

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRIS ALLEN GREEN,

Defendant-Appellant.

UNPUBLISHED

October 24, 2006

No. 261732

Iosco Circuit Court

LC No. 04-001424-FC

Before: Whitbeck, C.J., and Murphy and Smolenski, JJ.

PER CURIAM.

Defendant Chris Green appeals as of right from his jury convictions of one count of CSC II (victim under age 13),¹ and three counts of CSC I (victim under age 13).² The trial court sentenced Green to concurrent prison terms of 2 to 15 years for CSC II and 6 to 20 years for each CSC I count. We affirm.

I. Basic Facts And Procedural History

A. The Events Leading Up To The Charges

In October 2003, the complainant was 17 years old and lived with her mother and Green, her stepfather, in Iosco County. By the time of trial, the complainant's mother had been married to Green for 13 years. The complainant's mother testified that, until recently, she and the complainant had a good, close relationship. She claimed their relationship started to sour when the complainant began seeing a boy whom she and her husband did not like. They frequently argued about him. She testified that the complainant told her and Green that she wanted to move out of the house to be with her boyfriend. She said that, after catching the complainant giving oral sex to her boyfriend, they told the complainant she could no longer see or contact the boy. According to the complainant's mother, two days after this incident occurred, a child protective services worker arrived at her residence to speak with her and Green. Green testified that, after the argument with the complainant about her boyfriend, the complainant threatened to take the whole family down and do what she had to do to be with him.

¹ MCL 750.520c(1)(a).

² MCL 750.520b(1)(a).

Bill VanDriessche, a children's protective services worker with the Family Independence Agency (FIA) went to the complainant's high school to interview her about allegations of physical abuse. The complainant asked VanDriessche "what [her] rights were, [and] if [she was] old enough to leave the house by [herself]." VanDriessche stated that, after he said no, she "mentioned that there was some things going on." VanDriessche met with the complainant twice over two days, the first time for ten minutes, and the second time for 45 minutes to an hour. During the first interview, she told him "[t]hat she had been hit" but gave no details. He said that "[s]he was afraid to talk to me." VanDriessche informed her during the first interview that he was required to speak with her parents. The complainant came back the next day for the second interview with a written list of sexual abuse allegations. VanDriessche said she then detailed five incidents of sexual abuse that took place when she was 12 years old.

B. The Allegations

The complainant testified that the first incident occurred when she was in her living room, getting ready to go out and play. She said Green commented to her about how her figure was starting to come out and how the boys would soon be chasing her. She said Green then "got up to go use the bathroom, and as he did he brushed past my breasts." She said "[h]e kind of slipped his hand across my chest, starting from the left over to the right, as he passed me." She said she thought he did not squeeze them, just brushed past them, but could not remember for sure.

The complainant testified that the second incident happened when she took a shower. She said she came out of the bathroom wearing only her towel to look for her mother but discovered only she and Green were at home. According to the complainant,

[Green] was sitting on the couch in the living room, and he asked me to sit down and that there was something that he needed to check out, and he told me to take off the towel, that he wanted to check something out. So I did, and he ended up touching my breasts, and then he ended up going down below and ended up putting a finger inside [my vagina].

The complainant testified that the third incident occurred after Green told her "there was something that he wanted me to do for him, and if I was a good kid, I would do it." She said he then instructed her to perform fellatio on him.

The complainant testified that during the fourth incident Green again asked her to perform fellatio. She testified that

he started to unzip his pants, and I said I didn't want him to, and he grabbed my neck and forced me down on it. And I remember my little sister was pounding on the door asking to come in for a drink of water, and he kept telling her to go out and play. And I felt something warm come into my mouth, so I started to gag and threw up whatever it was inside of the toilet, and then he brought in a glass of milk and told me to drink it, because my mother would be able to smell him on me is what he said.

The complainant testified that the fifth incident happened when her mother left to go shopping for food, leaving her and Green alone in the house. She said Green took her back to her bedroom and then

he put a blanket over the window, and he told me to take off my clothing and lie on the bed, and he undressed down to his underwear and laid on top of me and he started to kiss me, and then he thought he heard her car, so he jumped up and told me to get dressed really quick and not to say anything.

She testified that her mother came back early because she had forgotten her purse.

