant's trial was rendered unfair by these statements. Accordingly, we find no instances of prosecutorial misconduct warranting any relief.

IV. SENTENCING ERROR

Defendant challenges the court's imposition of a lifetime electronic monitoring provision in the judgment of sentence. The prosecution concedes that the trial court erred. Pursuant to MCL 750.520n(1), a defendant convicted of CSC-I "against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring. . . ." The victim was 15 years old at the time of the offenses and therefore the lifetime monitoring provision was inapplicable. We remand to the trial court for correction of the judgment of sentence.

Defendant's convictions are affirmed. We remand to the trial court to correct defendant's judgment of sentence by deleting the lifetime monitoring provision. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Jane M. Beckering
/s/ Elizabeth L. Gleicher