STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 19, 2009
v	No. 281765 Montcalm Circuit Court
GAMALIEL WARREN KINSEY, Defendant-Appellant.	LC No. 07-009011-FH

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of criminal sexual conduct, second degree (CSC II), MCL 750.520c(1)(a) (victim under age 13). Defendant was sentenced to concurrent prison terms of 14 months to 15 years for each of the convictions. Defendant appeals as of right, and for the reasons set forth in this opinion, we affirm.

This case arises from a complaint made by a child that defendant had "inappropriately" touched her on two occasions while defendant and the victim were attending a church service. Defendant was tried and convicted of the charged offenses in October 2007. Following the verdict, it was revealed that one of the jurors "might have dozed" during the judge's instructions.

Defendant asserts that his right to a fair trial was violated because a juror who was asleep for a portion of the jury instructions participated in convicting him. The trial judge heard and denied a motion for a new trial based on this complaint. The court's decision to deny a new trial is reviewed for an abuse of discretion, while its findings of fact are reviewed for clear error. *People v Crear*, 242 Mich App 158, 167; 618 NW2d 91 (2000). An abuse of discretion occurs when the result is outside the range of principled outcomes. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008). A court's finding is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake was made. *Hill v Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007).

A new trial may be granted on all or some of the issues when the substantial rights of a party were materially affected because, among other things, there was irregularity or misconduct in the proceedings of the jury. MCR 2.611(A)(1). The misconduct must have been of a nature that affected the impartiality of the juror or had disqualified him from exercising the powers of reason and judgment. *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998). To justify a new trial on the basis of juror misconduct, a defendant must show actual prejudice

resultant from the presence of the juror or that the juror was excusable for cause. *Crear*, *supra* at 167.

Jurors are presumed to be qualified and competent. *Froede v Holland Ladder & Mfg Co*, 207 Mich App 127, 130; 523 NW2d 849 (1994). Misconduct can be demonstrated with evidence pertaining to outside or extraneous influences, but cannot be demonstrated with evidence of misconduct inherent in the verdict, such as juror thought processes or inter-juror inducements. *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

> In *People v Nick*, 360 Mich 219, 230; 104 NW2d 435 (1960), our Supreme Court set forth the standard of review where there is an allegation of juror misconduct:
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> "It is well established that not every instance of misconduct in a juror will require a new trial. The general principle underlying the cases is that the misconduct must be such as to affect the impartiality of the jury or disqualify them from exercising the powers of reason and judgment. A new trial will not be granted for misconduct of the jury if no substantial harm was done thereby to the party seeking a new trial, even though the misconduct is such as to merit rebuke from the trial court if brought to its notice."

Before this Court will order a new trial on the ground of juror misconduct, some showing must be made that the misconduct affirmatively prejudiced the defendant's right to a trial before an impartial and fair jury. *People v Provost*, 77 Mich App 667, 671; 259 NW2d 193 (1977), rev'd on other grounds, 403 Mich 843 (1978). In the instant case, defendant contends that the juror was sleeping for 25 minutes during jury instructions, but the record does not demonstrate what, if any, information she missed while "dozing." Defendant does not specifically allege how he was prejudiced by the juror's sleeping, only that the juror could not have been fully informed, or qualified to give a verdict.

The record reveals that when questioned by defense counsel as to how much of the jury instructions that the judge read did the juror hear, she responded: "I understood it all." When asked by defense counsel if the juror heard the instructions read by the trial court the juror responded, "Yes." Therefore, the record leads us to conclude that the trial court did not abuse its discretion in denying the motion for a new trial based on this issue.

Next, defendant argues that the prosecutor's statement that defendant offered "phony alternative explanations," disparaged the defense by suggesting that the defense was not credible and trying to mislead the jury. This issue is not preserved for appeal because it was not raised in the trial court. Unpreserved claims of prosecutorial misconduct may only be reviewed for plain error. *People v Odom*, 276 Mich App 407, 413; 740 NW2d 557 (2007). 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. *Id.*

A prosecutor has a duty to provide a defendant with a fair trial, but may use strong language when arguing his case if it is supported by the evidence. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). A prosecutor may argue the evidence and make reasonable inferences to support his theory of a case. *People v Christel*, 449 Mich 578, 599-600;

537 NW2d 194 (1995). Prosecutorial remarks are evaluated on a case-by-case basis in the context of the defense arguments and the relationship of the comments to evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631. When defendant advances evidence or a theory, prosecutorial argument on the inferences created is proper. *People v Reid*, 233 Mich App 457, 477; 592 NW2d 767. A prosecutor may even argue from the evidence that a witness is unworthy of belief. *Id.* at 478.

A prosecutor is afforded great latitude regarding his arguments and conduct at trial. *People v Unger (On Remand)*, 278 Mich App 210, 236; 749 NW2d 272 (2008). But, the prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *Id*. However, the prosecutor's comments may properly address the weaknesses of defendant's theory of defense. *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005).

In the instant case, prosecutor said, "Don't be distracted by phony, alternative explanations for the defendant's actions." While the propriety of this remark may be subject to some debate it is not plainly improper. Rather, it is plausible to view this remark as a permissible response to defense arguments asserting potential innocent explanations for the incident. Thus, defendant is not entitled to relief based on this issue because he has not shown plain error.

Next, defendant argues that he was denied a fair trial because the prosecutor attempted to bolster the credibility of the victim by vouching for her truthfulness in closing arguments. This issue was also not preserved and may be reviewed only for plain error that resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings. See *Odom*, *supra* at 413.

A prosecutor may properly argue in closing regarding the credibility of witnesses, and may argue from the evidence and the inferences to be drawn from the evidence that the defendant is guilty. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992). The prosecutor may not imply that he had some special knowledge that a witness was testifying truthfully. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). And the prosecutor may not vouch for a witness's credibility with her integrity or the prestige of the position. *McGhee*, *supra* at 633.

A prosecutor's remarks are reviewed in context, particularly in light of defense arguments, to determine whether the defendant was denied a fair trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). Here, defendant contends that the prosecutor impermissibly bolstered the victim's credibility and the credibility of the victim's great-aunt when he said, "She's honest. She's credible and I believe her to be believable. As I said, I don't think anybody's lying to you. I think [the great-aunt] is telling you the story as best she remembers it and her testimony is very consistent." These remarks were made in the context of the prosecutor explaining how parts of the victim's testimony changed after she had a dream and why the great-aunt was credible even though she did not recall some details.

The victim's changing testimony was a substantial aspect of the defense. A prosecutor may comment on his own witness's credibility during closing argument, especially when evidence conflicted and the question of the defendant's guilt depends on which witnesses the jury believes. *Thomas*, *supra* at 455. The prosecutor may argue from the facts that a witness

should be believed. *Id.* Here, the prosecutor was attempting to prove the witnesses' credibility with references to the facts of the case. But he was also referencing his personal experience. In the sentence preceding the statement in question the prosecutor tried to explain the possible impact of the victim's dreams with reference to his father's advice to him to "sleep on it" when you have a problem. The prosecutor also referred to his personal beliefs when he said "I believe her" and "I don't think anyone's lying to you." The prosecutor interjecting his personal experience and special knowledge appeared to be offered to explain why he believed the victim and were accordingly impermissible.

However, to the extent the statements may be considered improper vouching, the court's instructions to the jurors that it was their responsibility to decide what the facts are and to not let prejudice influence them were sufficient to cure any prejudicial effect from any error. *People v Rodriguez*, 251 Mich App 10, 31; 650 NW2d 96 (2002). Curative instructions are sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements, and jurors are presumed to follow the instructions. *Unger*, *supra* at 235. Further, there is no evidence that these comments denied defendant a fair trial.

Next, defendant argues that he was denied a fair trial because evidence of another investigation of his conduct was impermissibly admitted and this evidence was inflammatory and prejudicially influenced the jury's view of defendant. The admissibility of bad acts evidence will be reversed on appeal only when there has been a clear abuse of discretion. *McGhee*, *supra* at 600.

The introduction of prior bad acts of defendant as evidence of character is excluded, except as allowed by MRE 404(b), to avoid the danger of conviction based on a defendant's history of misconduct. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). MRE 404(b) governs the admission of prior bad acts and provides:

> (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Generally, to be admissible under MRE 404(b), bad acts evidence: (1) must be offered for a proper purpose, (2) must be relevant, and (3) must not have a probative value substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. *Johnigan*, *supra* at 465. Where the prosecutor seeks to admit prior bad acts evidence, she must give notice in order to identify and seek admission only of relevant bad acts evidence, to ensure that the defendant has an opportunity to object to, and defend against, the evidence, and to facilitate a thoughtful ruling grounded on an adequate record. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001).

In the instant case, defendant alleges that the prosecutor solicited evidence of another investigation against defendant in order to inflame and prejudice the jury. The victim's mother

twice referenced this investigation during her testimony. The first time was in response to the prosecutor's direct examination, as follows:

> *Prosecutor:* Now when was this – when were these offenses reported to law enforcement authorities?
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> *Witness:* I'm not exactly sure. It had been a few months afterwards. There was another case involving him and they had –
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> *Defense Counsel:* Objection.
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> *The Court:* Sustained.

The prosecutor's question was in reference to when the victim's mother reported the alleged incident, an issue at trial, rather than in reference to defendant. In *People v Haywood*, 209 Mich App 217, 228-229; 530 NW2d 497 (1995), this Court held that improper comments by the victim's father about the victim's prior injuries were not grounds for a mistrial because they were not elicited by the prosecutor's questioning. Instead, the comment was volunteered and was an unresponsive answer to proper questioning. *Id.* Here, the witness's response was also unresponsive. Furthermore, the witness's response was also vague. The only thing clear from her response is that there was another case involving defendant. It is not clear what the nature and disposition of this case was and the jury was not able to consider any particular bad act of defendant.

The second instance where defendant alleges that bad acts evidence was impermissibly admitted occurred while defense counsel was cross-examining the mother of the victim. The exchange was as follows:

> *Defense Counsel:* How did [the trooper] come to contact you, if you know?
>
> *Witness:* She was informed because she was investigating another situation.

Defendant may forfeit or waive appellate review of a decision to admit bad acts evidence by failing to timely object, or by voluntarily offering the information by his own actions. *People v Yarger*, 193 Mich App 532, 539; 485 NW2d 119 (1992). Here, defendant solicited the witness's response after the witness had already indicated in direct testimony, to which defense counsel objected, that there was another pending investigation. After soliciting the information, defense counsel did not object to the answer of the witness. Additionally, we find that as in the first instance brought by defendant, the response is vague and did not definitively inform the jury of prior bad acts to consider. Accordingly, it is not clear that prior bad acts of defendant were admitted. Further, the court instructed the jury to not consider any evidence that was excluded or stricken during the trial and consider only admitted evidence. The statements by the mother of the victim were more likely than not outcome determinative. *People v Knapp*, 244 Mich App 361, 378; 624 NW2d 227 (2001).

Next, defendant contends that there was insufficient credible evidence presented to convict him beyond a reasonable doubt because the victim's story was inconsistent and the

weight of the evidence was insufficient for submission to a jury. In reviewing the sufficiency of the evidence, we must view the evidence de novo. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). Upon review, the evidence presented is examined in the light most favorable to the prosecutor and evaluated to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Due process demands that the prosecutor introduce evidence sufficient to justify a trier of fact in concluding that the criminal defendant is guilty beyond a reasonable doubt. *Tombs*, *supra* at 206-207. The prosecutor does not have to disprove every reasonable theory of innocence, but must only prove his own theory beyond a reasonable doubt while considering whatever contradictory evidence the defendant provides. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

Here, the jury convicted defendant of two counts of CSC II, and the trial judge denied the motion for a directed verdict of acquittal based on the testimony of the victim. The charge of CSC II requires the prosecutor to show that defendant engaged in sexual contact with a person under the age of 13 years. MCL 750.520c(1)(a). Sexual contact is defined as "the intentional touching of the victim's or actor's intimate parts or the intentional touching of the clothing covering the immediate area of the victim's or actor's intimate parts, if that intentional touching can reasonably be construed as being for the purpose of sexual arousal or gratification." MCL 750.520a(q), *In re Ayres*, 239 Mich App 8, 24; 608 NW2d 132 (1999). Testimony from the victim and her mother established that she was ten years old at the time of this incident.

The victim testified that defendant touched her on the buttocks and on the breast. These instances of touching on her intimate parts occurred a few minutes apart. She then became quite upset, ran to her great-aunt, and reported the touching to the great-aunt and then to her mother. The victim, her mother and great-aunt were consistent in testifying to these facts. The jury found that defendant intentionally touched the victim for reason of sexual gratification considering all the facts and circumstances. See *People v Safiedine*, 163 Mich App 25, 29; 414 NW2d 143 (1987). Because of the difficulty of proving defendant's intent, minimal circumstantial evidence is sufficient. *McGhee*, *supra* at 623. Circumstantial evidence and the reasonable inferences that arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Fennell*, 260 Mich App 261, 270; 677 NW2d 66 (2004). Here, the testimony sufficiently proved the elements of CSC II beyond a reasonable doubt.

Defendant argues that defendant's testimony was too inconsistent to be credible. The victim did admit during testimony that she reported some details of the incident in differing ways. Questions of credibility and intent should be left to the trier of fact to resolve. *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999). This Court should not interfere with the fact-finder's role of determining the weight of evidence or the credibility of witnesses. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007). These convictions were primarily based on the victim's testimony. The jury's determination of her credibility should not be disturbed.

Lastly, defendant contends that the statutory maximum length of his sentence was increased in violation of his Sixth Amendment[1] rights because the findings of the judge that resulted in the increase were not proven beyond a reasonable doubt by a jury. A Sixth Amendment challenge to sentencing is a question of constitutional law that is reviewed de novo. *People v Drohan*, 475 Mich 140, 146; 715 NW2d 778 (2006). See also, *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, the Michigan Supreme Court has confirmed that a sentencing judge in Michigan's sentencing scheme does not violate *Blakely* by engaging in fact-finding to determine the minimum of a defendant's indeterminate sentence unless the fact-finding increases the statutory maximum sentence. *People v McCuller* (*On Remand*), 479 Mich 672, 682; 739 NW2d 563 (2007).

In the instant case, the minimum guideline sentence was 12 to 24 months and the statutory maximum was 15 years. This sentence recommendation placed defendant in a "straddle cell" where the sentencing judge had the option to impose (1) a term of imprisonment with a minimum term within that range, or (2) an intermediate sanction. MCL 769.34(4)(c). The judge determined the sentence to be a minimum of 14 months to the statutory maximum of 15 years. This sentence was within the guidelines and did not exceed the statutory maximum. Thus, it did not violate defendant's Sixth Amendment rights under *Blakely*.

Affirmed.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Stephen L. Borrello

[1] US Const, Am VI.