

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
June 19, 2012

v

MARIO ELIZONDO,
Defendant-Appellant.

No. 303333
Wayne Circuit Court
LC No. 10-011251-FC

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree criminal sexual conduct (“CSC”), MCL 750.520b (person under 13, defendant 17 years of age or older), and second-degree CSC 750.520c (person under 13, defendant 17 years of age or older). Defendant was sentenced to 25 to 50 years’ imprisonment for his first-degree CSC conviction and 1 to 15 years for his second-degree CSC conviction. We affirm.

In 2010, 11-year-old K.M., her three older brothers, and her mother resided with 53-year-old defendant and his wife and children due to financial reasons. In September of that year, defendant and K.M. were in his room putting together a puzzle when defendant pushed K.M. down on the bed, removed K.M.’s pants and underwear and his own, then began touching her genitals. Defendant had K.M. touch his genitals as well. Defendant’s wife walked into the room and began screaming when she saw what was happening, at which point K.M. went downstairs and told her mother what had just occurred. K.M. was taken to a hospital and examined, and the police were notified.

Defendant first argues on appeal that the prosecution improperly admitted prior bad acts evidence by failing to redact an agreed upon line in the victim’s medical records. Defendant argues that the likelihood of prejudice was so great that the trial court erred in denying him a new trial. We disagree.

A trial court's decision to deny a motion for a new trial is reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). An abuse of discretion occurs only when the court chooses an outcome outside the principled range of outcomes. *Id.* A trial court may grant a new trial to a defendant on the basis of any ground which would support reversal on appeal, or because it believes that the verdict has resulted in a miscarriage of justice. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999); MCR 2.611(A).

Typically, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. *People v Mardlin*, 487 Mich 609, 611; 790 NW2d 607 (2010); MRE 404(b)(1). However, in a criminal case in which the defendant is accused of committing any of the “listed offenses” against a minor, evidence that the defendant committed another such offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. *People v Watkins*, 277 Mich App 358, 363; 745 NW2d 149 (2007); MCL 768.27a(1). A “listed offense” is one of those offenses defined in section two of MCL 28.722. MCL 768.27a(2)(a).

Here, the offenses for which defendant was charged, violations of MCL 750.520b and MCL 750.520c, are encompassed within the definition of “listed offense.” See, MCL 28.722(k); MCL 28.722(w). The bad acts evidence that was inadvertently admitted was the statement in the victim’s medical records that “[b]oth patient and mother state that this is not the first time patient had been molested by perp.” The prior act is thus also encompassed within the definition of “listed offense” and would thus be admissible under MCL 768.27a. Further, the evidence was highly relevant.

True, if the prosecutor intends to offer evidence under the above statutory standard, he or she must disclose the evidence to the defendant at least 15 days before the scheduled date of trial or at a later time, as allowed by the court for good cause shown, including the statements of witnesses or a summary of the substance of any testimony which is expected to be offered. *Watkins*, 277 Mich App at 363; MCL 768.27a(1). Nevertheless, where the evidence was admissible, and the defendant has suggested no basis on which he could have objected had notice been given, the lack of notice fails to have significant effect, and thus does not merit reversal of the defendant's conviction. See, e.g., *People v Hawkins*, 245 Mich App 439, 455-456; 628 NW2d 105 (2001). The trial court thus did not abuse its discretion in finding that no ground supported reversal.

Even if defendant could show that admission of the evidence resulted in error, defendant fails to show how the introduction of the evidence resulted in a miscarriage of justice. If a defendant can show a preserved, nonconstitutional error, he must establish that, more probably than not, a miscarriage of justice resulted. *People v Lukity*, 460 Mich 484, 493-494; 596 NW2d 607 (1999); *People v Knapp*, 244 Mich App 361, 378-379; 624 NW2d 227 (2001). A miscarriage of justice occurs when, after an examination of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Knapp*, 244 Mich App at 378-379.

The unredacted line was likely not outcome determinative. Melissa Elizondo, defendant’s wife, testified that she saw the victim and defendant facing each other on a bed and that both were naked from the waist down, kissing each other. The victim was touching defendant’s genitals. Melissa further testified that defendant told her he was in love with the victim and that since they were all going to die in 2012, the victim would not have the opportunity after that. The victim’s mother testified that the victim told her that defendant forced her to touch his penis and that he touched her vagina, and the victim also testified to the events of that day. The prosecution presented evidence that defendant confessed to Nancy Doss, the Child Protective Services worker, that he penetrated the victim’s vagina with his finger. The prosecution also presented evidence that defendant told the victim’s brother and Officer Craig

Cieszkowski that he was in love with the victim and that because the world was going to end in 2012, she would not have an opportunity to have such an experience. The prosecution presented more than sufficient evidence for the jury to find defendant guilty of first-degree CSC and second-degree CSC such that the single unredacted line in the medical report was not likely outcome determinative. The trial court's denial of defendant's motion thus was not so far outside of the range of principled outcomes to constitute an abuse of discretion.

