STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 2, 2010
v	No. 288074 Livingston Circuit Court
GARY CLINTON OWENS, Defendant-Appellant.	LC No. 08-017115-FH

Before: M. J. KELLY, P.J., and MARKEY and OWENS, JJ.

PER CURIAM.

Defendant Gary Clinton Owens appeals as of right his jury trial convictions of two counts of second-degree criminal sexual conduct. See MCL 750.520c(1)(a). The trial court sentenced defendant to serve 30 months to 15 years in prison for each conviction. On appeal, defendant argues that there were several errors during his trial that deprived him of a fair trial. We agree that the prosecutor engaged in misconduct and that his trial counsel provided inadequate representation. For these reasons, we reverse his convictions and remand for a new trial.

I. BASIC FACTS AND PROCEDURAL HISTORY

Sometime in 2005 or early 2006, Owens' daughter, Kelsey Owens, began dating SP. As the relationship progressed, the Owens family became friendly with SP's family and they spent time together. SP had five siblings, including eleven-year-old MP. Kelsey had one older sister, Kaylee. The two families socialized, visited each other's homes, watched football games together, and celebrated some holidays. In summer 2007, Kelsey and SP made plans to attend separate colleges in the fall, but share an apartment.

At 8:30 p.m. on the day before SP and Kelsey planned to move into their apartment, SP's family visited the Owens' home. When they arrived, the Owens' girls were home, but defendant and his wife were out for a walk. After defendant and his wife arrived a few moments later, the families congregated at the entryway to the residence to briefly talk and say goodbye.

The Owens family had recently received a cat from SP's family, which was recovering after being declawed and neutered. Kelsey and SP planned to take the cat with them to their apartment, but during the interim the Owens kept the animal in the basement. At some point while the families were talking, defendant and MP went into the basement to look for the cat. What happened in the basement was the subject of dispute at trial. MP testified that defendant

repeatedly pinched her nipple from the outside of her shirt, kissed her neck, told her she was beautiful, took her hand and placed it on his pants over his erect penis, bumped her into a closet by pushing his genitals into her buttocks, and grabbed her buttocks as she walked up the stairs carrying the cat. Defendant denied that he did these things, but testified that his hand may have inadvertently brushed the top of her chest as he handed her the cat and stated that he held his hand toward the small of her back as she ascended the stairs because she began to "list backwards." The jury ultimately rejected defendant's version of the events at issue and found him guilty of two counts of second-degree criminal sexual conduct. See MCL 750.520c(1)(a). Defendant appealed to this Court and this Court remanded the case for a *Ginther*[1] hearing.

After the hearing, the trial court agreed that defendant's trial counsel should have been more aware of the issues supporting defendant's defense, including forensic interview techniques: "On an objective basis, somebody that's handling a [criminal sexual conduct] case of this nature should, in the opinion of the Court, know about those matters and know about those factors." Indeed, the trial court characterized defendant's trial counsel's lack of knowledge in this area as "disturbing." However, the court also noted that some of the issues were common knowledge:

> On the other hand, Mr. Brewer [defendant's trial counsel] indicated his experience was trial by . . . fire and there was . . . some of these things you don't need to know—or need to have an expert because you know people—people lie. And children lie for the same reasons that adults lie . . . . Mr. Brewer indicated that he did know that such experts existed and he considered it would be obvious. Although . . . it was not obvious to the prosecutor and it was not otherwise obvious to the jury. Could have—could Ms. Okla's [defendant's proposed expert] testimony have added something to this case? I believe that it could have. Especially regarding the prepubescent factors that were discussed which were not argued to the jury, were not discussed at the time of trial and were not otherwise considered by Mr. Brewer.

Finally, although the trial court agreed that defendant's trial counsel's performance was deficient in this regard, it nevertheless determined that the error did not warrant a new trial because it did not affect the outcome:

> And there I look at what was argued to the jury and what was presented during the course of the voir dire. And as I've indicated earlier, although Mr. Brewer did not have specific knowledge of the body of research that existed, he did have the innate, I'll call it, experience, innate common sense—and I use common sense when I talk to the jury all the time—to know that those various components did exist. And he talked about it during the voir dire. He talked about suggestibility during voir dire, he talked about lying during voir dire. Got commitments from

[1] See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

the jury regarding that. And indeed although the argument that he presented in his final argument was not comprehensive, it did touch on those issues. And in that regard, although I find that the expert's testimony would have been valuable it would have been nothing more than reinforcement of the argument that Mr. Brewer was otherwise making. And I cannot say that but for such error the outcome of the trial would have been changed.

