

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM EVERT HOLLAND, JR.,

Defendant-Appellant.

UNPUBLISHED

October 25, 2002

No. 231511

Charlevoix Circuit Court

LC No. 00-050309-FC

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and attempted first-degree criminal sexual conduct, MCL 750.520b(1)(f), MCL 750.92. Defendant was sentenced to serve a term of 28 years to life in prison for his first-degree criminal sexual conduct conviction, and 57 months to 10 years in prison on his conviction of attempted first-degree criminal sexual conduct. Defendant appeals as of right. We affirm defendant's convictions, but vacate defendant's sentence for first-degree criminal sexual conduct and remand for resentencing.

Defendant first argues he was denied a fair trial by the introduction of testimony that his apartment, which was frequented by the victim and her friends, was used by underage teenagers to smoke, drink, and use drugs, thus implying that he had the character and propensity to engage in criminal conduct. We disagree.

Defendant's failure to object to the admission of this evidence presents an unpreserved issue that is subject to review for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a defendant must prove that (1) error occurred, (2) the error was plain, meaning clear or obvious, and (3) the plain error affected the defendant's substantial rights. *Id.* In this case, defendant has failed to establish error because the evidence was properly admissible.

"Logical relevance is the foundation for admissibility." *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). Generally, all relevant evidence is admissible except where otherwise precluded, and irrelevant evidence is not. MRE 402; *Layher, supra*. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." "Under this broad definition, evidence is admissible if it is helpful in

throwing light on any material point.” *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

To sustain a conviction of first-degree criminal sexual conduct, the prosecution was required to establish that defendant used force or coercion to engage in sexual penetration of the victim. MCL 750.520b(1)(f). In an effort to counter the prosecution’s ability to establish this element, defendant exploited the victim’s behavior, arguing that the gaps between the alleged assaults, the delay in reporting the assaults, and the victim’s behavior following the assaults were inconsistent with being sexually assaulted and consistent with fabrication. Under these circumstances, the evidence was relevant and material to provide the contextual background of defendant’s assault as it tended to show why defendant was allowed initial unchallenged access to the victim’s tent and why there was a lapse of 4 to 5 weeks between the sexual assault and its disclosure. Thus, the challenged testimony was inextricably intertwined with the allegations and was therefore part of the *res gestae* – the “complete story” of the matter in issue.” *Aldrich*, *supra* at 115; see also *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996); *People v Delgado*, 404 Mich 76, 82-83; 273 NW2d 395 (1978). Accordingly, the challenged evidence was relevant and properly introduced to prove a material point.

However, as defendant rightly argues, relevant evidence can be inadmissible where its relevance was substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 57-58; 614 NW2d 888 (2000). Unfair prejudice exists where there is a tendency that the evidence will be given undue or preemptive weight by the jury or when it would be inequitable to allow use of the evidence. *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, mod 450 Mich 1212 (1995). The prejudicial effect of evidence is best determined by the trial court’s contemporaneous assessment of the presentation, credibility, and effect of the testimony. *People v Bahoda*, 448 Mich 261, 290-291; 531 NW2d 659 (1995).

In this case, the trial court prohibited evidence of defendant’s other acts of criminal sexual conduct, but allowed admission of the challenged evidence. Implicit in the court’s decision in this regard is a belief that the court’s contemporaneous assessment of the testimony was that it was not unduly prejudicial. *Id.* Support for this conclusion is found in the ambivalent nature of the testimony and its failure to directly implicate defendant as an accomplice in the illegal activities. Moreover, the trial court’s cautionary instruction to the jurors – that while the testimony might show defendant committed other bad acts he was not on trial for those acts – was sufficient to diffuse any lingering prejudice. *People v Katt*, 248 Mich App 282, 308; 639 NW2d 815 (2001). Accordingly, defendant has failed to avoid forfeiture under the plain error rule because he has not demonstrated that error, if any, affected the outcome of the lower court proceedings. *Carines, supra*.

Defendant also alleges several instances of prosecutorial misconduct: (1) improper vouching for the complainant, (2) denigration of a defense witness, (3) disparagement of defendant and injection of improper prejudicial innuendo by referring to defendant as “a 25-year-old manipulative, immature, coward,” (4) interjection of issues and evidence broader than defendant’s guilt or innocence, and (5) shifting of the focus from the proofs to the jurors’ emotions and consciences.

This Court reviews de novo allegations of prosecutorial misconduct by examining the prosecutor's remarks in context to determine whether the defendant received a fair and impartial trial. *Bahoda, supra* at 266-267; *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). However, absent an objection at trial to the alleged misconduct, appellate review is foreclosed unless a defendant demonstrates plain error that affected his substantial rights, i.e., error that was outcome determinative. *Leshaj, supra*. Error warranting reversal may not be found where the prejudicial effect of the prosecutor's comments could have been cured by a timely requested instruction. *Id.*

In the case at bar, defendant's allegations of prosecutorial misconduct, when taken in context and evaluated in light of defense arguments, are insufficient to warrant reversal. Our review of the record indicates that the challenged comments were isolated remarks supported by the evidence, were directly responsive to defendant's theory of the case and closing arguments, and did not seek to have the jurors suspend the own powers of judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Likewise, the prosecutor did not imply some special knowledge that the victim was testifying truthfully, *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001), but rather simply repeated the obvious defects in the witnesses' testimony to argue against credibility. *People v Launsbury*, 217 Mich App 358, 361; 551 NW2d 460 (1996). This, when combined with the trial court's instructions that it was the jury's duty to determine credibility and that the lawyers' statements and arguments should not be considered evidence leads this Court to conclude that reversal is not warranted. *Knapp, supra* at 382-383; *Launsbury, supra*.

In his final challenge on appeal, defendant argues that his sentence of 28 years to life in prison violates the indeterminate sentencing provisions of MCL 769.9(2). We agree.

Generally, the Michigan Constitution empowers the Legislature to provide for indeterminate sentencing and allow courts to fix the minimum and maximum term between the statutory limits. Const 1963, art 4, § 45; *People v Snider*, 239 Mich App 393, 426; 608 NW2d 502 (2000). However, the indeterminate sentencing statute exempts crimes for which the only punishment prescribed is life imprisonment or where the parameters of the sentence are statutorily defined. MCL 769.9(1) and (3); *People v Kelly*, 186 Mich App 524, 528-531; 465 NW2d 569 (1990).¹

In this case, the clear language of MCL 769.9(2) is applicable. Defendant was convicted of first-degree criminal sexual conduct, a felony punishable by imprisonment in the state prison for life or for any term of years. MCL 750.520b(2). Defendant's sentence violates the clear language of MCL 769.9(2), which precludes the imposition of a sentence where the "maximum penalty is life imprisonment with a minimum for a term of years included in the same sentence." Accordingly, the sentence imposed for his conviction of first-degree criminal sexual conduct must be vacated and the case remanded for resentencing. *People v Boswell*, 95 Mich App 405, 410-411; 291 NW2d 57 (1980); *People v Harper*, 39 Mich App 134, 142-143; 197 NW2d 338 (1972).

¹ In *Kelly, supra*, the Court held the defendant's sentence of one day to life in prison did not violate the indeterminate sentencing act because the maximum and minimum sentence were statutorily set. See also *People v Vronko*, 228 Mich App 649, 658; 579 NW2d 138 (1998).

We affirm defendant's convictions, but remand for resentencing on his conviction of first-degree criminal sexual conduct. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Michael J. Talbot