

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM K. PRESTON, JR.,

Defendant-Appellant.

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UNPUBLISHED  
November 8, 2002

No. 230318  
Macomb Circuit Court  
LC No. 99-000742-FC

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendant appeals by right from his conviction by a jury of eight counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), one count of kidnapping, MCL 750.349, and one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). The trial court sentenced him to concurrent prison terms of 480 to 720 months for each CSC I conviction, 300 to 600 months for the kidnapping conviction, and 120 to 180 months for the CSC II conviction. We affirm.

Defendant first argues that he is entitled to a new trial because, when he insisted on representing himself after having three attorneys, his waiver was neither unequivocal nor voluntary. We disagree.

We review the trial court's decision to allow defendant to represent himself for an abuse of discretion. *People v Adkins (After Remand)*, 452 Mich 702, 721 n 16; 551 NW2d 108 (1996). Criminal defendants have a constitutional right to proceed *in propria persona* in any criminal proceeding. *Id.* However, before granting a defendant's request to proceed *in propria persona*, a trial court must substantially comply with the waiver of counsel procedures set forth in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976), and MCR 6.005(D). *Adkins, supra* at 706. Substantial compliance requires the court to discuss the requirements set forth in both *Anderson* and MCR 6.005(D) and to determine that "the defendant fully understands, recognizes, and agrees to abide by these procedures." *Adkins, supra* at 706.

There are four main requirements with which the court must substantially comply. First, the defendant's request must be unequivocal. *Id.* at 722. Second, the trial court must determine that the defendant's assertion of his right is knowing, intelligent, and voluntary. *Id.* In assuring a knowing and voluntary waiver, the trial court must make the defendant aware of the dangers and disadvantages of self-representation so that the record will establish that he knows what he is

doing and that his choice is made with his “eyes open.” *Id.* Third, the trial court must determine that the defendant will not unduly disrupt the court while acting as his own counsel. *Id.* Finally, in complying with the court rule, the trial court must advise the defendant of the charge, the maximum possible prison sentence, any mandatory minimum sentence, and the risks of self-representation, as well as offer the defendant the opportunity to consult with a lawyer. MCR 6.005(D); *People v Belanger*, 227 Mich App 637, 642; 576 NW2d 703 (1998). “The trial judge is in the best position to determine whether the defendant has made the waiver knowingly and voluntarily.” *Adkins*, *supra* at 723.

In the present case, we find that the trial court created a record and substantially complied with the requirements of *Anderson* and MCR 6.005(D). The record reveals that defendant's request to represent himself was unequivocal and voluntary. In fact, the trial court questioned and advised defendant regarding his request to proceed without counsel on *several* occasions before trial. On each of those occasions, defendant adamantly and unmistakably indicated that he wanted to represent himself. Apart from clearly expressing a request to represent himself, defendant involved himself in conducting arraignment and pretrial, asked to review the evidence and be allowed access to the law library, gave a lengthy opening statement at trial, and interposed motions and objections throughout the proceedings. As reflected in the record, defendant was articulate and understood the nature of the proceedings.

The record also demonstrates that the court had lengthy dialogues with defendant concerning the risks associated with self-representation and advised defendant against proceeding without an attorney. Additionally, over defendant's objection, the court appointed advisory counsel to assist defendant and repeatedly gave defendant the opportunity to consult with counsel during trial. The trial court also advised defendant of the possible penalties for the charged offenses, which defendant stated he understood. The trial court advised defendant that he would not be allowed to unduly disrupt the court while acting as his own counsel, which defendant acknowledged. Finally, at subsequent proceedings, the court advised defendant of his right to counsel, and defendant continued to reaffirm his waiver of that right. See MCR 6.005(E) and *People v Lane*, 453 Mich 132, 137; 551 NW2d 382 (1996). The record in this case convinces us that the trial court substantially complied with the waiver of counsel requirements, and the court did not abuse its discretion in allowing defendant to proceed *in propria persona*.<sup>1</sup>

Next, defendant argues that he was denied a fair and impartial trial because of several instances of prosecutorial misconduct. We disagree.

