STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2002
V	No. 231383 Kent Circuit Court
SETH MITCHELL ULYSSESS WILSON, Defendant-Appellant.	LC No. 00-944-FC

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

A jury convicted defendant Seth Mitchell Ulyssess Wilson of first-degree criminal sexual conduct (CSC I).[1] The trial court sentenced Wilson to eight to twenty-five years in prison. Wilson appeals as of right. We affirm.

I. Basic Facts And Procedural History

Angela Smith, Wilson's coworker and the complainant's cousin, invited Wilson to her birthday party on January 8, 2000. Wilson arrived at the party around 11:30 p.m., where he and the complainant met for the first time. The complainant played cards and danced at the party, but did not drink. Wilson also played cards at the party, but drank and smoked marijuana. According to Wilson, after he had an initial conversation with the complainant, she asked him what he was doing after the party and if she could go home with him, saying, "when you guys get ready to go, make sure you don't forget me." Other partygoers, such as Lionnell Scott and John Townsend, observed Wilson and the complainant interacting, and thought that they were getting along well.

Later that night, the complainant left the party with Wilson and two of his friends. Scott was driving and Willie Garrett was in the passenger seat, with Wilson and the complainant sitting in the back seat. Scott dropped off Garrett and also made a stop at a party store. Scott reportedly asked Wilson if he needed a condom. When Wilson said yes, Scott allegedly gave Wilson a condom from the glove box. The complainant, however, later claimed not to have heard this conversation between Scott and Wilson.

[1] MCL 750.520b(1)(f).

After arriving at Wilson's home, the complainant said, she and Wilson eventually went upstairs, where they turned on the stereo and the television. According to the complainant, she and Wilson were looking at magazines and talking when Wilson started touching her. She told him to stop, but claimed that he then "went up under my shirt and unbuckled my bra, and I told him we couldn't have sex, I just met him." Wilson seemed to accept her refusal, so she went into the bathroom to fasten her bra. When she came out of the bathroom, the complainant said, she asked Wilson if she could call a cab, but he told her that he did not have a telephone and he could not give her a ride home, so she went into the bathroom a second time. Wilson then followed the complainant into the bathroom, grabbed her by her hair, hit her head against the toilet, and then dragged her into the hallway, where he continued hitting her on her face and neck. The complainant claimed that, while she and Wilson were in the hallway, he pulled down her pants, lifted her legs over his shoulders, and then inserted his penis into her vagina. The complainant recalled that Wilson's father came out of his room and pulled Wilson off of her, so she was able to stand and pull up her pants. However, Wilson pushed the complainant down the stairs and yelled at her as she was leaving his house, "you tell anything – tell anybody about this, I'm going to kill you. If I see you around the hood, I'm going to kill you."

When the complainant left Wilson's home, she went house-to-house seeking someone who would let her use a telephone. She finally found someone who would let her use the telephone four or five blocks away from Wilson's home. The complainant then called her cousin, Angela Smith, who picked her up and took her to Latoya Smith's house. The complainant explained what had happened and then went with Latoya Smith, who is the complainant's sister, and her boyfriend to find Wilson's house. When they were unable to locate the house, Latoya Smith and her boyfriend took the complainant to her mother's home. The complainant's mother then called the police.

Grand Rapids Police Officer Carol Stahl arrived at the complainant's mother's home around 7:20 a.m. on January 9, 2000, and observed the complainant crying. The complainant said that she had been raped, and Officer Stahl saw that the complainant had an injury to her face, a scratch on her neck, and some blood on her shirt and hands. Officer Stahl obtained Wilson's address from Angela Smith and, after making arrangements for the complainant to receive care, went to his house with Sergeant Potter and Officer Sherrie Bailey.

The officers told Wilson that he had been accused of criminal sexual conduct. According to Officer Stahl, Wilson initially responded that "he did not have sex with the [complainant], . . . and he did not hit her. He stated he had [fallen] asleep on the bed but awoke with [the complainant] – when [the complainant] was taking his necklace and going through his pants pockets. When he found her doing this, he told her to leave." Wilson told the officers that the complainant had fallen down the stairs before she left the house. Joseph Wilson allegedly told Officer Stahl that "he knew nothing about it [the assault], he slept through the whole night." Officer Stahl gathered clothing, including a pair of khaki pants, from Wilson's room as evidence, and the officers took photographs of the scene.

Officer Sherrie Bailey transported Wilson to the Kent County Jail on January 9, 2000. She did not question Wilson while transporting him, but alleged that Wilson said, "This is ridiculous. She wanted to come home with me." While Wilson was being processed at the Kent County Jail, he also allegedly commented, "Look at me. I'm a good looking guy. Why would I

have to rape anyone?" Officer Bailey did not notice any injuries on Wilson, although there were some small traces of dried blood on his arms and hands.

