STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERMAIN SKINNER,

Defendant-Appellant.

UNPUBLISHED
November 18, 2003

No. 236876
Genesee Circuit Court
LC No. 98-003756-FC

Before: Murphy, P.J., and Cooper and C. L. Levin*, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(c) (victim under thirteen years of age), second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under thirteen years of age), and first-degree home invasion, MCL 750.110a(2). He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of forty to sixty years for the first-degree CSC conviction, and fifteen to thirty years for the second-degree CSC conviction, to be served consecutive to a twenty- to forty-year term for the home invasion conviction. He appeals as of right. We affirm.

Defendant was convicted of breaking into a home during the night and sexually assaulting an eleven-year-old girl. Defendant's first trial ended in a mistrial because of a deadlocked jury. After the second trial, defendant was convicted as charged. The primary defenses were that the complainant was not assaulted, and some of the DNA found at the scene matched a different man—a relative of the complainant—who may have committed the offense. Other DNA implicated defendant.

I. Effective Assistance of Counsel

Defendant contends that he was denied the effective assistance of counsel when his trial attorney failed to move for a mistrial after the officer-in-charge testified on direct examination that he had not supplied the defense with exculpatory discovery materials because "there is no evidence to support [the claim] that Mr. Skinner is not the person responsible for this crime. Everything has led to him – ah – from the early onset of the investigation, to what has been testified here in court today regarding the DNA evidence. Had it not been Mr. Skinner, I'm

* Former Supreme Court justice, sitting on the Court of Appeals by assignment.

certain that – ah – there would be someone else sitting here [as defendant]." There was no objection to this testimony.

A timely request for, and an appropriate instruction could have cured any prejudice. Defendant's lawyer, rather, sought, on cross-examination, to continue the inquiry whether the officer had properly investigated other possible leads.

To establish ineffective assistance of counsel, a defendant must overcome the presumption that, under the circumstances, the challenged conduct might be considered sound trial strategy. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). It appears that defendant's trial attorney sought to use the officer's testimony to buttress the defense claim that, in a rush to judgment against defendant, the police were blind to evidence pointing to other suspects.

II. Disqualification of Prosecutor

Defendant next contends that he was denied a fair trial when the assistant prosecutor failed to disqualify himself from the prosecution of this matter. Defendant argues that the assistant prosecutor was disqualified because he was endorsed as a witness.

The assistant prosecutor had conducted a pretrial interview with the complainant, and defendant argued that the assistant prosecutor had influenced the complainant's preliminary examination identification testimony by suggesting that the person who committed the offenses would be appearing in court. In a prior appeal, this Court agreed that the identification procedure was unduly suggestive, but found that there was an independent basis for identification. *People v Skinner*, unpublished opinion per curiam of the Court of Appeals, decided September 12, 2000 (Docket No. 219452), slip op at 5.

A witness list contained a handwritten notation of the assistant prosecutor's name. While two names were added to the list in blue ink, and some names were crossed out in red ink or in pencil, the assistant prosecutor's name was written in black ink outside the area used for listing witnesses. A later witness list, filed as part of an amended information, did not include the assistant prosecutor's name among the endorsed witnesses. Defendant argues that the assistant prosecutor was added as a witness in the first trial on the prosecutor's motion.

To be sure, the prosecutor had successfully added the assistant prosecutor's name as a potential rebuttal witness in the first trial.[1] That did not control the proceedings in the second trial. Defendant did not move for the assistant prosecutor's disqualification—although defendant knew that he had been added as a possible witness in the first trial—and the assistant prosecutor did not testify at either trial.

Because defendant failed to preserve this issue, our review is limited to plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130

[1] The People were represented by a different assistant prosecutor in the first trial.

(1999). The assistant prosecutor did not testify, and defendant has not shown how he was prejudiced. We conclude that the defendant's substantial rights were not affected.

III. Denigration of Defense Counsel

Finally, defendant contends that he was denied a fair trial when the assistant prosecutor denigrated defense counsel in arguments before the jury. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case by case basis, and the reviewing court examines the pertinent portion of the record and evaluates a prosecutor's remarks in context, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999), and in light of defense arguments and the relationship the remarks bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Appellate relief is generally precluded if the defendant fails to timely and specifically object, unless an objection could not have cured the error or a failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Watson*, *supra* at 586; *People v Rivera*, 216 Mich App 648, 651-652; 550 NW2d 593 (1996).

Defendant claims that the assistant prosecutor improperly accused defense counsel of misleading the jury when the assistant prosecutor objected to the manner in which defense counsel was introducing an exhibit:

> Your Honor, I'm gonna object to the procedure he's [defense counsel] using. If he's gonna be bringing sections of the [preliminary examination] transcript, then he has to, by the Doctrine of Completeness, read the rest of the sec – that section. Because the next section characterizes the exact terms he's using.

Defense counsel "objected" to being interrupted. The court ruled that the assistant prosecutor's objection was valid under MRE 106.

We find no misconduct in the assistant prosecutor's apparently valid suggestion that the testimony was being taken out of context. The court agreed with the assistant prosecutor's objection, and defendant does not dispute that ruling. We note that defense counsel made a similar argument during trial that the assistant prosecutor could use the "doctrine of completeness" if he "thinks I left anything out." Considered in the context of a valid objection, the assistant prosecutor's remark did not denigrate defense counsel.

The assistant prosecutor also remarked in voicing objections that the defendant's attorney had made a "gross mischaracterization" and a "mischaracterization" of the testimonial record. After defendant objected to the first reference, the assistant prosecutor withdrew his objection, and the phrase "gross mischaracterization." Thus, defendant was granted relief with regard to this first reference, and he has not shown prejudice.

Defense counsel did not object to the second reference to "mischaracterization," although the attorneys argued about which version of the testimonial record was correct. The trial court

expressed agreement with the assistant prosecutor's recollection of the testimony. Defendant has not shown plain error in this regard. The trial court agreed that the assistant prosecutor's comment was factually correct. In any event, the assistant prosecutor's comments did not suggest that defense counsel was intentionally attempting to mislead the jury. Defendant was not denied a fair trial by the assistant prosecutor's objections.

Defendant claims that the assistant prosecutor also committed misconduct when he asked an expert witness whether additional DNA testing could be performed so long after the offense. In his examination, the assistant prosecutor asked, "So, for example, if [defense counsel] doesn't like that you opened the known [sample; from known persons] five days before you opened the unknown – ." That question was interrupted by a defense request for a side-bar conference. No specific objection was noted on the record, but, when the questioning resumed, the assistant prosecutor asked the question a different way.[2] We find no error.

The question was responsive to a prior question from defense counsel regarding the preferable way to test samples. In cross-examination of the DNA expert, defense counsel asked many pointed questions about testing protocols designed to prevent contamination, including the preferability of testing the unknown samples from a crime scene before the known samples are opened or tested. In this context, the question did not denigrate defense counsel, but instead related back to the preferable manner of testing samples.

During another point in the testimony of the DNA expert, the assistant prosecutor was questioning the witness about prior incidents of contamination:

> *Q.* . . . When he [defense counsel] was talking about the two instances of contamination, what's he talking about?
>
> *A.* He's talking about transferring DNA in the form of cells to another sample, inadvertently, by mistake.
>
> *Q.* And both those times, was it – was it detected?
>
> *A.* Ah – In – In the case or scenario that he gave in terms of 450 cells versus a very concentrated stain, you may not detect the contamination that was transferred. Ah – If – If the sample is quite le-weak, you may see a contribution.
>
> *Q.* No. He [defense counsel] just snuck in at this last – his last question –

[2] The assistant prosecutor rephrased the question as follows:

> Just so I know – We're not gonna talk about anything that we've just been talking about. That conversation's over, okay? Just so I know, [defense counsel] was asking you, "well, if you opened the unknown versus the known, which is preferable," I thought you testified you opened the known how many days apart from the unknown?

[DEFENSE COUNSEL]: Please don't refer to me like that. Please, Mr. [assistant prosecutor].

THE COURT: Yeah.

[DEFENSE COUNSEL]: . . . I think it [the original defense question] was fair inquiry and I object to the reference of me.

Again, the assistant prosecutor rephrased the question to avoid referring to defense counsel. The court agreed with defendant's objection, and defendant did not request a curative instruction. Defendant has not shown that his right to a fair trial was prejudiced by the assistant prosecutor's unfortunate choice of words.

Affirmed.

/s/ Michael R. Smolenski
/s/ William B. Murphy
/s/ Charles L. Levin