This appeal followed.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

A. FAILURE TO HIRE AN EXPERT WITNESS

Defendant first argues that his counsel should have used Michigan's forensic interview protocol in order to properly question MP about the alleged sexual assault. Additionally, defendant maintains that his counsel should have retained an expert witness to show that the questioning techniques used by MP's family were suggestive and tainted her account of what actually happened. In order to warrant relief for ineffective assistance of counsel, defendant must show that his trial counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that, but for his trial counsel's deficient performance, the outcome would have been different. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008).

At the *Ginther* hearing, Defendant's trial counsel stated that he did not do any research on behavior patterns of sexual abusers or consult with an expert because he believed that "it was obvious that this [offense] wouldn't happen … under these circumstances." Had he engaged in proper investigation, defendant's trial counsel would have learned that adults who sexually abuse children often engage in specific acts to groom their victims. Given that there was no evidence that defendant had ever engaged in grooming behavior with MP or any other child, defendant's trial counsel could have used the expert's testimony to provide context for the allegations and to highlight the improbable nature of MP's description of events. Dr. Katherine Okla, the proposed defense expert, testified at the *Ginther* hearing that she could have offered expert testimony that external factors in this case may have impacted MP's description of the incident. Okla explained that several factors such as MP's age, questioning by her family and others before the forensic interview, and MP's family's criticism of defendant during the ride home concerning his treatment of SP could have tainted MP's memory of the events. In addition, Okla could have offered testimony that the forensic interview was not dispositive of whether MP's account of the incident was tainted by interaction with her family. This testimony would have served to rebut the prosecutor's forceful argument that MP could not have been "coached":

> You know, [defendant's counsel] talks about the coaching. Mom must have coached her. How would her mom coach her on this. She told what happened. Her mom is so good that she can coach a kid into, you know, *having this believed, you know, through a forensic interview process*, which as Ms. Stahl described for you as being a process which is to try to get the most accurate information from children. It tests hypothesis. It . . . tests why something might be. It's another red herring. [emphasis added.]

Indeed, Okla stated that she could have testified that, during the forensic interview process, a child may rely on memory that has been tainted by external influences. This would have served to rebut the prosecutor's use of Stahl's testimony and the forensic interview to bolster MP's credibility. At the *Ginther* hearing, defense counsel stated that he did not call an expert witness because it was plainly obvious that MP's mother influenced her statement. However, he admitted that he did not know anything about Michigan's forensic interviewing protocol, and it appeared he was unprepared to counter the prosecutor's assertion that MP was likely telling the truth because she was subjected to the forensic interviewing process.

We conclude that a reasonable trial counsel presented with these facts would have investigated the limitations on the forensic interview process and would have called an expert to testify about those limits as well as about the common behaviors of adults who sexually abuse children. For that reason, defendant's trial counsel's decision not to investigate and call an expert on this area fell below an objective standard of reasonableness under prevailing professional norms. Further, because this case involved a close credibility contest, we cannot conclude that this error was harmless. *Yost*, 278 Mich App at 387.

B. THE FAILURE TO OBJECT

Defendant also contends that he was denied his right to the effective assistance of counsel when his counsel failed to object to the prosecutor's introduction of inadmissible other acts evidence. On direct examination, defendant's trial counsel questioned Kaylee about her father's past behaviors:

Q. Has [defendant] ever done anything inappropriate with you?

A. No.

Q. Have you ever known him to do that to any—anybody else?

A. No.

Q. Did you have [sleepovers] as a little girl?

A. I did, yes.

Q. Did . . . your sister?

A. Yes, she did as well.

Q. Did your dad at any point in time do weird stuff when you had [sleepovers]?

A. No.

Immediately following this questioning, and without any objection, the prosecutor began to question her about her father's prior problems with cocaine:

Q. Mr. Brewer asked you if your father ever did . . . anything inappropriate with you or in—in your presence. Your father did have a drug problem, did he not?

A. Yes, that's correct.

Q. Did he ever use drugs in front of you while you were in the home?

A. No.

Q. Did he ever use drugs in the home to your knowledge?

A. No.

Q. In fact he was addicted to cocaine, is that correct?

A. At one point, yes.

Q. Okay.

A. Well he had a drug—I don't know if he was addicted. I just know that he used cocaine.

Q. You're saying to the best of you knowledge he didn't use it in your presence?

A. Yes, that's correct.

Q. And never in the presence of when you had children over for [sleepovers].

A. Yeah, as far as I know nothing happened.

Q. But he could have been under the influence when those children were there, is that fair to state?

A. It's possible, but as far as I knew that was not the case.

The prosecutor also questioned Kelsey about her father's addiction without any objection by defendant's trial counsel:

Q. Okay . . . I'm sure [defendant's] a good man. He's a good man. These people liked him. He's had his problems, is that fair to state?

A. I don't know. I guess we've all had our problems.

Q. He's had a prior cocaine addiction, correct?

A. My father has been successfully rehabilitated now for about six years.

Q. Okay.

A. So that is not even an issue, Ms. Mass.

Finally, the prosecutor questioned defendant's wife, also without any objection by defendant's trial counsel:

> *Q*. In fact there was a time when [defendant] struggled with cocaine addiction, correct?
>
> *A*. Yes.
>
> *Q*. There was a time when you were close to throwing him out of the house because of that, fair to state?
>
> *A*. Yes, ma'am.

In her closing arguments, the prosecutor used the evidence concerning defendant's prior cocaine addiction to suggest that defendant's testimony was incredible:

> I'd submit to you too that the Defendant—just again it was very practiced, very rehearsed. Adults can be very practiced liars. I think that's why he was so good. I mean he came across—he made the effort to look at all of you, and give the testimony, and smile and all of those types of things. *Adults have years of practicing deception. Especially I would submit to you adults who have had problems with addiction in the past.* But don't be fooled. Don't be fooled if you think that he seemed very smooth. [emphasis added.]

As a preliminary matter, we note that this line of questioning was improper. Although a prosecutor may ask a witness about specific instances reflecting on the defendant's character where the defendant has placed his or her character at issue, see MRE 404(a)(1), a review of the trial transcript reveals that defendant's trial counsel did not put the defendant's whole character at issue with the line of questioning. Defendant's trial counsel was clearly not asking whether defendant had engaged in *any* inappropriate acts; rather, he was referring to whether defendant had ever engaged in *sexually* inappropriate acts. Even the choice of the word "weird" appears to be in response to the prosecutor's earlier examination of MP where MP testified that defendant slowly kissed her on the neck. ("Okay. Okay. And you said that it made you feel weird?") Because defendant placed only his character for engaging in sexual acts with minors at issue, the prosecutor could not properly solicit testimony about defendant's prior cocaine addiction. See MRE 404(a)(1); *People v Roper*, 286 Mich App 77, 93; 777 NW2d 483 (2009). Thus, the prosecutor's line of questioning about defendant's prior problems was improper, highly prejudicial, and warranted an immediate objection.

We further cannot agree the failure to object to this clearly inadmissible and highly prejudicial line of questioning could be a strategic decision so as not to "run the risk of providing emphasis to adverse evidence." At the very least, counsel should have called for a side-bar conference with the judge and asked to place a delayed objection on the record outside the presence of the jury and moved that the prosecutor be prohibited from asking any additional

witnesses about cocaine use and not to make reference to it in closing argument. By not doing so, two additional witnesses were asked about defendant's prior cocaine use and the prosecutor used it in her closing argument to maintain that—in a case in which both sides agreed and argued that the chief issue before the jury was credibility—defendant was, as a former "addict", untrustworthy and "especially" practiced at deceitfulness. Because defendant's credibility was essential in this case, it is clear that, but for defendant's failure to object to the prosecutor's introduction of this improper character evidence, the result of the proceeding would likely have been different. *Yost*, 278 Mich App at 387.

III. PROSECUTORIAL MISCONDUCT

Defendant also maintains that several instances of prosecutorial misconduct at trial also warrant reversal. It is worth noting that, at the *Ginther* hearing, the trial court agreed that the prosecutor had over reached with her argument:

> And children lie for the same reasons that adults lie. In fact, I think Ms. Mass [the prosecutor] argued that in her closing argument, although we haven't commented on Ms. Mass's closing argument. Which it's not a matter before me, but I found Ms. Mass's argument in many respects that there was over reaching or over stretching that was being done . . . to the jury in this case. But again, that's not in front of me.

This Court reviews unpreserved challenges to alleged instances of prosecutorial misconduct for plain-error affecting substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). "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*. The test for prosecutorial misconduct is whether defendant was denied a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007). A prosecutor jeopardizes a defendant's right to a fair trial when she interjects issues broader than guilt or innocence of the accused. *Id*. at 63-64.

