

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 19, 2010

v

ZUHAIR TAWFIQ DADOUSH,

Defendant-Appellant.

No. 292571
Macomb Circuit Court
LC No. 2007-003897-FH

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of fourth-degree criminal sexual conduct (CSC 4), MCL 750.520e(1)(b). Defendant was sentenced to 60 months' probation and appeals as of right. We affirm.

Defendant first argues that the trial court erred in denying his motion for a mistrial, asserting that he was denied a fair trial when the prosecutor committed misconduct and conspired with the police detective to introduce inadmissible and improper evidence. We disagree.

Challenges of prosecutorial misconduct are preserved by objecting to the alleged misconduct at trial. *People v Dobek*, 274 Mich App 58, 64-65; 732 NW2d 546 (2007). A claim of prosecutorial misconduct is precluded on review if the defendant failed to object timely and specifically. *People v Barber (On Remand)*, 255 Mich App 288, 296; 659 NW2d 674 (2003). Defense counsel objected immediately after a sequence of questions in which the detective testified that defendant had three previous contacts with the police. A bench conference was held off the record. The following day, defendant's objection to the detective's testimony was placed on the record, and defendant moved for a mistrial. Defense counsel, however, said nothing regarding prosecutorial misconduct as he was placing his objection on the record. The objection did not specifically raise the issue of prosecutorial misconduct. Thus, this issue was not preserved for appeal. Therefore, we review for plain error affecting defendant's substantial rights. *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004).

A defendant is entitled to a fair trial, not a perfect trial. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). A jury is generally presumed to follow instructions, *id.*, and the detective's testimony did not have a prejudicial effect such that it could not have been cured by a cautionary instruction. The jury was already aware of one prior incident by defendant because T.K. gave detailed testimony before the detective testified. In addition, the detective

merely gave one isolated, improper statement amidst two full days of trial testimony. Consequently, a jury instruction could have been given which would have cured any potential prejudice. *Id.* However, defendant explicitly requested that no curative instruction be given to the jury regarding the detective's statement.

Furthermore, there is no prosecutorial misconduct when the prosecutor attempted to elicit testimony in good-faith. *Dobek*, 274 Mich App at 70-71. The trial court found that the prosecutor did not intentionally elicit the detective's statement regarding defendant's prior contacts with the police. As soon as the detective gave his testimony, the prosecutor directed his attention toward the incident regarding T.K. and did not dwell on the detective's statement. In addition, the prosecutor's question called for a "yes-or-no" response.

This issue does not entitle defendant to appellate relief when there was ample evidence to support the conviction. The victim and her two friends all testified that defendant touched the victim's breasts for several minutes. In addition to the testimony of the victim and her two friends, both the victim's grandmother and her friend testified that defendant made an incriminating statement. Moreover, T.K. gave evidence of a previous, similar act by defendant. In light of this evidence, it cannot be said that any error in the detective's testimony seriously affected defendant's substantial rights.

Defendant also argues that the trial court erred in denying him his constitutional right to confront and cross-examine the victim regarding the contents of her webpage. We disagree. Defendant preserved his appeal to the extent that he claims that the contents of the website were relevant to the victim's credibility. Defendant, however, did not preserve this issue to the extent that he claims that he was denied his constitutional right to confront the victim. At trial, defense counsel repeatedly stated that the contents of the victim's webpage were relevant for impeachment purposes, but never once stated that the exclusion of the webpage denied defendant his constitutional right to confrontation. The fact that defendant preserved his appeal on the grounds of relevance does not mean he preserved it on constitutional grounds. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003).

This Court reviews a trial court's determination regarding the admission of evidence for an abuse of discretion. *People v Smith (On Remand)*, 282 Mich App 191, 194; 772 NW2d 428 (2009). Unpreserved questions of constitutional law are reviewed for plain error. *Coy*, 258 Mich App at 12. First, there must be an error; second, the error must be plain; and third, the error must affect substantial rights, in other words, the error must be outcome determinative. *Id.*

Defense counsel wanted to cross-examine the victim regarding her testimony that she was a "private person," and that, in "real life," she is different from the person she was portraying to the jury. Specifically, on her webpage, the victim had several pictures of herself in clothing that partially revealed her breasts, with sexually explicit language, as well as the statement that she craves attention. The trial court ruled that these proposed questions were not relevant to the issues of this case.

The trial court correctly determined that this line of questioning was irrelevant. Under MRE 401, "[r]elevant evidence" means evidence having any 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.” To prove CSC 4, the prosecutor must show that the defendant “engage[d] in sexual contact with another person,” and used “force or coercion to accomplish the sexual contact.” MCL 750.520e(1)(b). The element of “force” can be met by “the actual application of physical force,” MCL 750.520e(1)(b)(i), or “when the actor achieves the sexual contact through concealment or by the element of surprise.” MCL 575.520e(b)(v). Given the elements of the charged crime, any question regarding the contents of the victim’s webpage is irrelevant to whether defendant made sexual contact with her by means of force.

Although a witness may generally be cross-examined on any matter relevant to any issue in the case, including credibility, MRE 611(c), the contents of the victim’s webpage were not relevant for impeachment, either. In his brief on appeal, defendant argues that the victim “was trying to present herself as a shy, private person who did not feel comfortable at the tailor shop and she used this purported slight demeanor to explain why she said **nothing** as she was allegedly being ‘sexual touched’ [sic]. . . .” (Emphasis in original). A close reading of the trial transcript shows that defendant mischaracterizes the victim’s testimony. When the victim was asked on direct examination whether she said anything to defendant as he was touching her, she responded: “No. I just thought, you know, I didn’t know if it was standard procedure. . . .” The prosecutor then asked what the victim was feeling at the moment, to which the victim responded: “Shocked. But, I--I also didn’t want to make a scene if it wasn’t, you know, procedure, but he kept telling me that it is procedure and not to feel uncomfortable.” Nothing about the victim being a “private person” was mentioned until cross-examination, when defense counsel asked her if she considered herself a private person, and whether she was uncomfortable showing herself to strangers. The victim said she was a private person, and that she was indeed uncomfortable showing herself to strangers. These questions, however, were in no way tied to any of the victim’s testimony, nor to any of the elements of the charged offense. As the trial court succinctly noted, the victim’s webpage “has nothing to do with that lawsuit.” The trial court did not abuse its discretion by excluding this evidence. *Smith*, 282 Mich App at 194.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ William C. Whitbeck