STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 16, 2000
v	No. 213860 Ingham Circuit Court
ROBERT DEWAYNE GILBERT, Defendant-Appellant.	LC No. 97-072402-FH

Before: Meter, P.J., and Griffin and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(b); MSA 28.788(5)(1)(b). The trial court sentenced defendant to concurrent terms of four to fifteen years in prison for his CSC III conviction and one to two years in prison for his CSC IV conviction. We affirm.

I

Relying on *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), defendant argues on appeal he was denied his due process right to a fair trial because the prosecutor and the police failed to adequately investigate the case against him. Defendant cites the failure to investigate the shed where the incident occurred, the failure to interview the complainant a second time until nearly five weeks after the complainant's original statement to the police, and the failure to interview defendant's alibi witnesses. We disagree.

Whether the prosecutor and the police have a duty to investigate a criminal case to a certain degree is a question of law this Court reviews de novo. *People v Sierb*, 456 Mich 519, 522; 581 NW2d 219 (1998). The United States Supreme Court held in *Brady* that the "suppression by the prosecutor of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id*. at 87; see also *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). This Court has stated:

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).]

Under the above analysis, defendant has not established a *Brady* violation because he has failed to prove the prosecutor *possessed* evidence favorable to him; he merely alleges the prosecutor failed to adequately investigate the case. However, the issue remains whether the prosecutor had a duty to investigate the case against defendant with a certain amount of diligence. Michigan courts have not held prosecutors have such a duty. In fact, our Supreme Court has noted that neither the prosecution nor the defense has an affirmative duty to search for evidence to aid the other's case, and the duty created by statute requiring the state to disclose certain witnesses is not to investigate for the benefit of the state's adversary, but to share evidence that is discovered in fulfilling the prosecutor's and defense counsel's duties to their respective clients, subject to the Fifth Amendment and attorney-client privilege. *People v Burwick*, 450 Mich 281, 289, n10; 537 NW2d 813 (1995). This Court has also stated that the prosecutor's office is not required to undertake discovery on behalf of a defendant. *People v McWhorter*, 150 Mich App 826, 832; 389 NW2d 499 (1986).

Defendant also relies on *People v Jordan*, 23 Mich App 375, 385-389; 178 NW2d 659 (1970), where this Court reversed after the prosecutor failed to obtain testing of stains on a handkerchief the defendant in a criminal sexual conduct case allegedly used to clean up semen. However, defendant's reliance on *Jordan* is misplaced because this Court's holding was actually that the testing was a prerequisite to the admission of the evidence so that a proper foundation was laid. *Id.* at 389.

Furthermore, this Court has held that due process does not require the police to seek and find exculpatory evidence. See *People v Sawyer*, 222 Mich App 1, 6; 564 NW2d 62 (1997); *People v Stephens*, 58 Mich App 701, 705-706; 228 NW2d 527 (1975). Therefore, the prosecutor and the police did not owe defendant a duty to investigate this case more thoroughly than they did.

Furthermore, the investigation of the police and the prosecutor was reasonable and sufficient in light of the circumstances of this case. First, the failure to investigate the shed where the incident occurred for traces of semen was not unreasonable. Until his cross-examination at trial, the complainant did not tell anyone that defendant forced him to perform oral sex on the defendant. Based on what the complainant told the police, the only semen they could have found would have been the complainant's. Additionally, the police could not look for the complainant's ripped shirt because the complainant did not tell them his shirt was ripped during the incident. Finally, although the detective assigned to this case testified he did not interview defendant's alibi witnesses until May 20, 1998, over a year after the incident, he stated he had just received the information regarding those witnesses on that day. Under these circumstances, we find no error requiring reversal.

II

Defendant next contends he was denied his right to a fair trial as a result of inappropriate remarks by the prosecutor during his closing statement. We disagree.

This Court's review of allegedly improper prosecutorial conduct is precluded if the defendant fails to timely and specifically object to the conduct at trial, or if an objection could have cured the error, or if this Court's failure to review the issue would not result in a miscarriage of justice. *Stanaway*, *supra* at 687; *People v Vaughn*, 186 Mich App 376, 384; 465 NW2d 365 (1990). Defendant did not specifically and timely object to the alleged prosecutorial misconduct at trial. Therefore, this Court will review this issue only if an objection and instruction could not have cured the error or if a miscarriage of justice would result absent review. Claims of prosecutorial misconduct are decided case by case and the proper test is whether, based on a review of the whole of the prosecutor's actions or statements, taken in their context, the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995).

Defendant first argues the prosecutor in this case improperly vouched for the credibility of the witnesses, expressed his personal opinion regarding the credibility of all three defense witnesses, and denigrated those witnesses, by referring to defendant's alibi as "garbage." We disagree. Defendant relies on *People v Dalessandro*, 165 Mich App 569, 578-580; 419 NW2d 609 (1988), as analogous to this case. In *Dalessandro*, this Court remanded the case for a new trial, despite the defendant's failure to object to the prosecutorial misconduct at trial, because the prosecutor referred to the defense as a sham meant to mislead the jury. *Id*. at 578-579. However, defendant's reliance on this case is misplaced because this Court reasoned that reversal was required because the prosecutor attacked the veracity of defense counsel. *Id*. at 580.

