

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER TOBIAS PATILLO,

Defendant-Appellant.

UNPUBLISHED

November 28, 2006

No. 262689

Oakland Circuit Court

LC No. 02-184859-FC

Before: Whitbeck, C.J., and Sawyer and Jansen, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for three counts of first-degree criminal sexual conduct (“CSC I”), MCL 750.520b(1)(c) and (1)(f)(i), first-degree home invasion (“home invasion”), MCL 750.110a(2), and assault, MCL 750.81(2). Defendant was sentenced to 12 to 40 years’ imprisonment for each of the three CSC I convictions, 10 to 20 years’ imprisonment for the home invasion conviction, and 93 days in jail for the assault conviction. We affirm.

Defendant argues on appeal that the prosecutor made improper comments during closing argument that appealed to the jury to sympathize with the victim, vouched for the credibility of the victim and the merits of her allegations, and invoked a sense of civic duty from the jurors. Defendant also asserts that during trial a police officer improperly remarked on defendant’s right to remain silent. We disagree.

Because defendant did not object to the prosecutor’s remarks, he failed to preserve the issue for appeal. Hence, we review for plain error that affected defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Defendant did object to the police officer’s testimony, allegedly pertaining to defendant’s silence, which we review de novo as a preserved constitutional issue. *People v Haynes*, 256 Mich App 341, 345; 664 NW2d 225 (2003).

A prosecutor need not argue in the blandest of terms. *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004). A prosecutor is free to argue the evidence and any reasonable inferences that may arise from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Although a prosecutor may not personally vouch for the credibility of a witness or suggest that they have some special knowledge about the truth of a witness’s testimony, they may argue the credibility of a witness based on the evidence presented at trial. *People v*

McGhee, 268 Mich App 600, 630; 709 NW2d 595 (2005). It is also improper for a prosecutor to appeal directly to the jury to sympathize with the victim or evoke the jury's sense of civic duty. *Matuszak*, *supra*.

The prosecutor's remark about the "horrible experience" that the victim experienced does not appeal directly to the jury's sympathy or invoke the jury to act in accordance with their civic duty. Rather, the prosecutor's reference to the victim's "horrible experience" was merely a means to direct the jury to consider the nature of the evidence that was presented at trial. Defendant admitted that he beat the victim. The victim underwent an intrusive forensic medical examination and was required to repetitively describe the events that occurred. During trial, the victim's sexual history was put on public display. The evidence presented supported the comments made by the prosecutor that the victim went through a "horrible experience" and had no ulterior agenda or motivation to fabricate her accusation of rape. The prosecutor never appealed directly to the jury to sympathize with the victim, but merely made a valid argument based on evidence presented during trial.

The next instance of prosecutorial misconduct asserted by defendant occurred during the prosecutor's rebuttal argument. Defense counsel suggested during his closing argument that the prosecutor had never lost a case, that the prosecutor's only motivation was to win and that defense counsel was the only one that could lose the case. In rebuttal, the prosecutor stated that her actions were not "about winning and loosing." The prosecutor indicated that her only motivation was "justice," and that "[t]here are no winners." The prosecutor asserted that, regardless of the outcome of the trial, the victim is "never going to be a winner." Because defense counsel first raised the issue of winning and losing, it was proper for the prosecutor to rebut defense counsel's argument. It is recognized that even "improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), overruled in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

A review of the lower court record fails to support defendant's assertion that the prosecutor improperly appealed to the jurors' sympathy. As such, the comments referenced in support of defendant's allegation neither blatantly appealed to the jury's sympathy nor were so inflammatory that they served to prejudice defendant. The comments were only a very brief aspect of the overall case presented by the prosecutor. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). In addition, the court instructed the jury that the statements and arguments of the attorneys were not evidence and that the jury should not allow sympathy for the victim to influence their decision. Jurors are presumed to follow a trial court's instructions. *Matuszak*, *supra*, p 58. Hence, the prejudicial effect, if any, would have been cured by the jury instructions. Because defendant was not prejudiced by the prosecutor's comments, there is no entitlement to relief. *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001).

Although defendant asserts that comments by the prosecutor appealed to the jurors' civic duty to obtain a conviction, defendant fails to elaborate on this allegation by any specific citation to the lower court record for examples of the alleged misconduct or argument. "It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him

his arguments, and then search for authority either to sustain or reject his position.” *People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).

