

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERMAINE ANDREW MOORE,

Defendant-Appellant.

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UNPUBLISHED

May 20, 2008

No. 277299

St Clair Circuit Court

LC No. 06-002030-FH

Before: Donofrio, P.J., and Sawyer and Murphy, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of criminal sexual conduct in the third degree, MCL 750.520d. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that defendant assaulted her while she was asleep at a party. At approximately 2:00 a.m., complainant's boyfriend decided to go to sleep in a room of the home. Complainant stayed up with defendant and a few others for another forty-five minutes, and sat in the home's hot tub. She then joined her boyfriend in bed, after removing her wet swimsuit, and fell asleep. Some time after 4:00 a.m., she awoke to find someone performing oral sex on her. She thought it was her boyfriend, but then discovered defendant under the covers with his mouth on her vagina. She asked him what he was doing and told him to leave. Defendant told her that he was sorry and not to tell her boyfriend. Complainant woke her boyfriend and attempted to tell him what had occurred. Defendant returned to the room and tried to explain that he was drunk and that he did not mean it. After complainant and her boyfriend returned to his home, complainant called her mother and told her what had happened. She then called the police.

Defendant first argues that the police and the prosecution denied him his right to due process by failing to fully investigate the charge. Defendant asserts that the investigating officer should not have discouraged complainant from going to the hospital after the assault to have a rape kit performed. Defendant also complains that the officer only recorded his interrogation of defendant using written notes and did not have defendant sign a statement. Defendant further notes that the officer made no attempt to collect physical evidence, such as the bed sheets, did not take photographs of the home or bedroom, and did not speak with other guests at the party.

Defendant did not raise this issue below; therefore, our review is for plain error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130

(1999). Reversal is warranted only “when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings.” *Id.* at 774.

A defendant has a due process right to obtain exculpatory information or evidence within the prosecutor’s control that would “raise a reasonable doubt about the defendant’s guilt.” *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). However, contrary to defendant’s apparent assertion, the police and the prosecutor are not required to seek and find exculpatory evidence. *People v Burwick*, 450 Mich 281, 289 n 10; 537 NW2d 813 (1995). Moreover, with respect to evidence of unknown probative value, which is thus only potentially exculpatory, loss of the evidence denies due process only when the police act in bad faith. *Arizona v Youngblood*, 488 US 51, 58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

Thus, defendant’s claim that the police were required to interview other persons who were at the party is without merit, especially here, where defendant admitted that he was at the party, and no one asserted that any of the other potential witnesses were in the room or saw the assault. Defendant does not elaborate in any detail on what type of physical evidence the police should have been able to discover that would have helped his claim. Because there is no question of mistaken identity as to who allegedly attacked complainant, any physical evidence found would have likely been inculpatory. However, even were we to credit defendant’s argument that the failure to collect evidence equated to a failure to preserve evidence, defendant cannot show that this resulted from bad faith on the part of the police. Defendant has not addressed the subject of bad faith, nor can we perceive any. We thus find that defendant has not shown a due process violation.

Defendant next argues that he was denied a fair trial when the prosecutor elicited a statement from the officer that defendant’s initial exculpatory version of the events during questioning “just didn’t sound like a real plausible story.” Defendant asserts that this amounted to an improper comment on his guilt. Because defendant failed to object to the introduction of this evidence, he must demonstrate plain error in its admission. *Carines, supra* at 763-764.

It is improper for a witness to express an opinion on the defendant’s guilt or innocence of the charged offense. *People v Bragdon*, 142 Mich App 197, 199; 369 NW2d 208 (1985). Here, however, as defendant acknowledges, the officer did not specifically testify that he believed that defendant was guilty; only that he did not believe defendant’s initial story and that this led defendant to offer a different version to the officer. Nor do we agree with defendant’s apparent assertion that the officer or the prosecutor were improperly “vouching” for defendant’s guilt using the authority or prestige of the prosecutor’s office, see *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995), by simply making the decision to charge defendant. Defendant cannot demonstrate plain error here. Moreover, the trial court properly instructed the jury that “the fact that the defendant is charged with a crime and is on trial is not evidence” and that “you are the only judges of the facts, and you should decide the case from the evidence.” Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors. *People v Bauder*, 269 Mich App 174, 190; 712 NW2d 506 (2005). To the extent the officer’s statement could be regarded as inappropriate, defendant still cannot demonstrate that he is entitled to relief.

Defendant also argues that the prosecutor denied him a fair trial when she improperly asked the jury to feel sorry for complainant under the “guise” of establishing complainant’s credibility. Generally, a claim of prosecutorial misconduct is reviewed de novo as a

constitutional issue. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). However, “[r]eview 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). Thus, because defendant did not object to the prosecutor’s closing remarks at trial, our review is for plain error that affected defendant’s substantial rights. *Id.*

In general, appeals to the jury to sympathize with the victim are improper. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, a prosecutor is free to argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case, *Bahoda, supra* at 282, and is not limited to the blandest possible presentation of the case and evidence when doing so. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001). Thus, a prosecutor may touch on subject matter that might arouse jurors’ sympathy when arguing the evidence and its reasonable inferences in relation to his theory of the case.

The prosecutor’s allegedly inappropriate comments concerned statements about complainant’s age, the difficulty she must have had explaining both her intoxicated state and her somewhat embarrassing sexual situation, as well as “what was going on with her body” at the time of the assault<sup>1</sup> to the investigating officer and during trial and why her willingness to do so supported her credibility. Viewing these remarks in context, *Aldrich, supra* at 110, we find that the prosecutor was attempting to provide reasons, based on the evidence, to show that the complainant was credible, rather than to have the jury decide that defendant was guilty due to the complainant’s age or vulnerability. To the extent that the prosecutor’s remarks may have evoked sympathy for the victim, it would seem to have been unintentional, especially given that the thrust of the prosecutor’s argument reiterated the poor judgment and choices made by complainant prior to the assault. A prosecutor may argue that a witness is credible on the basis of the facts. *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). We conclude that the challenged comments did not constitute deliberately improper conduct by the prosecutor.

In addition, even were we to find that the prosecutor’s remarks were improper appeals for sympathy, we would find that they are not grounds for reversal of defendant’s conviction. The trial court did provide a standard instruction to the jury to not be influenced by sympathy or prejudice. To the extent this did not suffice, any further prejudicial impact could have been cured with a more specific cautionary instruction had defendant timely requested one. *Callon, supra* at 329.

Affirmed.

/s/ Pat M. Donofrio  
/s/ David H. Sawyer  
/s/ William B. Murphy

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<sup>1</sup> Complainant testified that she was having her period when defendant assaulted her.