STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2001
v	No. 218605 Hillsdale Circuit Court
ROBERT ALLEN FOX, JR., Defendant-Appellant.	LC No. 98-227939

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

PER CURIAM.

Defendant appeals as of right from his convictions of two counts of attempted third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a), MCL 750.92; one count of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(a); and one count of furnishing alcohol to a minor, MCL 436.1701(1). Defendant was sentenced as a fourth habitual offender, to serve 6 ½ to 20 years in prison for each conviction of attempted CSC III, 2 to 15 years in prison for CSC IV, and sixty days in prison for furnishing alcohol to a minor. We reverse.

The complainant testified that she was living at defendant's home with his daughters, her friends. One evening she and other girls, all of whom were under twenty-one years of age, were drinking alcohol at defendant's home. According to complainant, during the evening, defendant fondled her breasts and attempted vaginal and anal intercourse with her. The complainant said, however, that defendant never penetrated her.

Defendant contends that the prosecutor improperly elicited prejudicial character evidence and then during his rebuttal closing improperly urged the jury to consider that evidence in deciding defendant's guilt. While we do not agree that the evidence itself was improper, we do agree that the prosecutor's rebuttal closing was improper and prejudicial.

During the course of trial, the prosecutor elicited testimony about the conditions and circumstances of defendant's home on the night the crimes allegedly occurred. We believe this testimony was properly admitted as res gestae evidence. See *People v Henderson*, 25 Mich App 28, 32; 180 NW2d 903 (1970). However, we agree that the prosecutor made improper use of this evidence during his rebuttal closing argument. In his closing argument, defense counsel had

raised the question of how defendant could prove that he did not do something. This was the starting point for the prosecutor's rebuttal:

> How do you prove you didn't do something? [Defense counsel] asks, "How do you prove a negative?" You can do that by leading people to believe that your behavior is honorable. You can convince people that you are an honorable person by your behavior.
>
> I want you to think about the behavior of the defendant. I want you to remember how many beds are in the house. There are two beds and two couches. And in this house where the defendant sleeps in one bed and has one other bed available to sometimes as many as seven teenaged girls who will spend the night there --
>
> If you add them up and you include [one young woman], who is 19 years old, there are seven teenaged girls staying in this house, smoking and drinking with this person who, apparently, doesn't have a job but works on building another house.
>
> What's going on here? Is there a problem? Is there something that tells you that perhaps this guy who was drinking that night wouldn't let down his defenses, wouldn't, because of the alcohol, cause himself to be tempted by a girl who took off her clothes partially in the house and was in a nightgown?
>
> Aren't these aspects that you look at, ladies and gentlemen, when you determine whether someone is honorable, whether someone is credible, whether it actually happened? You can establish – you can beat a negative. People can do that. The defendant can't because of the circumstances and because of the testimony of [complainant].

Although defendant raised an objection during this argument, it did not relate to the character issue now argued on appeal.[1] "Objections based on one ground are insufficient to preserve appellate review based on other grounds." *In re Leone Estate*, 168 Mich App 321, 326; 423 NW2d 652 (1988). Accordingly, we review 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 . . . , 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. [*People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).]

Further, if the three elements of the plain error rule are established, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or

[1] Defendant objected on the ground that the prosecutor was arguing a fact not in evidence, i.e., the maximum number of girls who had spent the night in defendant's house at any one time.

when an error '"seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."'" *Id.* at 763-764, quoting *United States v Olano*, 507 US 725, 736-737; 113 S Ct 1770; 123 L Ed 2d 508 (1993) (quoting *United States v Atkinson*, 297 US 157, 160; 56 S Ct 391; 80 L Ed 555 [1936]). Issues of prosecutorial misconduct are decided on a case-by-case basis, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *People v Paquette*, 214 Mich App 336, 341-342; 543 NW2d 342 (1995).

"[I]n our system of jurisprudence, we try cases, rather than persons, and thus a jury may look only to the evidence of the events in question, not defendant's prior acts in reaching its verdict." *People v Allen*, 429 Mich 558, 566; 420 NW2d 499 (1988). When, as in the present case, character is not at issue, it is improper for the prosecutor to comment on a defendant's character. *People v Quinn*, 194 Mich App 250, 253; 486 NW2d 139 (1992). Here, the prosecutor's remarks went beyond mere rebutting of defendant's "how can I prove a negative" argument. Instead, the prosecutor's rebuttal suggested that the res gestae evidence showed defendant was not an "honorable" man. We believe it also suggested that these circumstances and his lack of honor could be used as circumstantial evidence that he committed the crimes charged. *Id.* at 253-254. "Is there something that tells you," the prosecutor asked the jury, "that perhaps this guy who was drinking that night wouldn't let down his defenses, wouldn't, because of the alcohol, cause himself to be tempted by a girl who took off her clothes partially in the house and was in a nightgown?" Thus, we conclude that a plain error did occur.

Further, we conclude that this error did affect the outcome of the proceedings below. *Carines, supra* at 763. As in *Quinn*, we believe this argument went beyond vigorous advocacy and likely inflamed the prejudices of the jury. *Quinn, supra* at 253. Accordingly, we conclude that defendant has satisfied the requirements of the plain error rule.

We also conclude that the prejudicial effect of the prosecutor's argument could not have been undone by a cautionary instruction. *Id.* at 254. "Moreover, the prejudicial remarks were made during rebuttal, when defense counsel had no opportunity to respond." *Id.* Believing that this prosecutorial error did seriously undermine the fairness and integrity of defendant's trial, we conclude that reversal is warranted. *Carines, supra* at 763-764.

Because we find that the prosecution committed error mandating reversal by improperly commenting on the res gestae evidence, we do not reach defendant's other claims. In any event, we have reviewed these claims and find them to be without merit.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.