# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH EZEKIEL,

Defendant-Appellant.

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UNPUBLISHED
September 19, 1997

No. 196080
Macomb Circuit Court
LC No. 95-001857-FC

Before: Markey, P.J., and Neff and Smolenski, JJ.

MEMORANDUM.

Defendant appeals by right his jury conviction of two counts of first degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), resulting in an enhanced sentence based on his habitual offender status. This appeal is being decided without oral argument pursuant to MCR 7.214(E). We affirm.

Defendant presents two unpreserved issues on appeal. He first contends that the trial court erred in giving the jury a standard criminal jury instruction regarding defendant's prior inconsistent statement, arguing that there was no record evidence of a prior inconsistent statement. To obtain reversal on this issue, defendant must show that the trial court erred and that the error was outcome determinative. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). If, as defendant claims, he never uttered a prior inconsistent statement as compared with his trial testimony, the first part of the instruction, which told the jury to determine whether the statement had been made, would have terminated jury consideration of any related issue. Accordingly, on this record, any error in this regard cannot be deemed outcome determinative.

During rebuttal closing argument, the prosecutor asserted that defendant's testimony that this case was about drugs was a "red herring." There was no objection, but defendant now contends that this constituted an improper denigration of defense counsel. In context, the reference was to defendant's testimony, not to defense counsel. Nevertheless, if this apparently proper comment were somehow deemed erroneous, it was certainly subject to curative instruction given a timely objection and

cannot be deemed to rise to the level of reversible error. *People v Bahoda*, 448 Mich 261; 531 NW2d 659 (1995).

Affirmed.

/s/ Jane E. Markey
/s/ Janet T. Neff
/s/ Michael R. Smolenski