

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAMIKA SHUNTELL WILLIAMS,

Defendant-Appellant.

UNPUBLISHED

November 18, 2008

No. 279631

Macomb Circuit Court

LC No. 2007-000128-FC

Before: Zahra, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from her jury trial convictions of two counts of torture, MCL 750.85, and two counts of first-degree child abuse, MCL 750.136b(2). She was sentenced to 15 to 25 years in prison for each torture conviction, and 10 to 15 years in prison for each first-degree child abuse conviction. We affirm defendant's convictions and prison sentences, but remand for consideration of her ability to pay attorney fees and investigation costs.

Defendant first argues on appeal that the prosecutor improperly elicited testimony from multiple witnesses regarding the credibility of the two victims in this case. We disagree. This unpreserved issue is reviewed for outcome-determinative, plain error. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "Further, we cannot find error requiring reversal where a curative instruction could have alleviated any prejudicial effect." *Id.* at 329-330.

The victims in this case, twin sisters, were adopted by defendant in 2005. At the time of the incidents in question they were enrolled in the third grade. After their teachers noticed some suspicious injuries on the girls, the school called Child Protective Services (CPS) to investigate. Two CPS caseworkers examined and interviewed the victims. The victims had marks and scars all over their bodies, some fresh and some old. Both girls had bruised eyes and linear patterns of bruising on their bodies. At first, the victims were reticent and gave improbable stories regarding the sources of their injuries. They told one of the caseworkers that they were afraid of getting into trouble if they disclosed who injured them.

After one caseworker reassured the girls that they were secure and could disclose the information safely, both victims stated that it was defendant who had injured them. The

caseworkers testified that they did not believe the victims' initial statements because they were inconsistent with the injuries and their demeanor was, according to the caseworkers' experience and training, not consistent with someone who was providing the full truth. After the victims began to talk about defendant, their demeanor changed and they appeared to be more forthright and honest, according to the caseworkers.

Defendant argues that the prosecutor's questioning of the caseworkers regarding whether and why they believed the victims' second explanation over the first was improperly elicited to bolster the credibility of the victims. A question about whether testimony is properly elicited is "as much an evidentiary issue as it is a prosecutorial misconduct matter" *People v Dobek*, 274 Mich App 58, 70-71; 732 NW2d 546 (2007). As such, this Court's review focuses on whether the testimony was elicited in good faith. *Id.* at 71. The prosecutor is entitled to attempt to introduce evidence she believes will be accepted by the court. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). On the other hand, it is generally impermissible for a witness to opine about the credibility of another witness. *Dobek, supra* at 71. "An expert may not vouch for the veracity of a victim." *Id.* Credibility determinations are to be made by the jury. *Id.*

The prosecutor's questioning was not in bad faith. It was necessary to understand which of the victims' conflicting explanations the caseworkers believed in order to explain their further immediate actions with respect to the investigation. The prosecutor asked each caseworker what led them to their conclusions and did not ask them to judge the general character for truthfulness of the victims.¹ Further, as witnesses for the prosecution, the jury would not be surprised to discover that they believed the victims' stories. Finally, both victims testified at trial and were, therefore, subject to cross-examination and subject to having their credibility directly judged by the jury. The prosecutor's questioning did not usurp the jury's role in making credibility determinations.

Defendant next argues that the prosecutor improperly elicited testimony regarding the victims' credibility from two police officers who also interviewed the girls. The officers were called to the school after the CPS caseworkers concluded that there were allegations of child abuse. Like the caseworkers, the officers needed to make a determination regarding the victims' veracity in order to decide whether to continue the investigation. One officer testified that the victims did not want to talk to him and gave him an explanation for the injuries – that they fell on some wood chips – that was inconsistent with the nature of the injuries. The other officer only testified that the girls' statements to him were consistent with what he was told by the caseworkers and that he concluded that the investigation should be pursued. This testimony was even less potentially harmful to defendant than that from the caseworkers. It was essential to understand how the officers made their immediate decisions regarding the case, and the officers did not opine regarding the victims' general character for truthfulness. The prosecutor's questioning was not improper in this instance either.

¹ For this reason, we reject the prosecutor's argument that the testimony was admissible under MRE 608.

Defendant next argues that the prosecutor improperly elicited testimony from the examining doctor, Bradley Gutierrez. Gutierrez testified as follows.

Q. Can you tell if a patient is lying about their injuries?

A. Sometimes, yes, you can.

Q. What do you look for?

A. Well, you just look – look at body . . . language. And, generally, as I stated earlier, children, in my experience, are brutally honest and will tell you the truth. Having kids of my own, they tend not to lie. It's not in their nature at that age, you know.

Q. What reason would they lie?

A. Well, usually to protect – if the children were to lie . . . I would say they would . . . like to protect a family member.

