

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

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
January 17, 2013

v

FRANK LEONARD ADKINS,  
  
Defendant-Appellant.

No. 309898  
Ingham Circuit Court  
LC No. 10-000352-FH

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Before: OWENS, P.J., and FITZGERALD and RIORDAN, JJ.

PER CURIAM.

Defendant appeals his conviction following a jury trial of criminal sexual conduct, third-degree (CSC III), MCL 750.520d(1)(c) (incapacitated victim). Defendant was sentenced to prison for 18 to 180 months. Defendant appeals as of right. We affirm.

In December 2008, a group of freshmen from Michigan State University threw a birthday party for a friend. The victim attended the party and began drinking. In total, she consumed four shots of tequila. The victim began feeling ill and went to defendant's bathroom to vomit. According to the victim, while in the bathroom, defendant put his hands in her shirt and rubbed her breasts. She also said defendant undid her zipper and rubbed her vagina through her underwear. Furthermore, the victim testified that defendant rubbed his pelvis on her buttocks while she was lying helpless on the bathroom floor.

Eventually, the victim was carried to defendant's bed where she fell asleep. The victim said she was awakened sometime later when defendant was tugging on her pants. She said that defendant assaulted her from behind and penetrated her vagina with his penis.

Michigan State Police Forensic Scientist Nicole Graham testified that she was the forensic analyst who performed the DNA analysis in the case. Graham testified that she obtained a cervical swab from the victim and was able to do a differential extraction which resulted in a cervical epithelial fraction (non-sperm cells) which matched the victim's DNA profile. Graham also got a sperm fraction that had a mixture of DNA, one donor being the victim and the other donor being an unidentified male.

From the mixture, Graham was able to deduce what the male DNA profile would be at eight of the 13 loci used to make a profile. Graham received a buccal swab from defendant and developed a DNA profile for defendant. Graham testified that the DNA mixture was consistent

with both defendant and the victim's DNA profiles. Graham testified that she did not have a complete profile and that she "could not include [defendant] at those three loci that were inconclusive." Graham testified that she could not make conclusions on three of the loci because the results were below the reporting threshold, but defendant could not be excluded as a possible donor based on a DNA analysis of 10 out of 13 loci. Graham also testified that the probability of a random person matching the DNA mixture in this case was "one in 60,000 in the Caucasian population and one in 44,000 in the African American, and one in 24 of the Hispanic."

The jury returned a verdict of guilty on the CSC III charge and not guilty of the CSC IV charge. This appeal followed.

First, defendant argues that the trial court erred in denying his motion for directed verdict for acquittal because there was insufficient evidence to support the jury's verdict. We disagree.

We review de novo sufficiency of the evidence issues. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). We examine the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that every essential element was proven beyond a reasonable doubt. *Id.* at 196. Similarly, when reviewing a trial court's decision on a motion for directed verdict of acquittal, we examine the evidence in a light most favorable to the prosecution. *People v Hartuniewicz*, 294 Mich App 237, 242; 816 NW2d 442 (2011). We must determine if a rational trier of fact would have found the defendant guilty because every essential element was proven beyond a reasonable doubt. *Id.*

MCR 6.419(B) indicates that, after the jury verdict, a motion for directed verdict of acquittal may be filed or renewed. The trial court must grant a motion for directed verdict of acquittal if there is "[in]sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt" when considering the evidence in a light most favorable to the prosecution. *People v Lemmon*, 456 Mich 625, 634; 576 NW2d 129 (1998) (quotation marks and citation omitted). "However, it is not permissible for a trial court to determine the credibility of witnesses in deciding a motion for directed verdict of acquittal, no matter how inconsistent or vague that testimony might be." *People v Schultz*, 246 Mich App 695, 702; 635 NW2d 491 (2001) (quotation marks and citation omitted).

The prosecutor has the burden to produce evidence that demonstrates guilt beyond a reasonable doubt. *People v Harverson*, 291 Mich App 171, 175; 804 NW2d 757 (2010). Generally, circumstantial evidence and the reasonable inferences that can be drawn from that evidence can amount to sufficient evidence. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999). What inferences can be drawn from the evidence and the weight given to those inferences is a question left to the jury. *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). The jury is also responsible for determining questions of credibility. *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009). This Court should not interfere with the jury's role in determining credibility and weight of the evidence. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, as amended 441 Mich 1201 (1992). Instead, when reviewing whether there was sufficient evidence, this Court "is required to draw all reasonable inferences and make credibility choices in support of the jury verdict." *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