While the officers were arresting Wilson, the complainant met with Suzanne Reiter, a nurse at the YWCA who cares for victims of sexual assaults. Reiter observed that the complainant had blood on her coat and hands, a developing black eye, and red marks and a laceration on her neck. According to Reiter, the complainant told her that Wilson dragged her from the bathroom into the hallway and then pulled down her pants and underwear, while hitting and strangling her. The complainant also told Reiter that Wilson put his fingers and penis in her vagina and that she thought he ejaculated. Reiter observed five tears in the complainant's genital area. Reiter also swabbed the complainant's genital area to gather physical evidence for the crime laboratory to analyze. Reiter said that what she observed during the complainant's physical examination was consistent with her story, though it would be possible for the same injuries to occur during consensual sex.

At trial, Wilson gave a very different version of the events that occurred after he and the complainant returned to his house. Wilson claimed that when he and the complainant went to his bedroom, they talked for about five minutes before they started "making out." Wilson said that he used a condom and that they had sex for forty-five minutes to an hour. Wilson recalled using the bathroom, at which time he noticed that the condom had broken. According to Wilson, after the complainant used the bathroom, he told her about the broken condom and they discussed pregnancy. Wilson stated that he fell asleep around 4:30 a.m. and then woke up to find the complainant taking his necklace off his neck. Wilson claimed that the complainant "put the necklace in her pocket and walked out of the room very quickly. I jumped up and said, come back here, and ran after her." He admitted that hit the complainant and slapped her around before his father stopped the assault. Wilson said that he then forced the complainant to sit on the floor so he could go through her pockets. When he finished looking through her pockets, Wilson said that he slapped the complainant again and then pushed her down the stairs. He denied threatening to kill the complainant, but admitted that he made derogatory remarks toward her.

Wilson's father, Joseph Wilson, testified that during the early morning hours of January 9, 2000, he was sleeping in the same room as his girlfriend, Patricia Green, and his four year-old daughter when he heard his son yelling about his necklace being taken. Green told Joseph Wilson to get up and stop his son so that he would not get arrested for assault. He went into Wilson's bedroom and saw the complainant squatting by the bed with Wilson standing over her and hitting her. Joseph Wilson reportedly told Wilson to stop hitting the complainant, and then hit him on the back of his neck with his crutch when he did not stop the assault. Wilson stopped hitting the complainant and then began going through her pockets to see if she had anything else belonging to him.

Green testified that she heard Wilson come into the house around 3:00 a.m. on January 9, 2000, and then woke up again around 4:45 a.m. because she heard yelling coming from Wilson's bedroom. Green testified that she heard Wilson say, "Hey, where you going? You thought I was asleep, didn't you? I was just waiting on you to do something." Green claimed that she then heard Wilson naming items as he pulled them out of the complainant's pockets. She also heard Wilson hitting the complainant, so she awakened Joseph Wilson so he could attempt to stop the assault.

Paul Donald, an employee at the Michigan State Police Forensics Science Division at the Grand Rapids Crime Laboratory, testified about the tests he performed on the physical evidence gathered from the complainant. Donald found sperm cells on the vaginal and rectal swabs. He also found seminal stains on a pair of boxer shorts and a pair of panties. Donald found blood on two t-shirts, a pair of khaki pants, and a New York Yankees jacket. Donald completed a DNA analysis of blood samples from Wilson and the complainant and then compared the results with the semen and blood he had found on the clothing. Donald found that the blood on one of the t-shirts and on the khakis matched the complainant's DNA profile. The complainant's DNA also matched the vaginal and rectal swabs. The blood on the jacket was a mixture and it could not be determined exactly who contributed to the mixture. Wilson's DNA profile matched the rectal swab taken from the complainant and the semen found on her panties.

II. Sufficiency Of The Evidence

A. Standard Of Review

Wilson contends that the prosecutor failed to prove beyond a reasonable doubt that he committed CSC I because the complainant's testimony was so incredible that no reasonable juror could believe it. Whether the prosecutor provided sufficient evidence to convict Wilson is subject to review de novo.[2]

B. *Lemmon*

To determine whether the evidence presented at trial was sufficient to sustain Wilson's conviction, "this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt."[3] Wilson contends that the complainant's testimony at trial was insufficient to prove this crime because defense counsel impeached her, and her recollection was uncertain and suffered from discrepancies. He suggests that, at most, her testimony demonstrated only consensual sexual activity, noting that the complainant was already sexually active and "street wise," had been overtly attentive to him at the party, asked to go home with him, and had agreed to go with him to his bedroom late at night.

