

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LONNIE W. JOHNSON,

Defendant-Appellant.

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UNPUBLISHED

April 15, 2003

No. 238176

Wayne Circuit Court

LC No. 01-000251

Before: Meter, P.J., and Cavanagh and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for armed robbery, MCL 750.529, and first-degree criminal sexual conduct, MCL 750.520b(1)(e). Defendant was sentenced to two concurrent terms of fifteen to thirty years' imprisonment as a fourth habitual offender, MCL 769.12. We affirm.

I. Rape Shield Statute

Defendant argues that the trial court erred in ruling that testimony regarding an alleged prior act of consensual sex between defendant and the complainant was barred by the rape shield act. We disagree. This Court reviews a trial court's decision to exclude evidence under the rape shield statute for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made." *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). The court "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." *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984).

A trial court may admit evidence of past sexual conduct between a sexual assault victim and the defendant as an exception to the rape shield statute. MCL 750.520j(1)(a). Pursuant to the statute, a defendant who proposes to offer such evidence must file a written motion and offer of proof within ten days after the arraignment. MCL 750.520j(2). The evidence must be material to a fact at issue in the case and its inflammatory or prejudicial nature must not outweigh its probative value. MCL 750.520j(1).

When a defendant fails to comply with the ten-day notice provision, the trial court must conduct a case-specific analysis to determine whether preclusion of the evidence violates the defendant's Sixth Amendment rights. *People v Lucas (On Remand)*, 193 Mich App 298, 301-302; 484 NW2d 685 (1992). In making such a determination, the trial court should consider the purpose of the statute—to protect the victim from surprise, harassment, unnecessary invasions of privacy and undue delay—and the timing of the defendant's offer to produce the evidence. *Id.* at 302-303. "The closer to the date of trial the evidence is offered, the more this factor suggests willful misconduct designed to create a tactical advantage and weighs in favor of exclusion." *Id.* at 303.

It is undisputed that defense counsel in this case neglected to file the proper notice. While the trial court recognized that defense counsel was not defendant's counsel at the time of arraignment, or even within ten days of the arraignment, it found that she was the attorney of record at least four months prior to trial and, therefore, could have complied with the notice provision well before cross-examination of the complainant. Thus, the trial court determined that defense counsel's decision to raise the issue on the day of trial was for a tactical reason. See *People v Lucas (After Remand)*, 201 Mich App 717, 719; 507 NW2d 5 (1993).

The trial court further concluded that the exclusion of this evidence neither abridged defendant's right to confrontation nor significantly limited his ability to present his defense of an alleged prior relationship. The trial court noted that defendant could argue that he knew the complainant and that the instant sexual act was consensual. In fact, defendant testified that he dated the complainant for a few weeks. Defendant further testified that the allegations in this case were in retaliation for the fact that he ended the relationship and destroyed the complainant's crack cocaine. On this record, we conclude that defendant was not denied his Sixth Amendment right of confrontation. Accordingly, we find that the trial court did not abuse its discretion when it denied defendant's request to admit evidence of prior sexual conduct. See *id.*

Defendant's suggestion that the rape shield act is inapplicable to this case is meritless. Defendant opines that the sexual act sought to be admitted into evidence was a *concurrent* act, rather than a specific instance of *prior* sexual conduct, and therefore outside the purview of the rape shield act. See MCL 750.520j(1)(a). However, the record shows that defense counsel sought to admit evidence that defendant and the complainant engaged in consensual sexual intercourse twice, once in the morning and once in the evening, on the day in question. According to defense counsel's offer of proof and defendant's testimony, the second alleged act of sexual conduct formed the basis for the charges in this case. Because the first alleged sexual act was distinct from the conduct defendant claims formed the basis of the instant charges, it falls within the scope of the rape shield statute as prior sexual conduct.

## II. Prosecutorial Misconduct

Defendant next contends that the prosecution made several comments during closing arguments that amounted to prosecutorial misconduct that denied defendant a fair trial. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Because defendant failed to object to these alleged instances of misconduct, our review is limited to plain error affecting his substantial rights.