In order to establish CSC III, the prosecutor must prove (1) the defendant engaged in sexual penetration, (2) with another person, (3) under a variety of circumstances including the victim being mentally incapable, mentally incapacitated, or physically helpless. MCL 750.520d(1)(c). The prosecutor must prove identity in all criminal prosecutions because identity is an element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The jury is responsible for determining how credible identification evidence is. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Generally, a positive identification by a witness is sufficient evidence to support a conviction. *Id.* Furthermore, the testimony of a victim in a CSC case does not have to be corroborated by other evidence. MCL 750.520h; *People v Phelps*, 288 Mich App 123, 132; 791 NW2d 732 (2010).

Defendant argues that the victim's testimony was weak and that there was no evidence to support the claim that defendant was the assailant. Defendant also argues that only the DNA evidence could have possibly identified defendant as the assailant, but the DNA evidence was not conclusive. However, the jury is responsible for both credibility and evidentiary weight determinations. *Hardiman*, 466 Mich at 428; *Harrison*, 283 Mich App at 378. In this case, the victim testified that defendant was her assailant. According to the victim, earlier in the night defendant had been wearing a white shirt and green basketball shorts; she was eventually moved to defendant's bed and was awakened by someone wearing a white shirt that was tugging on her pants; and defendant had a bad body odor or stench and she could smell it while he was in bed with her and any other time she was around him. Thus, although she did not see her assailant's face, she was sure it was defendant because of what he did to her earlier in the night in the bathroom, the fact the assailant was wearing a white shirt, and the particular odor of her assailant.

The jury was responsible for determining whether the victim's testimony was credible and whether to believe any or all of her testimony. *Harrison*, 283 Mich App at 378. Additionally, the jury was free to find defendant guilty based solely on the victim's testimony without any additional evidence. MCL 750.520h; *Phelps*, 288 Mich App at 132. Defendant maintains that the victim's testimony conflicted with her police statements and that the jury could not reasonably believe defendant committed CSC III and not believe defendant committed CSC IV. However, the jury does not have to accept all testimony as true and can determine whether to believe some, all, or none of a witness' testimony. See CJI2d 2.6. Furthermore, it is inappropriate for a trial court to make credibility determinations, even if the testimony is inconsistent and vague. *Schultz*, 246 Mich App at 702.

The trial court did not err in denying the motion for a directed verdict of acquittal because, based on the victim's testimony, there was sufficient evidence for the jury to find defendant guilty. Additionally, defendant's argument regarding the DNA evidence is meritless. Graham testified that defendant could not be excluded as a possible donor based on a DNA analysis of 10 out of 13 loci and that the probability of a random person matching the DNA mixture in this case was "one in 60,000 in the Caucasian population and one in 44,000 in the African American, and one in 24 of the Hispanic." Again, the jury was responsible for determining what weight to give this evidence. *Hardiman*, 466 Mich at 428. The jury was free to determine that the DNA evidence was persuasive and what inferences could be drawn from it including whether defendant was the donor or not. *Id.* Based on the DNA evidence and the

victim's testimony, there was sufficient evidence to support the jury's verdict. The trial court did not err in denying defendant's motion.

Finally, defendant argues that there were several plain errors that affected his substantial rights warranting reversal, or that, alternatively, counsel was ineffective for failing to object to the alleged errors and, therefore, relief is appropriate. We disagree.

Neither the alleged errors nor the alleged ineffective assistance of counsel issues were preserved. We review unpreserved issues, including claims of prosecutorial misconduct, for plain error affecting substantial rights. *Carines*, 460 Mich at 764; *People v Brown*, 279 Mich App 116, 134; 755 NW2d 664 (2008). To avoid forfeiture for plain error, the defendant carries the burden of proving the following: (1) there was an error, (2) the error was clear or obvious, and (3) the plain error affected substantial rights. *Carines*, 460 Mich at 763. Reversal is warranted only if the error seriously affected the integrity of the judicial system or resulted in the conviction of an actually innocent person. *Id.* at 763-764. However, we review unpreserved claims of ineffective assistance of counsel for errors apparent on the record. *People v Unger*, 278 Mich App 210, 253; 749 NW2d 272 (2008).

Defendant argues there were several errors that affected his substantial rights. First, defendant argues that there was hearsay testimony that was prejudicial to the extent of affecting the outcome of the trial. Hearsay is an out of court statement offered for the truth of the matter asserted. MRE 801(c). Hearsay is generally inadmissible, unless it falls under one of the hearsay exceptions. MRE 802; *People v Stamper*, 480 Mich 1, 4; 742 NW2d 607 (2007).