Wilson acknowledges that it was the jury's job to determine whether the complainant was a credible witness, but claims that the complainant's testimony fit into certain narrow exceptions the Supreme Court identified in *People v Lemmon*.[4] In *Lemmon*, the Supreme Court considered the appropriate standard for granting a motion for a new trial, noting that a new trial may be granted on the basis of a credibility determination not as a matter of course, but only in "exceptional circumstances."[5] Examining federal precedent, the *Lemmon* opinion identified several circumstances when a new trial might be appropriate, including

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[2] *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

[3] *People v Grayer*, 252 Mich App 349, 355; 651 NW2d 818 (2002).

[4] *People v Lemmon*, 456 Mich 625, 643-644; 576 NW2d 129 (1998).

[5] *Id*. at 642.

> if the "testimony contradicts indisputable physical facts or laws," "[w]here testimony is patently incredible or defies physical realities," "[w]here a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror," or where the witnesses testimony has been seriously "impeached" and the case marked by "uncertainties and discrepancies."[6]

The only one of these exceptions that Wilson does *not* claim applies to the complainant's testimony is the second exception dealing with testimony that defies physical realities.

Even setting aside the different procedural contexts in this case and *Lemmon*, we cannot say that the evidence introduced at trial fits any of these exceptions when viewed in the light most favorable to the prosecutor.[7] As the *Lemmon* Court was quick to note:

> Criminal cases are usually fought on the battlefield of witness credibility, and this is particularly true in situations involving the credibility of a victim of a CSC crime where the only witnesses present are the victim and the perpetrator, with the credibility of a professed accomplice to an unwitnessed crime, or the credibility of a coconspirator to a conspiracy, which, by its very nature, is a clandestine offense often know only to its members. It is a well established rule that a jury may convict on the uncorroborated evidence of a CSC victim . . . . Jury decisions in these cases are essentially based on the jury's assessment of the witnesses' credibility. In general, the trial courts " 'must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses,' " and only where exceptional circumstances can be demonstrated may the trial judge "intrude upon the jury function of credibility assessment."[8]

This is just such a battle of credibility. Wilson was entitled to present his theory of the case to the jury and attempt to impeach the complainant's credibility. However, Wilson simply has not demonstrated that this case presents "exceptional circumstances" in which the complainant's direct testimony incriminating him, coupled with the physical evidence and the other testimony, was insufficient to prove his guilt beyond a reasonable doubt.

III. Prosecutorial Misconduct

A. Standard Of Review

Wilson argues that he was denied his fundamental right to a fair trial because of the prosecutor's misconduct. However, Wilson failed to object to any of the alleged instances of misconduct, which means our review is limited to determining whether there was plain error that affected his substantial rights.[9]

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[6] *Id*. at 643-644 (citations omitted).

[7] See *Grayer*, *supra* at 355.

[8] *Lemmon*, *supra* at 643, n 22 (citations omitted).

[9] See *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

B. Arguments

Wilson contends that the prosecutor improperly denigrated his presumption of innocence and right to remain silent and placed an unfair burden on defense witnesses to have offered exculpatory information immediately in order for the jury to believe those witnesses. However, examining the prosecutor's remarks in context,[10] it is clear that the prosecutor was presenting the jury with the prosecution's theory of the case in light of the evidence presented at trial. Prosecutors are "'free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case,'"[11] including the contention that the defendant or another witness is not credit-worthy.[12] Wilson has not demonstrated error, plain or otherwise, and was afforded the fair trial to which he was entitled.

IV. Ex Parte Communications With The Jury

A. Standard Of Review

Wilson contends that he was denied a fair trial because the trial court engaged in ex-parte communications with the jury after it began deliberating. Review de novo is appropriate for this constitutional issue.[13]

B. The Trial Court's Communication

Defense counsel brought this issue to the attention of the trial court at sentencing, when a different judge was presiding, explaining:

> There were a couple other things that happened during this trial that in my opinion were a gross injustice to this man's rights. One is after the trial was concluded and the jury went back to deliberate, they had a question. Koncki, or Kellee Koncki [the prosecutor] and I had already left the building, as periodically we do, but we're always on call and easily accessible. The jury had a question. The judge answered the question without even notifying us that he had a question. Or that they [the jurors] had a question. I would not have even learned about this situation had I not engaged in a conversation with Judge Leiber's court clerk, and she happened to mention, "Oh, yeah, by the way, the jury had a question and the judge took care of it.". . .
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> . . . The question was they wanted a reading of the elements for conviction on CSC-1, personal injury. They wanted that reading. If I had been consulted, if

[10] See *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

[11] *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995), quoting *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989) (alteration in *Bahoda*).

[12] See *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

[13] See *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

> Kellee Koncki had been consulted, she and I would have agreed, sure, that's fine, bring the jury back into the courtroom, reread it along with the defense reading of it, because I would have asked for the defense reading. What he did was he sent Lisa, Judge Leiber's clerk, to a copy machine and had her copy 12 copies of the elements out of the jury instruction book and she sent them to the jury room for the jury to read. They did not receive a copy of the defense of consent, they just received what they asked to be read to them. That is my understanding. That, your Honor, in my opinion, is a gross error of judgment. We should have been advised of the fact this jury had a question, we should have been allowed our input on this. I believe, in fairness, Kellee would have agreed to allow a reading by that judge. Once again, I would have had no problem with it as long as they were allowed to hear the consent defense again. They weren't given that opportunity. We were not given the opportunity to even consider the matter.

Defense counsel did not ask for any relief because of this alleged error. As a result, the trial court simply indicated that Wilson was free to raise this issue on appeal.

On appeal, Wilson has not asked this Court to remand the case to the trial court so that he can make a record concerning the trial court's ex parte contact with the jury. However, the prosecutor, at the sentencing hearing and in the appellate brief, has never claimed that defense counsel's summary of the ex parte contact was factually inaccurate. Thus, we assume for the sake of analysis that this occurred.

MCR 6.414(A) mandates that a trial court

> may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The [trial] court must ensure that all communications pertaining to the case between the court and the jury or any juror are made a part of the record.

The trial court in this case plainly violated this court rule in providing the jury with additional instructions without informing the attorneys, allowing them and Wilson to be present for the contact, and failing to make a record of the contact with the jury. However, as much as Michigan courts "discourage" ex parte communications like this, the Michigan Supreme Court in *People v France*[14] held that this sort of contact is not subject to automatic reversal.

To analyze this issue, we must first categorize the trial court's contact with the jury as "substantive, administrative, or housekeeping."[15] The *France* opinion makes clear that the communication in this case was "substantive" because the communication concerned "supplemental instruction on the law given by the trial court to a deliberating jury."[16] "A substantive communication carries a presumption of prejudice in favor of the aggrieved party, regardless of whether an objection is raised. The prosecution may only be rebutted by a firm and

[14] *People v France*, 436 Mich 138, 161-162; 461 NW2d 621 (1990).

[15] *Id*. at 163.

[16] *Id*.

definite showing of an absence of prejudice."[17] The prosecution can accomplish this rebuttal by demonstrating that counsel had consented in advance to the content and manner of the communication, or by "showing that the instruction was merely a recitation of an instruction originally given without objection, and that it was placed on the record."[18]

There is no evidence that Wilson, either individually or through his attorney, consented to this ex parte communication or the content of the supplemental instructions the trial court gave the jury. However, when the trial court issued its instructions to the jury at the close of proofs, the defense did not object to the standard jury instructions explaining CSC I. More importantly, at the sentencing hearing, defense counsel indicated more than once that she had no objection to the ex parte instructions the trial court gave, and that she merely would have asked the trial court to instruct the jury on the consent defense a second time in addition to the elements of the crime. Yet, "[t]here is no requirement that when a jury has asked for supplemental instruction on specific areas that the trial judge is obligated to give all of the instructions previously given. The trial judge need only give those instructions specifically asked."[19] In the absence of a request by the jury for supplemental instruction on the consent defense, the trial court's original instructions on the defense were adequate.[20]

The *France* opinion suggests that the trial court still had an obligation to create a record[21] regarding this contact with the jury, which MCR 6.414(A) confirms. However, the absence of an official record in this case has not harmed our review, given the parties' evident agreement on what transpired outside their presence in the trial court. Accordingly, while we do not approve of the ex parte communication in this case, we see no error requiring reversal.

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot

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[17] *Id*.

[18] *Id*. at 163, n 34.

[19] *People v Darwall*, 82 Mich App 652, 663; 267 NW2d 472 (1978).

[20] See *People v Parker*, 230 Mich App 677, 681; 584 NW2d 753 (1998) (trial court did not err when it reissued requested instructions, but did not reinstruct jury on self-defense, which the jury had not requested); see also *People v Katt*, 248 Mich App 282, 310-311; 639 NW2d 815 (2001) (trial court did not err when it interpreted jury request for supplemental instructions as an indication that jury was deadlocked and declined to reinstruct jury on the burden of proof.

[21] See *France*, *supra* at 163, n 34.