

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GORDON LEWIS HAMILTON,

Defendant-Appellant.

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UNPUBLISHED

October 19, 2001

No. 226956

Macomb Circuit Court

LC No. 99-000626-FC

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a), and two counts of second-degree CSC, MCL 750.520c(1)(a). He was sentenced to concurrent prison terms of sixteen to twenty-five years for the first-degree CSC conviction and ten to fifteen years each for the second-degree CSC convictions. He appeals as of right. We affirm.

Defendant first contends that the trial court erred in denying his request for an instruction on fourth-degree CSC, MCL 750.520e(1)(a), as a lesser included offense. This Court reviews a claim of instructional error de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

Fourth-degree CSC is a misdemeanor. MCL 750.520e(2). A court must instruct on a lesser included misdemeanor offense where (1) there is a proper request, (2) there is an inherent relationship between the greater and lesser offense, (3) the misdemeanor offense is supported by a rational view of the evidence, (4) the defendant has adequate notice when the request is made by the prosecutor, and (5) no undue confusion or other injustice would result. *People v Stephens*, 416 Mich 252, 261-265; 330 NW2d 675 (1982); *People v Corbiere*, 220 Mich App 260, 262-263; 559 NW2d 666 (1996).

An instruction on fourth-degree CSC as a lesser included offense of first-degree CSC was not supported by a rational view of the evidence because defendant admitted that penetration occurred. *People v Gaines*, 129 Mich App 439, 448; 341 NW2d 519 (1983). Additionally, an instruction on fourth-degree CSC as a lesser included offense of second-degree CSC was not supported by a rational view of the evidence because there was no evidence that the victim was other than twelve years old at the time defendant committed the offenses. *People v Murphy*, 146

Mich App 724, 727; 381 NW2d 798 (1985); *People v Favor*, 121 Mich App 98, 111-112; 328 NW2d 585 (1982).

Defendant next contends that he was denied a fair trial due to prosecutorial misconduct. Claims of prosecutorial misconduct are decided on a case-by-case basis. This Court examines the record and evaluates the alleged improper remarks in context to determine whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Because defendant failed to preserve this issue by making a timely objection to the challenged comments below, review is precluded unless defendant establishes plain error that affected the outcome of the trial. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

The prosecutor did not impermissibly express a personal belief in defendant's guilt. When read in context, the remark that "the truth is that this man has violated the laws against our society" was a statement based on the evidence presented. *People v Swartz*, 171 Mich App 364, 370-371; 429 NW2d 905 (1988); *People v Humphreys*, 24 Mich App 411, 414; 180 NW2d 328 (1970). The prosecutor's comment that "the defense brought up . . . smoke screens to divert your attention" was not improper. The prosecutor did not attack defense counsel personally; rather, he was arguing that defense counsel's argument was not supported by the evidence. *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

To the extent the prosecutor made an improper civic-duty argument by asking the jury to do the right thing, we find that the error was not outcome determinative. The remark was relatively innocuous for a civic-duty argument; it came at the end of an otherwise proper argument in which the prosecutor focused on the evidence presented, and defendant admitted to committing the crimes charged. *People v Crawford*, 187 Mich App 344, 354-355; 467 NW2d 818 (1991). In addition, the court's instructions that the lawyers' arguments were not evidence was sufficient to cure any error. *People v Curry*, 175 Mich App 33, 45; 437 NW2d 310 (1989).

Affirmed.

/s/ Jessica R. Cooper  
/s/ David H. Sawyer  
/s/ Donald S. Owens