Our Supreme Court has held, as a general rule, a prosecutor may not vouch for the credibility of a witness in such a way that leads the jury to believe the prosecutor has special knowledge the witness is testifying truthfully. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, this Court has held a prosecutor may argue from the facts that the defendant, or another witness, is not worthy of belief and a prosecutor is not required to state his inferences and conclusions in the blandest possible terms. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). Furthermore, this Court has held a prosecutor may comment on the evidence and argue regarding the credibility of witnesses where there is conflicting testimony and the defendant's guilt or innocence depends, at least in part, on the believability of the witnesses. *People v Foreman*, 161 Mich App 14, 25; 410 NW2d 289 (1987), vacated on other grounds *People v Kirkpatrick*, 431 Mich 897; 432 NW2d 172 (1988); *People v Flanagan*, 129 Mich App 786, 796; 342 NW2d 609 (1983).

When the prosecutor's closing argument is read as a whole, it is evident the prosecutor was properly arguing that this case rested on the believability of the complainant versus defendant's alibi witnesses. If the jury believed the complainant's testimony, it would necessarily find defendant guilty. If the jury believed defendant's alibi witnesses' testimony that defendant was at home baby-sitting during the alleged incident, it would necessarily find defendant not guilty. The prosecutor's statements in this case are no more egregious than those in *People v Rosengren*, 159 Mich App 492, 503-504; 407

NW2d 391 (1987), where the prosecutor referred to the defendant's testimony as "horse manure" and this Court found no reversible error because the prosecutor was informing the jury it had to decide who to believe and comparing the testimony of the witnesses. Therefore, no manifest injustice occurred in this case as a result of the prosecutor's statement that defendant's alibi was garbage and any possible error could have been cured by a proper objection and instruction to the jury to disregard the statement.

Defendant next argues the prosecutor improperly made statements that were not supported by the evidence presented at trial when he explained the reason the complainant did not report that he was forced to perform oral sex on defendant until he was cross-examined was that he was embarrassed. Once again, we disagree.

A prosecutor may not make a statement of fact to the jury that is not supported by the evidence presented at trial. *Stanaway, supra* at 686. However, it is well settled a prosecutor may argue based on the evidence presented at trial and all reasonable inferences that arise from it. *Bahoda, supra* at 282; *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). The prosecutor's argument was a reasonable inference from the complainant's testimony that he did not tell his family about the incident because he was scared and embarrassed. Therefore, there is no manifest injustice and any error could have been cured by a proper objection and a curative instruction. Defendant was not denied his right to a fair trial.

III

Finally, defendant contends he was denied his rights to a fair trial, assistance of counsel, and to be present at the proceeding against him because a recording of the jury instructions cannot replace the judge reading the instructions to the jury and the jury should not have been allowed to take the recording into the jury room. We disagree.

Defendant failed to object to the jury instructions at trial. Therefore, this Court's review of this issue is precluded absent manifest injustice. *People v Ullah*, 216 Mich App 669, 676-677; 550 NW2d 568 (1996). This Court has held there was no prejudice to the defendant when the jury was allowed to hear a recording of the jury instructions in the jury room while it was deliberating. See *People v White*, 144 Mich App 698, 705; 376 NW2d 184 (1985); *People v Cavanaugh*, 127 Mich App 632, 642-643; 339 NW2d 509 (1983). This Court in *White* noted, however, that such a procedure should be discouraged and it should not be used until the issue was addressed by our Supreme Court. *White, supra* at 705. Our Supreme Court specifically addressed the issue by adopting MCR 6.414(G), which became effective in 1989 and provides in part:

> On the request of a party or *on its own initiative, the court may provide the jury with* a full set of written instructions, *a full set of electronically recorded instructions*, or a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided. If it does so, the court must ensure that such instructions are made a part of the record. [MCR 6.414(G) (emphasis added).]

Therefore, it was not error for the trial court to allow the jury to take the recorded jury instructions into the jury room during deliberations. However, MCR 6.414(G) does not address whether the trial court may play a recording of the jury instructions, recorded specifically for the case before the court prior to closing arguments, in lieu of reading the instructions to the jury. We decline to reverse on that basis. The judge was properly the person to give the instructions, a tape recording does not detract from such factors as the judge's tone of voice and emphasis, and there is little risk the jury would ignore the playing of the judge's recording in open court if it would not ignore the instructions when read to them directly by the judge. Defendant was given several opportunities to object to the procedure and did not do so. We are satisfied that there was no manifest injustice.

Affirmed.

/s/ Patrick M. Meter
/s/ Richard Allen Griffin
/s/ Michael J. Talbot