Excited utterance is an exception to the hearsay rule. MRE 803(2); *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003). To qualify as an excited utterance, the statement must be a "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." *Id.* (quotation marks and citation omitted). There is no exact time limit in which the statement must be made, and the focus should be on the declarant's lack of capacity to fabricate. *People v Smith*, 456 Mich 543, 551; 581 NW2d 654 (1998).

Another exception to the hearsay rule is statements made for the purposes of medical treatment. MRE 803(4). In order to qualify as a statement made for the purposes of medical treatment, the statement must be (1) "made for the purposes of medical treatment or diagnosis in connection with treatment" and (2) "must describe medical history, past or present symptoms, pain or sensations, or the external source of the injury." *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). Furthermore, "the identification of the assailant is necessary to adequate medical diagnosis and treatment." *Id.*

Defendant maintains that a witness was allowed to testify that the victim said defendant committed the crime without any foundation. However, defendant does not address the fact that the statement would have qualified as an excited utterance. The witness testified that the victim made the statement and then was walked back to her room. The witness said that the victim was "distraught. [The victim] didn't—she was upset. . . . was like kind of panicking at the situation. . . she was just upset and mad at the situation."

Based on the testimony, the victim's statement would have qualified as an excited utterance. Being sexually assaulted is a startling event and the victim was under the stress of the event when she made the statement. The victim testified that shortly after waking up and calling for help, she told the witness and the other girls that defendant did it. There is no time limit on when the statement must be made and it appears that the victim was still processing what happened when she told the others that defendant was her assailant. *Smith*, 456 Mich at 551. Based on the victim's apparent state of shock, she did not have the capacity to fabricate the statement and, therefore, her statement to the witness fell under the excited utterance exception. Because the testimony would have fallen under an exception, defendant has failed to demonstrate any error.

Furthermore, defendant does not address the fact that the victim herself identified defendant as the assailant and, therefore, even if the witness had not testified what the victim had told her, the victim herself would have testified that defendant did it, and a victim's identification and testimony is sufficient for conviction without corroboration. *Davis*, 241 Mich App at 700; *Phelps*, 288 Mich App at 132.

Defendant also argues that the sexual assault nurse was permitted to testify that the victim identified defendant as her assailant and that was error because it was hearsay. However, our Supreme Court has expressly held that "the identification of the assailant is necessary to adequate medical diagnosis and treatment." *Meeboer*, 439 Mich at 322. Defendant cites pre-*Meeboer* cases to support his position that identification of the assailant does not fall within the exception of MRE 803(4), statements for medical treatment. The victim's identification of defendant as the assailant to the nurse does fall within the exception, based on *Meeboer*. Furthermore, the nurse testified that she was collecting patient history, which included a question about the details of the assault. The details of the assault included a question about the assailant's name. And, again, defendant has failed to address the fact that the victim testified that defendant was the assailant. Therefore, defendant has not demonstrated there was plain error requiring relief. *Carines*, 460 Mich at 763.

Defendant also argues that Michigan State University Police Department Detective Valerie O'Brien gave an expert opinion without being qualified to do so. However, MRE 701 permits a non-expert witness to testify in the form of opinions or inferences. Lay opinion is permissible under MRE 701 if it is rationally based on the witness's perceptions and it would be helpful to understand the witness's testimony or a fact at issue. *Yost*, 278 Mich App at 358.

Defendant also argues that the prosecutor attempted to lay a foundation that O'Brien was an expert. However, the transcript indicates that the prosecutor was laying a foundation to allow O'Brien to give her lay opinion and was attempting to establish why O'Brien perceived victim's timelines to be out of order or off. MRE 701 permits a non-expert witness to testify in the form of opinions or inferences. The testimony from O'Brien does not appear to be for the purpose of qualifying her as an expert, but to establish why she has the opinion or made the inference she did.

Additionally, O'Brien's testimony was helpful to understand a fact at issue because defendant was arguing that he was not in the room when the victim said he had assaulted her.

Therefore, O'Brien's testimony that a victim's timeline may be off was helpful to that fact at issue, as well as the disputed issue of identity.

Defendant's reliance on *US v Lopez-Medina*, 461 F3d 724 (CA 6, 2006) is misplaced because the prosecution never attempted to have O'Brien qualified as an expert. The prosecutor's questions laid a proper foundation to allow O'Brien to give her lay opinion, which was permissible. Defendant has not demonstrated there was a plain error warranting relief. *Carines*, 460 Mich at 763.