In her closing arguments, the prosecutor emphasized that several people—people who were presumably more competent to judge MP's credibility than the jury—had all believed MP's version of events:

> And I'm gonna submit to you, ladies and gentlemen, why it is that [MP], who is 11 years old, came in here and told you the 100 percent absolutely truth about what happened to her at the hands of this Defendant.
>
> * * *
>
> Go back there, ladies and gentlemen—you must go back and decide who you believe and [who] you don't. And the only person worthy of belief relating to this situation of the people who matter, and that's [MP] . . . because this happened to her. Why else, ladies and gentlemen, would she have gone home and told about this right away. Why else would she have made this outcry and told her mom immediately what was happening. *Was this child so sophisticated that she*

> *could pull the wool over her parents' eyes, or the eyes of her family, over the eyes of a trained forensic interviewer, over the eyes of a trained 30 year plus police officer that you met Detective Bolling, over the assistant prosecutor and then expect to come and pull the wool over the eyes of the 14 of you.* [MP] told you that the Defendant did these sexual touches to her because, ladies and gentlemen, beyond any doubt it happened. [emphasis added.]

It is well-settled that a prosecutor may not vouch for the credibility of her witnesses by suggesting that she has some special knowledge of the witness' truthfulness. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Additionally, although a prosecutor is free to "argue the evidence and all reasonable inferences arising from it as they relate to the prosecutor's theory of the case," a prosecutor "may not make a statement of fact to the jury that is unsupported by the evidence." *People v Schumacher*, 276 Mich App 165, 178-179; 740 NW2d 534 (2007). Finally, "[a] prosecutor may not intentionally inject inflammatory arguments with no apparent justification except to arouse prejudice." *People v Lee*, 212 Mich App 228, 247; 537 NW2d 233 (1995).

The prosecutor initially did not commit misconduct when she argued that MP was more credible than defendant. See *Dobek*, 274 Mich App at 66 (noting that a prosecutor may argue the credibility of witnesses). However, the prosecutor committed several serious acts of misconduct during the remainder of her closing and rebuttal arguments when she articulated the reasons why the jury should find MP more trustworthy than defendant. The prosecutor stated that defendant, because he was an adult, had years of "practicing deception," and that defendant was "especially" untrustworthy because he had had an addiction. This statement improperly referenced facts outside the evidence because there was nothing presented at trial to support that defendant had years of "practicing deception" or to support that addicts are especially practiced at deception. *Schumacher*, 276 Mich App at 178; see also *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970) (a prosecutor "may not express a belief in the defendant's guilt without relating the belief to the evidence"). While the prosecutor argues that it is common sense that addicts are especially practiced at deception, this statement is not a matter of common sense. Most troubling was the prosecutor's reference to defendant's prior problem with cocaine in a deliberate attempt to convince the jury that defendant was untrustworthy. This statement was highly inflammatory and an improper use of character evidence to support the inference that defendant was predisposed to dishonesty because of his former drug problem. *Lee*, 212 Mich App at 247. Defendant's prior drug use was wholly irrelevant and unrelated to his trustworthiness. By arguing that adults are practiced liars and that drug addicts are "especially" practiced at deceitfulness, the prosecutor created the inference that defendant was a bad person and unworthy of belief and in doing so she interjected issues broader than defendant's guilt or innocence in this case. *Dobek*, 274 Mich App at 63-64. The prosecutor also injected the prestige of her office into the case. Specifically, the prosecutor inferred that she, her expert witness, and a police detective, because of their positions of authority, had special knowledge about MP's truthfulness. *Bahoda*, 448 Mich at 276. The prosecutor essentially stated that MP was telling the truth because a trained forensic interviewer, an experienced police detective, and she—the assistant prosecutor—all believed MP's account of the incident. These arguments were improper and highly prejudicial in this case that involved a pure credibility contest.

We conclude that the prosecutor engaged in plain misconduct that affected defendant's substantial rights by denying him a fair and impartial trial. We also conclude that the error seriously affected the fairness, integrity, and public reputation of the judicial proceedings. For these reasons, we conclude that the prosecutor's misconduct independently warrants a new trial. See *Callon*, 256 Mich App at 329.

IV. CUMULATIVE ERROR

Finally, even if no single error on the part of defendant's trial counsel or the prosecutor warrants relief, we would nevertheless conclude that the cumulative effect of these errors warrants a new trial. See *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

In light of our resolution of these claims of error, we decline to address the remaining issues defendant raised on appeal.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Jane E. Markey
/s/ Donald S. Owens