

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
November 29, 2011

v

RICHARD ARNETTE SHEPARD,
Defendant-Appellant.

No. 299043
St. Clair Circuit Court
LC No. 09-002077-FC

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

PER CURIAM.

Defendant appeals his jury trial convictions of two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a).¹ The jury convicted defendant for sexually assaulting the learning-disabled daughter of his former fiancée. The trial court sentenced defendant to concurrent terms of four to 15 years in prison. For the reasons set forth below, we affirm.

I. JURY DELIBERATIONS

Defendant argues that the trial court abused its discretion when it denied his motion for a mistrial. According to defendant, the jury was deadlocked during deliberations and the trial court's reading of the deadlocked jury instruction coerced the jury into reaching a verdict.

We review the trial court's denial of a motion for a mistrial for an abuse of discretion. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A trial court may declare a mistrial if the jury is unable to reach a unanimous verdict. *People v Lett*, 466 Mich 206, 217; 644 NW2d 743 (2002). The trial court has the discretion to order continued deliberations, accept a verdict, or declare a mistrial with respect to one or more counts of a multiple-count trial. See MCR 6.420(C). However, "if [the trial judge] fails to discharge a jury which is unable to reach a verdict after protracted and exhausting deliberations, there exists a significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the

¹ The jury acquitted defendant of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(a).

jurors.” *Arizona v Washington*, 434 US 497, 509; 98 S Ct 824; 54 L Ed 2d 717 (1978). A trial court should balance the need for a mistrial with “the ends of public justice.” *People v Hicks*, 447 Mich 819, 829; 528 NW2d 136 (1994), quoting *United States v Jorn*, 400 US 470, 485; 91 S Ct 547; 27 L Ed 2d 543 (1971).

Here, on the second day of deliberations, the jury sent a note to the trial judge stating that the jury was “at a deadlock.” Significantly, however, the two dissenting jurors “remain[ed] undecided.” Further, the jury had deliberated for less than two days. A jury may properly reach a verdict after several days of deliberations, despite prior indications to the judge that the jury was unable to reach a verdict. See, e.g., *People v Sullivan*, 392 Mich 324, 327; 220 NW2d 441 (1974) (four days of deliberations before guilty verdict). Less than seven hours of deliberation over the course of two days is not “protracted and exhausting.” Moreover, the note did not state that the two jurors had finalized their opinions of the case, but instead indicated that the two jurors could not reach a conclusion at the time because they were “undecided.” Under these circumstances, it was clearly reasonable for the trial court to conclude that further deliberations could result in a unanimous verdict.

A trial court should not inquire as to the numerical division of a jury during deliberations. *Burton v United States*, 196 US 283, 307; 25 S Ct 243; 49 L Ed 482 (1905). Such an inquiry can be coercive, and “carries the improper suggestion that the state of numerical division reflects the stage of deliberations. It has the doubly coercive effect of melting the resistance of the minority and freezing the determination of the majority.” *People v Wilson*, 390 Mich 689, 691-692; 213 NW2d 193 (1973).

Here, however, the trial court did not inquire about the numerical division of the jury. Rather, the jury volunteered this information and the trial court did not call attention to the numerical division beyond reading the language of the note for the record. Further, the trial court’s instructions did not criticize the dissenting jurors, indicate that a deadlocked jury was a failure, or indicate that a unanimous verdict was easily achievable. See *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1985). The trial court neither implicitly nor explicitly coerced the jury to reach a verdict simply by knowing the numerical division at one point in time.

A court may instruct a jury to continue its deliberations after the jury informs the court that a verdict cannot be reached. *Sullivan*, 392 Mich at 330-331. The purpose of this instruction is to “generate discussion directed towards the resolution of the case [without] forcing a decision.” *Id* at 334 (footnote omitted). Such an instruction is prejudicial to the defendant if the instruction substantially departs from ABA Standard Jury Instruction 5.4(b), now stated in CJI2d 3.12. *Id* at 382. Here, the trial judge explicitly followed the instruction as set forth in CJI2d 3.12. Moreover, that instruction concludes with this warning: “none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement.” The jury instruction given by the trial court was not coercive.

II. CONDUCT OF THE PROSECUTOR

Defendant argues that the prosecutor engaged in misconduct. To preserve a claim of prosecutorial misconduct, a defendant must either timely object or request a curative instruction.

People v Brown, 279 Mich App 116, 134; 755 NW2d 664 (2008). Defendant objected to the prosecutor's comments during closing argument, but did not do so during voir dire. We review preserved claims of prosecutorial misconduct de novo, *id.*, and review unpreserved claims of prosecutorial misconduct for plain error affecting substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). We review claims of prosecutorial misconduct on a case-by-case basis to determine whether a defendant was denied a fair and impartial trial. *People v Fyda*, 288 Mich App 446, 460; 793 NW2d 712 (2010). We will not reverse a defendant's convictions if a curative instruction could have cured any prejudice. *Ackerman*, 257 Mich App at 449.²

Defendant argues that the prosecutor impermissibly referenced facts not in evidence when, during closing argument and rebuttal, she discussed the forensic interview that was conducted with the victim. This argument is without merit.

During her closing argument, the prosecutor discussed the issue of the victim's inconsistencies and observed that questions asked of the victim by different people may tend to elicit different answers, depending on the questions asked. The prosecutor asked the jury to consider whether a mother or a forensic interviewer would ask a child victim different questions than the prosecutor asked during trial. Defense counsel objected to the reference to the forensic interviewer because the interviewer did not testify during trial. The prosecutor clarified that she did not intend to imply that the victim gave the same responses to the forensic interviewer.

