

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 18, 2012

v

CHRISTOPHER THOMAS WINGFIELD,

Defendant-Appellant.

No. 303559
Crawford Circuit Court
LC No. 10-002952-FH

Before: WHITBECK, P.J., and FITZGERALD and BECKERING, JJ.

PER CURIAM.

Defendant Christopher Wingfield appeals as of right his conviction, following a jury trial, of third-degree criminal sexual conduct involving a victim between 13 and 15 years old (CSC III).¹ The trial court sentenced Wingfield to serve 13 months to 15 years' imprisonment. We affirm.

I. FACTS

The complainant testified that at the time of the encounter, Wingfield was 18 years old, she was 15 years old, and Wingfield knew that she was 15 years old because Wingfield was friends with the complainant's brother. Wingfield was also friends with the complainant's aunt, who was 14 years old.

According to the complainant's testimony at trial, she met Wingfield and her aunt at a park one evening in July 2009. The complainant testified that after her aunt returned home, she and Wingfield remained in the park for 20 or 30 minutes. The complainant testified that she and Wingfield spoke about having sex; the complainant had not previously had sex. Wingfield suggested that they could go to a friend's apartment to have sex. Wingfield and the complainant then walked to Millissa Webb-Lippert's apartment.

¹ MCL 750.520(d)(1)(a).

Webb-Lippert testified that Wingfield and the complainant arrived at her apartment at around 5:00 a.m. and that she did not know the complainant at the time. She testified that Wingfield asked if they could stay at the apartment, and that she protested because the complainant “looked underage.” She testified that Wingfield responded that the complainant was going to turn 18 in one week and was locked out of her mother’s home. Webb-Lippert testified that she let Wingfield and the complainant into the apartment, gave Wingfield a condom at his request, and went back to sleep in her room. The complainant testified that she and Wingfield then went into an adjacent bedroom, where they had vaginal intercourse.

The complainant testified that she met Wingfield at the park a couple of days later, and that Wingfield flirted with her aunt. Tara Jung, the complainant’s mother, testified that she noticed that the complainant was moody and withdrawn in August 2009. When Jung questioned the complainant about her mood, she admitted that she had sex with Wingfield, and said that Wingfield treated her poorly afterward. Jung testified that she was upset and angry, and went to Webb-Lippert’s apartment to request a written statement. Jung testified that she then went to police because she “didn’t think [the complainant] was treated in a proper manner.”

In September 2009, Grayling Police Officer Alan Somero began investigating the encounter between Wingfield and the complainant. When Wingfield came to the Grayling Police Department for an interview, Officer Somero informed him of the complainant’s accusation. Officer Somero testified that Wingfield denied being involved, became angry, and left the interview.

Wingfield later agreed to speak with a state police officer. On November 2, 2009, Michigan State Police Trooper James McCloughan interviewed Wingfield. Wingfield wrote a statement that he did not remember being alone with the complainant and that he had been at Webb-Lippert’s apartment with his friend, Shane Reichelderfer. When Trooper McCloughan interviewed Wingfield a second time, Wingfield gave a second written statement, in which he admitted that he began having vaginal intercourse with the complainant at Webb-Lippert’s apartment, but stopped because he felt uncomfortable. Trooper McCloughan testified that he believed Wingfield looked scared before writing the second statement, but appeared relieved and remorseful afterward.

Officer Somero testified that about two weeks after he began investigating the encounter between Wingfield and the complainant, he began investigating an encounter between Wingfield and the complainant’s aunt. The complainant’s aunt testified that in November 2009, she and Wingfield had sex at a friend’s home, and that she was a virgin before having sex with Wingfield. She wrote in a journal entry that Wingfield led her on, took her virginity, and then distanced himself from her afterward.

Reichelderfer testified that Wingfield told him that he only wrote the second statement to end the investigation. Reichelderfer testified that Wingfield never told him that he had sex with the complainant or the complainant’s aunt. Another witness testified that the complainant told her that she did not have sex with Wingfield.

The jury found Wingfield guilty of CSC III.

