

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND A. ROSS,

Defendant-Appellant.

UNPUBLISHED

March 23, 2004

No. 244281

Wayne Circuit Court

LC No. 01-006374

Before: Griffin, P.J., and White and Donofrio, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of criminal sexual conduct, third-degree, MCL 750.520d(1)(a), and sentenced to twenty-five months to fifteen years' imprisonment. Defendant appeals as of right, asserting that he was deprived of due process by the trial court's refusal to grant his motion for a mistrial, which he brought on the basis of prosecutorial misconduct and improper testimony from the prosecution's expert. We affirm.

I

The test for prosecutorial misconduct is whether the defendant was deprived of a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial misconduct claims are reviewed on a case by case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Id.* "Review of alleged prosecutorial misconduct is precluded unless the defendant timely and specifically objects, except when an objection could not have cured the error, or a failure to review the issue would result in a miscarriage of justice." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003), citing *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Unpreserved claims of prosecutorial misconduct are reviewed for plain error that affected substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *Callon, supra* at 329.

A

Defendant challenges the prosecutor's references in opening statement and closing argument to a potential juror's remarks during voir dire to the effect that she had been raped, did

not report the rape because she feared not being believed, and that she regretted not having reported the rape.

During voir dire, the court asked whether anyone knew any victims of sexual abuse, and the prospective juror responded that she had been raped at age fourteen, that she had not reported the rape because it was a he said/she said situation, and that she wished she had. The prospective juror was not chosen to sit on the jury.

In opening statement, the prosecutor discussed the circumstances of the alleged rape and that complainant did not report it for three days, remarking that, after the rape, the complainant “cries, goes downstairs and her sister encounters her. As much as [the prospective juror] stated when we were doing voir dire.” Defense counsel objected, stating: “Well your Honor, that is completely out of line.” The trial court stated: “Sustained. Objection sustained. Disregard, inappropriate, you may proceed.” Notwithstanding the court’s admonition, the prosecutor again alluded to the prospective juror in closing argument, as follows:

You know, it’s perfectly reasonable that someone delayed to tell us what happened to them. Sometimes people never tell and sometimes they regret it for the rest of their lives.

As I submit to you, what Danielle did was a very, very, brave thing to do. You will hear from today what is going on in the world these days. Some people never tell and Danielle did, three days later and I submit to you that is not unreasonable, that is not unreasonable at all and from things you heard yesterday makes perfect sense to tome [sic] people never tell.

Some people don’t think they will be believed. Some people feel ashamed and think it is their fault they were taken advantage of by someone older.

Defendant asserts that the prosecutor’s closing argument again referred to the prospective juror’s remarks during voir dire: “Look at the defendant he is a very large man. It makes sense that she did not resist, some people don’t. You heard that. You heard that from other people.” Defendant argues that because no evidence was introduced at trial that some people do not report rapes, the prosecutor’s argument was unsupported by the evidence.

We agree that the prosecution’s references and allusions to statements made in voir dire by a potential juror were clearly improper. A prosecutor may not make a statement of fact to the jury that is unsupported by the evidence. *Stanaway, supra* at 686. However, we conclude that reversal is not warranted.

Defendant objected to the remark in opening statement, and the trial court immediately instructed the jury to disregard the prosecutor’s assertion. During closing argument, the court instructed the jury soon after the challenged remark that “in closing arguments the Prosecutor is only allowed to argue the evidence or inferences from the evidence. There is no other evidence according to that last statement and you are to disregard that.” The court later instructed that opening statement, closing argument and the attorneys’ questions were not evidence, and that:

Occasionally during the trial, I told you that certain things that were inappropriate for you to consider even though they were said. . . I told you to disregard it. I know how difficult that is once they're said for you to disregard them . . . But nonetheless I told you to disregard those things. You are not to consider those things . . . Make your decision only on the evidence that I let in and nothing else.

Jurors are presumed to follow the court's instructions. The court's instructions were sufficient to cure any error. We thus conclude reversal is not warranted.

B

Defendant next challenges the prosecutor's remark in opening statement that:

[T]here's two points during the evening he [defendant] slapped her [complainant] on the butt. People would contend it was an inappropriate thing for a 25-year-old man to do with a 16-year-old girl, and children and a girlfriend alike.

We conclude that this unobjected-to remark was not improper. The challenged remark was directed to what the prosecutor anticipated the evidence would show regarding defendant's conduct on the evening in question, including conduct before the alleged rape. To the extent the prosecutor's comment that "people would contend it was an inappropriate thing for a 25-year-old man to do" was argument or referred to facts that would not be in evidence, the statement was innocuous, and could have been cured by a timely objection.

C

Defendant also challenges the prosecutor's remark in closing argument that:

Even if he didn't remember what he did, although the People would submit he does, as long as that act was committed he is guilty.

Defendant argues the prosecutor's remark expressed her personal opinion as to his guilt and infringed on his right to remain silent. Defendant notes that he (defendant) did not testify at trial, and thus did not testify that he did not remember what he did on the evening in question.

A prosecutor may not comment on a defendant's failure to testify or failure to present evidence, but may argue that certain evidence is uncontradicted. *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003). A prosecutor may argue from the facts that a witness should be believed, *Watson, supra* at 591, and that the defendant is not worthy of belief, *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). In the instant case, defendant did not testify, and the defense presented no witnesses. However, the victim testified that she saw defendant after she reported the incident and that he said all he remembered about that night was ordering pizza and eating it. The victim's uncle testified that he confronted defendant after learning of the incident, and that defendant told him he had blacked out and could not remember that night. Under these circumstances, we conclude that the prosecutor's remark was not improper.

D

Defendant also argues that prosecutorial remarks in opening and closing constituted improper vouching for the credibility of the complaining witness:

But most of all, judge the credibility of the witnesses, please listen to Danielle's testimony. Please understand that she is a teenager with who [sic] has had an incredibly humiliating experience.

* * *

In closing argument, the prosecutor argued:

Now let's talk about Daniel's [sic] testimony. Now Danielle got up on the stand and you saw her ladies and gentlemen and I don't have to really reiterate how compelling her testimony was.

She got up here and she told you what happened and her testimony was very compelling and it was I would submit to you, very visceral.

Visceral is something that wells up in you it is a crude emotion that prevents itself from some type of physical reaction to what is going on in your life.

And you saw Danielle yesterday and you saw her tell you what happened to her. I can't recreate it. I can't try to recreate it because it was visceral. It was of the moment and she transported herself back to that awful night when the defendant took advantage of her.

* * *

And when you listen to Mr. Muawad says, please think about Danielle. Please think about her demeanor on the stand and her emotions, which I submit to you was real and was sincere and was compelling.

Defendant did not object to these specific remarks, and acknowledges that curative instructions were given, but argues the harm was so prejudicial and inflammatory that no curative instruction would help.

It is for the jury to decide the credibility of a witness and the guilt or innocence of the defendant, and prosecutors are prohibited from vouching for the credibility of their witnesses. *Bahoda, supra; People v Erb*, 48 Mich App 622, 631; 211 NW2d 51 (1973).

We conclude that reversal is not warranted. Defendant cannot show plain error that affected his substantial rights. The court instructed the jury to consider whether a witness's age and maturity may affect his or her testimony. The prosecutor could properly argue that the victim was worthy of belief. *Watson, supra*.

II

Defendant's final argument is that he was denied due process by the trial court's failure to declare a mistrial after the prosecution's expert witness, Dr. Susan Horling, declared that she believed complainant had been assaulted. Defendant objected to the challenged testimony, and the court sustained the objection.

Dr. Horling, who examined complainant and performed a rape kit three days after the alleged rape when complainant presented to the emergency room, testified for the prosecution as an expert in emergency medicine. Dr. Horling found no presence of sperm and no bruising or tearing. She testified that complainant had showered three times between the time of the alleged rape and presenting to the emergency room, and that complainant was also menstruating, therefore, she would not expect to find sperm in the cervix. Dr. Horling testified that complainant was upset and crying when she told her about the alleged rape, and read into the record complainant's description of the incident. The prosecutor then asked Dr. Horling:

Q. Doctor was your findings [sic] consistent with the history that she gave you?

A. Yes.

Q. I'm sorry. Actually was your finding consistent with someone who would have said that she did not resist the defendant?

A. Are you asking me if I believe that she was raped?

Q. I'm not allowed to ask you that. Were your findings basically regarding the no vaginal tear consistent with someone saying that they did not resist?

A. My instincts tells [sic] me this woman was assaulted.

MR. MUAWAD: Judge.

THE COURT: Sustained, disregard.

MR. MUAWAD: For the record, I'm objecting to the answer, it is completely prejudice [sic] to the jury.

THE COURT: Sustained.

MR. MUAWAD: Thank you Judge.

Defendant also moved for a mistrial after the expert's testimony. "[T]he grant or denial of a motion for mistrial rests in the trial court's sound discretion, and an abuse will be found only where denial of the motion deprived the defendant of a fair and impartial trial." *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990).

After closing arguments, the trial court remarked:

During the case-in-chief, when the prosecutor asked their expert witness to opine whether she believed that the witness was raped and the doctor testified specifically that she believed that the victim was assaulted.

That's also improper and could lead to a mistrial, the jury was instructed to disregard that. But, you know, to use farm analogy, it's like the cow peeing in the milk. I mean, once the jury heard that, it's a little bit difficult for them to disregard that even if I do give an instruction under 105. I tried to cure that again in my final instructions that I gave."

The prosecution argues on appeal that the court did not remember accurately the questions put to the expert, and that the court's observation that the prosecutor's questioning of Dr. Horling's testimony could lead to a mistrial was similarly erroneous.

We conclude that the trial court did not abuse its discretion in denying the motion for mistrial, because the prosecution's expert witness provided an unresponsive answer and there was no indication the prosecutor played a role in encouraging the witness to give the response or knew that the witness would provide unresponsive testimony. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995); *People v Hackney*, 183 Mich App 516, 531; 455 NW2d 358 (1990). Further, we are satisfied that the unresponsive answer did not affect the outcome of the trial.

Affirmed.¹

/s/ Richard Allen Griffin
/s/ Helene N. White
/s/ Pat M. Donofrio

¹ Defendant's remaining claims do not warrant reversal. Defendant notes the prosecutor's bad faith was evident in her constant interruption of the proceedings, including by allowing her phone or pager to go off. We note that the trial court admonished the prosecutor several times in the jury's presence for the interruptions, including "You've got to stop the pagers, you've got to stop the conversation with other attorneys, you are disrupting court proceedings." The court further stated that it "isn't the first time that you've done that in this trial. Ladies and gentlemen that again is inappropriate conduct by the prosecution."

Defendant also notes that bad faith was evident in the prosecutor's attempt to turn over "newly discovered evidence to the defense on the day of trial."

Given the trial court's admonitions of the prosecutor, and its exclusion of the alleged "newly discovered evidence," there is no indication that defendant was prejudiced.