

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

THEODORE JOHNSON, a/k/a TEDDY
JOHNSON,

Defendant-Appellant.

UNPUBLISHED

October 23, 2003

No. 240807

Kalamazoo Circuit Court

LC No. 01-001563-FC

Before: Bandstra, P.J., and Hoekstra and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right his conviction of criminal sexual conduct in the first degree (CSC I), MCL 750.520b(1)(f), entered after a jury trial. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant was charged with CSC I as a result of allegations made by his former wife. Complainant testified that defendant, to whom she was still married at the time, engaged her in a physical altercation and forced her to have sexual intercourse against her will. She indicated the incident occurred after she told defendant she wanted a divorce. Complainant maintained that defendant had never before attacked her in that fashion. The physician who treated complainant in the emergency room testified that he detected bruises on complainant's upper lip, left wrist, and left upper arm. The physician acknowledged that the results of the rape kit test were negative, but noted that the absence of semen did not indicate with certainty whether a sexual assault occurred.

Defendant testified that complainant did not resist his advances, and that the physical struggle alleged by complainant was actually a form of physical play. On cross-examination, the prosecutor inquired if complainant had a habit of accusing him of things. Defendant responded in the affirmative. When the prosecutor inquired again if complainant had previously accused him of forcing her to have sexual intercourse against her will, defendant responded in the negative.

Defendant moved for a mistrial and requested that the trial court dismiss the case with prejudice on the ground that the prosecutor's question regarding whether complainant had made similar accusations in the past was designed to mislead and prejudice the jury. Defendant also indicated that after the prosecutor received a negative response to his question, he turned to the

jury and said “yeah, sure.”¹ The trial court denied defendant’s motion for a mistrial, observing that it understood that by asking the question the prosecutor was seeking to establish that complainant had not made similar accusations on previous occasions.

The jury found defendant guilty as charged. The trial court sentenced defendant to ten and one-half to twenty-five years in prison, with credit for 186 days.

We review the trial court’s denial of a motion for a mistrial for an abuse of discretion. A mistrial should be granted only for an irregularity that results in prejudice to the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct issues are decided on a case-by-case basis. The reviewing court must examine the pertinent portion of the record, and evaluate a prosecutor’s remarks in context. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). 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 Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). No error requiring reversal will be found if the prejudicial effect of the prosecutor’s remarks could have been cured by a timely instruction. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002).

Defendant argues that he was entitled to a mistrial and to an outright dismissal of the case with prejudice. We disagree and affirm defendant’s conviction. The prosecution acknowledges that the question that resulted in the motion for a mistrial and dismissal was asked in a sarcastic manner. The trial court noted that the prosecutor had a style of questioning that “kind of backs into his goal.” Nevertheless, it is clear from the context in which the question was asked that the prosecutor expected defendant to reply in the negative when he was asked if complainant had made similar accusations in the past. Complainant testified that defendant had never before acted in such a manner. It seems apparent that the prosecutor was attempting to elicit certain testimony from defendant, i.e., that complainant had not made similar accusations in the past, that supported complainant’s assertion. Defendant corrected his answer and indicated that complainant had not made similar accusations in the past. Read in context, the prosecutor’s question was not improper. *Noble, supra; Schutte, supra*. The jury was entitled to accept complainant’s testimony as credible, and to reject defendant’s assertion that he did not force complainant to have sexual intercourse against her will. *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). In light of the strength of the other evidence against defendant, and in light of the fact that defendant refused to consider the possibility of the trial court giving the jury a cautionary instruction, *People v Lumsden*, 168 Mich App 286, 299; 423 NW2d 645 (1988), we conclude that the trial court did not abuse its discretion by denying defendant’s motion for a mistrial. *Alter, supra*.

¹ This assertion is not supported by the record.

Furthermore, defendant's assertion that he was entitled to a dismissal with prejudice because the prosecutor goaded him into moving for a mistrial is without merit. The issue of whether a defendant was compelled by prosecutorial conduct to move for a mistrial is relevant only if the trial court actually declares a mistrial. A mistrial granted on the defendant's own motion or with his consent, unless prompted by prosecutorial conduct intended to provoke the mistrial request, waives double jeopardy protections. See *People v Dawson*, 431 Mich 234, 253; 427 NW2d 886 (1988). The trial court denied defendant's motion for a mistrial; therefore, it was not required to determine whether dismissal of the case was appropriate.

We affirm.

/s/ Richard A. Bandstra

/s/ Joel P. Hoekstra

/s/ Stephen L. Borrello