

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES LEE SHERMAN,

Defendant-Appellant.

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UNPUBLISHED

January 22, 2004

No. 244814

Muskegon Circuit Court

LC No. 01-045907-FC

Before: Markey, P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of first-degree criminal sexual conduct, MCL 750.520b(1)(c), as a fourth habitual offender, MCL 769.12. The trial court departed from the sentencing guidelines' range and sentenced defendant to a term of fifty to one-hundred years' imprisonment. We affirm.

I. Facts and Procedural History

The seventy-two year old victim was alone at home when she woke up in the middle of the night and saw "a clump on the floor." She poked it twice and realized that the clump was a person. She started to get up but was "flung back on the bed." The light from the television screen that was on allowed her to see part of the person but she could not see his face. He was a white male in his thirties. He was wearing a blue stocking cap, a white polo shirt with what seemed to be red lettering on the back and a pair of jeans. She saw "a little brown spot, like a scar or a scab, near his waist on the right side." She tried to remove the man's hat. He pushed her arms back and put his hand over her mouth and told her to "shut up" twice. He then flipped her over onto her stomach.

The man threw a cover over her head. He used his fingers "very roughly," placing them inside her vagina. She believed that his penis may have touched her legs and she knew that he ejaculated because her legs were wet. After the man left, the victim lay crying and sobbing on the bed. She eventually got up and wiped her legs with a tissue and flushed it down the toilet. She called her granddaughter who, in turn, called the police. The police arrived immediately and took the bed sheet and the bedspread.

The victim died before the time of the trial and the testimony she gave at the preliminary examination was read into the record. Because the victim could not identify her assailant, the

central issue in this case focused on his identity. Defendant's theory of the case was that the police committed too many mistakes in the investigation, foremost of which was defendant's claim that the police failed to accurately maintain a chain of custody with respect to the blood sample drawn from defendant for DNA testing. The defense attempted to cast doubt on whether his blood sample may have been mistakenly mixed up with the blood samples of other suspects in this case. Accordingly, the prosecutor presented the testimony of virtually every person involved in the chain of custody over the evidence that included the victim's bed sheet on which the assailant's semen was found and the blood samples drawn from defendant and the other suspects.

## II. Analysis

Defendant alleges two instances of prosecutorial misconduct. Defendant failed to preserve the issue for appeal because he failed to object to the prosecutor's alleged misconduct at trial. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000), citing *People v Carines*, 460 Mich 750, 761-762; 597 NW2d 130 (1999). We review unpreserved claims of prosecutorial misconduct for plain error affecting defendant's substantial rights. *Schutte, supra*. Reversal is warranted only when a plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id.* at 720-721.

Defendant first maintains that the prosecutor improperly elicited from defendant's mother testimony that she evicted defendant from her house after she confronted defendant with a newspaper article over the instant offense. Defendant's mother was one of the prosecution's witnesses. The pertinent portion of the testimony is as follows:

*THE PROSECUTOR:* Do you remember a particular article in The Muskegon Chronicle?

*DEFENDANT'S MOTHER:* Yes.

*Q.* And what was that article about?

*A.* It was about a rape that was in our neighborhood.

*Q.* Did you show that article to James?

*A.* Yes, I did.

*Q.* Did you and James argue about it?

*A.* Yes.

*Q.* How long had James been living at your house prior to this article?

*A.* I don't know. Five, six months, I think it was.

Q. All right. After your argument, did you say anything to James about whether he could still live there?

A. No. My husband and I told him that he had to find a new place to live.

Q. And how long did he live there until he moved?

A. He moved out within a day or two.

While defendant concedes on appeal that the prosecutor was allowed to elicit testimony that defendant's mother showed the article to defendant for impeachment purposes, defendant argues that the testimony gave rise to damaging inferences that defendant was evicted from his mother's house because she believed he committed the offense and that he may have had a prior conviction for sexual assault. With respect to the inference that defendant may have had a prior criminal sexual misconduct conviction, the record indicates that the prosecutor agreed that defendant's prior conviction was not allowed into evidence. With respect to the inference that defendant's mother believed her son committed the instant offense, such evidence would be barred by MRE 602 that provides a witness' testimony may be disallowed if she has no personal knowledge of the events about which she testifies.

Assuming that an inference may be made from the testimony that defendant's mother told defendant to move out of her house because she believed he committed the offense, we conclude that the error was harmless. Substantial independent evidence existed in this case to support defendant's conviction of first-degree criminal sexual conduct. Although the victim was unable to identify her assailant, the victim testified that the perpetrator was wearing a white polo shirt with red letters and a blue knit cap. She also testified that her assailant was a white male in his thirties who had a scar on his right side. A blue knit cap and a white sweat shirt with red or black lettering was discovered among defendant's possessions. When the victim was shown a picture of the clothing, she told the police that they looked familiar. Defendant had a scar to the right side of his navel. Defendant resided four houses down from the victim's home. Defendant's own testimony was highly incredible and contradictory. Importantly, DNA tests conducted independently by two different laboratories concluded that defendant was the source of the semen found on the victim's bed sheet. Therefore, defendant cannot establish any error affecting his substantial rights.

Defendant next asserts that the prosecutor improperly denigrated counsel in rebuttal. A prosecutor cannot personally attack the defendant's trial attorney because this type of attack can infringe upon the defendant's presumption of innocence. *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996). A prosecutor may not suggest that defense counsel is intentionally attempting to mislead the jury. *People v Watson*, 245 Mich App 572, 592; 629 NW2d 411 (2001). However, the prosecutor's comments must be considered in light of defense counsel's comments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). An otherwise improper remark may not rise to an error requiring reversal when the prosecutor is responding to the defense counsel's argument. *Kennebrew, supra* at 608.

Defendant points to two instances in the prosecutor's rebuttal in which the prosecutor stated that the defense was creating "smoking mirrors," "throwing up a lot of smoke in the air

and trying to obscure what is a very simple and common sense case,” and that the defense was “just trying to confuse the issues.” The statements are as follows:

*THE PROSECUTOR:* What does defense do? They bring in the doctor. That’s a defense witness. What does he tell you? Well, part of the time he was there. There is no evidence he did anything that he should remember, no evidence that he was there necessarily when the blood was drawn. Your recollection governs but, you know. No evidence that there’s any records that would refresh his recollection, nobody brought in any records. [The defense has] the power of subpoena. Why did they put him up? It’s smoking mirrors here. They’re just trying to confuse the issues.

\* \* \*

Isn’t the evidence produced at this trial that RFLP [the method in testing DNA]. . . used to be the standard in the industry and now the standard is PCR? And that is because it has a greater sensitivity and it can work with contaminated or degraded samples. Where is the Defense expert - - And they have the same power of subpoena - - to say that our experts are wrong, that RFLP is better?

All they’re doing is they’re just throwing up a lot of smoke in the air and trying to obscure what is a very simple and common sense case . . .

Defendant relies on this Court’s decision in *People v Dalessandro*, 165 Mich App 569, 580; 419 NW2d 609 (1988), and argues that the prosecutor’s language in both instances impermissibly cast defendant’s counsel as attempting to divert the jury from the truth. In *Dalessandro*, the prosecutor expressly uttered in closing argument a string of accusations against the defense, claiming that the defense presented “damnable lies” and “fabrications of evidence.” *Id.* at 579. This Court determined that the prosecutor’s argument improperly attacked defense counsel and improperly suggested to the jury that defense counsel was intentionally trying to mislead the jury.

In this case, we conclude that the prosecutor’s comments in the above two instances do not rise to the level of the improper language of the prosecutor in *Dalessandro*. Rather, the prosecutor’s statements constituted proper arguments based on the reasonable inferences from the evidence and from the issues defendant raised in closing argument. Therefore, defendant has not established error requiring reversal.

Defendant’s claim that he was denied the effective assistance of counsel by counsel’s failure to object to the alleged prosecutorial misconduct must also fail. Because defendant did not move for a *Ginther*<sup>1</sup> hearing to preserve the issue of ineffective assistance of counsel for appellate review, this Court’s review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To prevail on a claim of ineffective assistance, a defendant must show that (1) counsel’s performance was below an objective

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<sup>1</sup> *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors. *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001). To establish a claim of ineffective assistance of counsel meriting reversal of a conviction, a defendant must show that counsel's deficient performance prejudiced the defense. *People v Hill*, 257 Mich App 126, 138; 667 NW2d 78 (2003).

With respect to the manner in which the prosecutor questioned defendant's mother, defendant failed to show prejudice in light of the fact that there was substantial independent evidence in this case to support his conviction, as previously discussed in this report. Defendant also failed to establish a claim of prosecutorial misconduct that would have required action on the part of defendant's counsel.

Defendant finally asserts that the scoring of OV 10 was improper. Because defendant did not challenge the alleged scoring error below, this Court may not review it. MCR 6.429(C); *People v Wilson*, 252 Mich App 390, 393; 652 NW2d 488 (2002); *People v McGuffey*, 251 Mich App 155, 165-166; 649 NW2d 801 (2002). We decline defendant's invitation to disagree with the conclusion in *McGuffey* and convene a special panel pursuant to MCR 7.215(J)(2) to determine whether the statute, MCL 769.34(10) should trump the court rule, MCR 6.429(C).

Affirmed.

/s/ Jane E. Markey  
/s/ William B. Murphy  
/s/ Michael J. Talbot