II. OPINION TESTIMONY

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

Generally, this Court reviews for an abuse of discretion the trial court's decision to admit evidence.² The trial court abuses its discretion when its outcome is outside the range of reasonable and principled outcomes.³

However, a defendant must properly preserve an issue by raising it before the trial court.⁴ Although Wingfield challenged Jung's testimony below, he did not challenge Trooper McCloughan's testimony. Thus, the issues concerning Trooper McCloughan's testimony are unpreserved. We review unpreserved claims of error for plain error affecting the defendant's substantial rights.⁵ An error is plain if it is clear or obvious.⁶ An error affects the defendant's substantial rights if it prejudiced the defendant by affecting the outcome of the proceedings.⁷

B. LEGAL STANDARDS

Both lay witnesses and expert witnesses may offer opinion testimony under the Michigan Rules of Evidence.⁸ Lay opinion testimony is permitted if it is "rationally based on the perception of the witness and . . . helpful to a clear understanding of the witness' testimony or the determination of a fact at issue."⁹ Thus, lay witnesses may testify about opinions they have formed as a result of direct physical observations.¹⁰

All evidence, including opinion testimony, must be relevant.¹¹ Evidence is relevant if it has "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."¹² Even

² *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

³ *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

⁴ *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010).

⁵ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

⁶ *Id.*

⁷ *Id.*

⁸ MRE 701; MRE 702.

⁹ MRE 701.

¹⁰ MRE 701; *People v Hanna*, 223 Mich App 466, 475; 567 NW2d 12 (1997).

¹¹ MRE 402; *People v Beckley*, 434 Mich 691, 713; 456 NW2d 391 (1990).

¹² MRE 401.

relevant evidence may be inadmissible if the probative value of the evidence is “substantially outweighed by the danger of unfair prejudice[.]”¹³

C. TROOPER MCCLOUGHAN’S TESTIMONY

1. LAY OPINION TESTIMONY

Wingfield argues that Trooper McCloughan’s testimony that he believed Wingfield was exhibiting remorse when he signed his statement was improper opinion testimony. Below, Wingfield offered evidence that he was not being truthful when he signed the second statement. When asked how Wingfield acted when signing his second statement, Trooper McCloughan’s testified that Wingfield appeared very remorseful, because he first appeared scared and then relieved, and that “when I look at somebody and they’re not being genuine in their emotions and when they are, and [Wingfield] appeared to be genuine to me when he was leaving that day.” A police officer’s opinion testimony is admissible as a lay opinion if the officer bases his or her opinion on direct perceptions, rather than on a technical or scientific analysis.¹⁴ Here, Trooper McCloughan based his opinion on his perceptions and observations of Wingfield and his personal experience. Trooper McCloughan’s opinion that Wingfield exhibited remorse would help the jury determine whether to consider Wingfield’s statement and what weight to give it. Thus, we conclude Trooper McCloughan’s testimony was proper lay opinion testimony, and the trial court did not clearly err when admitting the opinion testimony.

2. RELEVANCE

Wingfield also argues that Trooper McCloughan’s testimony was more prejudicial than probative because it was not helpful to determine a fact in issue. We disagree. Evidence is probative if it has *any* tendency to make a fact of consequence more or less probable.¹⁵ Wingfield’s state of mind when he signed his statement was a fact in issue because the parties disputed whether Wingfield was being truthful when he gave Trooper McCloughan the written statement. As noted above, McCloughan’s testimony about Wingfield’s appearance would make it more or less likely that he was truthful when signing the statement. Thus, we conclude that Trooper McCloughan’s testimony did have probative value.

Wingfield has not convinced us that the prejudicial effect of this testimony substantially outweighed the probative value. Unfair prejudice occurs if use of the evidence would be inequitable or if there is a danger that the jury will give it undue or preemptive weight.¹⁶ “[T]he fear of prejudice does not generally render the evidence inadmissible,” nor does the fact that the

¹³ MRE 403.

¹⁴ *People v Daniel*, 207 Mich App 47, 57; 523 NW2d 830 (1994); see *People v Petri*, 279 Mich App 407, 416; 760 NW2d 882 (2008).

¹⁵ *People v Crawford*, 458 Mich 376, 389-390; 582 NW2d 785 (1998).

¹⁶ *People v Blackston*, 481 Mich 451, 462; 751 NW2d 408 (2008).

evidence is damaging.¹⁷ Although the testimony was damaging, the jury was also able to consider Wingfield's evidence that he was not truthful when signing the statement. Further, the evidence was more than marginally probative. We conclude that Wingfield has not shown that a plain error in the relative weight of the probative value and prejudicial effect of Trooper McCloughan's testimony affected his substantial rights.

D. JUNG'S TESTIMONY

Next, Wingfield argues that the trial court erroneously admitted Jung's testimony about her emotional reaction to discovering that Wingfield and the complainant had sexual intercourse, because the testimony lacked probative value since it had nothing to do with the elements of the offense. We disagree. As stated above, evidence is probative if it has *any* tendency to make a fact of consequence more or less probable.¹⁸ Evidence may be relevant even when it does not pertain to an element of an offense, as long as it pertains to a matter in controversy.¹⁹ Facts that may have influenced a witness's testimony or indicate a witness's bias are relevant.²⁰

Here, Jung testified that after she learned that the complainant and Wingfield had sexual intercourse, she obtained Webb-Lippert's written statement and wanted Wingfield to be prosecuted. Jung explained that she was angry at Wingfield for having sexual intercourse with her daughter, and that she was very upset. Defense counsel challenged the testimony on the grounds that it was irrelevant, and the prosecution argued that the testimony was necessary to explain her reactions, which included obtaining Webb-Lippert's written statement and taking the information to the police. Defense counsel's theory of defense was that the prosecution's witnesses should not be believed. Thus, the testimony concerned Jung's biases and had probative value.

Further, we disagree that the prejudicial effect of the testimony significantly outweighed its probative value. The trial court has the best opportunity to determine what effect the admission of the evidence would have on the jury.²¹ Wingfield did not argue below, and does not explain on appeal, how a mother's predictable reaction to such news would so shock the jury that the jury would give that evidence undue or preemptive weight. We conclude that the trial court did not abuse its discretion when it admitted the challenged testimony because its outcome did not fall outside the principled range of permissible outcomes.

¹⁷ *People v Mills*, 450 Mich 61, 75; 537 NW2d 909 (1995).

¹⁸ *Crawford*, 458 Mich at 389-390.

¹⁹ *Mills*, 450 Mich at 67-68; *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005).

²⁰ *Id.*

²¹ *Blackston*, 481 Mich at 462.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Generally, this Court reviews questions of fact for clear error, and questions of law de novo when considering a defendant's claim of ineffective assistance of counsel.²² But because Wingfield did not move the trial court for a new trial or evidentiary hearing on this basis, our review of the effectiveness of counsel's assistance is limited to errors apparent from the record.²³

B. LEGAL STANDARDS

To prove that his defense counsel was not effective, the defendant must show that: (1) defense counsel's performance was so deficient that it fell below an objective standard of reasonableness, and (2) there is a reasonable probability that defense counsel's deficient performance prejudiced the defendant.²⁴ The defendant was prejudiced if, but for defense counsel's errors, the result of the proceeding would have been different.²⁵

C. APPLYING THE STANDARDS

Wingfield briefly argues that counsel was ineffective for failing to challenge the above testimony's admission. We disagree, because we conclude that there was no reasonable probability that the results of the proceeding would have been different. Even without Trooper McCloughan's opinion testimony about Wingfield's demeanor while giving the statement, the statement itself would have been admitted. Further evidence against Wingfield included the testimonies of several witnesses, including Webb-Lippert's testimony, the complainant's testimony, the complainant's aunt's testimony, and to a certain extent Reichelderfer's testimony. Most importantly, the trial court instructed the jury that it alone had the duty to determine the witnesses' credibility, whether Wingfield made a statement to the police, and what weight to give that statement. "We presume that a jury follows its instructions."²⁶ In light of the extensive evidence against Wingfield and the trial court's instructions, we conclude that it is not reasonably likely that the results of the proceeding would have been different. Thus Wingfield has not shown that he was ineffectively assisted by counsel.

²² *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

²³ *People v Hoag*, 460 Mich 1, 7; 594 NW2d 57 (1999); *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

²⁴ *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

²⁵ *Id.* at 312.

²⁶ *People v Armstrong*, 490 Mich 281, 294; 806 NW2d 676 (2011).

IV. PROSECUTORIAL MISCONDUCT

A. STANDARD OF REVIEW

This Court will not reverse a conviction on the basis of prosecutorial misconduct unless the defendant “timely and specifically” challenges the alleged misconduct before the trial court, or unless a failure to review the issue would result in the miscarriage of justice.²⁷ We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant’s substantial rights.²⁸ An error affects the defendant’s substantial rights when that error prejudices the defendant.²⁹ We will not find error requiring reversal if a curative instruction could have alleviated the effect of the prosecutor’s misconduct because curative instructions are “sufficient to cure the prejudicial effect of most inappropriate prosecutorial statements,” and because we presume that jurors follow their instructions.³⁰

B. LEGAL STANDARDS

The prosecutor has committed misconduct if the prosecutor abandoned his or her responsibility to seek justice and, in doing so, denied the defendant a fair and impartial trial.³¹ We must evaluate instances of prosecutorial misconduct on a case-by-case basis, reviewing the prosecutor’s comments in context and in light of the defendant’s arguments.³²

C. WINGFIELD’S RIGHT TO SILENCE

The prosecution violates the defendant’s right to due process under the Fourteenth Amendment if the prosecution uses a defendant’s post-*Miranda*³³-warning silence as substantive evidence or for impeachment purposes.³⁴ But the prosecution cannot violate the defendant’s rights if the defendant did not actually invoke his right to silence.³⁵

²⁷ *People v Unger (On Remand)*, 278 Mich App 210, 234-235; 749 NW2d 272 (2008).

²⁸ *Id.* at 235; *Carines*, 460 Mich at 763-764.

²⁹ *Unger*, 278 Mich App at 235; *Carines*, 460 Mich at 764.

³⁰ *Unger*, 278 Mich App at 235.

³¹ *People v Dobek*, 274 Mich App 58, 63; 732 NW2d 546 (2007); *People v Jones*, 468 Mich 345, 353; 662 NW2d 376 (2003).

³² *Dobek*, 274 Mich App at 64.

³³ *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

³⁴ *Doyle v Ohio*, 426 US 610, 619 n 11; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567, 573; 628 NW2d 502 (2001).

³⁵ *People v McReavy*, 436 Mich 197, 221-222; 462 NW2d 1 (1990).

Wingfield argues that the prosecution elicited testimony that Wingfield refused to talk to the police. In context, Officer Somero testified as follows:

When I informed him of the accusation involving [the complainant's aunt], [Wingfield] got angry and upset and left the building He just was more or less telling me that he wasn't involved . . . and he was going to have none of it, and he wanted to leave. . . . [H]e refused to talk to me and he was getting up and getting his things and proceeded out the door.

There is no indication that Wingfield invoked his right to silence. Instead, he denied any involvement with the complainant's aunt. Nor is there any indication that Officer Somero gave Wingfield *Miranda* warnings or that Wingfield was under custodial interrogation. To the contrary, this testimony reflects that Wingfield not only felt free to leave, but actually did leave. Thus, the record does not support Wingfield's claim of prosecutorial misconduct on this ground. We conclude that the prosecution did not use Wingfield's silence against him because Wingfield did not invoke his right to silence.

D. EVIDENCE OF THE COMPLAINANT'S VIRGINITY

Wingfield raises two arguments concerning the prosecutor's argument in closing that

[t]his is about somebody who's targeting these girls who are virgins. And I got to wonder based on the testimony if they were keeping score, is there anything—do you get anything more for these young girls who are virgins? I don't know. But they said they were keeping score.

First, Wingfield argues that the evidence did not support the prosecution's statement that Wingfield and Reichelderfer were "keeping score". A prosecutor may not argue the effect of testimony that was not in evidence.³⁶ However, a prosecutor may argue all the facts in evidence and all reasonable inferences arising from them, as they relate to the prosecutor's theory of the case.³⁷

Here, Reichelderfer testified that he and Wingfield often talked to each other about girlfriends and "kept score" of "[w]hich one's hot and which one's not." The prosecution argued that this testimony might lead someone to wonder whether virgins were more valuable when keeping this score, and the defense argued that Reichelderfer's testimony meant that they kept score of physically attractive traits rather than which girls were willing to engage in sexual encounters. Both arguments appear to be fair inferences arising from Reichelderfer's testimony. We conclude that the prosecution's argument was a reasonable inference arising from the evidence.

³⁶ *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

³⁷ *Bahoda*, 448 Mich at 282; *Unger*, 278 Mich App at 236.

Second, Wingfield argues that the prosecution committed misconduct when it elicited that the complainant was as a virgin, because her virginity was irrelevant. We disagree. “A prosecutor’s good-faith effort to admit relevant evidence does not constitute misconduct.”³⁸ A person’s motive to commit a crime may be highly relevant.³⁹

The prosecution’s theory of the case was that Wingfield was motivated to attain sexual encounters with virgins, and that this made it more likely that he had a sexual encounter with the complainant. Under these circumstances, the evidence that the complainant and the complainant’s aunt were virgins was pertinent to the prosecution’s theory of the case and Wingfield’s motives. Further, Wingfield highlighted the same evidence to argue that the complainant’s virginity made it less likely that she and Wingfield had a sexual encounter, because she could not remember many details of the encounter, and she should have shown a better memory if it was her first sexual experience. Wingfield did not challenge the evidence as irrelevant when the prosecution admitted it, and from his own use of the evidence, it appears that decision was intentional. We conclude that the prosecution did not commit prosecutorial misconduct because the prosecution argued this evidence in good-faith, for the purpose of showing Wingfield’s motives.

E. DENIGRATION OF THE DEFENSE

Wingfield argues that the prosecution improperly denigrated the defense when the prosecutor argued that defense counsel was attempting to confuse the jury, that the defendant’s argument was fraudulent. We agree that the prosecutor’s comments were improper, but conclude that these statements did not prejudice Wingfield.

After relating Reichelderfer’s testimony about a party at which Wingfield and the complainant’s aunt allegedly had a sexual encounter, the prosecution argued:

Do you see how they’re trying to confuse you? I hope you picked up on that, because it’s fraudulent. It really is.

The prosecution may not “denigrat[e] a defendant with intemperate and prejudicial remarks.”⁴⁰ The prosecution may not argue that defense counsel is intentionally misleading, because the argument undermines the defendant’s presumption of innocence.⁴¹

We agree that the prosecutor’s statements were improper. The prosecution argues that it may respond to defense counsel’s argument, which included that the prosecution attempted to

³⁸ *Dobek*, 274 Mich App at 70.

³⁹ *People v Fisher*, 449 Mich 441, 453; 537 NW2d 577 (1995).

⁴⁰ *Bahoda*, 448 Mich at 283.

⁴¹ *Unger*, 278 Mich App at 236, quoting *People v Wise*, 134 Mich App 82, 102; 351 NW2d 255 (1984).

mislead the jury about the same event. We must consider the context of the prosecutor's arguments, and otherwise improper remarks that respond to improper arguments by defense counsel may not be prosecutorial misconduct.⁴² Here, the prosecutor made this statement during his initial closing statement, rather than during rebuttal, and so they did not respond to a defense argument.

However, we conclude that the prosecutor's remarks did not deprive Wingfield of a fair trial. The remark concerned a separate sexual encounter between Wingfield and the complainant's aunt, and was not directly pertinent to the prosecution's case against Wingfield's encounter with the complainant. Importantly, Wingfield did not contemporaneously challenge the remark. A contemporaneous cautionary instruction could have cured any possible prejudice from this comment.⁴³ Further, the trial court instructed the jury about the presumption of innocence and that the attorneys' arguments were not evidence. We conclude that this single statement, which was not directly pertinent to the complainant's case, did not unduly prejudice the defendant because the trial court properly instructed the jury. And Wingfield could have cured any potential prejudice with a contemporaneous challenge and instruction.

Finally, Wingfield argues that the prosecution improperly argued that Wingfield is "not a man," but does not provide any analysis to support this argument. A fair reading of the prosecutor's remark reveals that the prosecutor does not state that Wingfield is not a man, but argued that the kind of person who targets young girls and brags about sexual encounters with them is not a man. We note that a prosecutor need not make the blandest possible argument.⁴⁴ Further, an appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims," or give issues cursory treatment on appeal.⁴⁵ The appellant abandons an issue when he or she fails to discuss its merits.⁴⁶ We conclude that Wingfield has abandoned this argument.

F. CUMULATIVE ERRORS

The cumulative effect of several errors may deprive the defendant of a fair trial.⁴⁷ Because we have concluded that Wingfield has not shown several errors, we do not decide this issue.

⁴² *People v Kennebrew*, 220 Mich App 601, 608; 560 NW2d 354 (1996).

⁴³ See *Unger*, 278 Mich App at 238.

⁴⁴ *Dobek*, 274 Mich App at 66.

⁴⁵ *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

⁴⁶ *Id.*

⁴⁷ *Dobek*, 274 Mich App at 106.

V. CONCLUSION

We conclude that Wingfield has not established that the trial court abused its discretion when admitting evidence, or that any plain errors in the admission of evidence or in prosecutorial misconduct affected Wingfield's substantial rights.

We affirm.

/s/ William C. Whitbeck

/s/ E. Thomas Fitzgerald