

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SCOTT RICHARD TOONE,

Defendant-Appellant.

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UNPUBLISHED

May17, 2007

No. 271075

Marquette Circuit Court

LC No. 05-042944-FH

Before: Schuette, P.J., and O’Connell and Davis, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of one count of felonious assault, MCL 750.82, for which he was sentenced to 24 months probation, with 12 months in jail. We affirm. This case arose when defendant, accompanied by his friend, Freddie Soto, sped his truck along a beachfront campground and repeatedly spun it out on the beach. The evidence indicates that this occasion was at least the second time that defendant had intimidated the campers with stunts and reckless driving that day, so the victim went out to confront defendant. Defendant and Soto attacked the victim, beating him with a plastic pipe and a club. They then kicked him and stomped on him while he was on the ground.<sup>1</sup>

Defendant first argues that the prosecutor’s misconduct deprived him of a fair trial. We disagree. Defendant’s argument centers on the prosecutor’s use of the investigating officer’s testimony to bolster the complainant’s credibility. A prosecutor is generally precluded from personally vouching for a witness or introducing innuendo that the police or prosecutors possess inside information about the veracity of a witness. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). Although a prosecutor may not knowingly introduce or elicit inadmissible evidence, *People v Dyer*, 425 Mich 572, 576; 390 NW2d 645 (1986), a “good-faith effort to admit evidence does not constitute misconduct.” *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). We review the prosecutor’s actions in context, *People v Reed*, 449 Mich 375, 398; 535 NW2d 375 (1995), and will not reverse unless prosecutorial misconduct prevented defendant from receiving a fair trial. *Ackerman, supra*.

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<sup>1</sup> Because of unrelated circumstances, a mistrial was granted against the co-defendant Soto.

Defendant and Soto were represented by separate counsel. Soto's counsel pursued a strategy of impeaching the complainant by asking him about alleged inconsistencies between his testimony and the prior statements of other eyewitnesses. Specifically, counsel challenged the complainant's testimony that he never struck defendant's truck with the plastic pipe. Counsel referred to two witnesses' statements to the police that they initially thought the sound that they heard was the complainant striking defendant's truck with the plastic pipe. The prosecutor objected on the grounds that the questions improperly elicited the complainant's commentary on the veracity of the other witnesses. The court overruled the objection. Counsel for Soto continued his cross-examination and at one point specifically asked the complainant about his perception of the accuracy of another witness's testimony. The prosecutor again objected, arguing that it was "inappropriate to ask one witness to comment on the credibility of another witness." The court again overruled the objection. The prosecution's objections were well founded. Generally, a witness's opinion on the credibility of other witnesses does not add anything material to the trial and threatens to interfere with the jury's independent credibility determination. *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). In this case, however, the trial court ruled that a partial exposition of the anticipated testimony of other witnesses during the complainant's cross-examination would help the jury better determine the complainant's credibility.

In turn, the prosecutor asked the investigating officer what aspects of the complainant's testimony were verified by other evidence gathered in the course of his investigation. Soto's counsel objected, arguing that the prosecutor was impermissibly "trying to bolster the victim's testimony with testimony from another individual." The prosecutor responded that Soto's counsel had previously impeached his witness's credibility using the statements of other witnesses, so Soto's counsel had "opened this up." The court overruled the objection of Soto's counsel. The officer then recalled several particulars from the complainant's testimony that were verified through the course of the investigation, and the officer did not indicate the underlying facts on which he relied to find a "consistency." Therefore, at first blush, the officer's testimony could be interpreted as impermissibly implying "some special knowledge" about the case that the jurors did not share. *McGhee, supra*.

However, the prosecutor asked the innuendo-laden question at the outset of the officer's examination and immediately followed up the testimony with questions directly related to the complainant's early police interviews. After eliciting that the complainant's own testimony was consistent with his earlier statements, the officer went through the physical evidence found at the scene. Therefore, taken in context, the follow-up questions to the officer dispelled any notion that the officer had additional evidence of defendant's guilt that was kept secret from the jury. Although a witness is usually prohibited from commenting on another witness's credibility, evidence that would be otherwise inadmissible may be admitted as rebuttal evidence if the opposing party has "opened the door" to the challenged evidence. *People v Verborg*, 170 Mich App 490, 498; 430 NW2d 775 (1988). Here, the prosecutor and Soto's counsel framed the argument before the jury and limited the testimony's relevance to whether the officer could bolster the complainant's credibility with the complainant's own prior consistent statements and other evidence gathered and presented. Under the circumstances, the prosecutor's inquiry was a clear attempt to respond to the questionable methods of impeachment employed by Soto's counsel, so defendant fails to demonstrate that the questions were anything other than a good-faith attempt to introduce valid rebuttal evidence. *Ackerman, supra*. Defendant also challenges

the officer's testimony that, in his experience, minor discrepancies are typical and attributable to differences in individual perception. This vaguely stated opinion did not directly address the credibility of any of the trial witnesses, or impermissibly imply that he knew something that the jury did not, so the second portion of the officer's testimony did not constitute improper vouching or innuendo.

Defendant last argues that the trial court erroneously scored prior record variable (PRV) 5 in sentencing him. The record indicates that defendant has served his jail sentence. Had the court scored PRV 5 as zero points rather than two points, defendant's sentence would still have fallen in an intermediate sanction cell. See MCL 769.31; MCL 769.34(4)(a); MCL 777.67. When a defendant qualifies for an intermediate sanction, an order of probation is within the discretion of the trial court. MCL 769.31(b)(ii), (iv); MCL 771.1(1). The assessments the court ordered were prescribed by statute as incidents of defendant's probation. MCL 771.3. Therefore, the court's scoring of PRV 5 had no impact on its probation order. Because defendant has fully served the jail sentence and other intermediate sanctions the court imposed were unaffected by the guidelines scoring, any error in the court's scoring of PRV 5 is moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994).

Defendant next argues that the trial court erred by ordering him to repay the expenses that the county incurred for his legal defense. We disagree. Defendant failed to preserve this issue in the trial court, so we will not vacate the trial court's order unless we find plain error that affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant cites *People v Dunbar*, 264 Mich App 240, 254; 690 NW2d 476 (2004), for the proposition that the trial court was required to consider defendant's financial status and earning potential before requiring repayment. According to *Dunbar*, a court does not need a formal hearing, but it should "provide some indication of consideration, such as noting that it reviewed the financial and employment sections of the defendant's presentence investigation report or, even more generally, a statement that it considered the defendant's ability to pay." *Id.* at 254-255. In this case, the sentencing court specifically struck some of the proposed fees and costs because it wanted to make certain that defendant could pay for the costs it decided to impose. One of the "other fees" that the sentencing court specifically preserved and wanted defendant to be able to afford was his obligation to reimburse the county for his legal fees. Therefore, the sentencing court specifically considered defendant's earning capacity and assets before it required defendant to reimburse the county for his legal costs. Moreover, the sentencing court acknowledged defendant's ability to repay the debt through community service. Applying the correct standard to this issue, the sentencing court did not plainly err by ordering defendant to reimburse the county for the cost of his legal defense.

Affirmed.

/s/ Bill Schuette  
/s/ Peter D. O'Connell  
/s/ Alton T. Davis