

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS MICHAEL VIRDEN,

Defendant-Appellant.

UNPUBLISHED
February 17, 2009

No. 281307
Lenawee Circuit Court
LC No. 07-013040-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS MICHAEL VIRDEN,

Defendant-Appellant.

No. 281876
Lenawee Circuit Court
LC No. 07-013042-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THOMAS MICHAEL VIRDEN,

Defendant-Appellant.

No. 281877
Lenawee Circuit Court
LC No. 07-013041-FC

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of first-degree criminal sexual conduct (victim between 13 and 16 years of age and related to perpetrator), MCL 750.520b(1)(b)(ii). Defendant was sentenced to concurrent prison terms of 135 to 405 months

for one conviction and 180 to 540 months for each of the remaining three convictions. We affirm, and decide these appeals without oral argument pursuant to MCR 7.214(E).

I. Factual History

These consolidated cases arise from allegations of criminal sexual conduct made by the victim against defendant, her father. Defendant and his wife are the parents of two children, the victim and her twin brother. The victim asserted that defendant engaged in inappropriate physical contact with her since she had reached the age of six, but only four specific instances were charged. The charged events occurred when the victim had reached between 13 and 16 years of age, and involved digital penetration, fellatio and cunnilingus. The victim alleged that defendant would attempt to touch her private areas and, if she resisted or expressed discomfort, would suggest she did not love him, and that if she told anyone of his behavior that he would go to jail and she would be “taken away.” All contact occurred within the family residence when the victim’s mother and brother were either not present or in other areas of the home.

Defendant denied that any inappropriate contact occurred. Defendant attributed the victim’s allegations to recent difficulties involving the victim’s attitude and behavior regarding her boyfriend, and defendant’s decision to forbid the continuation of that relationship. The victim’s mother and brother denied having observed any inappropriate contact between the victim and defendant, and did not believe her allegations. The victim’s mother also denied that the victim had ever implied or hinted of any concerns related to defendant’s conduct. In fact, defendant, his wife, and the victim acknowledged that when defendant and his wife contemplated divorce, the victim indicated she would prefer to live with defendant, along with her brother.

At trial, the court permitted the prosecutor to introduce the testimony of Crystal Wolfe, a former babysitter for the victim and her brother. Wolfe, age 22 at the time of trial, began babysitting for defendant’s children when she was approximately 13- or 14-years of age. Wolfe testified that defendant verbalized inappropriate comments regarding her appearance, which made her uncomfortable. Wolfe asserted that defendant also touched her directly, or using an item, by rubbing her arms, legs and stomach and “brush[ed] his hands up over my breasts.” Wolfe stopped babysitting for the children because she felt uncomfortable with defendant, but did not initially report his alleged conduct. Wolfe acknowledged that she remained friendly and had frequent contact with the victim. Defendant and his wife denied that Wolfe ever refused to babysit at their home and asserted that they used her as a babysitter on a very limited basis, on about five occasions. Defendant denied all of Wolfe’s assertions that he had engaged in any inappropriate verbal or physical contact with her.

In addition, during opening and closing arguments the prosecutor referenced that defendant and his wife had voluntarily relinquished their parental rights to the victim. Mention of the relinquishment of their parental rights was also briefly elicited through testimony of the victim and the assigned Child Protective Services caseworker, Candace Aldrich.

II. Standard of Review

On appeal, defendant argues that the prosecutor’s conduct denied him a fair trial, specifically that the prosecutor improperly shifted the burden of proof by eliciting evidence that

he and his wife had voluntarily released their parental rights to the victim, and by mentioning that fact in her opening statement and closing argument. He also argues that the prosecutor improperly denigrated defense counsel and the defense. Because defendant did not object to the prosecutor's conduct at trial, he failed to preserve this issue for appeal. Therefore, relief is precluded unless defendant establishes a plain error that affected the outcome of the trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004); *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Defendant additionally contends that the trial court erred in admitting other acts evidence, contrary to MRE 404(b)(1). We review for an abuse of discretion the trial court's decision whether to admit evidence. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

III. Analysis

A. Prosecutorial Misconduct

"The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial (i.e., whether prejudice resulted)." *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). A prosecutor's comments are "evaluated in light of defendant's argument and the relationship they bear to the evidence." *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002).

