

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
June 23, 2011

v

JOSE SOCORRO MANCIO,

Defendant-Appellant.

No. 297307
Kent Circuit Court
LC No. 04-011487-FC

Before: TALBOT, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

Defendant Jose Socorro Mancio appeals as of right his jury convictions of two counts of criminal sexual conduct in the first degree. MCL 750.520b(1)(b). The trial court sentenced defendant to serve concurrent terms of 15 to 40 years in prison. Because we conclude that there were no errors warranting relief, we affirm.

Defendant's convictions arise from the sexual abuse of his wife's niece. The victim, who was 15 years old at the time of the trial, resided with defendant and his wife from 2002 to 2004.

According to his wife, defendant inexplicably left his home sometime after 11 pm on the night before the last day of his trial in February 2006. Defendant apparently did not return home and did not appear for trial on the next day. The trial continued without defendant and the jury convicted defendant on both counts of criminal sexual conduct. Law enforcement officers located defendant in Mexico and, after defendant's extradition to Michigan in November 2009, the trial court sentenced defendant as noted in March 2010.

Defendant first argues that the prosecutor committed misconduct by commenting on his absence on the last day of trial and by commenting on his failure to testify on his own behalf. Defendant also argues that the trial court erred when it instructed the jury concerning his absence. This Court reviews de novo claims of prosecutorial misconduct. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We generally review claims of prosecutorial misconduct on a case-by-case basis, in the context of the issues raised at trial, to determine whether the prosecutor's conduct denied the defendant a fair and impartial trial. *People v Fyda*, 288 Mich App 446, 461; 793 NW2d 712 (2010).

Defendant first argues that the prosecutor's comments were improper. During his closing arguments, the prosecutor commented on the fact that defendant failed to show for the last day of trial and, obviously, would not be testifying on his own behalf:

Prosecutor: You heard [defense counsel] say that defendant was going to take the stand. Not true. Did he ever take the stand? Okay? Did he ever sit in this chair and testify? He did not.

* * *

Prosecutor: I would agree, your Honor. That was improper. He doesn't have to [testify], okay? I'm just commenting on the fact that he said he was going to. Legally he doesn't have to. Where's he now, folks? He's not even here. He left in the middle of trial. What does that tell you? What common sense conclusions can you draw from that mere fact alone, flight? Evidence of flight is evidence of guilt. Who flees? The guilty flee.

Defense Counsel: Objection, your Honor. That is not the law.

The Court: Well, that's argument and I'll be giving an instruction that that's not the only interpretation you can draw or conclusion you can draw from his absence. So again, ladies and gentleman, what the attorneys say is argument. You may continue.

Prosecutor: You're right. That's an argument. That's my argument, folks. That's a common-sense argument. Only the guilty flee.

Defense Counsel: Your honor, I don't think a constant reference that is not the law and [the prosecutor] keeps talking about a law that is nonexistent.

The Court: Well, again, I'll be giving you an instruction on that, and that can be an indication of a consciousness of guilt and it can also be an indication of—for instance, he could have been incapacitated in some way that we don't know about. We just don't know. So continue, Mr. [prosecutor].

Prosecutor: Thank you, your Honor. Again, simply use your common sense, draw your own conclusions as to what you think that shows. What does your common sense tell you it shows?

A prosecutor can jeopardize a defendant's right to a fair trial by interjecting issues broader than the guilt or innocence of the accused. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). However, prosecutors are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *People v Unger*, 278 Mich App 210, 236; 749 NW2d 272 (2008). Moreover, prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

A prosecutor may not generally comment on a defendant's failure to testify or present evidence, as such comments tend to shift the burden of proof. See *People v Fields*, 450 Mich 94, 108-109; 583 NW2d 356 (1995). Nor may a prosecutor suggest that the defendant must prove something or present a reasonable explanation for damaging evidence. *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983).

Here, the prosecutor plainly commented on defendant's failure to testify. However, on defendant's trial counsel's objection, the prosecutor agreed that defendant was not required to testify and that it was improper to suggest that he had to testify. The prosecutor explained that he was not implying that defendant had an obligation to testify, but was responding to defendant's trial counsel's opening statement where he told the jury that defendant would "testify, and he will tell you that he is not guilty." The prosecutor did not further pursue the argument; he limited his comments to the inference that could be drawn from defendant's absence: namely, that his absence was evidence that he had a guilty conscience. Here, the prosecutor was clearly responding to defendant's trial counsel's statement that defendant would testify by noting that he did not do so. The prosecutor did not impermissibly argue that the defendant's failure to testify was itself substantive evidence of guilt. See *Fields*, 450 Mich at 110-111.

Additionally, to the extent that his comment implied that defendant's failure to testify should be used as substantive evidence of his guilt, the prosecutor conceded—albeit inartfully—that the comment was improper and the trial court instructed the jury that "every defendant has the absolute right not to testify" and that the jury "must not consider the fact that [defendant] did not testify. It must not affect your verdict." Given the prosecutor's concession, any minimal prejudice was cured by the trial court's instruction. See *Abraham*, 256 Mich App at 279 (noting that jurors are presumed to follow their instructions and instructions are presumed to cure most errors). Therefore, even if this were error, it would not warrant relief.

Defendant also contends that the prosecutor engaged in misconduct by arguing that the jury could infer that defendant was conscious of his guilt from the fact that he fled. Specifically, defendant contends that the prosecutor could not comment on his flight because there was no evidence that he actually fled. The term "flight" includes: fleeing the scene of the crime, leaving the state or jurisdiction, running from the police, or attempting to escape custody. *People v Smelley*, 485 Mich 1023, 1024; 776 NW2d 310 (2010). Evidence of defendant's flight is generally relevant to show consciousness of guilt. *Id.*

At the beginning of the fourth day of trial, defendant's wife continued her testimony by informing the court that she did not know where defendant was located. Defendant's wife explained that defendant told her that he felt restless around 11:00 p.m. the previous night, so he left the bedroom to watch television. Defendant's wife stated that she could not find him the next morning. Defendant argues that the reason for defendant's absence was not determined, and that any number of factors could have explained his absence.

Prosecutors are generally free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case. *Unger*, 278 Mich App at 236. Here, there was evidence from defendant's wife that defendant had left. Even though defendant's wife did not state that defendant fled, she also could not account for innocent circumstances that would

result in his absence. Thus, the jury could reasonably infer from this evidence that defendant had fled. The prosecutor is not required to prove that defendant left the jurisdiction due to a fear of apprehension before he could argue this inference. *Smelley*, 485 Mich at 1023. Nor was the prosecutor required to disprove other innocent explanations for defendant's conduct. See *People v Martin*, 271 Mich App 280, 340; 721 NW2d 815 (2006) (stating that the prosecution need not negate every reasonable theory consistent with the defendant's innocence). Considering the entirety of the circumstances, the prosecutor's argument was not improper. Furthermore, following defendant's trial counsel's objection, the trial court informed the jury that defendant's absence could be for innocent reasons or could reflect a consciousness of guilt and that the reason for defendant's absence was unknown. The jury was thus allowed to consider whether the evidence indicated consciousness of guilt or was the result of innocent circumstance. The trial court did not err in giving the flight instruction. *Smelley*, 485 Mich at 1024-1025.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Talbot
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly