

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES ALONZO LEWIS,

Defendant-Appellant.

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UNPUBLISHED

June 26, 2008

No. 277755

Macomb Circuit Court

LC No. 06-005311-FC

Before: Markey, P.J., and White and Wilder, JJ.

PER CURIAM.

Defendant appeals by right his jury trial convictions for first-degree criminal sexual conduct (victim under 13 years of age), MCL 750.520b(1)(a), and second-degree criminal sexual conduct (victim under 13 years of age), MCL 750.520c(1)(a). Defendant was sentenced to 10 to 40 years' imprisonment for the first-degree criminal sexual conduct conviction and 5 to 15 years' imprisonment for the second-degree criminal sexual conduct conviction. We affirm defendant's convictions and sentences, but we vacate that portion of the judgment of sentence requiring defendant to pay \$4,050 for his legal fees and remand to the trial court for reconsideration for the reasons explained herein.

Defendant first argues that the trial court improperly admitted the testimony of Sergeant Steven Briney of the Macomb County Sheriff's Department regarding defendant's demeanor during the interview that eventually resulted in defendant's arrest. Defendant argues further that the prosecution committed misconduct when it elicited this testimony. We disagree.

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). But, where, as here, a challenge to the admission of evidence is unpreserved, this Court reviews the admissibility of the evidence for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Allegations of prosecutorial misconduct are reviewed on a case-by-case basis, analyzing the prosecutor's comments in view of defense arguments and the evidence admitted at trial, to determine whether a defendant has been denied a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Where allegations of prosecutorial misconduct are unpreserved, such claims are reviewed for plain error. *People v Ackerman*, 257 Mich App 434, 448-449; 669 NW2d 818 (2003).

Here, Briney testified that, during the interview, when Briney would ask defendant a key question, defendant would pause before giving his response. Briney also explained that the interview with defendant was challenging because “when someone acts like, like they don’t know what you’re talking about, or acts like they, asks you questions when you ask questions instead of answering your questions, it becomes a difficult interview.”

“It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury.” *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007). Thus, a prosecutor may not ask a defense witness if a prosecution witness has lied. *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001). Here, Briney did not comment on the credibility of any witness that offered testimony in this case.

Further, contrary to defendant’s argument, Briney’s observations regarding defendant’s demeanor during the interview did not extend to an opinion regarding defendant’s guilt or innocence. The substance of Briney’s testimony was limited to Briney’s observation that defendant was difficult to interview because, when defendant paused to reflect upon answers to his questions, Briney was convinced, on the basis of his experience, that defendant was not forthcoming during the interview. Moreover, defense counsel was afforded ample opportunity to cross-examine Briney regarding his impressions during the interview. During defendant’s vigorous cross-examination, Briney acknowledged that defendant denied during the interview that he had improperly touched complainant.

In addition, contrary to defendant’s assertion, nothing in the record indicates that the jurors assessed inordinate weight to Briney’s testimony. Even if Briney’s testimony was arguably improper, any unfair prejudice to defendant could have been cured by a timely jury instruction. *Ackerman*, *supra* 449-450; *Knapp*, *supra* at 385. Here, the trial court specifically instructed the jury to judge the credibility of law enforcement testimony in the same manner as that of any other witness. Jurors are presumed to have followed their instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000).

Moreover, Briney’s testimony was admissible as lay opinion evidence pursuant to MRE 701. Briney’s testimony regarding defendant’s demeanor during the interview was “rationally based on the perception of the witness,” and “helpful to a clear understanding of . . . a fact in issue.” MRE 701. Briney testified that he had 13 years of experience as a law enforcement officer and had conducted over 1,000 interviews during the course of his career. Briney opined that from his experience and rational perception of defendant’s demeanor, defendant was difficult to interview. The fact in issue here was whether the testimony of complainant and her brother was credible or fabricated, and Briney’s testimony helped the jury to more clearly understand this issue and ultimately assess the credibility of all of the witnesses. Briney’s testimony did not invade the province of the jury in its role of weighing the credibility of the witnesses because, once again, Briney did not comment on the credibility of any witness, and defendant has not shown that Briney’s testimony otherwise abridged the jury’s function in judging the facts of this case.

Because Briney’s testimony had a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence,” it constituted relevant evidence under MRE 401. Defendant has failed to

persuade this Court that the probative value of the evidence was substantially outweighed by the danger of unfair prejudice; therefore, the trial court did err when it admitted Briney's testimony. MRE 402; MRE 403.

To the extent that defendant argues that the prosecutor committed misconduct when she elicited Briney's testimony regarding his impressions of defendant during the interview, the record does not demonstrate that the prosecutor elicited the testimony in bad faith, and any prejudicial effect to defendant was minimized because: (1) Briney did not comment on the credibility of any witness; (2) Briney did not express an opinion regarding defendant's guilt or innocence; and (3) the prosecutor's line of questioning was in direct response to the defense theory that the prosecution witnesses were fabricating their testimony. *Knapp, supra* at 385. A claim of prosecutorial misconduct may not be premised upon a prosecutor's good faith effort to admit evidence. *Ackerman, supra* at 448. Accordingly, even if the prosecution arguably acted improperly when it elicited Briney's testimony, any error was harmless. We conclude that Briney's testimony regarding his impressions with respect to defendant's demeanor during the interview was properly admitted, and the prosecution did not commit misconduct when it elicited this testimony.

Defendant next argues that the prosecution engaged in misconduct by evoking sympathy and vouching for the credibility of the witnesses during its closing and rebuttal arguments. We disagree. We review this unpreserved claim for plain error. *Ackerman, supra* at 448-449.

As a general rule, "prosecutors are accorded great latitude regarding their arguments and conduct." *Bahoda, supra* at 282. Moreover, a prosecutor is "free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case." *Id.* If the prejudicial effects of a prosecutor's comments could have been dispelled with a timely jury instruction, then reversal is not required. *Ackerman, supra* at 449.

A prosecutor may not appeal to the emotions and sympathies of the jurors. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Further, it constitutes improper argument for a prosecutor to vouch for a witness's credibility in order to imply that the prosecutor is privy to "special knowledge" that the witness is telling the truth. *Bahoda, supra* at 276. Nonetheless, a prosecutor may comment on the credibility of his own witness and argue that the witness has no reason to lie, particularly where "there is conflicting evidence and the question of the defendant's guilt or innocence depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004).

Here, the prosecutor did not appeal to the jurors' sympathy nor did he vouch for the credibility of complainant and the eyewitness, her brother, both minors. The prosecution's closing and rebuttal arguments specifically emphasized that the witnesses' testimony was credible based upon their demeanor while testifying. Instead of inviting the jury to disregard the evidence and convict defendant merely because the witnesses were children, the prosecution asserted that complainant and her brother's testimony was believable and supported the prosecution's theory of the case. Further, the record demonstrates that the prosecutor neither stated nor implied that she knew that complainant and her brother were testifying truthfully on the basis of information that was not disclosed to the jury. Rather, the prosecution urged the jury to consider the demeanor of complainant and her brother when they testified and assess the credibility of their testimony accordingly.

Moreover, even if the prosecutor's conduct in this instance was arguably improper, any unfair prejudice to defendant could have been cured by a timely jury instruction. *Ackerman, supra* 449-450; *Watson, supra* at 586. Here, following the prosecution's closing and rebuttal arguments, the trial court instructed the jurors that in deciding the verdict, "you may only consider the evidence that has been properly admitted in this case." The trial court specifically instructed the jury that "the lawyers [sic] statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories." Moreover, the trial court instructed the jury that, "You must not let sympathy or prejudice influence your decision." Jurors are presumed to have followed their instructions. *Mette supra* at 330-331. Beyond an invitation to speculate, defendant has failed to demonstrate that the jury ignored its instruction to base its verdict solely on the evidence and not on the prosecution's argument. Defendant has also failed to show that the alleged misconduct affected the outcome of the trial. *Carines, supra* at 763. Moreover, the record does not reveal that the alleged appeal to the jurors' sympathy and vouching by the prosecutor resulted in defendant's conviction despite his actual innocence, or that the error negatively impacted the fairness integrity or public reputation of judicial proceedings. *Id.* Accordingly, reversal is unwarranted.

Defendant next argues that he was denied the effective assistance of counsel. We disagree.

This Court's review of an unpreserved ineffective assistance of counsel claim is limited to mistakes apparent on the record. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). A defendant has waived the issue if the record on appeal does not support the defendant's assignments of error. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). An ineffective assistance of counsel claim is a mixed question of law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance of counsel claim is reviewed by this Court de novo. *Id.*

Both the United States Constitution and the Michigan Constitution protect the right to counsel. US Const, Am VI; Const 1963, art 1, § 20. It is presumed that a defendant received the effective assistance of counsel; to prevail, a defendant bears the heavy burden of proving that counsel was ineffective. *LeBlanc, supra* at 578. A defendant must establish that: "(1) counsel's performance was below an objective standard of reasonableness and (2) a reasonable probability that the outcome of the proceeding would have been different but for trial counsel's errors." *Ackerman, supra* 455.

Here, defendant contends that he was denied the effective assistance of counsel when his trial lawyer failed to object to the admissibility of Briney's testimony and failed to object to any of the instances of prosecutorial misconduct subsequently identified by defendant's appellate counsel. But because Briney's testimony was admissible lay opinion evidence pursuant to MRE 701 and was also relevant and admissible pursuant to MRE 401 and MRE 402, defense counsel's objecting would have been futile. Defense counsel's failure to futilely object does not deprive a defendant of the effective assistance of counsel. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Moreover, because defendant's arguments regarding his allegations of prosecutorial misconduct are all without merit, defense counsel was not ineffective for failing to object to them. *Ackerman, supra* at 455. As such, defendant's argument that he was denied effective assistance of counsel fails.

Lastly, defendant argues that this Court should vacate the portion of the judgment of sentence requiring him to reimburse \$4,050 in attorney fees because the trial court did not consider defendant's financial circumstances. Because defendant failed to preserve this issue, this Court's review is limited to plain error affecting defendant's substantial rights. *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004). When a trial court orders a defendant to reimburse the entity funding appointed counsel, the court need not conduct a formal hearing but must indicate it has in some manner considered the defendant's ability to pay. *Id.* at 254-255, citing *People v Grant*, 455 Mich 221, 242, 243 n 30; 565 NW2d 389 (1997).

Here, at defendant's sentencing, the trial court simply stated: "You're going to repay your court appointed counsel fees to [defense counsel]." Immediately thereafter, the trial court granted defense counsel's motion for additional attorney fees, bringing the total amount defendant was required to reimburse to \$4,050. The record does not demonstrate that the trial court considered defendant's ability to pay when it ordered defendant to reimburse the costs for his appointed counsel. Since the trial court did not comport with this requirement, we vacate the reimbursement order and remand for the trial court's reconsideration "in light of defendant's current and future financial circumstances." *Dunbar, supra* at 255.

We affirm defendant's convictions and sentences, but we vacate that portion of defendant's judgment of sentence requiring defendant to pay \$4,050 for his legal fees and remand to the trial court for reconsideration consistent with this Court's decision in *Dunbar*. We do not retain jurisdiction.

/s/ Jane E. Markey  
/s/ Kurtis T. Wilder