

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PRINCE MALCOLM-KENYATT WEBB,¹

Defendant-Appellant.

UNPUBLISHED

October 28, 2004

No. 247654

Oakland Circuit Court

LC No. 2002-185644-FH

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under thirteen) for which the trial court sentenced him to one year in jail. We affirm.

I. Facts

Defendant and the victim's mother met in January 2002. Shortly thereafter, defendant visited the victim's home meeting the victim, her two sisters, and three brothers. Sometime in March 2002, defendant took up residence in the home.

According to the seven-year-old victim, one day, in March 2002, she entered her mother's bedroom to watch television and defendant was there lying on the bed. In somewhat contradictory testimony, the victim testified that defendant touched her inappropriately outside the clothing on her vaginal area. The victim left the room, but did not tell anyone about the incident for several weeks.

In early April 2002, the victim's mother was jailed on an unrelated matter for six months. Defendant and the victim's mother agreed that defendant would remain in the house. But the victim's grandmother moved into the house and was eager to have defendant removed from the premises. Both the victim's grandmother and defendant testified that there was tension between them while they both resided in the house. Defendant testified that the grandmother refused to

¹ In the lower court record, defendant's name is spelled more than six different ways. This spelling reflects that on the judgment of sentence.

talk to him and urged him to move into the basement. Ultimately, the grandmother contacted the police in an attempt to have defendant evicted. But defendant left voluntarily on or about April 22, 2002.

In May 2002, the victim attended a presentation at school designed to teach children about “good touches” and “bad touches.” The victim’s grandmother testified that when the victim returned home from school, after attending the presentation, the victim described “bad touches” as “just like [defendant] used to do to me.” The victim, however, admitted that at the preliminary examination, she testified that her grandmother initiated the discussion by asking her if defendant had touched her.

On May 13, 2002, the victim’s grandmother took the victim’s four-year old sister to William Heath, M.D. claiming that she noticed something unusual while giving the girl a bath. After extensive discussion about whether portions of Dr. Heath’s proposed testimony should be excluded, the trial court permitted Dr. Heath to testify that he discovered irritation, a tiny laceration, and discharge consistent with trauma occurring within the preceding forty-eight to seventy-two hours. The trial court excluded testimony that the victim’s sister told Dr. Heath that defendant had touched her.

The day after the jury delivered its verdict, one of the jurors contacted the trial court indicating that she did not believe defendant was guilty. She ultimately signed an affidavit stating that she and other jurors used cellular telephones during deliberations to arrange childcare. The juror attested that she believed she and other jurors arrived at the verdict based on childcare issues rather than their belief in defendant’s guilt. Defendant moved for a new trial based on this information, but the trial court denied the motion concluding that there was no basis for a new trial.

II. Excluded Testimony

Defendant first argues that the trial court erred in excluding Dr. Heath’s testimony that the victim’s sister told him that defendant had hurt her. Defendant argues, on appeal, that the “false, nonhearsay statement,” in conjunction with Dr. Heath’s testimony about the nature of the victim’s sister’s injury, would have tended to prove that the victim and her sister were “coached” by their grandmother to make false accusations against defendant.

Even if there is merit to defendant’s argument, the trial court’s exclusion of this evidence does not provide a basis for reversal because, in the lower court, defendant argued that the evidence should be excluded and the trial court ruled in defendant’s favor. Although there was extensive discussion about this evidence, defense counsel specifically stated, “my intention is not to elicit any testimony from the doctor concerning what anybody may have told him, but strictly that he made observations” Defense counsel also argued that Dr. Heath’s testimony about the victim’s sister’s statement was inadmissible hearsay evidence that did not fit within the medical treatment exception because the name of the accused is not relevant to medical treatment or diagnosis. The trial court agreed with defense counsel and excluded the evidence on the basis that it was hearsay that did not fit within the medical treatment exception. We will not permit defendant to harbor error as an “appellate parachute” by allowing him to claim error in the exclusion of this evidence when, in the trial court, defense counsel argued that the evidence should be excluded and the trial court ruled in defendant’s favor. *People v Pollick*, 448 Mich

376, 387; 531 NW2d 159 (1995); *People v Hall (On Remand)*, 256 Mich App 674, 679; 671 NW2d 545 (2003); *People v Milstead*, 250 Mich App 391, 402 n 6; 648 NW2d 648 (2002).

In his reply brief, defendant argues, in the alternative, that he was denied effective assistance of counsel because defense counsel argued for the exclusion of this evidence. But reply briefs may contain only rebuttal argument, and raising an issue in a reply brief is not sufficient to properly present an issue for appeal. MCR 7.212(G); *People v Brown*, 239 Mich App 735, 748; 610 NW2d 234 (2000). Therefore, we decline to address this issue.

III. Prosecutorial Misconduct

Defendant argues that the prosecutor improperly bolstered the victim's testimony by vouching for her credibility and asking jurors to sympathize with the victim. We disagree.

We review allegations of prosecutorial misconduct de novo, examining challenged statements in context to determine whether they deprived the defendant of a fair trial. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001); *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). Because defendant failed to preserve this issue, we review it for plain error that was outcome determinative. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

The test for prosecutorial misconduct is whether the defendant was denied a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). In closing arguments, a prosecutor is afforded great latitude and is permitted to argue the evidence and make reasonable inferences to support his theory of the case. *Id.* at 284. But a prosecutor may not vouch for the credibility of his witness by suggesting that he has some special knowledge of the witness' truthfulness. *Bahoda, supra* at 276.