Similarly, defendant asserts the prosecutor’s comments improperly served to vouch for the credibility of the victim. A review of the lower court record reveals that the comments of which defendant complains do not constitute prosecutorial misconduct. When viewed in context, it is clear that the prosecutor was merely arguing and delineating the consistency between the victim’s testimony and the physical evidence and that defendant’s guilt was a reasonable inference to be made from this evidence. *Bahoda, supra*, p 282. While a prosecutor may not vouch for the credibility of a witness by implying that they have some special knowledge of their truthfulness, “a prosecutor may comment on h[er] own witnesses’ credibility during closing argument, especially when there is conflicting evidence and the question of defendant’s guilt depends on which witnesses the jury believes.” *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). As such, defendant has failed to demonstrate that the prosecutor’s comments constituted outcome determinative plain error, thus, forfeiting the issue. *Id.* at 456.

Defendant next argues that defendant’s right to a fair trial and due process was affected because a police officer commented on defendant’s right to remain silent. While the officer was under direct examination by the prosecutor he was asked to describe his duties as lead investigator. The officer replied that he coordinated evidence, took initial reports from witnesses and the victim, and that he “would have taken a statement from [defendant].” At this point defense counsel objected and nothing further was said throughout the remainder of the trial regarding defendant’s right to remain silent or the exercise of that right. A curative instruction was neither requested nor provided at the time of the objection.

Police officers have the duty to avoid improper comments during trial. *People v Holly*, 129 Mich App 405, 415-416; 341 NW2d 823 (1983). It is improper to comment on a defendant’s post-*Miranda*¹ right to remain silent. *People v Dixon*, 217 Mich App 400, 405-406; 552 NW2d 663 (1996). Commenting on a defendant’s pre-*Miranda* silence, however, is permissible. *Id.* If a defendant fails to allege sufficient facts on appeal to establish whether the remarks concerned a pre- or post-*Miranda* silence, the defendant forfeits his right to an evidentiary hearing on remand. *Id.* at 406.

It is not clear, even in its most basic context, whether the police officer’s comment referred to defendant’s silence. Not only is it unclear whether a comment was actually made regarding defendant’s silence, even if the reference is construed as a comment on his silence, it is unclear whether the reference involved defendant’s pre- or post-*Miranda* silence.

The constitutions of the United States and the State of Michigan contain provisions which guarantee criminal defendants “the right to be free of governmentally compelled self-incrimination.” *People v Collier*, 426 Mich 23, 40; 393 NW2d 346 (1986) (Boyle, J., concurring); US Const, Am V; Const 1963, art 1, § 17. Pursuant to these provisions, it is inappropriate for a prosecutor to elicit testimony regarding a criminal defendant’s silence or to

¹ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

comment on his silence. *People v Bobo*, 390 Mich 355; 212 NW2d 190 (1973). However, because defendant's silence in this case was not demonstrated to be either the result of a police interrogation or to have been maintained in reliance on any *Miranda* warnings, it was not constitutionally protected. *People v Schollaert*, 194 Mich App 158, 167; 486 NW2d 312 (1992).

Notably, the Michigan Supreme Court has recognized that “it would not comport with due process” to permit a prosecutor to call attention to a defendant’s silence following defendant’s receipt of his *Miranda* warnings. *People v Dennis*, 464 Mich 567, 574; 628 NW2d 502 (2001) (citation omitted). In similarity to this case, *Dennis* only comprised a “single question and answer” in which a detective, responding to an open-ended question, revealed that the “defendant had refused to be interviewed by the detective before speaking with an attorney.” *Id.* at 574-575. As here, *Dennis* involved “no further questioning or argument regarding defendant’s silence.” *Id.* Based on these factual circumstances, the *Dennis* Court opined the defendant was not deprived of his constitutional right to due process by the question and answer exchange. *Id.* at 581.

This is not a situation where the purported reference to defendant’s silence served to impeach his exculpatory testimony. The prosecutor did not follow up on the line of questioning or comment further on the officer’s statement during trial or closing argument. Hence, in accordance with *Dennis*, it cannot be demonstrated that the one question and partially elicited response affected either the outcome of the proceedings or infringed on defendant’s right to due process or a fair trial.

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Kathleen Jansen