Prosecutors may argue reasonable inferences from the evidence, but may not make statements that are not supported by the evidence. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). A prosecutor may not suggest that opposing counsel is "intentionally attempting to mislead the jury." *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). We review a prosecutor's arguments in the context of the entire trial. *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

A full reading of the prosecutor's remarks during her closing argument show that she essentially conceded that the forensic interviewer's testimony would have differed from the victim's statements to her mother. Because the forensic interviewer did not testify and interview notes were not admitted into evidence, the substance of the interview is not on the record. However, the prosecutor's statements did not result in an unfair trial for defendant. Instead, the prosecutor's implication supported the defense argument that the victim made inconsistent statements. The prosecutor's argument did not deny defendant due process.

² Prosecutorial misconduct that does not rise to the level of constitutional error is reviewed under the nonconstitutional error standard. *People v Blackmon*, 280 Mich App 253, 270; 761 NW2d 172 (2008). Under this standard, a defendant has the burden of establishing a "miscarriage of justice." *People v Houthoofd*, 487 Mich 568, 587; 790 NW2d 315 (2010). A miscarriage of justice occurs if the error was outcome determinative. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010). An error was outcome determinative if "it is more probable than not that the error affected the outcome of the proceedings." *People v Young*, 472 Mich 130, 141-142; 693 NW2d 801 (2005).

During defense counsel's closing argument, he criticized the prosecutor for failing to call the forensic interviewer to testify. Defense counsel told the jury that it did not "hear the whole story" because the forensic interviewer did not testify. The prosecutor objected and noted that the interviewer's testimony would have been hearsay. The trial court prohibited defense counsel from referring to any testimony that the interviewer might or might not have provided at trial. Defense counsel stated that the forensic interviewer's testimony would have been "inconsistent" with the victim's testimony.

During her rebuttal argument, the prosecutor told the jury that the interviewer could not testify for evidentiary reasons and that, if defense counsel believed she would support his position, he could have called the interviewer to testify. The prosecutor then told the jury that the interviewer's testimony would have been consistent with the victim's testimony. Defense counsel objected, and the trial court reminded the prosecutor not to speculate about the interviewer's testimony, but gave no curative instruction. We hold that the prosecutor's statements do not rise to the level of reversible error.

"Otherwise improper prosecutorial conduct or remarks might not require reversal if they address issues raised by defense counsel." *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). The prosecutor's statements during rebuttal directly responded to defense counsel's closing argument. Defense counsel's suggestion that the forensic interviewer was not called to testify because she held unfavorable information was matched by the prosecutor's claim that the forensic interviewer held favorable information. To the extent that the prosecutor stated the forensic interviewer's testimony would be consistent with the victim's testimony, defense counsel invited the error and committed error by stating the forensic interviewer's testimony would be inconsistent with the victim's testimony. The exchange was initiated by defense counsel and not the prosecutor. Moreover, the prosecutor's argument was promptly interrupted by defense counsel before she could continue. The damage, if any, to defendant was therefore minimal because the prosecutor's comments were brief and simply rebutted references by defense counsel.

Moreover, the prosecutor's reference was minor and isolated in the context of the overall trial. During trial, defense counsel elicited conflicting stories of the crimes from the victim herself. Defense counsel aptly demonstrated to the jury that the victim's recollection of the sexual assaults was conflicted. The prosecutor's comments did not seriously undermine defense counsel's trial strategy. The trial court instructed the jury to not consider the statements of the attorneys as evidence. "Jurors are presumed to follow their instructions[.]" *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Moreover, "instructions are presumed to cure most errors[.]" *Id.*

We further note that defense counsel failed to request a curative instruction. This failure undermines defendant's claim that the trial court reversibly erred by not giving a curative instruction during rebuttal. See MCL 768.29 ("The failure of the court to instruct on any point of law shall not be ground for setting aside the verdict of the jury unless such instruction is requested by the accused.").

Defendant also contends that, during voir dire, the prosecutor erroneously sought the jury's sympathy for the victim and vouched for the victim. "The purpose of voir dire is to elicit

enough information for development of a rational basis for excluding those who are not impartial from the jury.” *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). The trial court must “allow the elicitation of enough information so that the court itself can make an independent determination of a juror’s ability to be impartial.” *Id.* at 620. However, a prosecutor may not appeal to the jury’s sympathy for the alleged victim. *People v Swartz*, 171 Mich App 364, 372; 429 NW2d 905 (1988).

During voir dire, the prosecutor asked prospective juror seven how she would react if the prosecutor asked her “to describe [her] last consensual experience in great detail.” Juror seven replied that she would feel “very uncomfortable.” The prosecutor told the prospective jurors to “keep that in mind” when hearing the testimony at trial. Defendant claims this was improper vouching because the prosecutor’s question assumed that juror seven had a prior consensual experience and that this assumption implied that the victim’s allegations were true.

A review of the record reveals that the prosecutor did not improperly appeal to the jury’s sense of sympathy for the victim. The prosecutor’s question and comments were tailored to determine whether any jurors would have a bias against a child sexual assault victim who changed the details of his or her story. The prosecutor did not discuss the details of the sexual assault, nor did she call attention to the victim herself. The prosecutor’s questions were part of a broader set of questions for jurors in sexual assault cases.

And, while it is the case that a prosecutor is not permitted to vouch for the credibility of a witness or imply that he or she has special knowledge regarding a witness’ truthfulness, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), the questions asked by this prosecutor did not amount to improper vouching or otherwise suggest that she had special knowledge regarding the victim’s truthfulness.

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O’Connell