

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL SYNDER,

Defendant-Appellant.

UNPUBLISHED

August 2, 2011

No. 293972

Wayne Circuit Court

LC No. 2005-009243-FC

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of second degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced as a habitual fourth offender, MCL 769.12, to concurrent terms of 4-20 years' imprisonment on each count. Because we find no prosecutorial misconduct and no denial of the effective assistance of counsel, we affirm.

Defendant was convicted in the instant matter as a result of allegations by his step-daughter that he had engaged in sexual contact with her when she was between the ages of approximately 10 and 12 years. According to the step-daughter, defendant had come into her room on several occasions while she slept and had touched her genitals and breasts both over and underneath her clothing.

On appeal, defendant asserts that instances of prosecutorial misconduct denied him a fair trial and violated his right to due process. Claims of prosecutorial misconduct are generally reviewed de novo to determine whether defendant was denied a fair trial. *People v Wilson*, 265 Mich App 386, 393; 695 NW2d 351 (2005). Where a defendant fails to properly preserve these claims of prosecutorial misconduct, however, he must demonstrate plain error that affected his substantial rights. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Id.* "Generally, prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (internal quotation omitted). Nevertheless, a prosecutor may not engage in conduct or make an argument that rises to the level of denying defendant a fair and impartial trial, such as vouching for the credibility of a witness by suggesting that he or she has some special knowledge of the witness's truthfulness. *People v Seals*, 285 Mich App 1, 22; 776 NW2d 314 (2009). A prosecutor is also prohibited from

appealing to a jury's sympathy. *People v Unger*, 278 Mich App 210, 237; 749 NW2d 272 (2008). A prosecutor's remarks must be considered in their entirety when making a determination regarding their propriety. *Bahoda*, 448 Mich at 281.

Here, defendant claims that the prosecution bolstered the credibility of the complainant and vouched for her by repeatedly stating that the victim had made prior consistent statements both in sworn testimony and in out of court statements when, in fact, the complainant's story had changed several times. Defendant points out, for example, that at trial, the complainant denied that she ever screamed during the assaults. Yet, during the preliminary examination, she testified that she did scream out once when defendant assaulted her. Defendant also points out that at trial, the complainant testified that she did not recall how many times defendant assaulted her but that it was over three times, whereas she had previously testified that the assaults had taken place once a week or two to three times per week. According to defendant, the prosecutor was well aware of these and other inconsistencies, while the jury was not privy to the victim's prior inconsistent testimony or her out of court statements, and that the prosecutor's intentional misleading and inaccurate statements constituted misconduct that denied him a fair trial. We disagree, for several reasons.

First, the initial charges brought against defendant were not entirely the same as those for which he was on trial in the instant matter. Defendant was initially charged with three counts of second degree CSC, contrary to MCL 750.520c, based upon allegations of sexual contact with the complainant, and two counts of first degree CSC, contrary to MCL 750.520b(1)(a), based upon allegations of sexual penetration of the complainant. In his initial trial, defendant was acquitted of the first degree CSC charges while the jury was hung on the remaining charges. Thus, when he proceeded to the trial that resulted in the instant convictions, he was tried only on three counts of second degree CSC. Because the first degree CSC allegations involved penetration and the same was not at issue in the instant trial, the testimony would not necessarily have included the same details as those provided in the first trial or at the preliminary examination.

And, the trial took place several years after the sexual assaults occurred. When she first testified, the complainant was 13 years of age. At trial, the complainant was approximately six weeks shy of her 17th birthday. The prosecutor, when confronted with testimony that was not exactly the same as the complainant's prior testimony, elicited testimony from the complainant that her memory would have been better in the years prior to trial. Both the prosecutor and the complainant, then, acknowledged that the complainant's testimony was different to some degree.

Second, defendant places great emphasis on the prosecution's use of the words "consistent" and "same" when questioning the complainant and referencing the complainant's statements about the assaults, apparently believing that if the complainant's testimony were not identical, the prosecutor was misleading the jury in using such words. We do not, however, find that the prosecutor's use of these words, when reviewed in context, elicited false testimony from the complainant or represent misconduct on the prosecutor's part. The prosecution asked the complainant:

Q: Do you remember going back to court in September 2005 for the first time?

A: Yes.

Q: When you went to court that first time did you tell the Court the same thing you're telling today?

A: Yes.

Q: Did you make the same accusations against [defendant] when the police came to your house in 2005?

A: Yes.

Q: When you went to that Kids Talk facility, that special place where people interview you and it's on tape, did you tell the interview people about the same thing that [defendant] did to you?

A: Yes.

Q: When you came to court in 2005 for the first time did you make those same accusations that you're making today against [defendant]?

A: Yes.

Q: When you came to court in this building for the very first time, in December of 2005, when you testified under oath that time, did you make the same accusations that you're making today against [defendant]?

A: Yes.

It is true that the complainant testified differently as to certain details of the assaults at trial and at the preliminary examination.¹ Most notably, at preliminary examination the complainant testified to at least one instance of digital penetration and potentially of oral penetration whereas no penetration was testified to at trial. Again, however, defendant was not on trial for any instances of penetration in this matter. Discrepancies were also present with respect to the frequency of the assaults. However, in her closing argument, the prosecutor, while again indicating that the complainant's story was the same, acknowledged that the complainant provided details were not always the same:

¹ Because we were not provided with the December, 2005 trial transcripts, we offer no opinion on the consistency or lack thereof between the complainant's testimony at that trial and the present one.

[W]hat we know from the testimony here today and the prior times that she's testified, is that what she has told you has been consistent. With the exception of very minor, unimportant details that quite honestly looking back four years perhaps any of us would be not able to remember those details.

She has consistently told you that these acts occurred between the ages that she said, while she was in her bedroom, while she was either asleep or awoken by the defendant. And she's consistently told you where the defendant touched her.

And again, the version of what she says has been consistent through all of these different appearances.

When viewed in context, use of the words "same" and "consistent" can be understood to mean that the complainant never wavered in her assertion that sexual abuse occurred. The complainant did testify and state, repeatedly, that defendant sexually assaulted her many times over a two-year period. It could be argued, then, that she made the "same" accusations against him or that she was "consistent" in her accusations. The prosecution's statements that the complainant's testimony and statements were consistent or the same, then, did not bolster the complainant's credibility through false representations.

Finally, as defendant admits, defense counsel impeached the complainant with her prior inconsistent statements. For example, counsel asked the complainant if she ever screamed during any of the assaults. When she responded, "No," counsel showed her the September, 2005 preliminary examination transcript where she had testified that she screamed once during an assault. Counsel also elicited testimony that the complainant had testified that the assault occurred two or three times per week, yet had testified on another occasion that they occurred approximately once a week. Issues of the complainant's credibility were brought to the forefront, were exposed and explored by defense counsel, and were properly left to the jury to assess. See, e.g., *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005). In sum, we do not find that the prosecution bolstered the credibility of the complainant or improperly vouched for her.

Defendant also contends that the prosecutor engaged in misconduct during her closing argument by seeking sympathy from the jury and vouching for the complainant. We disagree.

During her closing statement, the prosecutor stated:

The first thing I would ask you to ask yourself is what motive to lie does [the complainant] have in this case [?]

I think what's important when you look at whether she's got a motive to lie, is to look at the things that not only happened to [the complainant] when this assault was taking place, but what has happened to her life since she has

disclosed. And since [[the complainant] told Brandi Motley back at that picnic, and told Aunt Jackie at that picnic, her life has been turned upside down, ladies and gentlemen. She has had to come to court at least four times and testify in the last four years. She was removed from her mother's care, taken away and separated from her brothers and sisters, placed into foster care. She was taken away from the family that she loved and cared about because she told these things. Yet despite going through this trial, going through these different court appearances, going through being placed in a foster home, being removed from her mother who she loves and cares about, and her brothers and sisters, [the complainant] has always alleged that this defendant sexually assaulted her.

Not one time in the last four years did she ever say, you know what, I was making it up. I was upset with him. It didn't happen. In fact, what we know from the testimony here today and the prior times that she's testified, is that what she has told you has been consistent. With the exception of very minor, unimportant details that quite honestly looking back four years perhaps any of us would be not able to remember those details.

She told her aunt. Again, she told the police, she told the interviewers, and she's told the Court a number of different time[s]. And again, the version of what she says has been consistent through all of these different appearances.

While some of the above may have, in fact, elicited sympathy from the jury, the prosecutor's clear intent was to suggest that the complainant's testimony was credible. She did not suggest a special knowledge that the complainant was testifying truthfully so as to constitute improper bolstering. Instead, she simply relied upon facts in evidence to indicate that the complainant had no reason to fabricate the allegations against defendant and that the consequences attached to her revelation of the abuse support a finding of credibility. A prosecutor is "free to argue the evidence and all reasonable inferences from the evidence" *Bahoda*, 448 Mich at 282. A prosecutor may also argue from the facts that a witness is credible. And, "a prosecutor may comment on his own witnesses' credibility during closing argument." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). We find no instances of improper vouching or engendering the sympathy of the jurors.

Moreover, during its jury instructions, the trial court instructed the jury to base its verdict solely on properly admitted evidence, instruct the jury that, "Many things are not evidence and you must be careful not to consider[] them as evidence . . . The opening statements, the closing arguments, not evidence." Jury instructions are presumed to cure most errors, and jurors are presumed to follow their instructions. *People v Petri*, 279 Mich App 407, 414; 760 NW2d 882 (2008). Thus, any potential prejudicial effect of the prosecutor's closing argument would have been cured by the trial court's jury instructions.

Defendant's last argument on appeal is that counsel's failure to object to the improper comments by the prosecution in her closing argument amounted to ineffective assistance of counsel. Having found no objectionable conduct, we reject this claim because any objection lodged by defense counsel would have been groundless. *People v Unger*, 278 Mich App 210, 256; 749 NW2d 272 (2008) (defense counsel is not ineffective for neglecting to offer a futile objection).

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto