STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 13, 2008
v	No. 272019 Washtenaw Circuit Court
KARRIE CALVIN MUNLIN, Defendant-Appellant.	LC No. 05-001976-FC ON REMAND

Before: Saad, C.J., and Murphy and Donofrio, JJ.

PER CURIAM.

Our Supreme Court reversed our decision in *People v Munlin*, unpublished opinion per curiam of the Court of Appeals, issued June 5, 2008 (Docket No. 272019) and remanded for consideration of defendant's remaining appellate issues. *People v Munlin*, ___ Mich ___; 755 NW2d 658 (2008). For the reasons set forth below, we affirm defendant's conviction and sentence.

I. Prosecutorial Misconduct

Defendant contends that the prosecutor made improper comments during her closing argument.[1] He specifically complains that the prosecutor impermissibly shifted the burden of proof when she commented that there was no evidence that the victim consented to defendant's sexual acts. We hold that this comment was not improper.

The prosecutor made the remarks during her rebuttal argument and in response to defense counsel's assertions that the victim's testimony was untrustworthy and inconsistent. Defense

[1] We review defendant's unpreserved claim of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context." *People v Noble*, 238 Mich App 647, 660, 608 NW2d 123 (1999). "Reversal 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." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

counsel also stated during his opening argument that the victim consented to having sex with defendant. In her rebuttal, the prosecutor was simply highlighting the differences between defense counsel's opening statement and his closing argument. While a prosecutor may not attempt to shift the burden of proof, *People v Abraham*, 256 Mich App 265, 273; 662 NW2d 836 (2003), "attacking the credibility of a theory advanced by a defendant does not shift the burden of proof." *People v McGhee*, 268 Mich App 600, 635; 709 NW2d 595 (2005). Here, the prosecutor was not attempting to shift the burden of proof by pointing to any failure by defendant to present evidence, but was, instead, attacking defendant's theory of consent. Indeed, the prosecutor reiterated to the jury that the burden of proof is on the prosecution. Taken in context, plaintiff's statements were "proper commentary on the weaknesses of defendant's theory of defense." *Id.*

Citing the same passage, defendant claims that the prosecutor belittled defense counsel during her closing argument. "It is true that a prosecuting attorney may not personally attack defense counsel." *People v McLaughlin*, 258 Mich App 635, 646; 672 NW2d 860 (2003). While some of the prosecutor's comments appear to have been directed at defense counsel, the statements were mere rebuttals to defendant's earlier comments. Though the prosecutor attempted a few linguistic flourishes that appeared to be directed at defense counsel, in context, they are more appropriately characterized as directed at defense counsel's remarks. Finding that these statements were personal attacks would, in effect, be requiring plaintiff to use "the blandest possible terms," and the prosecutor is not so limited. *People v Williams*, 265 Mich App 68, 71; 692 NW2d 722 (2005).[2]

II. DNA Testing

Defendant maintains that the trial court denied him mandatory discovery by failing to require DNA testing on certain physical evidence. This issue is not preserved because defendant did not object to the lack of testing in the trial court, and the record does not indicate that he requested DNA testing. Accordingly, we review this issue under the plain error doctrine. "Absent a showing of suppression of evidence, intentional misconduct, or bad faith, the prosecutor and the police are not required to test evidence to accord a defendant due process." *People v Coy*, 258 Mich App 1, 21; 669 NW2d 831 (2003). Defendant had the right, under the Michigan Court Rules, to ask the trial court to require testing of the evidence, MCR 6.201(A)(6), but, absent such a request, the prosecutor is under no duty to do so. *Coy, supra*, 258 Mich App at 21-22.

Defendant erroneously asserts that the rape shield statute requires that a victim's statements be supported by physical evidence. Nothing in MCL 750.520j requires that a complainant's testimony be supported by other evidence. Furthermore, MCL 750.520h states that "[t]he testimony of a victim need not be corroborated in prosecutions under sections 520b to 520g [referring to first- to fourth-degree criminal sexual conduct]." Accordingly, the testimony

[2] Defendant also complains that the prosecutor made improper remarks during her opening statement. Contrary to defendant's assertion, however, a review of plaintiff's opening statement does not reveal that the prosecutor made any allegations that were not supported by evidence.

of the complainant in a criminal sexual conduct trial need not be corroborated. *People v Drohan*, 264 Mich App 77, 89; 689 NW2d 750, 756 (2004). For these reasons, neither the trial court nor the prosecutor were required to perform DNA tests on the evidence.

III. Assistance of Counsel

Defendant claims that his trial counsel was ineffective on the basis of errors he alleges above. As discussed, the issues that defendant raised on appeal are without merit, and "[c]ounsel is not ineffective for failing 'to advocate a meritless position,' " *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005), quoting *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Defendant also argues that defense counsel was ineffective for not bringing pre-trial motions to have a bedspread tested for DNA. As part of defendant's burden, he must demonstrate that trial counsel's actions were not part of a sound trial strategy. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In his opening statement, defense counsel argued that the victim engaged in consensual sex with defendant. Applying that theory, defendant would not benefit from any test of the victim's bedspread. A positive DNA test would be consistent with either forcible or consensual sexual activity. By not having the blanket tested, however, defense counsel was able to effectively cross-examine the police officer on the scope and effectiveness of her investigation. Defendant has failed to rebut the presumption that defense counsel was engaging in effective trial strategy.[3]

Affirmed.

/s/ Henry William Saad
/s/ William B. Murphy
/s/ Pat M. Donofrio

[3] Additionally, under MCR 6.201(A)(6), defendant would not have an automatic right to have the evidence requested, but may have had to show "good cause" to the trial court in order to test the evidence himself.