

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES N. YANT,

Defendant-Appellant.

UNPUBLISHED

June 13, 1997

No. 177846

Oakland Circuit Court

LC No. 93-129187-FC

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(e); MSA 28.788(2)(1)(e), one count of armed robbery, MCL 750.529; MSA 28.797, five counts of possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2), and one count of possession of a firearm by a felon, MCL 750.224f; MSA 28.421(6). Defendant also pleaded guilty to being a third habitual offender, MCL 769.11; MSA 28.1083. He was sentenced to terms of life imprisonment for the CSC convictions and twenty-five to forty years' imprisonment for the armed robbery conviction. Those sentences were vacated, and defendant was sentenced to a single term of life imprisonment for the habitual offender conviction. Defendant was also sentenced to two years' imprisonment for the felony-firearm convictions and three to five years' imprisonment for being a felon in possession of a firearm. Defendant appeals as of right. We affirm.

Defendant argues that he was denied a fair trial because of several instances of prosecutorial misconduct. We disagree. Appellate review of alleged prosecutorial misconduct is generally precluded absent objection by counsel because the trial court is otherwise deprived of an opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice. *Stanaway, supra*; *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). This Court reviews claims of prosecutorial misconduct on a case by case basis, examining the pertinent portion of the record to evaluate the remarks in the context they were made. *People v Bahoda*, 448

Mich 261, 266-267; 531 NW2d 659 (1995); *People v Legrone*, 205 Mich App 77, 82-83; 517 NW2d 270 (1994). The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *McElhaney, supra* at 283.

First, defendant argues that the prosecutor's cross-examination of him improperly implied that the previous defense attorney withdrew because he knew defendant's story was false and refused to participate in presenting it to the jury. A defense witness testified at trial that she went to the victim's home with defendant on the night of the incident and stayed there during the incident. The prosecutor questioned the witness and defendant as to why the witness had not been brought forward sooner in the case. During defendant's cross-examination, the following exchange occurred:

Q [Prosecutor]: -- you indicated that you had this great concern for this woman who was present during the course of time when you were having sex with this person. How often have you talked to her? How often have you told her, "No, I don't want you to come forward"?"

A [Defendant]: Well, I didn't tell her I didn't want her to come forward.

Q: Okay, so obviously she's lying about that?

A: No, I didn't say that. She --- my attorney suggested that we did not --- as far as come forward, she already came forward. There was no other time for her to come forward, except for today. She had, you know --- both my attorneys, my previous one and Mr. Brown [current defense counsel], have known about her and known about her being there with me.

Q: The other attorney who withdrew and refused to represent you, correct?

A: No. I had fired him because we had had a misrepresentation. Yes, and I let him go.

Q: Is that what the order said, that you fired him?

A: I don't remember what the order said, but he withdrew, yeah.

Defense counsel objected, stating that questions involving the attorney-client privilege and why the previous counsel may have withdrawn were not permissible. The prosecutor responded that defendant had raised the issue, but she would not pursue the matter further. No curative instruction was requested.

Defendant argues that the only interpretation for the prosecutor's questions was that the previous defense attorney withdrew because he knew defendant's story was false and refused to participate in presenting it to the jury. The lower court record contains an order permitting defendant's

original counsel to withdraw from the case. The order indicates that the motion to withdraw was made orally, but no reason is given for the withdrawal.

We agree that the way in which the prosecutor phrased her question regarding whether defendant's previous attorney "withdrew and refused" to represent him could have implied to the jury that the attorney withdrew because he did not believe defendant's story and refused to participate in presenting it to the jury. However, we do not believe that the attorney-client privilege was violated as argued by defense counsel when making the objection. Under MCL 767.5a(2); MSA 28.945(1)(2), communications are privileged and confidential when they are necessary to enable an attorney to serve as an attorney. *People v Johnson*, 203 Mich App 579, 584-585; 513 NW2d 824 (1994). The purpose of the privilege is to enable a client to confide in an attorney, secure in the knowledge that the communication will not be disclosed. *Id.* at 585. Although the statement by defendant that he fired the attorney because they had a "misrepresentation" indicates that any further questions on the matter may have revealed privileged communication and advice, because the prosecutor did not pursue the matter further after defense counsel objected, there was no violation of the attorney-client privilege. Moreover, a curative instruction could have eliminated any prejudicial effect of the prosecutor's questions and, therefore, defendant was not denied a fair trial.

Defendant also argues that the prosecutor's questions implied that the current defense counsel was participating in the fraud, and that this theme was revisited in the prosecutor's rebuttal argument when the prosecutor stated that defense counsel deliberately misrepresented the facts. However, defendant did not object to these remarks.

Defendant argues that the prosecutor's argument was an attempt to personally attack the credibility of his counsel and mislead the jury. Although a prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecution's theory of the case, *Bahoda*, *supra* at 282, a prosecutor cannot personally attack the defendant's trial attorney because this type of attack can infringe upon the defendant's presumption of innocence, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). However, remarks that might otherwise be improper may not require reversal when they address issues raised by defense counsel. *People v Simon*, 174 Mich App 649, 655; 436 NW2d 695 (1989).

The prosecutor in this case stated that defense counsel made "major misstatements" and that defense counsel deliberately tried to have the jury misinterpret or misunderstand some of the trial testimony. Although we agree with defendant that the prosecutor's remarks were excessive, we also find that they were made in response to defense counsel's arguments. In his closing argument, defense counsel argued that the victim hung up on the 911 dispatcher, that Deputy Boes walked around the victim's home and did not see anything out of place and found the area clear, that the hospital nurse used quote marks in her report to indicate what the victim told her after the incident but that none of the statements were in the police report, and that no fingerprints of anyone other than defendant's fingerprint on a light were found anywhere in the house. The prosecutor properly responded to these arguments by highlighting what the evidence supported and did not personally vouch for defendant's guilt. There was no error requiring reversal. See *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d

487 (1996) (the prosecutor's remarks during rebuttal argument were not improper where the prosecutor charged that the defense counsel had inaccurately summarized the evidence presented and did not personally attack the defense counsel or shift the jury's focus from the evidence to the defense counsel's personality).

Next, defendant argues that the prosecutor improperly elicited testimony during his re-cross-examination with regard to his claim that he was a police informant without providing evidence to support her assertions. Defendant failed to object to the prosecutor's questions. Because a curative instruction could have eliminated any prejudicial effect and failure to consider the issue would not result in a miscarriage of justice, appellate review of the prosecutor's remarks is precluded. *Stanaway, supra; McElhaney, supra; Nantelle, supra.*

Finally, the prosecutor's questioning of defendant about a police statement made by Tina Vitale was improper because it assumed facts not in evidence. See *People v Drake*, 142 Mich App 357, 360; 370 NW2d 355 (1985). Nevertheless, we do not believe defendant was denied a fair trial considering that the police statement was ultimately entered into evidence, that defense counsel was able to extensively question the witness about the statement, and that the trial court instructed the jury that the questions asked by the attorneys were not to be considered as evidence.

We affirm.

/s/ Richard A. Bandstra

/s/ Richard Allen Griffin

/s/ E. Thomas Fitzgerald