The last error defendant argues is that the prosecutor committed misconduct during closing argument by using the term "rape" and offering a personal opinion on defendant's truthfulness and guilt. A prosecutor has a duty to ensure justice, which is not just the conviction of the guilty. *People v Jones*, 468 Mich 345, 354; 622 NW2d 376 (2003). Claims of prosecutorial misconduct must be evaluated on a case-by-case basis. *People v Mann*, 288 Mich App 114, 119; 792 NW2d 53 (2010). Comments must be considered as a whole in light of all the facts, including the defense arguments and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135. Generally, a prosecutor has great latitude in argument and conduct and is free to argue any reasonable inference that may arise from the evidence. *People v Bahoda*, 448 Mich 261, 282; 792 NW2d 53 (1995). When arguing the inferences, the prosecutor does not have to use the blandest terms available. *People v Dobek*, 274 Mich App 58, 66; 732 NW2d 546 (2007). Although a prosecutor cannot directly vouch for the credibility of a witness, the prosecutor may argue from the evidence whether a particular witness is worthy or not worthy of belief. *Bahoda*, 448 Mich at 276; *Dobek*, 274 Mich App at 66.

First, the prosecutor's use of the word "rape" was not misconduct. A prosecutor does not have to make an argument using the blandest terms available. *Dobek*, 274 Mich App at 66. Furthermore, the prosecutor is permitted to use emotional language. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). In light of the evidence, it appeared the prosecutor's use of the word "rape" was appropriate use of emotional language. Throughout trial, the witness and the victim referred to the assault as a "rape." The prosecution's characterization of the assault as a rape was not inappropriate considering how the witnesses and the victim perceived and characterized the incident. The use of emotional language is not prosecutorial misconduct, and the prosecutor was using the term appropriately. *Ackerman*, 257 Mich App at 454.

Defendant also argues that the prosecutor expressed a personal opinion as to defendant's truthfulness. Although defendant did not testify at trial, the prosecutor played a recording of defendant's police interview. During the interview, defendant denied touching or assaulting the victim. Defendant also told the officers that he was elsewhere during the attack. Furthermore, defense counsel argued that defendant's statements were corroborated and not the victim's. Defense counsel also argued that there were two other males that were possibly in the room around the time of the attack, but never followed up on. Again, the victim testified that defendant was her assailant.

The determination in this case came down to a question of credibility and the jury was responsible for making that determination. *Harrison*, 283 Mich App at 378. A prosecutor has great latitude in argument and conduct, and is free to argue any reasonable inference that may

arise from the evidence. *Bahoda*, 448 Mich at 282. Although a prosecutor cannot directly vouch for the credibility of a witness, the prosecutor may argue from the evidence whether a particular witness is worthy or not worthy of belief. *Bahoda*, 448 Mich at 276; *Dobek*, 274 Mich App at 66. Comments must be considered as a whole in light of all the facts, including the defense arguments and how the comments relate to the evidence presented. *Brown*, 279 Mich App at 135.

Defendant argues that the prosecutor's comments—that if another man had done it then defendant would not be on trial—were misconduct. Defendant also argues that the prosecutor expressed a personal opinion in calling defendant a liar and further erred in arguing that defendant was on trial because he was guilty. However, when read in context with the defense argument, the prosecutor was merely responding and attempting to call into question defendant's credibility. *Brown*, 279 Mich App at 135. Defense counsel was attempting to call into question the victim's credibility and potential other suspects and the prosecutor was allowed to respond to the argument based on the evidence.

Additionally, the trial court instructed the jury that just because defendant was on trial did not mean defendant was guilty and that the statements and arguments made by the attorneys were not evidence. Jury instructions are presumptively curative and jurors are presumed to follow their instructions. *People v Bauder*, 269 Mich App 174, 195; 712 NW2d 506 (2005). Even though we find there was no error, any potential prejudice caused by the prosecutor's closing argument was cured by the instructions given by the trial court. Defendant has failed to demonstrate that there was any plain error requiring relief. *Carines*, 460 Mich at 763.

Because defendant has not demonstrated there was any plain error warranting relief, counsel was not ineffective. *People v Fonville*, 291 Mich App 363, 384; 804 NW2d 878 (2011).

Affirmed.

/s/ Donald S. Owens  
/s/ E. Thomas Fitzgerald  
/s/ Michael J. Riordan