

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CURTIS RODERICK HOFFMAN,

Defendant-Appellant.

UNPUBLISHED

May 10, 2005

No. 252513

Calhoun Circuit Court

LC No. 2003-001012-FC

Before: Cooper, P.J., and Jansen and Hoekstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree murder, MCL 750.316, and was sentenced to forty-eight to ninety years' imprisonment. He appeals as of right. We affirm.

The day before defendant's original trial date, the trial court heard the prosecutor's motion to remand to add a conspiracy count, to add witnesses, and to disqualify defendant's retained counsel, Daniel Rhodes. After hearing argument on the motion, the trial court denied the motion to remand, but allowed the prosecutor to add witnesses. During the hearing, Rhodes acknowledged that he had represented several of these witnesses and that he had spoken to others in connection with criminal activity. Rhodes thus indicated to the trial court that the addition of these witnesses would create a conflict of interest for him. The trial court reluctantly disqualified Rhodes from representing defendant further, on the basis that Rhodes would be in the "very uncomfortable and untenable position" of being forced to choose between being thorough and aggressive in his cross-examination of his former clients turned prosecution witnesses, or protecting some interest that the witnesses may have that is protected by attorney-client privilege with Rhodes.

On appeal, defendant argues that the trial court erred in concluding that Rhodes had an actual conflict of interest requiring his disqualification on the record before it, and instead was required to conduct a hearing to determine whether such a conflict existed. We disagree.

The constitutional right to counsel encompasses the right of a defendant to retained counsel of his own choosing. *People v Akins*, 259 Mich App 545, 557; 675 NW2d 863 (2003). However, the right is not absolute, and a court must balance the defendant's right to choice of counsel against the public's interest in the prompt and efficient administration of justice. *Id.* This Court in *People v Crawford*, 147 Mich App 244, 249-250, 383 NW2d 172 (1985) provided the following:

In *United States v Reese*, 699 F2d 803, 805 (CA 6, 1983), the Court held:

“When presented [with a government pretrial motion to disqualify a defense counsel] the district court must make a careful inquiry, balancing the constitutional right of the defendant to representation by counsel of his choosing with the court's interest in the integrity of its proceedings and the public's interest in the proper administration of justice. This inquiry will ordinarily require a hearing at which both parties will be permitted to produce witnesses for examination and cross-examination.

Furthermore, even if an actual conflict of interests or a strong likelihood of conflict is demonstrated the defendant must be given an opportunity to waive his constitutional right to conflict-free representation. A voluntary waiver of this constitutional right, knowingly and intelligently made, must be honored by the court in the absence of compelling circumstances.”

Compelling circumstances in which a defendant's waiver of the right to conflict-free representation should not be honored are presented when the defense counsel previously represented a prosecution witness and could not effectively cross-examine his former client without intruding into matters protected by the attorney-client privilege. See, for example, *United States v Provenzano*, 620 F2d 985, 1005 (CA 3, 1980).

In *Provenzano, supra*, the United States Court of Appeals for the Third Circuit explained that, “there is no absolute right to particular counsel where there is an actual conflict” and that such an actual conflict exists where a defense attorney could not effectively cross-examine a former client testifying for the prosecution against his current client without intruding into matters protected by the attorney-client privilege. Similarly, in *Serra v Dep’t of Corrections*, 4 F3d 1348 (CA 6, 1993), the United States Court of Appeals for the Sixth Circuit explained that, “[w]hile the trial court is required to recognize a presumption in favor of a defendant’s counsel of choice, that presumption can be overcome by *either* a showing of actual conflict or a showing of serious potential for conflict.” (emphasis in original).

In *Crawford*, this Court determined that the trial court erred in disqualifying defendant’s counsel where there was nothing in the record suggesting that defense counsel could not effectively cross-examine a witness he previously represented without intruding into matters protected by the attorney-client privilege and the trial court had not conducted an evidentiary hearing to determine whether there was any conflict. Thus, this Court noted that in the absence of a finding of actual conflict, the circuit court would have been required to honor a waiver by defendant and allow continued representation by defendant's retained counsel. *Crawford, supra* at 250-251. By contrast, in the instant case, Rhodes acknowledged that the trial court’s granting of the prosecution’s request to add witnesses created a conflict of interest for him. Thus, while defendant was willing to proceed, and Rhodes indicated that he thought he could be fair, the existence of an actual conflict constituted compelling circumstances in which a defendant's waiver of the right to conflict-free representation should not be honored. In the absence of Rhodes’ admission that a conflict existed, we would agree with defendant that the trial court

would have been required to conduct an inquiry into whether Rhodes faced an actual conflict. However, in the face of Rhodes admission that such a conflict existed, no such inquiry was required. Therefore, the trial court did not clearly err in determining that a conflict of interest existed compelling the disqualification of Rhodes as defense counsel.