This Court reviews preserved issues of prosecutorial misconduct case by case, examining the challenged remarks in context to determine whether the defendant received a fair and impartial trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). When a defendant

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<sup>1</sup> We note defendant's implication that he was prejudiced by his self-representation. However, a defendant who succeeds in asserting his right to self-representation will be held to the same standards of representation as a lawyer, and his errors and omissions cannot be the basis of a successful appeal on the ground of ineffective assistance of counsel. See *People v Burden*, 141 Mich App 160, 164; 366 NW2d 23 (1985).

fails to object to an alleged prosecutorial impropriety, the issue is reviewed for a clear or obvious error that affected the defendant's substantial rights, i.e., that affected the outcome of the proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

Our review of the record reveals that, viewed as a whole and in context, none of the challenged comments rise to the level of error requiring reversal. Defendant first argues that the prosecutor impermissibly expressed a personal opinion and referred to the potential penal consequences during closing argument when he said: "[Defendant] said, in your heart, you know that I don't deserve 40 years for this. Well, the People say he does." It is improper for a prosecutor to refer during closing argument to the disposition of a defendant after the verdict. See *People v Wallace*, 160 Mich App 1, 6-8; 408 NW2d 87 (1987). However, in this case, during trial, evidence was admitted that defendant stated to a police officer that "in [his] heart" he knew that he did not deserve forty years for the crime. Viewed in context, the prosecutor's remarks do not require reversal because they were responsive to defendant's statement and were based on the evidence produced at trial. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Moreover, the trial court instructed the jury that possible penalty should not influence their decision and that the lawyers' statements and arguments are not evidence.

Defendant also argues that the prosecutor argued facts not in evidence by making the following statement during rebuttal argument:

Well, then he says in my experience cocaine causes impotence, not sexual arousal. Well I don't know what his experience is and I don't care to know what his experience is, but maybe that played in some reason why it was only digital penetration.

Defendant did not object to this remark below. Although a prosecutor may not argue facts not in evidence, otherwise improper prosecutorial remarks generally do not require reversal if they are responsive to issues raised by the defense. *Duncan, supra* at 16. During trial, evidence was presented that cocaine paraphernalia was found on defendant's person. During closing argument, in the context of arguing that he did not sexually abuse the victim, defendant stated, "[a]s a matter of fact, my experience with cocaine usage causes impotence, not sexual arousal." Given the evidence and defendant's statement during closing argument, the prosecutor did not argue facts not in evidence, but rather commented on the statement made by defendant during closing argument. *Id.*

Defendant next contends that the prosecutor made an improper civic-duty argument when he urged the jury to "do the right thing" and "do the tough thing." Prosecutors should not resort to civic duty arguments that appeal to the fears and prejudices of jurors. *Bahoda, supra* at 282. However, the remarks at issue occurred at the end of a lengthy discussion of the evidence and were isolated. Moreover, the trial court properly instructed the jury to not be influenced by prejudice and that the lawyers' comments are not evidence, which cured any prejudice. *People v Long*, 246 Mich App 582; 588; 633 NW2d 843 (2001).

Defendant also argues that the prosecutor improperly appealed to the jury's sympathy for the victim and her mother during closing argument when he stated that the victim's mother

thought she would never see her child again, and that the “poor” “ten-year old girl” was “snatched off the street” and her “innocence [was] taken by this man, this predator.” Defendant did not object to the comments. Appeals to the jury to sympathize with the victim constitute improper argument. *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, the prosecutor’s comments, in the context of the complete opening and closing arguments, were not blatant appeals to the jury’s sympathy but were reasonable inferences from the evidence. *Fisher, supra* at 156. The prosecutor need not state his argument in the blandest possible terms. *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). In addition, the comments were isolated, were only a brief part of the argument, and were not so inflammatory that defendant was prejudiced. See *People v Mayhew*, 236 Mich App 112, 123; 600 NW2d 370 (1999). Further, the trial court instructed the jury not to be influenced by sympathy. Defendant has failed to show plain error affecting his substantial rights. *Carines, supra* at 763.