*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). “No error requiring reversal will be found if the prejudicial effect of the prosecutor’s comments could have been cured by a timely instruction.” *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

Defendant asserts that the prosecution improperly vouched for the credibility of the complainant and several police witnesses. Case law provides that a prosecutor may not personally vouch for a witness’ credibility or suggest that the government has special knowledge that a witness testified truthfully. *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). However, where the jury is faced with a credibility question, the prosecutor is free to argue a witness’ credibility from the evidence. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

Defendant cites several instances during closing arguments wherein the prosecutor essentially asserted that the witnesses against defendant had no reason to fabricate their testimony. Specifically, the prosecutor reminded the jury of what the complainant had to endure in order to bring the allegations against defendant. The prosecutor also suggested that the police officers had no motivation to lie. Viewing the prosecutor’s remarks in context, it is apparent to this Court that they were proper and based on the evidence presented. The prosecutor did not personally vouch for the credibility of these witnesses. Rather, he properly argued that the evidence supported the testimony of these witnesses. See *Schutte*, *supra* at 722.

Defendant next opines that the prosecution impermissibly argued that defendant was lying. The prosecution “must refrain from denigrating a defendant with intemperate and prejudicial remarks.” *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Moreover, a prosecutor may not urge the jurors to convict the defendant as part of their civic duty or appeal to the jury’s sense of justice. *Id.* at 282-283; *People v Williams*, 65 Mich App 753, 755-756; 238 NW2d 186 (1975). However, a prosecutor may argue from the facts that the defendant is not worthy of belief. *Launsburry*, *supra* at 361.

In the instant case, the prosecutor made reasonable inferences arising from defendant’s statements as they related to the evidence. See *Schutte*, *supra* at 721. We note that the prosecution need not use the least prejudicial evidence or state its arguments in the blandest of all possible terms. *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995); *Aldrich*, *supra* at 112. Further, we find the prosecutor’s statement that “[j]ustice in this case is to make [defendant] accept the consequences of his actions[,]” did not rise to the level of urging the jury to convict defendant based on their civic duty or sense of justice. Nevertheless, a cautionary instruction was given that the arguments of counsel were not evidence. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993).

Defendant also suggests that the prosecution attempted to evoke sympathy for the complainant. Specifically, defendant cites the following statement that the prosecutor made at the onset of closing arguments:

Think about the fact that [the complainant] had to come into this courtroom and sit in this chair with 14 strangers and, as I said, members of the audience, the judge, et cetera, and the man that raped her and tell you what happened to her. Can you imagine having to be accused of now knowing that person and that she has falsified this whole situation, the added pain that’s going through her mind.

Although a prosecutor may argue that a witness should be believed, he may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). However, we do not find that this isolated comment was so inflammatory or such a blatant appeal to the jurors' sympathy that it prejudiced defendant. *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). We note again that the trial court instructed the jury that the prosecutor's statements were not evidence. The jury was further instructed not to allow their decision to be influenced by sympathy or prejudice. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Because defendant has failed to show any prejudice from the prosecutor's comments, reversal is not required. *Carines, supra* at 763-764.

### III. Ineffective Assistance of Counsel

Defendant ultimately argues that he was denied the effective assistance of counsel. Specifically, defendant claims that his counsel was ineffective for failing to comply with the notice provision of the rape shield act and for failing to object to the prosecution's prejudicial comments during closing argument. We disagree. Because defendant failed to raise this issue before the trial court, our review is limited to error apparent on the record. *Snider, supra* at 423. An unpreserved constitutional error warrants reversal only when it is a plain error that affects a defendant's substantial rights. *Carines, supra* at 763-764.

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel, and he must overcome the strong presumption that counsel's performance was sound trial strategy; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

Defendant argues that his counsel was ineffective for failing to make a timely motion to admit evidence of past sexual conduct between defendant and the complainant. According to defendant, this evidence was critical to his defense and would have resulted in his acquittal. However, as previously indicated, defendant was permitted to argue that the sexual conduct in this case was consensual. Thus, defendant has failed to establish a reasonable probability that but for his counsel's alleged error, the result of the proceedings would have been different. *Id.*

Likewise, defendant's contention that his counsel was ineffective for failing to object to the prosecutor's allegedly improper comments is without merit. Because we concluded that the prosecution's comments were proper, any objection by defense counsel would have been futile. "A trial attorney need not register a meritless objection to act effectively." *People v Hawkins*,

245 Mich App 439, 457; 628 NW2d 105 (2001). Further, defendant has not overcome the presumption that his defense counsel's decisions in this regard were trial strategy. See *People v Ullah*, 216 Mich App 669, 685; 550 NW2d 568 (1996).

Affirmed.

/s/ Patrick M. Meter  
/s/ Mark J. Cavanagh  
/s/ Jessica R. Cooper