Defendant also argues that he is entitled to a new trial based on certain statements made by the prosecutor during closing and rebuttal argument. We disagree.

The test for prosecutorial misconduct is whether, examining the prosecutor's statements in context, they deprived defendant of a fair and impartial trial. *People v Hill*, 257 Mich App 126, 135; 667 NW2d 78 (2003). Claims of prosecutorial misconduct are considered on a case-by-case basis and the comments of the prosecutor are to be considered as a whole and evaluated in light of the defense arguments and the evidence admitted at trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002).

At trial, the prosecution presented witnesses who testified that defendant admitted that he had killed a person, under circumstances that indicated that the person was Vincent Brown. Defendant denied any role in Brown's murder and defense counsel went to great lengths to attempt to discredit the prosecution witnesses. There was no forensic evidence linking defendant to Brown's murder; the case hinged on the jury's assessment of the credibility of the witnesses presented by each side. Defendant argues that, to assure that the jury returned a guilty verdict, the prosecutor committed misconduct necessitating a new trial by appealing to the jurors' sympathy for the victim, vouching for the credibility of the investigators and his witnesses, denigrating defense counsel and interjecting racial prejudices before the jury during closing and rebuttal arguments. We disagree.

Contrary to defendant's assertion, the prosecutor did not intentionally inject race into this trial without justification to arouse the prejudice of the jury against defendant; instead the prosecutor argued that this defendant was guilty as evidenced by the facts and statements of the witnesses, which themselves included racial elements. Thus, there was no "deliberate arousal of prejudice" or "a studied purpose to arouse the prejudice of the jury" sufficient to rise to the level of misconduct. *People v Bahoda*, 448 Mich 261, 271; 531 NW2d 659 (1995).

While, a prosecutor may not vouch for the credibility of his witnesses by implying that he has some special knowledge of their truthfulness, "a prosecutor may comment on his own witnesses' credibility during closing argument, especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *Id.* at 276; *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). The prosecutor did remark that a particular witness was being truthful. However, nowhere did the prosecutor indicate that he had any special knowledge as to his truthfulness; rather, his comment was made in the context of explaining why the witness was worthy of belief and he appealed to the jury to use their own sense to determine whether the witness was being truthful. Further, the jurors were instructed that they were to decide the case based on the evidence, that the statements and arguments of the lawyers are not evidence, and that they must decide which witnesses they believed and the import of their testimony. This instruction dispelled any possible prejudice resulting from the prosecutor's comments. *Bahoda, supra* at 281.

Defendant also asserts that the prosecutor improperly appealed to the sympathy of the jury by reminding them that the victim had family and friends. A prosecutor may not appeal to the jury to sympathize with the victim in reaching their verdict. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001); *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, we note that the prosecutor's brief comments came at the beginning of his closing argument and were only a small part of that argument, there were no repeated references to the victim in any sympathetic way and any possible prejudice could have been cured by an instruction had defendant objected. Thus, these comments do not require reversal. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999).

Next, defendant argues that the prosecutor vouched for the credibility of investigators by noting that the passage of time did not weaken their resolve to solve this case. However, these comments were not comments as to the truthfulness of any testimony. Therefore, there is no basis for defendant's assertion that in making this statement, the prosecutor vouched for the credibility of the investigators.

Defendant also argues that the prosecutor impermissibly denigrated defense counsel by commenting that defense counsel's theory was "ridiculous" and "garbage." We disagree. A prosecutor may not attack the credibility of defense counsel, *People v Kennebrew*, 220 Mich App 601, 607; 560 NW2d 354 (1996), or suggest that defense counsel is intentionally attempting to mislead the jury, *Watson, supra* at 592. However, "when a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). The prosecutor's comments in the instant case were not a personal attack on defense counsel, but rather were an argument that the reasons advanced by defense counsel for acquittal did not stand up under close examination of the evidence. The prosecutor is not required to phrase arguments in the blandest possible terms; emotional language may be used during closing argument. *People v Ullah*, 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Therefore, while perhaps more colorful than necessary, we conclude that the prosecutor's comments that the defense theory was "ridiculous" or was "garbage" were not improper. Further, even if the comments were improper, any resulting prejudice was cured by the trial court's instruction to the jury that the statements of counsel are not evidence and that the jury was required to make its own assessment of the evidence in reaching its verdict. *Bahoda, supra* at 281.

Finally, defendant asserts that, even if each of the prosecutor's comments does not rise to the level of reversible error, their cumulative effect entitles him to a new trial. In order to reverse on grounds of cumulative error, there must be errors of consequence that are seriously prejudicial to the point that defendant was denied a fair trial. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001). Prejudicial error has not been identified in this case and absent the establishment of errors, there can be no cumulative effect of errors meriting reversal. *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (2000).

Affirmed.

/s/ Jessica R. Cooper
/s/ Kathleen Jansen
/s/ Joel P. Hoekstra