Defendant next argues that the prosecutor improperly argued facts not in evidence, vouched for the credibility of the witnesses, and directed the jury to only deliberate on specific facts in her closing argument. We disagree.

Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting a defendant's substantial rights. *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). Claims of prosecutorial misconduct are reviewed case-by-case, and any challenged remarks are reviewed in context. *People v Orlewicz*, 293 Mich App 96, 106; 809 NW2d 194 (2011). The test for prosecutorial misconduct is whether the defendant was deprived of a fair trial. *Id.*

Defendant first argues that the prosecutor argued facts not in evidence. Specifically, defendant takes issue with the prosecutor's use of the term, "labia majora." A prosecutor may not make a statement of fact to the jury which is unsupported by the evidence, but may argue the evidence and all reasonable inferences arising from it as they relate to the theory of the case. *People v Parker*, 288 Mich App 500, 510-511; 795 NW2d 596 (2010).

Here, there was no specific reference to the term "labia majora" during testimony. The only reference appeared, as indicated by the defendant, during the prosecutor's closing argument:

You're going to get an instruction from Judge Evans when you begin – before you begin your deliberations. And she's going to give you an instruction as to what legal penetration is.

And I think it is helpful for you to understand what it's not. Legal penetration does not mean that I have to prove, beyond a reasonable doubt, that his finger went into her vagina, okay?

We talked a lot about the female anatomy during the course of this trial. But I don't have to prove that it went into her vagina. What I have to prove is that it went into the outer lips; that it went past the outer lips; no matter how slight that touching was, if he touched her somewhere within the outer lips, the labia majora, of that young child.

The victim, however, had discussed her anatomy, indicating where on her genitalia defendant had touched her. Doss also testified that defendant admitted to placing his finger inside the victim's vagina. When viewed in context, it can be seen that the prosecutor only used the term "labia majora" when discussing her burden and tied it to the testimony of her witnesses. The prosecutor therefore only argued the evidence and inferences that arose from the evidence in an effort to explain how she met her burden. The prosecutor's use of the term "labia majora" was thus not error.

Defendant also objects to the prosecutor's comment that 53-year-old defendant likely knew the female anatomy better than the 11-year-old victim and the way the incident was described as being done "gently" and to make the victim "feel good" made it seem as though the defendant was "probably touching her clitoris." While there was no direct evidence that defendant touched the victim's clitoris, the prosecutor's statement reflected the evidence and inferences which arose from that evidence and was thus not improper.

Defendant next argues that the prosecutor interjected her personal opinion concerning Doss's testimony. In context, however, the prosecutor's statements reflect an attempt to impress upon the jury, through inferences, the findings necessary for defendant to be found not guilty of first-degree CSC, simply using Doss's testimony as an example. Specifically, the prosecution indicated that to find defendant not guilty, the jury would have to find that Doss lied. The prosecutor also stated that Doss had no reason to lie because she was just doing her job. A prosecutor may properly argue in closing regarding the credibility of his or her own witnesses. *People v Stacy*, 193 Mich App 19, 36-37; 484 NW2d 675 (1992).

Finally, defendant states that the prosecutor directed the jury only to deliberate on specific facts in her definition of the crime. However, a review of the prosecutor's comments in context reveals that the prosecutor, in anticipation of the later jury instructions, was phrasing her theory of the case to parallel the elements of the crime, as is proper. The prosecutor thus was not directing the jury to deliberate only on specific facts; rather, the prosecutor was highlighting the facts that weighed in her favor. The prosecutor thus did not err.

Defendant next contends that the prosecutor improperly vouched for the credibility of the victim and her mother concerning a scratch in the victim's vaginal area allegedly caused by defendant. We disagree.

A prosecutor may not invoke the prestige of the office or suggest that she has special knowledge regarding the veracity of witnesses. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995); *People v Matuszak*, 263 Mich App 42, 54-55; 687 NW2d 342 (2004). A prosecutor may, however, argue the credibility of witnesses. *Stacy*, 193 Mich App at 36-37.

Defendant contends that the prosecutor was aware there was no medical documentation of any scratch on the victim but nevertheless indicated that she "believed" that the lack of record did not mean that the mother and daughter were lying. Defendant argues that the prosecutor's use of the words "I believe" evinced the prosecutor's insertion of her personal belief regarding the credibility of the victim and her mother. However, context reveals that the prosecutor was actually arguing the credibility of the victim and her mother, in light of the fact that the scratch was not documented in the medical records. The prosecutor prefaced her comment with the fact that the record was devoid of mention of a scratch and indicated to the jury that "it's up [to] you to decide whether that's important, or not." Although the phrasing of the statement with, "I believe it doesn't," appears improper, the prosecutor was highlighting an inference from the evidence and was merely arguing the credibility of the witnesses in light of a discrepancy in the evidence--not conveying personal knowledge about the witnesses. The prosecutor's comment was thus not improper.

Finally, defendant takes issue with the prosecutor's summary of its case at the beginning of her closing argument, arguing that she again vouched for the credibility of her witnesses and for the evidence. The prosecutor's summary, however, did not constitute vouching for the credibility of the witnesses. A review of the record reveals that the prosecutor did not indicate some sort of personal knowledge on her part of the witnesses' credibility. The beginning of the prosecutor's closing argument constituted her theory of the case, highlighting the facts that weighed in the prosecution's favor. The fact that the prosecutor phrased her theory as fact or using the words, "I believe" and "we know" did not render her statements improper. "Rather, the prosecutor was asserting that 'we know,' on the basis of the evidence presented at trial and inferences drawn from that evidence, that the propositions advanced had been established." *People v Reed*, 449 Mich 375, 399; 535 NW2d 496 (1995). The prosecutor did not err in her closing argument.

Defendant next argues that the trial court pierced the veil of judicial impartiality in its questioning of defendant. We disagree.

A defendant is entitled to a neutral and detached magistrate during trial. *People v Cheeks*, 216 Mich App 470, 480-481; 549 NW2d 584 (1996). A trial court may question a witness to clarify testimony or elicit additional relevant information, but must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair or partial. *Id.*; MRE 614(b). The trial court may not pierce the veil of judicial impartiality by engaging in conduct or making comments that might unduly influence the jury and deprive a party of his or her right to a fair and impartial trial. *People v Conley*, 270 Mich App 301, 307; 715 NW2d 377 (2006). The test is whether the court's questions and comments could have unjustifiably aroused suspicion in the jury regarding a witness's credibility and whether partiality could have influenced the jury to the defendant's detriment. *Cheeks*, 216 Mich App at 480-481. The fact that testimony elicited by the court's questions damaged a defendant's case does not necessarily, however, establish that the court improperly assumed the prosecutorial role. *People v Davis*, 216 Mich App 47, 51-52; 549 NW2d 1 (1996). Further, even when questions of the court cross the line of impartiality, they are subject to harmless error analysis. *Id.*

Defendant challenges the trial court's questioning of defendant in several instances. First, defendant argues that the trial court improperly questioned him regarding his testimony that he awoke being kissed and believed his wife was the one kissing him. Specifically, defendant takes issue with the trial court's questions to defendant regarding his wife's size as compared to the size of the victim. The record shows, however, that the trial court was merely asking material questions of defendant that were not asked by the attorneys. Defendant's wife's height and weight was highly material in light of defendant's claim that he believed the person kissing him was his wife, an adult woman, and not the victim, an 11-year-old girl. And, defendant ultimately answered that there was not much of a difference in size between his wife and the victim. The fact that the trial court may have damaged the credibility of defendant in asking its questions did not render the trial court's questioning improper. The trial court thus did not pierce the veil of judicial impartiality by asking defendant questions regarding the size of his wife.

Next, defendant argues that the trial court improperly questioned him regarding his statement that he had heard that the victim had been touching his penis but had not felt it.

Immediately following defendant's statement, the trial court questioned defendant regarding from whom he had heard that the victim had touched him. When defendant responded that his wife had told him, the trial court asked, "[y]ou didn't—you didn't feel that?" Defendant responded he had not and the trial court asked, "But you felt that kiss?" While perhaps tinged with a suggestion of disbelief, the question could also be viewed as an attempt to clarify defendant's testimony. The trial court limited its questions in scope only to clarify defendant's statement that he had only heard that the victim had touched him, but did not feel it. The fact that the trial court damaged defendant's credibility through its questioning does not render the questions improper.

Defendant next argues that the trial court improperly questioned him regarding his statement that the incident between him and the victim was "not [worthy of] . . . making a big thing." The trial court's questions were not such that they would arouse suspicion in the jury. The trial court was merely asking defendant to elaborate on his statement. And, from the answers given by defendant, it was clear that defendant was trying to explain that he was innocent and felt the incident was a kiss and touching undertaken by a child that could have been addressed by the family. Again, similar to the previous analyses, the trial court was attempting to elicit from defendant the meaning behind his statement that the incident did not warrant the making of a "big thing."

Finally, defendant argues that the trial court improperly impeached him with his prior testimony regarding whether he felt the victim touch his penis. On re-cross examination, the prosecutor was questioning defendant whether, immediately after the incident, he told his wife he thought it was her in the bed with him. Defendant responded that he tried to tell her, at which point, the trial court interjected, "Well, wait a minute. Hold on for a minute. You said that you tried to tell your wife. But didn't you say or just testify that your wife told you that K[]'s hand was on your penis?" While defendant classifies this question as impeachment, the question does not necessarily make defendant's prior statement appear untrue. Defendant's version of the event was that he fell asleep and woke to being kissed with his eyes closed, then hearing screaming. When he opened his eyes, it was his wife screaming at the door to the bedroom. The timeframe when his wife told defendant that the victim had her hand on his penis was not established. To the extent that the question could be deemed to exhibit disbelief on the trial court's part or arouse suspicion in the jury regarding defendant's credibility, the substantial amount of evidence against defendant excluding the trial court's question renders the error harmless. *Davis*, 216 Mich App at 51-52.

Affirmed.

/s/ Deborah A. Servitto

/s/ Patrick M. Meter

/s/ Karen Fort Hood