

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SEAN MATTHEW HAMMOND,

Defendant-Appellant.

UNPUBLISHED

February 22, 2005

No. 252845

Muskegon Circuit Court

LC No. 03-048486-FH

Before: Schuette, P.J., and Fitzgerald and Bandstra, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial conviction of assault with the intent to commit criminal sexual conduct in the second-degree, MCL 750.520g(2), and willful failure to register a change of address under the Sex Offenders Registration Act, MCL 28.729. Defendant was sentenced as a habitual offender, second offense, MCL 769.10, to 28 months to 7 ½ years for the assault conviction and to 15 months to 6 years for the willful failure to register a change of address count. We affirm.

I. FACTS

Defendant enticed the six-year-old victim into his apartment, along with her cousin, with the promise of candy. After giving the victim and her cousin some candy, the victim's cousin left and defendant told the victim that he had some board games that she could use in his basement. After defendant and victim went to the basement, defendant knelt before the victim and pulled her shorts down. Meanwhile, the victim's father had come to defendant's apartment in search of his daughter and knocked. Defendant then pulled up the victim's shorts and told her not to say anything about the incident as the victim ran upstairs and out the door.

Defendant had been involved with an earlier incident involving a young girl in which he enticed the victim into a more secluded room, pulled her pants down, and licked her vagina. As a result of this incident, defendant was required to register his address under SORA. Defendant verified his address in January of 2002, but did not register a change of address when he moved in with his father in February of 2002. Defendant did not register any address changes until February of 2003.

II. PROSECUTORIAL CONDUCT

Defendant first contends that he was deprived of a fair trial as a result of numerous instances of prosecutorial misconduct. We disagree.

A. Standard of Review

The test of prosecutorial misconduct is whether defendant was deprived a fair and impartial trial. *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002). The prosecutor's conduct must be evaluated on a case-by-case basis and the reviewing court must evaluate the prosecutor's remarks in context. *Id.* at 30.

B. Analysis

1. Testimonial Questions

Defendant's first allegation of prosecutorial misconduct involved allegedly improper questioning by the prosecutor of defendant. Defendant's defense to the count of willful failure to register a change of address as a sex offender was that he did in fact register his new address as required by the law. Defendant stated that he went to register on two occasions. On the first occasion he was turned away by a woman because she told him that he needed to have his license changed on the front before she could process the change. On the second attempt, he stated he successfully registered his address and received a receipt, which he can no longer find.

When the prosecutor presented defendant with two women who worked at the office that handled sex offender registrations, he stated that neither of them were the women that he spoke to on the two occasions. He also denied that one witness, who testified that she was one of only four women who took sex offender registrations, was either of the women he spoke to on the two occasions. Following this testimony, the prosecutor asked defendant if he had said earlier in the hallway outside court, "That's the lady," referring to one of the women shown to defendant in court. Defendant responded by correcting the prosecutor, saying, "No. I said, 'That's not the lady.'" This exchange, defendant contends, constituted impermissible testimonial questioning on the part of the prosecutor, which deprived defendant of a fair trial.

This Court has held that the use of testimonial questions is improper. *See Rodriguez, supra* at 35. However, in the exchange of which defendant complained, the testimonial nature of the prosecutor's question was limited to an assertion that defendant said something in the hallway outside court, which sounded to the prosecutor like "that's the lady." Defendant immediately corrected the prosecutor and stated that he said "that's not the lady." This line of questioning was permissible impeachment of credibility based upon a perceived inconsistent prior statement. See MRE 613. Furthermore, once defendant corrected the prosecutor, stating that he actually said, "that's not the lady," the prosecutor dropped that line of questioning. Therefore, this question did not rise to the level of testimonial questioning.

Furthermore, this Court has held that a "judge, unlike a juror, possesses an understanding of the law which allows him to ignore such errors and to decide a case based solely on the evidence properly admitted at trial." *People v Taylor*, 245 Mich App 293, 305; 628 NW2d 55 (2001). Because this claim of error was unpreserved, to warrant a new trial, defendant must

show that this conduct was plain error affecting his substantial rights. *McLaughlin, supra* at 645. To demonstrate plain error affecting his substantial rights, defendant must show that the error was outcome determinative. *Id.* Given the presumption stated in *Taylor*, defendant cannot demonstrate that there was plain error affecting his substantial rights. Therefore, this line of questioning, even if it were assumed to be erroneous, did not rise to a level warranting a new trial.

2. Credibility of Witnesses

Defendant next asserts that the prosecutor improperly asked defendant to comment on the credibility of the prosecution's witnesses. It is well established that a prosecutor may not ask the defendant to comment on the credibility of a prosecution witness' testimony. *People v Ackerman*, 257 Mich App 434, 449; 669 NW2d 818 (2003). A prosecutor is permitted to explore discrepancies in testimony, see *id.*, but may not ask defendant to comment directly on the credibility of another witness. See *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Defendant refers to several questions by the prosecutor to defendant wherein the prosecutor asked defendant if he was aware of any reason why the witnesses would falsely testify against him. While these questions did not directly ask defendant to state that these witnesses were liars, as was the case in *Buckey, supra* at 7 n 3, they did invite defendant to comment on their credibility. Indeed the prosecutor's questions suggested that, if defendant could not demonstrate a reason why the witnesses would testify falsely, that the witnesses' versions of events must be the accurate version. For this reason, this line of questioning may have been improper.

However, in *Buckey*, our Supreme Court noted that where the defendant dealt with the questions well, there is no harm. *Buckey, supra* at 17. Furthermore, the *Buckey* Court noted that the inappropriate questions could have been stopped by an objection and any harm alleviated by a cautionary instruction. *Id.* at 18; see also *Ackerman, supra* at 449. Likewise, as already noted, in a bench trial, the judge is presumed to disregard such errors. *Taylor, supra* at 305. Therefore, defendant has not and cannot demonstrate plain error affecting his substantial rights.

3. Vouching

Defendant next contends that the prosecutor improperly vouched for the victim in the closing statement. Defendant is correct that a prosecutor may not vouch for the veracity of a witness' testimony, by implying that he had some special knowledge that the witness is being truthful. *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, a prosecutor may argue that, from the evidence, a witness is worthy of belief, "especially when there is conflicting evidence and the question of the defendant's guilt depends on which witness the jury believes." *Thomas, supra* at 455. When examined in context, each of the prosecutor's comments are seen to be permissible argument that the victim's testimony was more believable than defendant's testimony. The prosecutor never asserted that he had some special knowledge that the victim was being truthful, nor did he place the authority of his office behind his statements that he believed the victim was more truthful than defendant. Even if the prosecutor had done so, there is a presumption that the trial court would not be swayed by such tactics in the same way that a jury might be. *Taylor, supra* at 305. Therefore, these statements do not amount to plain error affecting defendant's substantial rights.

4. Closing Statement

Defendant next asserts that the prosecutor committed misconduct in his closing statement by arguing that what the defendant intended to do with the victim could be inferred from the prior acts testimony submitted at trial. Defendant asserts that this was an impermissible argument based upon character. MRE 404(b) clearly permits the presentation of prior acts evidence if it is offered for a purpose other than to prove the defendant's bad character and that he acted in conformity with that character. One example of a permissible purpose is to show the defendant's intent. MRE 404(b)(1). In this case, an essential element of the first count was defendant's intent at the time that he committed the assault upon the victim. At trial, the court was presented with testimony describing an attack by defendant upon a girl similar in age to the present victim and under strikingly similar circumstances. The trial court heard objections to this evidence and specifically ruled that it was admissible for a proper purpose under 404(b), including for the purpose to show defendant's intent. The trial court even specifically stated that it would use this testimony as evidence of defendant's motive, opportunity and intent, "but for nothing else now."

In his closing argument, the prosecutor referred to the defendant's intent when he knelt before the victim and pulled her pants down, and argued that the earlier attack under similar circumstances showed defendant intended to do the same thing when he enticed the victim into his basement, knelt before her, and pulled down her shorts. Likewise, at no point in this discussion does the prosecutor explicitly or implicitly state that the trial court should convict defendant based solely upon his character. Instead, the prosecutor, quite properly, argues that the other acts evidence is evidence of defendant's actual intent. The prosecutor specifically attempted to rebut defendant's assertion that he only pulled the victim's shorts down as a joke. Because the other acts evidence was properly admitted for the purpose of demonstrating defendant's intent and was properly used in the prosecutor's closing statement for that purpose and that purpose alone, it was not error. Furthermore, the trial court stated that it would only use this evidence for non-character purposes. Therefore, there was not error warranting a new trial.

5. Shifting the Burden of Proof

Defendant finally contends that the prosecutor committed misconduct by improperly shifting the burden of proof to defendant in his closing statement. Specifically, defendant alleges that the prosecutor's statement pointing out that defendant could not explain what happened to the receipts that he would have been provided had he registered his changes of address, invited the court to disbelieve defendant's theory of the case and "prove himself innocent." However, our Supreme Court has stated that "[a]lthough a defendant has no burden to produce any evidence, once the defendant advances evidence or a theory, argument on the inferences created does not shift the burden of proof." *People v Fields*, 450 Mich 94, 115 (1995). "When a defense makes an issue legally relevant, the prosecutor is not prohibited from commenting on the improbability of the defendant's theory or evidence." *Id.* at 116. The *Fields* Court even noted that the prosecutor could comment on a defendant's failure to present evidence corroborating his theory of the case. *Id.* at 115 n 24. Therefore, the prosecutor's comments regarding defendant's failure to present the receipts did not improperly shift the burden of proof to defendant.

Since the conduct alleged by defendant to have been misconduct, was in fact proper conduct or did not affect the outcome of the trial, a new trial based on prosecutorial misconduct is not warranted.

III. SUFFICIENCY OF EVIDENCE

Defendant next argues that the trial court erred when it failed to address the apparently contradictory evidence in its findings of fact and failed to comply with the court rules by finding the facts specially. Defendant also argues that the trial court failed to address the willful element of the offense. Defendant is incorrect on all three contentions.

A. Standard of Review

When reviewing a claim that the evidence was insufficient to support defendant's conviction, this Court reviews the evidence presented in a light most favorable to the prosecution and determines whether a rational trier of fact could have found that the essential elements of the crime charged were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

B. Analysis

Defendant correctly notes that MCR 2.517 requires a trial court sitting as the finder of facts must find the facts specially and state separately its conclusions of law. MCR 2.517(A)(1). However, defendant also correctly notes that MCR 2.517(A)(2) states, "Brief, definite, and pertinent findings and conclusions on the contested matters are sufficient, without overelaboration of detail or particularization of facts." The key words are "findings ... on the contested matters." *Id.* In the present case, defendant stipulated to the fact that he moved from the Royal Glen apartment to the West Dale address in February of 2002 and that this address change was not registered. Defendant's defense was that, notwithstanding the lack of records, he did in fact register his change of address. Thus defendant's argument was essentially that any lack of registration was a failure on the part of the sheriff's office, and therefore, he could not be found to have willfully violated the statute. Consequently, the only fact contested was whether defendant willfully failed to register his address change.

In its findings of fact, the trial court said, "Mr. Hammond's asking me to consider the sheriff's right on every occasion – or wrong, I'm sorry. Wrong the first time. Wrong the next time he goes back with dad. He missed reporting Webster. He missed reporting McGraft. And that I can't accept." These statements make it clear that the trial court properly considered the one element that was truly in dispute under count two, namely whether defendant willfully failed to register. The trial court simply did not believe defendant's attempts to shift the blame onto the staff at the sheriff's department. The trial court stated that, to believe defendant, it would have to assume that the sheriff's department erred on numerous occasions, which it could not do. The trial court even noted that defendant failed to register two other addresses. When read fairly, these statements indicate that the trial court weighed defendant's credibility and determined that he willfully failed to register despite his testimony to the contrary. After a review of the entire record, the lower court's finding is supported by the testimony presented and we are not left with a definite and firm conviction that a mistake has been made. *People v McSwain*, 259 Mich App 654, 682; 676 NW2d 236 (2003). Therefore, since each element of the charged offense was supported by evidence and the trial court did not clearly err when making its findings, there was no error warranting a new trial.

Affirmed.

/s/ Bill Schuette
/s/ E. Thomas Fitzgerald
/s/ Richard A. Bandstra