

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALLEN FOX, JR.,

Defendant-Appellant.

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UNPUBLISHED

June 19, 2001

No. 218605

Hillsdale Circuit Court

LC No. 98-227939

Before: Doctoroff, P.J., and Holbrook, Jr., and Smolenski, JJ.

SMOLENSKI, J. (*dissenting*).

I respectfully dissent. The majority concludes that the prosecutor engaged in misconduct during rebuttal closing argument. Although defendant neither objected to any of the prosecutor's comments during trial nor requested a curative jury instruction, the majority concludes that plain error occurred, mandating reversal of defendant's convictions. I disagree.

"Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object; this Court will only review the defendant's claim for plain error." *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." [*People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999) (citations omitted).]

I disagree that reversal of defendant's convictions is warranted in this case because I disagree that the alleged prosecutorial misconduct either resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.* Furthermore, I conclude that any prejudice that might have occurred from the

prosecutor's rebuttal closing argument could have been eliminated if defendant had requested that the trial court read a curative instruction to the jury. *Schutte, supra* at 720-721.

Accordingly, I would affirm.

/s/ Michael R. Smolenski