The prosecutor cannot argue that she has some special knowledge that the defendant is guilty. *People v Humphreys*, 24 Mich App 411, 418-419; 180 NW2d 328 (1970). Nor may a prosecutor inform the jury that another court has made a determination regarding the defendant's guilt, even if under a lesser standard than proof beyond a reasonable doubt, because it tends to shift the burden of proof to the defendant to prove his innocence. *People v Hudson*, 123 Mich App 624, 625; 333 NW2d 12 (1982). In this case, however, evidence that defendant voluntarily released his parental rights after the victim's allegations surfaced did not violate these rules because it did not impart information that another court had made an adjudication that defendant committed the charged acts. Notably, defense counsel did not object to the prosecutor's opening and closing arguments. Moreover, even were we to assume some impropriety in the prosecutor's reference, because defendant failed to object and the prosecutor's comments could have been cured by a timely instruction, this Court will not find a miscarriage of justice to have occurred. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). The trial court instructed the jury that their verdict must rest on the evidence presented at trial, and that statements made by the prosecutor and defense counsel did not comprise evidence. "Jurors are presumed to follow their instructions and instructions are presumed to cure most errors." *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005).

With regard to defendant's claim the prosecutor denigrated his counsel and the defense, a prosecutor may argue the evidence and all reasonable inferences arising therefrom as it relates to her theory of the case, but "must refrain from denigrating a defendant with intemperate and prejudicial remarks." *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995). A

prosecutor may not question defense counsel's veracity, suggest that defense counsel is intentionally attempting to mislead the jury, personally attack defense counsel, or denigrate the defense. *Watson, supra* at 592; *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996); *People v Wise*, 134 Mich App 82, 101-102; 351 NW2d 255 (1984). However, a prosecutor may point out deficiencies in defense counsel's arguments in light of the evidence. *People v Howard*, 226 Mich App 528, 548; 575 NW2d 16 (1997). Thus, a comment that might otherwise qualify as improper "may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument." *Kennebrew, supra* at 608.

Defendant argues that the prosecutor denigrated or attacked defense counsel by inaccurately suggesting that he had called the victim an "evil, little witch" and that he had referred to another witness as "evil." A review of the transcript shows that the prosecutor in fact argued that if the jury accepted defense counsel's argument, it would have to conclude that the victim and the other witness were both evil. The prosecutor's rebuttal argument properly responded to defendant's argument that the victim fabricated the allegations out of spite and that the other witness did so for her own ulterior reasons. The prosecutor's argument did not denigrate or attack defense counsel or suggest that he had tried to mislead the jury. Accordingly, no plain error occurred.

B. Other Acts Evidence—MRE 404b(1)

Contrary to defendant's assertions on appeal, the trial court did not abuse its discretion in admitting the challenged other acts evidence. Although the court allowed Wolfe to testify, the prosecution was not permitted to introduce her testimony during its case-in-chief as substantive evidence of defendant's guilt under MRE 404b(1). Rather, the court allowed the testimony as rebuttal evidence after the prosecution and the defense had both rested. The evidence was properly admitted to contradict the defense witnesses' implication that defendant could not have molested the victim because they had never observed him to engage in any such type of behavior. *People v Figgures*, 451 Mich 390, 399; 547 NW2d 673 (1996); *People v Pesquera*, 244 Mich App 305, 314; 625 NW2d 407 (2001).

Affirmed.

/s/ Michael J. Talbot
/s/ Richard A. Bandstra
/s/ Elizabeth L. Gleicher