

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

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MYRON LLOYD ERICKSON,

Defendant-Appellant.

---

UNPUBLISHED  
October 27, 1998

No. 207673  
Menominee Circuit Court  
LC No. 96-002208 FH

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant appeals of right from his jury conviction of third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4). Defendant was sentenced as an habitual offender, third, MCL 769.11; MSA 28.1083, to seven to twenty years' imprisonment. We affirm.

Defendant raises a single issue regarding comments made by the prosecutor during the voir dire. After the trial court had informed the prospective jurors of the nature of the case by indicating that it involved "an act of homosexuality," the prosecutor addressed the jurors and stated:

. . . Now, one thing I want to make absolutely clear is that [the complainant] is not a homosexual. This was not a consensual sex act. So I don't want you going into this trial thinking that the defendant -- the defendant, he told an office[r] he's bisexual, but I don't want you thinking the victim in this case is. Is that clear to everyone? Okay.

Later on, after the trial court and defense counsel both had made more statements to the prospective jurors regarding the fact that the trial would concern an alleged homosexual act and that the jurors would have to determine if the victim had been physically helpless, the prosecutor asked one juror:

. . . One thing that concerns me, when the term homosexual is used, or homosexual act, I'm concerned that maybe you or other jurors would use that it was a consensual act, that it kind of means that it was a consensual act. Would you agree to keep an open mind on the consent issue and decide this case after all evidence is presented?

\* \* \*

And [defense counsel] referred to something to the effect that the only reason we're here is because [the complainant] was -- to decide whether or not [the complainant] was physically helpless. Would you keep in mind that there is more to it than that? That this is a young man who woke up . . . .

Immediately after each of the prosecutor's comments, the trial court gave a sua sponte cautionary instruction to the jurors that the comments of the attorneys were not evidence, that they had not yet heard any evidence, and that they would determine the evidence from the testimony of the witnesses. Defendant subsequently moved the court to declare a mistrial based on the prosecutor's comments and the trial court denied that motion.

A trial court's decision regarding a motion for a mistrial is reviewed for an abuse of discretion. *People v Wolverton*, 227 Mich App 72, 75; 574 NW2d 703 (1997). An abuse of that discretion will be found only where the trial court's denial of the motion has deprived the defendant of a fair and impartial trial. *Id.* The trial court's ruling must be so grossly in error as to deprive a defendant of a fair trial or to amount to a miscarriage of justice. *People v McAlister*, 203 Mich App 495, 503; 513 NW2d 431 (1994). A claim of prosecutorial misconduct is likewise reviewed to determine if the defendant was denied a fair and impartial trial. *People v Howard*, 226 Mich App 528, 544; 575 NW2d 16 (1997). Such claims are reviewed on a case-by-case basis and evaluated within the context of the particular facts of the case. *Id.*

This Court has reviewed the prosecutor's remarks in context and finds that defendant has failed to demonstrate that his right to a fair and impartial trial was violated. The prosecutor's remarks were clearly intended to respond to the characterization of the incident by both the trial court and defense counsel as involving homosexual conduct. The prosecutor was trying to inform the prospective jurors that the complainant would claim that he was not a homosexual and that the incident had not been consensual. The prosecutor's comments did not misstate what the complainant's testimony did in fact subsequently disclose. To the extent that the prosecutor's remarks strayed into the realm of conveying his view of the evidence to the jurors, the trial court's prompt sua sponte cautionary instructions were sufficient to dispel any possible prejudice. Moreover, the trial court subsequently re-instructed the jury both at the beginning and at the completion of the trial that the statements of the attorneys were not evidence. Jurors are presumed to have followed a court's instructions until the contrary is clearly shown. *McAlister, supra* at 504. Defendant has presented no clear indication that the jurors failed to follow the court's cautionary instructions.

Thus, where the jurors each individually stated that they could decide the case based on the evidence, where the trial court repeatedly instructed them that the prosecutor's comments did

not constitute evidence, and where the evidence itself provided a sufficient basis for finding defendant guilty, defendant was not denied a fair and impartial trial.

Affirmed.

/s/ Henry William Saad

/s/ Harold Hood

/s/ Roman S. Gibbs