

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALVIN LORENZO DILLARD,

Defendant-Appellant.

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UNPUBLISHED

May 6, 2004

No. 245182

Lenawee Circuit Court

LC No. 02-009754-FC

Before: Talbot, P.J., and Neff and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(c), and delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv). The trial court sentenced defendant to 135 to 247 months for the CSC I conviction and to lifetime probation for the delivery of cocaine conviction. We affirm.

**I. Delivery of Cocaine**

Defendant contends that the trial court erred in failing to grant his motion for directed verdict on the delivery of cocaine charge. We disagree. In determining if the trial court erred in denying a motion for directed verdict, this Court reviews the record de novo, considers the evidence presented by the prosecution in the light most favorable to the prosecution, and decides if a rational trier of fact could find the essential elements of the crime were proved beyond a reasonable doubt. *People v Mayhew*, 236 Mich App 112, 124; 600 NW2d 370 (1999). The elements of delivery of less than fifty grams of cocaine are: 1) delivery; 2) of cocaine; 3) which defendant knew was cocaine; 4) in an amount less than fifty grams; and, 5) defendant was not legally authorized to deliver cocaine. MCL 333.7401(2)(a)(iv) (see also CJI2d 12.2). Defendant challenges only the second element, that the substance delivered was cocaine.

This case stems from defendant's sexual encounter with a thirteen-year-old girl. The victim and prosecution alleged, and the jury agreed, that the victim had sex with defendant in order to pay for crack cocaine. The victim, along with her mother, and her mother's friends, smoked the substance that defendant gave the victim after the sexual encounter, and therefore, there was no laboratory analysis. But the victim testified that she saw the substance, that it

looked like crack cocaine she had seen in the past, and that it produced the same high as the crack she had smoked in the past.<sup>1</sup> The victim further testified that defendant told her the substance was crack cocaine. The prosecution supported the victim's testimony with the testimony of a police officer with narcotics expertise. The officer's description of crack cocaine and its usual packaging were consistent with the victim's testimony describing the substance defendant gave her. This evidence is sufficient for a reasonable juror to conclude that the substance defendant delivered to the victim was cocaine.

Circumstantial evidence and reasonable inferences arising from circumstantial evidence can sufficiently establish an element of a crime. *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001). The victim's direct testimony regarding her first-hand experience with the substance delivered by defendant, along with the officer's testimony concerning cocaine, was sufficient for a reasonable juror to conclude beyond a reasonable doubt the substance was cocaine. Defendant's contention in essence questions the victim's credibility. This Court will not second-guess the credibility of a witness in a sufficiency of the evidence situation. *Id.* at 702. Given that sufficient evidence existed for a reasonable juror to convict defendant of delivery of cocaine, the trial court did not err in denying defendant's motion for directed verdict. *Mayhew, supra* at 124.

## II. CSC I

Defendant contends that there was insufficient evidence to convict him of CSC I. We disagree. To determine whether sufficient evidence existed to sustain a conviction, the court must view the evidence in a light most favorable to the prosecution and decide if a reasonable juror could find guilt beyond a reasonable doubt. *People v Nowack*, 462 Mich 392, 399; 614 NW2d 78 (2000).

Defendant was convicted pursuant to MCL 750.520b(1)(c). The elements of this offense are: 1) sexual penetration, and 2) the sexual penetration occurred under circumstances involving another felony. MCL 750.520b(1)(c); *People v Jones*, 144 Mich App 1, 3-4; 373 NW2d 226 (1985). Defendant challenges the second element. Defendant repeats his argument that insufficient evidence existed to convict him of delivery of cocaine because insufficient evidence existed to prove the substance was cocaine. Given our above conclusion that sufficient evidence did exist, this argument fails.

Defendant argues that insufficient evidence existed to create a link between the sexual penetration and the delivery of a controlled substance to satisfy MCL 750.520b(1)(c). Defendant essentially argues that these crimes were two separate, unrelated events. Defendant asserts that the evidence offered at trial merely proved he provided the cocaine after the sexual penetration and not at the same time. Defendant asserts that because he did not deliver the drugs simultaneously with the sexual penetration, there is no evidence that the penetration occurred under circumstances involving another felony.

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<sup>1</sup> Although young, the record reflects that the victim had significant exposure to crack cocaine, mainly through her mother. The victim and her mother were on an extensive crack binge at the time these events took place.

The victim's testimony contradicts defendant's assertions. Although no explicit agreement was reached between the victim and defendant, sufficient evidence existed for a reasonable juror to infer that the two crimes were related. The victim, her mother, and the mother's friend, unsuccessfully attempted to obtain money to purchase crack. Defendant made sexual advances towards the victim while her mother was in a store attempting to return stolen goods. Defendant then spoke to the mother's friend, who told the victim to go with defendant to get the crack. Immediately after having sex with the victim, defendant provided her with the crack without other compensation. This is sufficient circumstantial evidence from which the jury could infer a connection between the two crimes and to establish that the sexual penetration occurred under circumstances involving the delivery of the cocaine. *Schultz, supra* at 702; *Jones, supra* at 4.

The statute does not require that the separate underlying felony occur simultaneously with the sexual penetration. *Id.* It merely requires that it occur under circumstances involving another felony. *Id.* Viewed in the light most favorable to the prosecution, this evidence was sufficient for a reasonable juror to find defendant guilty of first-degree CSC I beyond a reasonable doubt. *Nowack, supra* at 399.

### III. Prosecutorial Misconduct

Defendant next contends that the prosecutor committed several acts of prosecutorial misconduct. We disagree. Defendant challenges the prosecutor's closing argument on numerous grounds, for the most part referring to the rebuttal argument as a whole. Defendant failed to preserve his claims of prosecutorial misconduct by timely and specifically objecting to the alleged misconduct. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).<sup>2</sup> Appellate review of improper prosecutor remarks is generally precluded without an objection by trial counsel, because it deprives the trial court of the opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Unpreserved issues of prosecutorial misconduct are reviewed for plain error. *Schutte, supra*. To avoid forfeiture under the plain error rule, three requirements must be met (1) an error must have occurred; (2) the error was plain; (3) and the plain error affected substantial rights, i.e., defendant was prejudiced (the defendant generally must show that the error affected the outcome of the lower court proceedings). *Id.* An appellate court must then exercise its discretion in deciding whether to reverse a defendant's conviction. *Id.* Reversal is warranted only when the plain error results in a conviction of an innocent defendant or seriously affects the fairness, integrity, or public reputation of judicial proceedings independent of the defendant's innocence. *Id.* No error requiring reversal exists where a curative instruction could have alleviated any prejudice. *Id.* at 721.

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<sup>2</sup> Following jury instructions, defendant moved for a mistrial, but only on the ground that the prosecutor stated in closing argument that the victim's mother and friend were co-defendants and that they had pleaded guilty and were in jail. Defendant essentially objected on the basis that the statement encouraged an impermissible "guilt by association" inference by the jury. This denial of the motion for mistrial is addressed in Part IV of this opinion.

### A. Vouching for Credibility of a Witness

Defendant argues that the prosecution improperly vouched for the victim's credibility. A prosecutor cannot vouch for the credibility of his witness by implying that he has some special knowledge of the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). But a prosecutor may comment on his own witness' credibility during closing, especially when there is conflicting evidence and the question of defendant's guilt turns on which witness the jury believes. *People v Stacy*, 193 Mich App 19, 29-30; 484 NW2d 675 (1992). The record must be read as a whole and the allegedly impermissible statements judged in the context in which they were made. *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

Here, the prosecutor was not implying that she had any special knowledge of the victim's truthfulness. The prosecutor made no comments about her personal beliefs or knowledge regarding the victim's truthfulness. She merely demonstrated, from the facts in evidence, that the victim had little reason or motivation to lie. Judging these statements in context, the prosecutor's statements were a fair comment on the victim's credibility. *Stacy*, *supra* at 29-30.

Further, the prosecution's statements rebut a theory presented by defendant. During closing, defense counsel repeatedly questioned the victim's credibility and indicated that she was lying to stay out of trouble with the Family Independence Agency (FIA). The prosecutor's remarks regarding the victim's lack of motivation to lie properly responded to defense counsel's argument. *Schutte*, *supra* at 721; *People v Allen*, 201 Mich App 98, 103-104; 505 NW2d 869 (1993).

### B. Denigrating Defendant, Defense Counsel, and Defendant's Defense

Defendant also generally contends that the prosecution committed misconduct by improperly denigrating defense counsel, defendant, and his defense, but defendant fails to specifically identify the basis of this argument. Defendant may not merely announce a position and then leave it to this Court to discover and rationalize the basis for this claim. *People v Leonard*, 224 Mich App 569, 588; 569 NW2d 663 (1997).