The complainant testified that when she made her original statements to police she told them that during the fifth incident Green went into the bathroom for five minutes and then came out and said that he made a mess, that when Green laid on top of her, she felt something hard on her stomach, and that her mother walked in on them, almost catching them. The complainant admitted that she did not testify to these specific events in her preliminary exam testimony, but said that those details were not important.

C. FIA Confrontation Of Green

VanDriessche went with Alcona County Sheriff's Department Deputies Leonard Franklin and Scott MacKenzie to interview Green and his wife regarding the complainant's allegations. Franklin testified that Green and his wife met them at the gate to their property, where they stood and discussed the complainant's situation. Franklin's car's video recording unit recorded the discussion. The audio of that conversation was recorded by a personal mike unit he carried on his belt.

When VanDriessche met Green and his wife at their gate, he told them he was there to discuss the complainant's sexual abuse allegations stemming from incidents that occurred when she was 12 years old. Green responded by saying that it was true, twice. When VanDriessche asked Green for details, Green said "you already heard it from [the complainant]" and claimed he was embarrassed. The only specific abuse allegation VanDriessche asked Green about was whether he made the complainant give him a "blow job."

Green testified at trial that he told VanDriessche that the complainant's allegations were true because he thought VanDriessche was at his residence to discuss the incident that occurred between the complainant and her boyfriend. He said it was only later, "when he directly asked me about allegations of a blow job," that he realized what VanDriessche was talking about. Green also said that he replied "absolutely not" to those allegations. Green testified that he then asked if he needed an attorney or if he would be immediately taken to jail. He explained that when he said he was embarrassed he meant he was embarrassed about slapping the complainant. Green denied that any of the five incidents of sexual abuse testified to by the complainant occurred.

When asked if there was ever an incident "of a somewhat sexual nature" between himself and the complainant, Green replied, "No, it - - just the time that she got curious." He indicated that "that happened on two separate occasions." Green testified that first, the complainant came to him and asked him what a "blow job" was. He said that "she had her head close to me and she said, well, I want to see" and that he pushed her away. Green later indicated that, during this

incident, the complainant tried to reach for his groin area with her hand and that he grabbed it. Green's testimony about the second incident was quite vague. He said that the complainant came "home again off the bus and sat next to me on the couch" and that he pushed her away.

D. Complainant's Discussion Of Incidents With Friends And Family

The complainant testified that she told a friend about the incidents when she was 14 years old. Her friend then told her to tell her mother, which she did. However, the complainant said that she only told her mother "something happened" and that Green "touched me." She testified that she never told anyone else. The complainant's mother testified that the complainant did come talk to her. However, her version of the conversation was somewhat different. She testified that the complainant told her that

She was embarrassed to tell me because she had approached [Green] and asked him to tell her what a blow job was, and she was embarrassed to tell me because she felt that I was going to be mad at her or something.

The complainant's mother testified that if the complainant had ever told her what she told VanDriessche, she would have taken her children and left Green.

Around the time she reported the abuse, the complainant wrote a letter to a friend in which she said she was going to "f[---] over" her family. The complainant stated at trial that she wrote those words because she felt bad, like she was betraying her family. She said she felt guilty for breaking her family up and really sad about "hurting them after all the years of growing up with them."

The complainant also stated that several of her family members asked her to lie on Green's behalf and claim that she made the whole thing up. When the complainant sought to leave the Green household, she talked to her grandparents about living with them. The complainant testified that her grandmother told her that her grandfather said that if she wanted to live there, she would have to change her story and say the sexual abuse allegations were a lie. She said she considered the idea because she did not want to live in a homeless shelter. However, she said she never did change her story and that, even so, she has stayed with her grandparents ever since. The complainant's grandfather testified that the complainant told him that part of the allegations were true and part were not. He denied telling her to change her story. The complainant's grandmother also testified that she never told the complainant to lie.

Timothy Grafe, the complainant's uncle, testified that she told him over the phone that she had fabricated the sexual abuse allegations in order to get out of the house. He testified that he and his wife had originally asked the complainant to come live with them but that they changed their mind because they did not want to help her unless she was honest.

Russell Grafe, the complainant's cousin, testified that once, while he talked with the complainant on the back porch of their grandmother's house, she told him that Green was threatening to throw her out of a window. He said she also told him:

She got scared and she went out. She went to school the next morning and she told the school that he abused her, but there was no physical contact of abuse [sic] on her, so she changed the story and said that he raped her or molested her.

Russell Grafe testified that the complainant told him the molestation never happened.

Trooper Michael Brown interviewed the complainant at the time of her allegations. Brown testified that, because the criminal charges differ when an abuser physically penetrates (as opposed to merely touches) the victim, he normally asks individuals complaining of sexual abuse specifically about penetration. He did not recall if the complainant ever indicated there was penetration, but he said that if she had, he would have included it in his written report. There was no indication of digital penetration in his report of the complainant's statement. The complainant claimed that her statement to Brown, that "[Green] grabbed [her] breasts and [her] vagina," covered basically what happened and was sufficient to indicate that she was digitally penetrated.

II. Sufficiency Of The Evidence

A. Standard Of Review

Green argues that the evidence presented at trial was so unreliable that no reasonable jury could have believed it and, therefore, there was insufficient evidence to support his convictions.

To determine whether sufficient evidence existed to support a conviction, we review the evidence de novo, in the light most favorable to the prosecution, and decide whether any rational fact-finder could have found that the essential elements of the crime were proven beyond a reasonable doubt.³

B. Reliability Of The Evidence

"The testimony of a victim need not be corroborated in prosecutions [of criminal sexual conduct]." ⁴ The testimony of a complainant alone can be sufficient evidence to establish guilt beyond a reasonable doubt.⁵ The credibility of witnesses is purely the province of the jury.⁶

Green calls our attention to the testimony of a number of witnesses that contradicts the complainant's testimony. He demonstrates how the circumstances would have made it beneficial for the complainant to fabricate incidents of sexual abuse. He argues that, when considering these things, a reasonable jury could not find sufficient evidence to convict him. However, all of Green's arguments go to the weight, not the sufficiency, of the evidence. The jury heard all of the evidence Green mentions and was free to weigh it as it saw fit.⁷ The jury was free to believe the complainant and disbelieve every other person who testified.⁸ The complainant's testimony

³ *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

⁴ MCL 750.520h.

⁵ *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

⁶ *Id.*

⁷ *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

⁸ *Taylor*, *supra* at 8.

alone provided the jury with sufficient evidence to find Green guilty beyond a reasonable doubt.⁹ Therefore, we reject Green’s attack on the sufficiency of the evidence to support his convictions.

III. Prosecutorial Misconduct

A. Standard Of Review

Green argues that the prosecutor engaged in multiple acts of prosecutorial misconduct that deprived him of a fair trial. He argues that this requires reversal and a new trial.

Generally, we review de novo a prosecutorial misconduct claim.¹⁰ “The test for prosecutorial misconduct is, viewing the alleged misconduct in context, whether the defendant was denied a fair and impartial trial.”¹¹ Preserved non-structural constitutional error requires reversal unless the beneficiary of the error can prove it was harmless beyond a reasonable doubt.¹² However, we must review for plain error Green’s unpreserved claims of constitutional error.¹³ With regard to such unpreserved claims, “[r]eversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings.”¹⁴ Reversal is not required “where a curative instruction could have alleviated any prejudicial effect.”¹⁵ We review prosecutorial misconduct claims on a case-by-case basis, looking at the prosecutor’s comments in context and in light of the defense arguments and their relationship to evidence admitted at trial.¹⁶

B. Vouching For Witness Testimony

Green asserts that the prosecutor improperly vouched for the testimony of a witness. While a prosecutor may not argue facts not entered into evidence,¹⁷ he may argue all reasonable inferences the evidence creates.¹⁸ Therefore, while a prosecutor may not vouch for the credibility of a witness on the basis of special knowledge, otherwise unavailable to the jury,¹⁹ he may argue that, on the basis of the evidence, a witness is worthy or unworthy of belief.²⁰

⁹ *Id.*

¹⁰ *People v Abraham*, 256 Mich App 265, 272; 662 NW2d 836 (2003).

¹¹ *People v Goodin*, 257 Mich App 425, 432; 668 NW2d 392 (2003).

¹² *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

¹³ *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

¹⁴ *Id.*

¹⁵ *Id.* at 329-330.

¹⁶ *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

¹⁷ *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

¹⁸ *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

¹⁹ *Id.* at 276.

²⁰ *Thomas*, *supra* at 455.

Green claims that the prosecutor improperly vouched for the complainant's testimony three times. First, Green claims it was improper for the prosecutor to state, "We know that the complainant's rendition of the assaults has never changed." This, however, is not improper vouching, but merely a proper argument for credibility based upon the facts in evidence--that the complainant's testimony has been consistent.

