

Court of Appeals, State of Michigan

ORDER

People of MI v Scott Denis Cronin

Docket No. 305525

LC No. 2010-002059-FC

Michael J. Kelly
Presiding Judge

Joel P. Hoekstra

Cynthia Diane Stephens
Judges

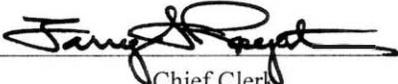
The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued October 1, 2012 is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Larry S. Royster, Chief Clerk, on

DEC 06 2012

Date


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 2, 2012

v

SCOTT DENIS CRONIN,

Defendant-Appellant.

No. 305525
Kalamazoo Circuit Court
LC No. 2010-002059-FC

Before: M. J. KELLY, P.J., and HOEKSTRA and STEPHENS, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of eight counts of first-degree criminal sexual conduct, MCL 750.520b. Defendant was sentenced to 9 to 40 years' imprisonment for one conviction of first-degree criminal sexual conduct (person less than 13 years of age), MCL 750.520b(1)(a); 25 to 40 years' imprisonment for each of three convictions of first-degree criminal sexual conduct (person less than 13 years of age, defendant 17 years of age or older), MCL 750.520b(2)(b); and 9 to 40 years' imprisonment for each of four convictions of first-degree criminal sexual conduct (multiple variables), MCL 750.520b. Defendant appeals as of right. For the reasons stated in this opinion, we affirm.

Defendant first argues that his first-degree criminal sexual conduct convictions were against the great weight of the evidence because the victim's testimony regarding the alleged sexual abuse was patently incredible and inherently implausible. Specifically, defendant maintains that the victim's testimony was patently incredible and inherently implausible because no person discovered the abuse despite many opportunities for discovery, because the victim was troubled and had a strong motive to falsely accuse defendant, and because the medical evidence presented by the prosecution regarding the victim's injuries was contradicted, and any injuries the victim received could have been caused by another person.

Preservation of a great weight claim requires that a motion for a new trial be raised in the trial court. *People v Cameron*, 291 Mich App 599, 617; 806 NW2d 371 (2011). Defendant did

not move the trial court for a new trial, and consequently, this issue is unpreserved. *Id.* at 618.¹ Where a great weight of the evidence issue is unpreserved, it is reviewed for plain error affecting substantial rights. *Id.* The test to determine whether a verdict is against the great weight of the evidence is whether “the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand.” *People v Lemmon*, 456 Mich 625, 627; 576 NW2d 129 (1998). A court may not act as a “thirteenth juror” when determining whether a verdict was against the great weight of the evidence, and “may not attempt to resolve credibility questions anew.” *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). “Absent exceptional circumstances, issues of witness credibility are for the trier of fact.” *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). The exceptional circumstances recognized in *Lemmon* were that (1) the testimony contradicts indisputable physical facts or laws; (2) the testimony is patently incredible or defies physical reality; (3) the testimony is so inherently implausible that it could not be believed by a reasonable juror; or (4) the testimony has been seriously impeached and the case is marked by uncertainties and discrepancies. *Lemmon*, 456 Mich at 643-644.

Upon review of the record in this case, we are not persuaded that defendant’s convictions were against the great weight of the evidence. Defendant is correct that the victim testified to several instances when sexual abuse allegedly occurred under circumstances suggesting the abuse would be discovered, for example, when the victim was sleeping in the same bed as her sister. However, the victim acknowledged that her sister sometimes woke up, but that she went back to sleep after defendant told her they were just talking. The victim testified that defendant covered them with a blanket, so the sexual acts they engaged in were not readily apparent. The fact that no person discovered the abuse even though there were opportunities for discovery does not render the victim’s testimony patently incredible or inherently implausible in light of the victim’s explanations. Similarly, the medical evidence presented by defendant to contradict the prosecution’s medical evidence was merely another factor for the jury to consider when weighing the credibility of the victim. Mere conflicting evidence is not sufficient to render the victim’s allegations patently incredible or inherently implausible. Finally, the fact that the victim was impeached with her possible motivation to lie similarly does not render her testimony patently incredible or inherently implausible.

The fact that the evidence weighed both for and against the credibility of the victim does not render the victim’s testimony patently incredible or inherently implausible. The conflicting evidence relied on by defendant to support his claim does not contradict indisputable physical facts or laws, does not defy physical reality, is not so inherently implausible that it could not be

¹ We find unavailing defendant’s argument that this issue ought to gain the status of being preserved because his timely motion to remand pursuant to MCR 7.211(C)(1)(a)(i) should be granted, the trial court then will address his great weight claim and after remand, the issue will be before us for review as preserved. In making this argument, it appears that defendant is relying on the proposition that his motion is one that “must be initially decided by the trial court.” MCR 7.211(C)(1)(a)(i). However, defendant cites no authority for this proposition, nor have we found any support for it.

believed by a reasonable juror, and does not constitute serious impeachment evidence rising to the level of an exceptional circumstance. See *Lemmon*, 456 Mich at 643-644. Absent exceptional circumstances not present in this case, we do not “attempt to resolve credibility questions anew.” *Gadomski*, 232 Mich App at 28. Accordingly, we conclude that defendant has not shown that “the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand,” *Lemmon*, 456 Mich at 627, and defendant has failed to demonstrate plain error affecting his substantial rights, *Musser*, 259 Mich App at 218.

Defendant also argues that the prosecutor engaged in misconduct where she impermissibly argued a fact not in evidence during her closing arguments. Defendant did not object to the prosecutorial misconduct claimed on appeal, and this issue is unpreserved. *Unger*, 278 Mich App at 234-235. Defendant’s unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting substantial rights. *People v Schumacher*, 276 Mich App 165, 177; 740 NW2d 534 (2007). Substantial rights are affected when the defendant is prejudiced, meaning the error affected the outcome of the trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Prosecutorial misconduct occurs if a defendant is denied a fair trial, *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001), and claims of prosecutorial misconduct are reviewed case by case, with the prosecutor’s remarks evaluated in the context of the entire record, *People v Dobek*, 274 Mich App 58, 64; 732 NW2d 546 (2007). A prosecutor may argue the evidence and all reasonable inferences from the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). However, a prosecutor “may not argue facts not in evidence or mischaracterize the evidence presented.” *Watson*, 245 Mich App at 588.

Here, the prosecutor improperly argued that the victim’s story remained consistent throughout the investigation and prosecution of this case. No testimony of record supported this, and the challenged comments were plain error. *Schumacher*, 276 Mich App at 177. However, we conclude this error does not require reversal because a timely instruction upon request could have cured any prejudice from the prosecutor’s arguing of a fact not in evidence. *Watson*, 245 Mich App at 586. If a curative instruction could have alleviated any prejudicial effect, this Court will not find error requiring reversal. *People v Callon*, 256 Mich App 312, 329-330; 662 NW2d 501 (2003). Moreover, the jury was instructed before their deliberations that “the lawyers’ statements and arguments are not evidence.” “Jurors are presumed to follow their instructions, and instructions are presumed to cure most errors.” *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Thus, defendant has failed to show the prosecutor’s improper argument resulted in any outcome-determinative error. *Carines*, 460 Mich at 763.

Affirmed.

/s/ Michael J. Kelly
/s/ Joel P. Hoekstra
/s/ Cynthia Diane Stephens