Defendant complains of a statement the prosecutor made during closing argument: "Sierra testified truthfully and there's no reason to find the defendant not guilty and I ask you to return a verdict of guilty." The victim in this case, was a seven-year-old girl who offered contradictory testimony, which defense counsel attacked in cross-examination in an effort to show that the only witness to the alleged crime was not credible. Based on the evidence presented at trial, the prosecutor argued that the jury should find that the witness was credible. This was proper because the prosecutor is permitted to remark about the credibility of a witness, particularly when conflicting testimony exists "and the question of defendant's guilt or innocence turns on which witness is believed." *People v Flanagan*, 129 Mich App 786, 795-796; 342 NW2d 609 (1983).

Defendant also complains that the prosecutor, in rebuttal, asked the jurors to reward the victim's courage with a guilty verdict. "Appeals to the jury to sympathize with a victim constitute improper argument." *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). But this Court will not reverse where the prosecutor makes only an isolated comment, and where the appeal to jury sympathy is not blatant or inflammatory. *Id.* Therefore, we conclude that the prosecutor's conduct was not plain error.

IV. Juror Misconduct

Defendant also argues that the trial court erred in denying his motion for a new trial when one juror came forward the day after trial and attested that she and several other jurors, who had used cellular telephones during deliberations to arrange for childcare, decided to render a guilty verdict based on childcare issues.

We review the trial court's grant or denial of a motion for a new trial on the basis of juror misconduct for an abuse of discretion. *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001). “Before this Court will order a new trial on the ground of juror misconduct, some showing must be made that the misconduct affirmatively prejudiced the defendant’s right to a trial before a fair and impartial jury.” *People v Fetterley*, 229 Mich App 511, 545; 583 NW2d 199 (1998).

“The rule is well established that jurors may not impeach their verdict by affidavits. To permit this would open the door for tampering with the jury subsequent to the return of their verdict.” *People v Pizzino*, 313 Mich 97, 105; 20 NW2d 824 (1945). “Once a jury has been polled and discharged, oral testimony or affidavits by its members or outside parties may only be received on ‘extraneous or outside errors (such as undue influence by outside parties), or to correct clerical errors or matters of form.’” *People v Riemersma*, 104 Mich App 773, 785; 306 NW2d 340 (1981), quoting *Hoffman v Monroe Public Schools*, 96 Mich App 256, 261; 292 NW2d 542 (1980); see also *People v Budzyn*, 456 Mich 77, 92 n 14; 566 NW2d 229 (1997). To establish that an extrinsic influence is reversible error, the defendant must prove: (1) that the jury was exposed to extraneous influence and (2) that these extraneous influence created a real and substantial possibility that it could have affected the jury's verdict. *Budzyn, supra*.

In this case, the trial court instructed the jury:

A verdict in a criminal case must be unanimous. In order to return a verdict, it is necessary that each of you agree on that verdict. . . . Any verdict must represent the individual, considered judgment of each juror. . . . Try your best to work out your differences, however, although you should try to reach agreement, none of you should give up your honest opinion about the case just because the other jurors disagree with you or just for the sake of reaching a verdict. In the end, your vote must be your own and you must vote honestly and in good conscience.

After approximately four hours of deliberation, the jury sent a note to the trial court indicating that a unanimous verdict could not be reached. The trial court provided the jury with the deadlocked jury instruction. It was approximately 4:01 p.m., when the trial court asked the jury to continue deliberations. At 4:55 p.m., the trial court sent a note to the jury stating: “I plan on having you deliberate until 5:15 p.m. today, do you plan to continue to deliberate past 5:15 or return tomorrow?” The jury initially replied that it would continue to deliberate, but soon after sent out another note indicating it had reached a verdict. After the jury foreman read the guilty verdict, the trial court asked each juror: “Was that and is that your verdict?” Each juror answered affirmatively.

The day after the verdict was rendered, one juror contacted the trial court indicating that she did not believe defendant was guilty. The trial court contacted defense counsel who interviewed the juror. The juror produced an affidavit indicating that she and several other jurors used cellular telephones to confirm daycare arrangements for that evening and the following day. Her affidavit further stated, in pertinent part:

5. That I and several of the jurors changed position regarding [defendant's] innocence solely based on daycare issues.
6. That I always believed that [defendant] was not guilty but changed my vote solely because I was unable to ensure proper day care arrangements for her [sic] family.

We conclude that defendant has failed to demonstrate that the jury was exposed to extraneous influences that created a real and substantial possibility of affecting the jury's verdict. The affidavit does not demonstrate that the jurors improperly discussed the case with anyone outside the jury room. The jurors discussed childcare, an ordinary everyday matter. Because the juror could only speculate on what the other jurors believed about defendant's guilt and the reason they reached the verdict they did, her conclusions about the other jurors' states of mind are nugatory. With respect to herself, the juror stated under oath that it was her verdict that defendant was guilty. The juror's affidavit expressing remorse about having reached this verdict does not establish reversible error. While cellular telephone use during deliberations should be prohibited, in this case, there is no indication that the use of cellular telephones to discuss childcare arrangements created a real and substantial possibility of affecting the jury's verdict.

We affirm, but remand the case for the trial court to ascertain the correct spelling of defendant's name and to correct the spelling on the judgment of sentence if that spelling is incorrect. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Hilda R. Gage
/s/ Brian K. Zahra