The prosecutor stated, in her closing: "He [defense counsel] is not a spring chicken. It is not like he is still wet behind the ears." The prosecutor made this remark in the context of correcting defense counsel's characterization of the FIA (the FIA's role was to protect children, not to jail them). Taken in the context of defense counsel's statements, the prosecutor's statements rebut the theory that the victim lied about the rape to get herself out of trouble with the FIA. *Schutte*, *supra* at 721. Defendant's claim fails.

### C. Appeal to Juror Sympathy

Defendant contends that the prosecution appealed to the jury's sympathy for the victim. Appeals to the jury to sympathize with the victim constitute improper argument. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). But a prosecutor is given great latitude to argue the evidence and all inferences relating to his theory of the case. *Bahoda*, *supra* at 282. Comments must be judged in context of both the prosecution and defense's theories. *Id.* at 283, 286.

Defendant again fails to specifically identify what statements support his contention. He points generally to the prosecution's comments about the victim's troubled home life and her lack of a motive to lie. Considered in context, the prosecutor's statements were based on the evidence and were a fair response to defense counsel's argument that the victim was a thirteen-year-old "drug using thief" who could not be believed. *Schutte, supra* at 721.

#### D. Facts not in Evidence and Improper Statement of the Law

Defendant challenges the prosecutor's references to the guilt of the victim's mother and her friend. The prosecutor stated:

[The mother's friend] has been charged and plead guilty. [Defense counsel] argued about why isn't she here. She is a co-defendant because she was charged with her participation. The mother is in jail as a result of this. He didn't want you to know any of those things.

All of these people are co-defendants. They cannot be made to testify against themselves. Isn't it interesting that He neglects to tell you that? He doesn't want you to hear those things. By the same token he doesn't want you to look at this.

Defendant specifically challenges these statements on the grounds that they constituted an improper personal attack on defense counsel and misstate the law regarding whether the witnesses could testify. We find no error on these grounds. The statements generally and fairly respond to defense counsel's argument that the prosecution had not produced any witnesses to corroborate the victim's story, specifically naming the victim's mother and her friend, and questioning their failure to testify. *Id.*

Nonetheless, we agree that the prosecutor's specific statements concerning the purported codefendants' guilt were without basis and may constitute error. No evidence at trial supported the prosecutor's statements. Further, evidence of the conviction of an accomplice is generally inadmissible in the trial of a defendant accomplice. *People v Kincade*, 162 Mich App 80, 84-85; 412 NW2d 252 (1987).<sup>3</sup> Even presuming error, however, we conclude that reversal of defendant's convictions is unwarranted.

Given the independent evidence of defendant's guilt, discussed above, including the victim's detailed testimony, we conclude that the error did not affect defendant's substantial rights. *Carines, supra* at 763. The victim provided details of not only the encounter with defendant, but also the context in which the sexual intercourse and drug use occurred. She identified the home where defendant allegedly took her to have sex, which was defendant's grandmother's house. Defendant had full opportunity to challenge the victim's testimony and other corroborating evidence. Further, defense counsel took full advantage of the opportunity to interpret the evidence, and the lack thereof, as the basis of defense theories during his own

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<sup>3</sup> The admission of an accomplice's guilty plea as substantive evidence of a defendant's guilt may constitute error requiring reversal. *People v Barber*, 255 Mich App 288, 297; 659 NW2d 674 (2003); *Kincade, supra* at 85-86.

closing argument. We are unconvinced that any alleged error resulted in the conviction of an actually innocent defendant or that the error seriously affected the fairness, integrity or public reputation of the proceedings. *Id.*

#### E. Remaining Claims of Prosecutorial Misconduct

To the extent that defendant has raised additional claims of misconduct, defendant has failed to adequately brief the merits of these claims. These claims are not properly presented for review. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993). We find no basis for reversal of defendant's conviction on the ground of prosecutorial misconduct. *Schutte, supra* at 720-721.

#### IV. Motion for Mistrial

Finally, defendant claims that the trial court abused its discretion in refusing to grant his motion for a mistrial (see *infra*, n 2). We disagree. This Court reviews the denial of a motion for mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of defendant and impairs his ability to receive a fair trial. *Id.*

Defendant essentially claims that the court erred in denying his motion for mistrial because the prosecutor's misconduct denied defendant a fair trial. Defendant moved for a mistrial on the ground that he was prejudiced by the prosecutor's references to the victim's mother and her friend as codefendants, and statements that they had pleaded guilty or were in jail. For the reasons discussed above, we conclude that the prosecutor's statements, while objectionable, were not so prejudicial that he was denied a fair trial.

Affirmed.

/s/ Michael J. Talbot

/s/ Janet T. Neff

/s/ Pat M. Donofrio