We further reject defendant’s argument that he was denied a fair trial because of the prosecutor’s misstatement of fact, made during closing argument, that the fiber samples taken from the victim’s shirt “matched” those samples from defendant’s van upholstery. Again, defendant did not object to this remark below, and we thus review this issue using a plain error analysis. A forensic scientist testified that the fibers from the victim’s clothing were “consistent with” those from defendant’s van upholstery. Defendant’s reliance on the semantics of the terms “matched” and “consistent with” are without merit, particularly where there was overwhelming evidence that the victim was in defendant’s van on the night of the incident. Defendant has failed to demonstrate an outcome-determinative plain error. *Carines, supra* at 763.

We also reject defendant’s claim that the prosecutor’s remark that “as the evidence comes in the noose just gets tighter and tighter around defendant’s neck” was improper. Although the prosecutor may have used colorful language during closing argument, his remark was not improper; it was transitory and was made in the midst of discussing the evidence produced during trial. See *Fisher, supra* at 156.

Defendant’s final prosecutorial misconduct claim is that the prosecutor improperly recited defendant’s statements made during opening statement regarding his being with the victim as evidence. Defendant did not object to the prosecutor’s remarks below. In any event, the challenged comments comported with the evidence presented at trial, which indicated that the victim was in defendant’s van on the night of the incident. Moreover, to the extent that any of the challenged remarks could be viewed as improper, the trial court’s instructions that opening statements and the lawyers’ comments are not evidence were sufficient to cure any prejudice. *Long, supra* at 588. Defendant has failed to show plain error affecting his substantial rights. *Carines, supra* at 763.

Defendant’s final argument on appeal is that his conviction should be reversed because the evidence that he was arrested at an adult bookstore while watching a “peep show” was inadmissible, under MRE 404(b), as “other acts evidence” and because the prosecutor failed to provide the required notice under MRE 404(b)(2).

To preserve an evidentiary issue for review, a party opposing the admission of evidence must object at trial and specify the same ground for objection that it asserts on appeal. MRE 103(a)(1); *People v Griffin*, 235 Mich App 27, 44; 597 NW2d 176 (1999). Although defendant objected to the admission of the evidence, he did so on relevancy grounds only. Thus, any issue

concerning MRE 404(b) was not properly preserved, and our review of this issue is once again limited to a plain error affecting substantial rights. *Carines, supra* at 763.

Under MRE 404(b)(2), the prosecution is required to provide notice before trial when it intends to introduce other acts evidence. Further, under MRE 404(b), other acts evidence is admissible only if it is offered for a proper purpose, i.e., one other than to prove the defendant's character or propensity to commit the crime, relevant to an issue or fact of consequence at trial, and sufficiently probative to outweigh the danger of unfair prejudice. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998).

In this case, we need not decide whether the prosecutor erred in introducing the evidence without the proper notice, because defendant has failed to demonstrate that the testimony at issue affected the outcome of his case. *Carines, supra* at 763.

During trial, there was significant evidence in support of defendant's guilt, apart from the testimony concerning the fact that he was arrested at an adult bookstore. The victim testified in detail about the incident. The victim identified defendant as the man who kidnapped and sexually penetrated her. She also identified defendant's van, including the precise contents inside of the van, which was corroborated by the contents found inside the van. In addition, physical evidence consistent with the victim's presence inside defendant's van was presented during trial. Moreover, a police officer testified that defendant told him that he was sorry and didn't mean for anybody to get hurt. Given this evidence, defendant has not established that the error was outcome-determinative and, thus, reversal is not warranted. *Id.*

Affirmed.

/s/ Donald E. Holbrook, Jr.  
/s/ Hilda R. Gage  
/s/ Patrick M. Meter