While Gutierrez was, like the other witnesses, only testifying regarding his immediate perception of the victims' veracity, his opinion in this regard was not relevant to his medical examination. Further, he opined regarding the general truthfulness of children. Moreover, the prosecutor elicited this testimony directly from him. This testimony infringes on the jury's role of making credibility determinations.

Nevertheless, this error did not affect defendant's substantial rights. Gutierrez's testimony was brief. The jury had an opportunity to judge the victims' credibility first-hand. On cross-examination, Gutierrez admitted that he was not qualified to judge whether the victims were telling the truth. Further, there was ample other evidence to support the victims' explanations, including their own testimony. Moreover, a simple curative instruction would have alleviated any prejudicial effect of this testimony by making clear that Gutierrez's testimony was not based on his expert opinion and that the jury should not consider it in making a credibility determination about the victims. *Callon, supra* at 329-330. Thus, there was no error requiring reversal in Gutierrez's testimony.

Defendant next argues that the prosecutor, herself, vouched for the credibility of the victims in her closing argument. A prosecutor may not vouch for the credibility of her witnesses by implying that she has some special knowledge concerning it. *People v Schutte*, 240 Mich App 713, 722; 613 NW2d 370 (2000), overruled in part on other grounds by *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004); *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). However, a prosecutor may comment on her own witnesses' credibility, especially where credibility is at issue and to rebut charges of fabrication by the defense. *Thomas, supra* at 455; *Schutte, supra* at 721-722. The prosecutor is free to argue from the evidence and its reasonable inferences in support of a witness's credibility. *Schutte, supra* at 721-722. The prosecutor simply must refrain from commenting on her "personal knowledge or belief regarding the truthfulness of the . . . witnesses," *Thomas, supra* at 455, and may not "convey a message to the jury that the prosecutor had some special knowledge or facts

indicating the witness' truthfulness," *People v Bahoda*, 448 Mich 261, 277; 531 NW2d 659 (1995).

The prosecutor stated in her closing argument:

Now you've heard a lot of implying by [defense counsel] that these little girls lie and we shouldn't trust them. I'm gonna be the first to admit that little kids do lie. As a matter of fact, children lie to get out of trouble. Right? They don't like to get into trouble. They don't lie to be paraded through a courtroom to talk about the, the . . . sadistic whims of a woman who all they wanted was to love them, not beat them repeatedly.

* * *

Why would they lie about the brutal, repeated abuse that they endured?
Why would they lie about the torture they suffered . . . ?

Nothing in this statement indicates to the jury that the prosecutor possessed any personal or special knowledge regarding the truthfulness of the victims' testimony. *Bahoda, supra* at 277. Defense counsel questioned multiple witnesses regarding specific instances of lying by the girls, and argued in his closing argument that the girls were lying about how they were injured. The prosecutor was free to argue that her witnesses were credible, especially where credibility was an issue in the case. *Thomas, supra* at 455. The prosecutor did not commit misconduct by merely arguing that victims had no motive to lie in this case.

Finally, defendant argues that defense counsel was ineffective for failing to object to and request curative instructions regarding the above instances of alleged prosecutorial misconduct. Because there was no prejudicial error introduced by the prosecutor's conduct, defendant's claim of ineffective assistance fails. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005).

Defendant next argues that the trial court failed to consider her ability to pay when it ordered her to repay attorney fees and investigative fees. We agree. This issue is also unpreserved and, therefore, reviewed for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Absent an objection by the defendant, a court does not need to make formal findings on the record regarding the defendant's ability to pay. *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d 476 (2004); see also *People v Arnone*, 478 Mich 908, 908; 732 NW2d 537 (2007), and *People v DeJesus*, 477 Mich 996, 996-997; 725 NW2d 669 (2007) (citing *Dunbar* approvingly). Defendant did not object at the time of sentencing. Despite this, the sentencing court must still provide *some* indication that it considered the current and future ability to pay. *Dunbar, supra* at 254-255. This can be as little as a "statement that it considered the defendant's ability to pay." *Id.* The trial court made no such statement.

This was plain error. *Carines, supra* at 763. Moreover, it is a violation of due process to require such reimbursement without some consideration of the ability to pay. *Dunbar, supra* at 254. Thus, the case must be remanded to the trial court to determine the question of fee

reimbursement while considering defendant's ability to pay. *Arnone, supra* at 908; *Dunbar, supra* at 254-255. The prosecutor accedes to this process on appeal.²

Defendant's conviction and prison sentence are affirmed, but the matter is remanded for a determination of her current and future ability to repay her court-appointed attorney fees and investigation costs. We do not retain jurisdiction.

/s/ Brian K. Zahra

/s/ Mark J. Cavanagh

/s/ Patrick M. Meter

² It is not entirely clear that *Dunbar* applies to investigation costs in addition to attorney fees. However, given the similarity of investigation costs to attorney fees, and given the prosecutor's agreement that a remand is necessary with regard to "attorney fees and investigator fees," we conclude, under the circumstances of this case, that the remand should encompass both types of fees.