

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTONIO LAMONT GROVER,

Defendant-Appellant.

UNPUBLISHED
October 29, 1996

No. 170331
LC No. 93000527 FH

Before: Markman, P.J., and Marilyn Kelly and L.V. Bucci,* JJ.

PER CURIAM.

Defendant was convicted following a jury trial of third-degree criminal sexual conduct. MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). He then pleaded guilty to habitual offender, second offense. MCL 769.10; MSA 28.1082.

Defendant argues that the prosecutor's injection of race into the trial prejudiced the jury, thereby necessitating a new trial. He asserts that the prosecutor improperly shifted the burden of proof by denigrating defense counsel. He alleges that reversal is required where the prosecutor improperly cross-examined him regarding the credibility of other witnesses. Finally, he claims that he was denied the effective assistance of counsel. We reverse.

I

We agree that the prosecutor's injection of race necessitates a new trial. Even though defendant failed to object to the prosecutor's remarks, we will review this issue, because our failure to do so would result in a miscarriage of justice. *People v Gonzalez*, 178 Mich App 526, 534-535; 444 NW2d 228 (1989). In reviewing defendant's claims of prosecutorial misconduct, we examine the remarks complained of in context. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Reversal is required where a prosecutor deliberately arouses the prejudice of the jury by appealing to race, thereby depriving a defendant of a fair trial. *Bahoda, supra*, p 267 n 7.

* Circuit judge, sitting on the Court of Appeals by assignment.

In this case, during his opening statement, the prosecutor stated:

[Y]ou're going to hear a story of a 19 year old girl, Susan Allen, who's got the mental age of a 12 year old. You're going to hear a story of where she was home, she was with her brother and the Defendant came over, a friend of her brother's.

Now, the Allens are white and the Defendant is black. And, of course, that has nothing to do with whether or not the defendant raped Susan Allen. But it is a fact the Defendant is a black man who came over to visit his friend.

* * *

Mr. Allen is going to testify to the fact that his daughter is basically a third, fourth grade level. She's going to appear like a 19 year old, but that's not where her mind is. And Bill Allen is in his early 20's, and he's mildly retarded, too.

So when he saw that this black man, Mr. Grover, was in the room with her [sic] sister -- with his sister he didn't go in, he stayed downstairs. And then as Susan came down and told him what happened he didn't believe her. How could his friend have done something to his sister?

During closing argument the prosecutor stated:

I can tell you the way I wanted her to testify. I wanted her to appear to you, boy, as the most credible witness you ever saw. I wanted you to believe her so bad. I wanted you to see a woman up there who knew exactly what happened, who remembered it in detail, who was able to tell you exactly the fear and the fright and the anguish she felt when this black man had his penis inside of her without her permission. I wanted that feeling to get across to you.

* * *

You decide who has a reason to lie. Is there any reason Susan Allen would lie? Is there any reason why her brother would lie? Why her father would lie? Hell, the defendant is a friend of the family. Why would these people lie? Have they shown to be bigots? Do they hate black people?

* * *

And if you believe Antonio that it didn't happen, you know what you have to believe is that his response to that was nothing. He wants you to believe that immediately after he raped -- Well, in his words, he had sex with her, and they went downstairs and Susan told his friend that she had been raped by him just moments before. His response was, hey, it didn't happen, I didn't do it. What would I do something like that. You're a friend of mine. My God, she's mentally retarded. She's white. I wouldn't do that. His response was what if you believe him? Nothing.

* * *

Maybe she didn't want to have sex for the first time. Period. Maybe she didn't want to have sex for the first time with a black man. I don't know. But she clearly told Billy that Billy told -- He clearly told Billy and Billy told you, there's no reason not to believe Billy, he said, no, she didn't want to have sex. That means he made her have sex. He made her. He put it in her and he made her have sex.

II

We find that the prosecutor's repeated remarks concerning the respective races of complainant and defendant were a tactic designed to arouse the prejudices or passions of the jury. There is no alternate explanation for the prosecutor's repeated references to race.

This situation differs significantly from that in *Bahoda, supra*. There, the Michigan Supreme Court found that reversal was not required where Arab and Iraqi references were made during a trial which took place during the Persian Gulf War. However, most of the improper comments were not deliberately injected by the prosecutor. They were responses by a witness who, because of his limited command of the English language, used ethnic terms to explain himself. The references were attenuated by the prosecutor and the trial judge, thus minimizing any potential prejudice. *Id.*, pp 272-273. Finally, while other remarks by the prosecutor that pointed out witnesses who were Iraqi were improper, they were found harmless in light of defense counsel's theory. *Id.*, p 273.

Here, it was the prosecutor, not the witnesses, who injected race into the proceedings. Moreover, the statements were irrelevant to counter any defense theory. Even though it was evident to the jurors that defendant was black and complainant was white, we cannot find that the error was harmless. The prosecutor went beyond the fact that the two were of different races, and apparently sought to outrage the jury to obtain defendant's conviction because he is black. As there is no apparent justification for the prosecutor's remarks, except to arouse prejudice, reversal is mandated. *People v Hill*, 258 Mich 79, 87-89; 241 NW 873 (1932); *People v Springs*, 101 Mich App 118, 125; 300 NW2d 315 (1980).

III

We find, also, that reversible error occurred where the prosecutor denigrated defense counsel. The denigration of defense counsel is improper, because it undermines the defendant's presumption of innocence and impermissibly shifts the jury's focus from the evidence to defense counsel's personality. *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988).

Here, the prosecutor's remarks that defense counsel was trying to "trip" complainant and that he was paid to create doubt undermined defendant's presumption of innocence. The remarks made it appear that defendant was guilty and needed defense counsel to employ improper tactics to gain his acquittal. The prosecutor undermined defendant's presumption of innocence.

IV

Because we are reversing and remanding for a new trial, we note briefly that the prosecutor improperly asked defendant on cross-examination to comment on the credibility of prosecution witnesses. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Defendant's opinion on their credibility is not probative of the matter. *Id.* We caution the prosecution not to ask similar questions on retrial.

In light of our disposition, we decline to address defendant's remaining arguments.

Reversed.

/s/ Marilyn Kelly

/s/ Lido V. Bucci