

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JAMES ECKERT,

Defendant-Appellant.

UNPUBLISHED

March 15, 2002

No. 227057

Kent Circuit Court

LC No. 99-006718-FH

Before: Meter, P.J., and Markey and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count each of third-degree criminal sexual conduct, MCL 750.520d(1)(a), and fourth-degree criminal sexual conduct, MCL 750.520e(1)(a). Defendant was sentenced to concurrent terms of three-and-one-half to fifteen years' and sixteen to twenty-four months' imprisonment, respectively. Defendant appeals as of right. We affirm.

Defendant complains of several instances of prosecutorial misconduct. Generally, we review claims of prosecutorial misconduct "case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Where the prosecutorial misconduct issue is preserved, we evaluate "the challenged conduct in context to determine if the defendant was denied a fair and impartial trial." *Id.* However, "[w]here a defendant fails to object to an alleged prosecutorial impropriety, the issue is reviewed for plain error." *Id.* "[T]o avoid forfeiture of the issue, defendant must demonstrate plain error that affected his substantial rights, i.e., that affected the outcome of the proceedings." *Id.*

Defendant first argues that the prosecutor improperly injected defendant's nationality into the case when it asked defendant questions regarding the sexual mores in South Africa, where defendant was raised. It should be noted that defendant did object to the general relevancy of this line of questioning; however, he did not argue that the line of questioning was improper on the grounds raised on appeal, nor did he contend that this line of questioning constituted prosecutorial misconduct. Accordingly, this issue has not been preserved. *People v Maleski*, 220 Mich App 518, 523; 560 NW2d 71 (1996).

The injection of racial or ethnic remarks into any trial is impermissible as it may arouse the prejudice of jurors against a defendant and lead to a decision based on prejudice rather than

on the guilt or innocence of the accused. *People v Bahoda*, 448 Mich 261, 266; 531 NW2d 659 (1995). Reversal is warranted where potentially inflammatory references are intentionally injected, with no apparent justification except to arouse prejudice. *Id.* However, otherwise improper prosecutorial remarks might not require reversal if they address issues raised by defense counsel. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977).

Here, defendant testified on direct examination about a seminar he conducted for teenagers regarding boy-girl relationships and moral values within the context of Christianity. Defendant explained that in this workshop he had spoken about being from South Africa and about African rites of passage. On cross-examination, the prosecutor asked defendant to explain the difference in sexual mores, if any, between South Africa and the United States. We conclude that the questions addressed matters that were first raised by defense counsel and were not intended merely to arouse the prejudices of the jury. Therefore, defendant has not demonstrated plain error.¹

Defendant also argues that “repeated questions” relating to defendant’s sexual past inserted “improper character evidence into this case.” It should be noted that defendant asserted timely objections to each line of questioning, and these objections were, for the most part, sustained by the trial court. The gravamen of defendant’s argument is that the questions constituted prosecutorial misconduct.

In regard to character evidence, MRE 404 states in pertinent part:

(a) Character Evidence Generally. Evidence of a person’s character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

MRE 405(a) states: “In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into reports of relevant specific instances of conduct.” We note that each of these references occurred during the prosecutor’s cross-examination of defense witnesses.

In the early stages of defendant’s evidentiary proofs, he presented two witnesses who were, like the victim, former babysitters for defendant. These witnesses testified that defendant never engaged in inappropriate discussions of a sexual nature with them, much less attempt any improper sexual contact. Similarly, on direct examination of another witness, defendant inquired whether she had “ever” seen defendant make “any sexual advances towards any member of the

¹ Defendant also asserts that these questions were improper character evidence. However, defendant does not develop this argument or provide legal support. A defendant may not simply assert error and then leave it to this Court to discover and rationalize the basis for his claims. *People v Griffin*, 235 Mich App 27, 45; 597 NW2d 176 (1999).

church?” The witness answered, “No.” Thus, as part of his defense, defendant certainly introduced evidence suggesting that the instant accusations were inconsistent with his character.

In light of defendant’s efforts to introduce positive character evidence, we are not persuaded that any of the purportedly improper character evidence would have been inadmissible if challenged on that ground. Moreover, defendant’s timely objections on other grounds, such as relevance, were largely sustained. Accordingly, we cannot conclude that defendant was denied a fair and impartial trial by the questions.

Finally, defendant argues that certain comments made by the prosecutor during her closing argument constituted misconduct because they were an attempt to have the jury sympathize with the victim. Defendant concedes that this issue is forfeited. Nevertheless, he may avoid forfeiture by demonstrating a plain error that affected his substantial rights. *Aldrich*, *supra* at 110.

A prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). Here, an argument can certainly be made that the prosecutor’s arguments inappropriately appealed to the jury to sympathize with the victim. See *id.* On the other hand, the prosecutor “did not ask the jury to suspend their judgment and decide the case on the basis of sympathy.” *People v Hoffman*, 205 Mich App 1, 21; 518 NW2d 817 (1994). Rather, the prosecutor requested “justice.” Accordingly, we are not persuaded that the closing arguments were plainly erroneous. Moreover, to avoid forfeiture, defendant must also demonstrate that his substantial rights were affected. The trial court instructed the jurors that they must decide the case based on the evidence presented and “must not let sympathy or prejudice influence your decision,” and reminded the jury that arguments by the attorneys were not evidence. See *Watson*, *supra* at 592. Therefore, we conclude that defendant’s substantial rights were not affected by the prosecutor’s closing argument, as necessary to avoid forfeiture of this issue.

Affirmed.

/s/ Patrick M. Meter
/s/ Jane E. Markey
/s/ Donald S. Owens