

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENITO DRAKE,

Defendant-Appellant.

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UNPUBLISHED

March 15, 2005

No. 254806

Wayne Circuit Court

LC No. 02-007486

Before: Wilder, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under thirteen) and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a) (victim under thirteen). The trial court sentenced defendant to concurrent terms of twenty to forty years in prison for the CSC-I convictions and ten to fifteen years in prison for the CSC-II conviction. We affirm.

I. Basic Facts

During his childhood, the victim saw defendant, his uncle, nearly every day because he lived down the street. Because the ladies of the family were “bingo queens,” the victim would oftentimes be alone with defendant who would force the victim to perform sexual acts with him. The victim could not recall the exact age when these acts first occurred, but it was under thirteen. The victim was approximately fourteen the last time that an incident like this occurred. Although the victim told his maternal grandmother that defendant was bothering him, she did not realize that he meant that defendant was raping him and she simply told the victim to “hit back.”

Years passed and defendant started telling people that the victim was a homosexual. The victim responded saying that if people did not stop saying this he would tell people why he was a homosexual. To his mind, defendant’s abuse caused his homosexuality. Defendant and the victim also began having arguments, which sometimes led to defendant hitting the victim. Eventually, the victim told his aunt and her friend that defendant had molested him. This led to police involvement.

After a police report was made, defendant’s brother told the victim that if defendant went to jail, the victim would have to watch his back for the rest of his life “because they’ll find [him] dead.” Defendant’s wife told the victim that she hated him and said “you’re gonna get yours.”

Additionally, defendant's mother, the victim's own grandmother, came over one night and choked the victim. She later presented the victim with a letter recanting his accusations against defendant. She instructed the victim to copy the letter in his own handwriting. The victim testified that he complied with this demand because he wanted to leave. Defendant's brother also wrote a letter. A notary came to the house and notarized both letters. The next day, the victim told his mother, his aunt, and the police.

## II. Evidentiary Rulings

Defendant first argues that the trial court erred in (1) excluding evidence of allegations that the victim had molested a child when it was offered to show bias and motive to falsely accuse defendant and (2) permitting the victim to testify about threats that were made against him.

### A. Evidence of the Victim's Sexual History

A determination whether evidence is admissible under the rape-shield statute, MCL 750.520j, "is entrusted to the sound discretion of the trial court." *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). "In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield evidence and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation." *Id.* While evidence of specific instances of a victim's past sexual conduct with others is generally inadmissible, there are some narrow exceptions, including permitting evidence of a complainant's sexual conduct if the information is probative of the victim's "ulterior motive for making a false charge." *Id.* at 348.

Defendant asserts that the victim himself was accused of molesting another child and sought to "get the heat" off himself by making accusations against defendant. Under the circumstances of this case, the trial court did not abuse its discretion in excluding this evidence. Allegations that the victim sexually assaulted someone does not make it more likely that the victim lied when he reported that defendant had abused him several years before. Moreover, defendant's speculation that the victim thought he could "get the heat" off himself is nonsensical. The victim was accused of molesting a child when he was fourteen or fifteen years old. The victim was seventeen years old when he ultimately made allegations against defendant. The charges against defendant should have no tangible effect on the accusation against the victim. Additionally, the victim did nothing to hide the accusations made against him. Under these circumstances, admitting this evidence would have been more likely to allow defendant to harass the victim than it would be probative of the victim's "bias and motive" to bring charges against defendant. The trial court did not err in excluding this evidence.

### B. Victim's Testimony About Threats Made Against Him

Defendant also argues that the trial court erred in admitting the victim's testimony about threats made against him by family members. We review this unpreserved evidentiary error for plain error affecting defendant's substantial rights. *People v Coy*, 243 Mich App 283, 287; 620 NW2d 888 (2000).

Defendant argues that the evidence of threats made against the victim by family members were inadmissible because there was no evidence linking defendant with these third-party threats. Evidence of a *defendant's* threat against a witness is generally admissible to demonstrate consciousness of guilt. See *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). But the evidence of threats in this case was not offered to show defendant's consciousness of guilt. Rather it was offered to rebut challenges to the victim's credibility when he had written a letter recanting his allegations against defendant. Specifically, the evidence that his uncle and aunt threatened him and his grandmother choked him was probative because it explained why the victim complied with his grandmother's demand that he recant his allegations against defendant in writing. See *People v Burton*, 433 Mich 268, 296; 445 NW2d 133 (1989). Therefore, we conclude there was no error in the admission of this evidence. Because there was no error, defense counsel was not ineffective for failing to object.

### III. New Trial

Defendant also argues that the trial court erred in denying defendant's motion for a new trial when, after trial, the victim's diary was discovered and it did not mention the alleged sexual assaults. We review the trial court's decision to grant a motion for new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003); *People v Johnson*, 245 Mich App 243, 250; 631 NW2d 1 (2001).

For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) "the evidence itself, not merely its materiality, was newly discovered"; (2) "the newly discovered evidence was not cumulative"; (3) "the party could not, using reasonable diligence, have discovered and produced the evidence at trial"; and (4) the new evidence makes a different result probable on retrial. [*Cress, supra* at 692 (citations omitted).]

Because defense counsel elicited much testimony at trial regarding the existence and location of the victim's diary, it appears that defendant could have produced the diary at trial with reasonable diligence. Indeed defendant located the diary shortly after trial. Further, the newly discovered evidence would not make a different result probable on retrial. The victim wrote in his diary in 1998. The alleged assaults occurred in 1996 and 1997. Although the evidence would have impeached the victim's testimony that he did not keep a diary at all, it would also have bolstered his testimony that he did not write the dates of the assaults or anything about the assaults in a diary. We conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial on the basis of the newly discovered diary.

### IV. Prosecutor's Conduct

Defendant contends that the prosecutor made remarks in closing argument and rebuttal that bolstered the victim's testimony, improperly appealed to the jury's sympathy and fear of crime, and denigrated defense counsel. To preserve a claim of prosecutorial misconduct for review, a defendant must timely and specifically object. *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Because defendant failed to object at trial, we review his claim for plain error affecting his substantial rights. *Id.* at 296.

The test of prosecutorial misconduct is whether defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003). We review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial. *Id.* at 272-273.

We discern no reversible error in the prosecutor's conduct. The prosecutor argued that the evidence showed that the victim was credible and that his testimony proved defendant's guilt. The argument did not inject issues broader than the defendant's guilt or innocence. *Id.* at 273. In rebuttal, the prosecutor responded to defense counsel's argument that the victim "lies when it's convenient for him." The prosecutor's response that defense counsel was twisting the truth was a fair rebuttal to defense counsel's argument. A prosecutor is not required to state inferences and conclusions in the "blandest possible terms." *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). However, the prosecutor's comment, "This is why people hate lawyers." was an improper denigration of defense counsel. *People v Kennebrew*, 220 Mich App 601, 607-608; 560 NW2d 354 (1996). But this isolated comment does not rise to the level of requiring reversal. *Launsbury, supra* at 361. Because there is no error requiring reversal, defense counsel was not ineffective for failing to object.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly