

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

FREDERICK LEE COLLINGHAM,

Defendant-Appellant.

UNPUBLISHED

July 23, 1999

No. 206776

Ingham Circuit Court

LC No. 93-065789 FC

Before: Neff, P.J., and Hood and Murphy, JJ.

PER CURIAM.

Defendant pleaded nolo contendere to three counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b), and was sentenced to ten to fifteen years' imprisonment on each count. Defendant appeals as of right. We affirm.

Defendant was originally convicted by a jury of three counts of first-degree criminal sexual conduct for these crimes. However, his convictions were reversed by this Court in a prior appeal because of prejudicial conduct by the prosecutor during trial. *People v Collingham*, unpublished opinion per curiam of the Court of Appeals, issued November 5, 1996 (Docket No. 170349). Defendant now argues that double jeopardy principles prevent his reconviction. We disagree.

Plaintiff does not contest defendant's ability to raise this claim on appeal, observing that a double jeopardy claim is not waived by a guilty plea. *People v White*, 212 Mich App 298, 305; 536 NW2d 876 (1995).

Where prosecutorial misconduct at trial is sufficiently egregious to satisfy the standards enunciated in applicable case law, the federal and state Double Jeopardy Clauses, US Const, Am V and Const 1963, art 1, § 15, preclude reconviction of a defendant subsequent to the trial at which the misconduct occurred. *Oregon v Kennedy*, 456 US 667, 676; 102 S Ct 2083; 72 L Ed 2d 416 (1982) (stating the federal standard); *People v Dawson*, 431 Mich 234, 257-258; 427 NW2d 886 (1988) (adopting for state double jeopardy analysis the standard set forth in *Kennedy*, *supra*). Our review of the prosecutor's conduct at defendant's first trial compels the conclusion that, although it was sufficiently prejudicial to warrant reversal of defendant's convictions, it did not rise to the level of

impropriety proscribed by *Kennedy* or *Dawson*, such that a retrial was barred by double jeopardy principles. Specifically, a fair reading of the record discloses that the prosecutor's conduct was not "intended to 'goad' the defendant into moving for a mistrial" *Kennedy, supra* at 676; *Dawson, supra* at 257.

Defendant next contends that he is entitled to resentencing because the prosecutor allegedly violated a plea agreement. Because defendant did not object at sentencing to the allegedly improper recommendation by the prosecutor, we conclude that this issue is not preserved for appeal. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Furthermore, we decline to accept defendant's interpretation of the agreement as requiring the prosecutor to recommend "a minimum sentence of 5 to 10 years in prison."

Finally, defendant maintains that the trial court improperly considered at sentencing his four prior convictions for fourth-degree child abuse. These convictions were obtained before the convictions for the CSC crimes in this case, although the time period circumscribing the conduct on which the abuse convictions were based is coextensive with the time frame underlying the CSC convictions. We are aware of no authority supporting the conclusion that the conduct underlying the abuse convictions must precede that underlying the CSC convictions before the abuse convictions can validly be considered during sentencing in this case, nor are we disposed to so hold in the absence of precedent.

Affirmed.

/s/ Janet T. Neff
/s/ Harold Hood
/s/ William B. Murphy