

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ARLIE DWAYNE SMITH,

Defendant-Appellant.

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UNPUBLISHED

January 27, 2004

No. 244232

Saginaw Circuit Court

LC No. 02-021434

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

PER CURIAM.

Following a jury trial, defendant Arlie Dwayne Smith was convicted of fourth-degree criminal sexual conduct, MCL 750.520e. The trial court sentenced him to three years' probation, with the first thirty days to be served in jail. Defendant appeals as of right. We affirm.

This appeal arises out of an incident that occurred during a Halloween party at the home of Dawn and Robert Gergen on October 27, 2001. Approximately fifteen to twenty people attended the party, including defendant and his wife, Shannon Smith. Defendant came dressed as the Phantom of the Opera, complete with a cape, top hat, mask, and cane.

Dawn Gergen went to bed in the master bedroom around midnight. By 1:30 a.m., everyone had left the home except: defendant and his wife; David Barker; Robert Gergen's parents; Robert Gergen's sister; and Nicole Boyland. Mike Barber arrived after Dawn Gergen went to bed and was not in costume.

At approximately 3:30 a.m., Dawn Gergen claimed that she heard the door from the main bathroom open into the bedroom. The main bathroom adjoined the master bedroom with another door leading into the hallway. At that time, she thought it was her husband. While she was laying on her stomach, Dawn Gergen testified that someone took the covers off her, slid her underwear down, touched her buttocks, and was proceeding toward her vaginal area. Dawn Gergen testified that she turned over at that point because she realized it was not her husband. Looking up, she saw an individual wearing a cape and a top hat running into the bathroom. Dawn Gergen immediately recognized the person as defendant, based on the build and costume.

Theodore Gergen observed defendant enter the master bathroom at approximately 3:30 a.m. He specifically recalled that defendant was wearing his mask, top hat, and cape at the time. According to Theodore Gergen, defendant was in the bathroom for approximately ten minutes.

Shortly thereafter, defendant left the party. After defendant left, Dawn Gergen told her husband about the incident. Robert Gergen described his wife as being very shaken and upset. Dorothy Gergen, who was spending the night, claimed that she was awakened when she heard her son screaming and a woman crying. She testified that she found defendant's mask on the counter in the main bathroom. Dawn Gergen called the police later that morning.

Defendant denied entering the master bedroom but admitted using the main bathroom. He further stated that he took off his mask and hat sometime during the party and left them on the kitchen counter. Defendant admitted, however, that he was the only individual still wearing a cape at the time. The following day, defendant told Mr. Barker that he did not remember much of the night before because he had been drinking. He then stated that he remembered everything about the night up until the time he got in the car to go home.

On appeal, defendant argues that he was denied a fair trial due to alleged prosecutorial misconduct. 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.<sup>1</sup> Because defendant failed to object to this alleged misconduct, our review is limited to plain error affecting his substantial rights.<sup>2</sup> “No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction.”<sup>3</sup>

Defendant initially asserts that the prosecutor improperly vouched for the credibility of witnesses. A prosecutor may not vouch for the credibility of a witness by conveying that he has some special knowledge that the witness is testifying truthfully, or express his personal opinion about the defendant's guilt.<sup>4</sup> But when the jury is faced with a credibility question, the prosecutor is free to argue a witness' credibility from the evidence.<sup>5</sup> Further, the prosecution may use “hard language” when it is supported by the evidence, and is not required to phrase arguments and inferences in the blandest possible terms.<sup>6</sup> Here, the prosecutor commented that defendant had convenient memory loss based on defendant's testimony that he basically “blanked out” right after leaving the house. Examining this comment in context, it is not apparent that the prosecutor engaged in improper vouching.<sup>7</sup> Rather, this was permissible argument based on the evidence.<sup>8</sup>

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<sup>1</sup> *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

<sup>2</sup> *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

<sup>3</sup> *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

<sup>4</sup> *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001).

<sup>5</sup> *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996).

<sup>6</sup> *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

<sup>7</sup> See *Schutte*, *supra* at 722; *People v Reed*, 449 Mich 375, 398-399; 535 NW2d 496 (1995).

<sup>8</sup> *People v Avant*, 235 Mich App 499, 512; 597 NW2d 864 (1999).

Likewise, we find no merit to defendant's claim that the prosecution acted improperly by commenting during rebuttal argument that "these people aren't lying." This statement was clearly responsive to the following comments made by defense counsel:

[Plaintiff's] family tried to support her on this story. Every one of her witnesses said, oh, I wasn't drinking, these Dutchman from Grand Rapids. My witnesses said, yeah, I was drinking. When people say they're not drinking, they're lying. They're going to lie on other things.

Indeed, we note that after stating that the witnesses were not lying, the prosecution further stated that the witnesses "could have said they were drinking and still testified." Nevertheless, "[o]therwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by defense counsel."<sup>9</sup>

Defendant also asserts that the prosecution appealed to the jury's sympathy with the following statements:

There was nobody else that could have done this, and you heard the testimony of the victim. You saw how upset she was, in tears, and you saw how certain she was who did this.

\* \* \*

Her actions were totally normal for someone that that happens to. You have to be a victim to know what that feels like, the embarrassment, the humiliation, you know. Sometimes us guys feel like, well, why didn't she just run right straight to the phone and dial 911 right then and there. She was just floored. That's very normal under those circumstances.

It is well established that a prosecutor may not urge a jury to convict out of sympathy for the victim.<sup>10</sup> However, these remarks were provided to explain why Dawn Gergen did not immediately call the police.<sup>11</sup> The prosecution's comments were not a blatant appeal to the jury's sympathy, nor were they "so inflammatory as to prejudice defendant."<sup>12</sup> Further, the trial court specifically instructed the jury not to let sympathy or prejudice influence its verdict. Juries are presumed to follow their instructions.<sup>13</sup>

To the extent defendant claims that the prosecutor improperly testified to facts not introduced as evidence, we disagree. Specifically, defendant cites the prosecution's comments

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<sup>9</sup> *Schutte*, *supra* at 721.

<sup>10</sup> *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984).

<sup>11</sup> See *People v Fisher*, 220 Mich App 133, 160-161; 559 NW2d 318 (1996).

<sup>12</sup> *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001).

<sup>13</sup> *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

that Dawn Gergen's response was "normal." A prosecutor is prohibited from arguing facts not in evidence to the jury.<sup>14</sup> But a prosecutor may argue the evidence and all reasonable inferences arising from it as they relate to his theory of the case.<sup>15</sup> Here, Dawn Gergen testified that she did not immediately call the police because she was embarrassed and scared. We also note that the trial court instructed the jury "the lawyers' statements and arguments are not evidence."<sup>16</sup>

Because defendant failed to present any instances of prosecutorial misconduct that denied him a fair trial, he has not shown that his trial counsel was ineffective for failing to object.<sup>17</sup>

Affirmed.

/s/ Brian K. Zahra  
/s/ Mark J. Cavanagh  
/s/ Jessica R. Cooper

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<sup>14</sup> *People v Stanaway*, 446 Mich 643, 686; 521 NW2d 557 (1994).

<sup>15</sup> *Fisher*, *supra* at 156.

<sup>16</sup> *Schutte*, *supra* at 721-722; see also *Graves*, *supra* at 486.

<sup>17</sup> *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).