

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY SHAWN SMITH,

Defendant-Appellant.

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UNPUBLISHED  
November 9, 2004

No. 249136  
St. Clair Circuit Court  
LC No. 03-000184-FC

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

Defendant appeals as of right from his jury-based conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(f), for which he was sentenced, as an habitual offender, second offense, MCL 769.10(1)(b), to five to thirty years' imprisonment. We affirm.

This case arises from an incident that took place on New Year's Day, 2003, in Port Huron. The complaining witness testified that defendant, in a friend's bathroom and over her continuous protestations, twice forcibly penetrated her. Defendant maintained that the complainant had agreed to have sex with him in exchange for some marijuana.

Defendant was charged with two counts of first-degree criminal sexual assault. The jury found him not guilty of the first count, but guilty of the other.

The sole issue in this appeal is whether defendant was denied a fair trial by the prosecutor's comments, during closing arguments, on defendant's credibility and expressing his belief that defendant was guilty.

It is misconduct for a prosecutor to denigrate a defendant with prejudicial remarks; the focus must remain on the evidence, not on the personalities involved. See *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995); *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996). It is likewise misconduct for a prosecutor to "vouch for the credibility of his witnesses to the effect that he has some special knowledge concerning a witness' truthfulness." *Bahoda*, *supra* at 276.

To support this argument, defendant presents one passage where the prosecutor commented on the complainant, and one where he commented on defendant:

There was some questions directed to [the complainant] about the emotions that she showed. You saw her, she was getting upset when she was recounting this. She kept getting upset several times over when she kept going through it over and over and over again. And there was some kind of hint or implication that this was made up, I guess, because the question was: Well, you were here before, you didn't cry, how come you're crying now?

My take on that is this is real genuine emotion. This isn't something you make up. She told you she's got an eighth grade education. She's not sophisticated enough to make this stuff up. This is real genuine hurt and pain

....

\* \* \*

Also, of course, you're going to be speaking about the Defendant and his testimony yesterday. I don't think the Defendant is believable. I don't think he's credible. My take on him is he's a sexual predator who took advantage of the situation here and forcefully and violently attacked this woman.

However, neither of the instances of prosecutorial argument drew any objections. A defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Comporting with this standard is this Court's pronouncement in *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996), that "[a]bsent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct."

Although both passages of prosecutorial argument of which defendant here makes issue directly urge credibility determinations upon the jury, neither constitutes misconduct. Where the jury is faced with a credibility question, the prosecutor is free to argue credibility from the evidence. *People v Smith*, 158 Mich App 220, 231; 405 NW2d 156 (1987). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment out of deference to the prosecutor or police. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995). Indeed, "provided the prosecutor's . . . argument is based upon the evidence and does not suggest that the jury decide the case upon the authority of the prosecutor's office, the words 'I believe' . . . are not improper." *People v Jansson*, 116 Mich App 674, 693-694; 323 NW2d 508 (1982).

In these instances, the jury was faced with a classic credibility contest, and the prosecutor argued credibility directly in relation to the evidence. Nowhere did the prosecutor imply that he was speaking from personal knowledge or insight concerning the witness' credibility.

Defendant asserts that there were three other instances of such prosecutorial misconduct, but does so only by referring to page numbers in the transcripts, providing no quotations or specific argument. We have checked the pages cited, and found only additional argument from

the evidence.<sup>1</sup> The prosecutor nowhere implied that he was bringing out-of-court insights to bear. There was no misconduct.

Moreover, the trial court instructed the jury to decide the case solely on the evidence, and that the statements or arguments of the attorneys were not evidence. Even if any of the challenged remarks had any prejudicial potential, any such excess should have been cured by the court's instruction. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Finally, defendant grafts onto this argument the assertion that the lack of objections below constituted ineffective assistance of counsel. Because the ineffective assistance argument is not germane to the one actually set forth in the statement of the question presented, this Court need not address it. MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995). The argument is without merit in any event. Because defendant has failed to show that any prosecutorial misconduct took place, no claim of ineffective assistance may be predicated on defense counsel's disinclination to raise objections in the matter. See *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989) ("Counsel is not obligated to make futile objections.").

Affirmed.

/s/ Christopher M. Murray

/s/ David H. Sawyer

/s/ Michael R. Smolenski

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<sup>1</sup> We caution appellate counsel against expecting this Court to search for the substance behind such cursory presentation. See *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000) ("A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim."); *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993) (a party's mere assertion of error, presented without cogent argument or supporting authority, is insufficient to invoke this Court's consideration).