Second, Green claims it was improper for the prosecutor to state, "Well, I think that [the complainant] did an excellent job yesterday explaining that to you." However, in context, it is clear he was arguing that the complainant's testimony explained the meaning of the inflammatory remark in her letter, even if, taken literally, he expressed a personal opinion of the content of her testimony. Even if the prosecutor was intending to assert his opinion of the complainant's credibility, this was cured by the instructions given to the jury that the remarks of counsel are not evidence, and would therefore not plainly deny Green a fair trial.

When Green raised the issue of the complainant's five-year delay in coming forward with these accusations, the prosecutor responded by stating, "Think about it. I don't think it's all that uncommon, and I don't think it destroys her credibility." Green claims it was improper for the prosecutor to make this statement. However, the statement, while perhaps unfortunately phrased, was merely an attempt to state that the complainant's credibility was not necessarily destroyed by a delay in reporting. Also, once again, the jury was instructed that the attorneys' statements were not evidence, and this statement did not plainly deny Green a fair trial.

C. Expression Of Personal Views Regarding Green's Guilt

Next, Green complains that the prosecutor used the power of his office to broadcast a personal opinion when he said that "the People believe that the evidence presented yesterday shows the defendant is guilty of the charges beyond a reasonable doubt." Green asserts that this is a violation of professional conduct rules requiring that counsel not express a personal belief regarding the guilt or innocence of an accused.²¹ But that "the People" believe guilt has been shown beyond a reasonable doubt goes without saying in any criminal trial in which a prosecutor submits the case to the jury. Therefore, while this may technically be a violation, it is of a generally harmless nature and was cured by the trial court's instructions indicating that the statements of counsel are not evidence.

D. Disparaging Witnesses

Green essentially claims that the prosecutor argued facts not in evidence and improperly disparaged defense witnesses Timothy and Russell Grafe when he stated:

That can say, hey, maybe he wasn't comfortable following in the lead of his dad.

And do you think that he didn't talk to his dad about this? Never - - probably never been in court before, driving from God knows where, you heard

²¹ *People v Whalen*, 390 Mich 672, 687; 213 NW2d 116 (1973).

the accent. Where were they staying? I don't know. Probably staying with the Greens. Who knows, okay. Never talked about it? Come on. Again, you know, I am just going to keep with this theme: It doesn't make sense, does it?

First, it was reasonable to argue from the evidence that the witnesses were relatives of Green and his wife and that they had discussed their testimony with each other.²²

It is not plain that the reference to the accents and unknown geographic origins of Timothy and Russell was meant to disparage these witnesses because of their way of speaking or because they were apparently not from the locality. Rather, the reference may have been tied to the prosecutor's suggestion that they were likely staying with Green or his relatives, and therefore had an opportunity to discuss their testimony. Accordingly, it is not plain that this reference to accents and geographic origins denied Green a fair trial.²³

E. Appeals To Jury Sympathies

Green also challenges the prosecutor's remarks essentially asking jurors how they would react if authorities told them there were allegations of sexual abuse of their daughter. Prosecutors may not admit evidence for the sole purpose of appealing to the sympathies of the jury.²⁴

However, the remarks at issue were not an appeal to the jury's sympathies, but instead an appeal to the jury's common experience of how a typical concerned parent would have responded in Green's place when approached by an FIA worker and the police. When Green said he distanced himself from the complainant for perhaps a year, the prosecutor made a similar sort of argument: "Ladies and gentlemen, and I am sure some of you have children. Again, does any of that make sense to you?" Here, it is clear the prosecutor was arguing that Green's behavior was inconsistent with the behavior of a typical parent concerned for his child's welfare, and was not appealing to the sympathies of the jurors as if the complainant were their child. Thus, these two statements contain no improper appeals to the sympathies of the jurors.

F. Improper Rebuttal

A prosecutor's rebuttal to a defendant's closing argument is limited to the issues raised in defendant's closing argument.²⁵ There is no limit to the length of the rebuttal beyond the length of time it would take to respond to the issues raised by defendant in his closing argument. With the exception of asking the jury to carefully listen to the judge's instructions on reasonable doubt, there was nothing in the prosecutor's rebuttal that did not directly respond to something from Green's closing argument. The prosecutor did not err in asking the jury to carefully

²² *Bahoda*, *supra* at 282.

²³ See *Bahoda*, *supra* at 271-273 (a prosecutor's references to ethnicity did not deny the defendant a fair trial in circumstances that did not involve "the deliberate arousal of prejudice").

²⁴ *People v Mallory*, 421 Mich 229, 250-251; 365 NW2d 673 (1984).

²⁵ MCR 6.414(G).

consider the judge's instructions because a generalized statement about the meaning of reasonable doubt, something that will soon be given in jury instructions, does not amount to a significant departure from the limited scope of rebuttal allowed to a defendant's closing argument.

G. Argument Of Facts Not In Evidence

A prosecutor must limit his closing arguments to the evidence presented at trial so that the jury will decide the issues based on that evidence and not on the prestige of the prosecutor's office.²⁶ The prosecutor in his closing argument stated, "Well, we know that none of them could testify, because I asked every and - - each and every one of them, none of them knew it didn't happen, okay." The People concede that this question was only asked of one witness, the complainant's mother, and not "each and every one of them" as the prosecutor said at trial. Nevertheless, the People characterize the statement as accurate because it was true that none of the witnesses testified that they knew for a fact the assault did not happen. This is false on its face, because the prosecutor did not state simply that "no one testified to this," but he stated that he specifically asked every witness if the witness knew for sure that the sexual assaults did not happen, implying he received a specific answer in the negative. However, it also is apparent that, if any of those witnesses could have testified that they knew for a fact that the assault did not happen, Green's counsel would have asked them that question as he certainly would have wanted it on the record. Thus, the fact that there was no such testimony could lead to a reasonable inference that if the question had been asked by the prosecutor, the witnesses would have answered that question in the negative. Therefore, while the prosecutor's statement was literally false, it substantially amounted to an inference that could properly have been made from the evidence. Further, any error in this regard was cured by the trial court's instruction that what attorneys in a case say is not evidence.²⁷

H. Burden Shifting

"An argument by a prosecutor which infers that a defendant must prove something may tend to shift the burden of proof, resulting in error."²⁸ "Similarly, where a prosecutor calls upon a defendant to present a reasonable explanation for damaging evidence, the argument may tend to shift the burden of persuasion."²⁹ Green claims the prosecutor's following comments were an inappropriate attempt to shift the burden of proof to defendant:

Now, if you believe that, don't you wonder why the defendant did not explain that story to the authorities while they were at his gate?

Well, we know that none of them could testify, because I asked . . . each and every one of them, none of them knew it didn't happen, okay.

²⁶ *People v Yearrell*, 101 Mich App 164, 167; 300 NW2d 483 (1980).

²⁷ *Callon, supra* at 329-330.

²⁸ *People v Heath*, 80 Mich App 185, 188; 263 NW2d 58 (1977).

²⁹ *Id.*

Did you hear the Defendant, any of his family members, his spouse saying yesterday he had any responsibility at all? I didn't. I heard him refusing to admit things he had said prior until I hammered him on it . . . But again, do you expect him to get up there during the middle of the trial and say, I did it? Of course not.

These arguments do not shift the burden of proof onto Green, but merely point out the incriminating nature of the evidence: that Green did not offer his exonerating story to authorities until much later, that there were no eyewitnesses who could refute the complainant's story besides Green, and that Green was not very forthcoming in his testimony. The prosecutor argued that the evidence presented was inconsistent with Green's innocence. A prosecutor is allowed to argue that the only reasonable explanation for the evidence presented is that a defendant is guilty.³⁰

I. Knowing Elicitation Of Inadmissible Evidence

Finally, in his sole preserved claim of prosecutorial misconduct, Green argues that the prosecutor improperly elicited testimony from a police officer that Green invoked his right to an attorney rather than submitting to a police interview. Assuming that this constituted prosecutorial misconduct, we conclude that the error was harmless beyond a reasonable doubt under the circumstances of this case. Independent of the challenged testimony, as recorded on a videotape played twice for the jury, Green responded to the FIA worker's statement that the complainant was alleging sexual abuse by saying it was true. In light of this strong evidence of Green's guilt, we conclude that there is no reasonable possibility that the testimony at issue from the police officer additionally prejudiced Green, or would have made a jury more likely to convict him in the absence of sufficient evidence. Thus, any error in this regard was harmless beyond a reasonable doubt and does not require reversal.³¹

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Michael R. Smolenski

³⁰ *Heath, supra* at 188.

³¹ *Carines, supra* at 774.