STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL PATRICK VIDAL,

Defendant-Appellant.

UNPUBLISHED
August 16, 2002

No. 231401
Macomb Circuit Court
LC No. 00-001710-FH

Before: Murray, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Defendant was convicted by a jury of three counts of third-degree criminal sexual conduct, MCL 750.520d, and was sentenced to three concurrent prison terms of nineteen months to fifteen years. He appeals as of right. We affirm.

Defendant first argues that he was denied a fair trial because of prosecutorial misconduct. Prosecutorial misconduct issues are decided case by case. *People v Schutte,* 240 Mich App 713, 721; 613 NW2d 370 (2000). Generally, this Court considers the alleged misconduct in context to determine whether it denied the defendant a fair and impartial trial. *People v Reid,* 233 Mich App 457, 466; 592 NW2d 767 (1999). However, where there was no objection to the alleged misconduct at trial, this Court reviews the issue for plain error affecting the defendant's substantial rights. *People v Carines,* 460 Mich 750, 763; 597 NW2d 130 (1999); *Schutte, supra*.

A prosecutor is afforded great latitude in closing argument. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995). An otherwise improper remark may not require reversal when it is responsive to defense counsel's argument. *People v Duncan,* 402 Mich 1, 16; 260 NW2d 58 (1977); *People v Kennebrew,* 220 Mich App 601, 608; 560 NW2d 354 (1996). Error requiring reversal will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra.*

Defendant complains that the prosecutor disingenuously argued that the complainant was sexually inexperienced and "ripe . . . for the picking." Because defendant did not object to these remarks, we review this issue for plain error. A prosecutor may use strong and emotional language in making his argument as long as the evidence supports it. *People v Ullah,* 216 Mich App 669, 678-679; 550 NW2d 568 (1996). Here, although the complainant volunteered that this was not her first sexual activity, she testified that intercourse with defendant was painful and that she found the oral sex "gross" and "disgusting." It was not improper for the prosecutor to

suggest that the charged incident, involving sexual activity with a thirty-one year old man rather than one of complainant's peers, which the complainant characterized as painful and "yucky," was an introduction to aspects of sexual activity. Nor was it improper for the prosecutor to concede that the complainant was "ripe . . . for the picking," given the complainant's testimony that she willingly consented to sex with defendant and defendant's theory that the child had a crush on him. The statements do not constitute plain error.

Defendant also argues that the prosecutor shifted the burden of proof by saying that the jury should convict defendant if it believed the complainant's testimony and acquit defendant if it thought the complainant was lying. Defendant's failure to object to these statements limits our review to plain error. *Carines, supra*. This case hinged on credibility. Viewed in context, the prosecutor was merely emphasizing that point to the jury. The remarks did not shift the burden of proof. *People v Fields*, 450 Mich 94, 115; 538 NW2d 356 (1995). The prosecutor's remark in rebuttal about why a "noble" man would buy cigarettes for a child was responsive to defense counsel's argument that, although defendant may have bought cigarettes for the complainant, he did not want anything to do with a child who had a crush on him. Viewed in this context, the statement does not warrant reversal. *Duncan, supra.*

Defendant also argues that it was improper for the prosecutor to elicit testimony that the complainant's relationship with defendant began when defendant and her uncle began camping out in the backyard, where the adults spent their weekends drinking and playing "quarter bounce." Defendant also argues that the prosecutor improperly elicited testimony from the complainant that he did not have custody of his children and that she believed that he loved her and was going to leave his pregnant girlfriend for her.

Once again, because defendant did not object to these matters at trial, appellate relief is precluded absent plain error affecting defendant's substantial rights. *Carines, supra.* The challenged testimony was relevant in explaining how the circumstances may have led the complainant to pursue a consensual sexual relationship. We are not persuaded that it constituted plain error.

Defendant also contends that it was improper to elicit testimony that he looked the same to the complainant at trial as he did at the time of the charged offense, except that he used to have "copper orange" hair. When defendant objected, the prosecutor was not permitted to question a police officer about any change in defendant's appearance since the time of his arrest, but there was testimony that the complainant thought defendant was "hot." We are not convinced that defendant was denied a fair and impartial trial because of this testimony. *Reid, supra.*

Defendant argues that the trial court gave an improper deadlocked jury instruction after the jury foreperson said that the jury could not reach a verdict "at this point." Defendant did not object to the instruction below. Therefore, we review this issue for plain error affecting defendant's substantial rights. *Carines, supra.* We disagree with defendant's claim that the court's instruction constituted a substantial departure from CJI2d 3, 12, or was unduly coercive. *People v Daoust*, 228 Mich App 1, 14; 577 NW2d 179 (1998). The instruction did not constitute plain error affecting defendant's substantial rights.

Next, defendant argues that counsel was ineffective. Because defendant did not request a *Ginther*[1] hearing, this Court's review is limited to mistakes apparent on the record. *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997). To establish ineffective assistance of counsel, the burden is on defendant to show that counsel made an error so serious that he was not functioning as the "counsel" guaranteed by the Sixth Amendment and that the error prejudiced his defense as to deprive him of a fair trial. *People v Mitchell*, 454 Mich 145, 156; 560 NW2d 600 (1997). There is a strong presumption that counsel's conduct was reasonable. *Id.*

Defendant argues that counsel was ineffective for failing to object to testimony by the complainant's mother concerning statements made to her by the complainant. The statements were consistent with the complainant's trial testimony. We disagree with defendant that the record establishes that the statements were offered for their truth and, as such, constituted hearsay. MRE 801(C). Rather, it appears that the statements were offered to explain how the criminal investigation came about, a non-hearsay purpose. Thus, defendant has not shown that defense counsel was ineffective for failing to object. Defendant also argues that defense counsel was ineffective for failing to object to the alleged instances of prosecutorial misconduct previously discussed in this opinion, and for failing to object to the deadlocked jury instruction. Consistent with our analysis of those issues, we are not persuaded that defendant has overcome the presumption that counsel's actions were reasonable or shown that the alleged defects detrimentally affected the result of the trial. *People v Fike*, 228 Mich App 178, 181; 577 NW2d 903 (1998).

Defendant next argues that the trial court erred in admitting the complainant's testimony about letters she wrote but did not send to defendant and a girlfriend, and also erred in admitting into evidence the letter she wrote to her girlfriend. Defendant did not object to the complainant's testimony about the letters, but did object to the admission of the letter to the complainant's friend. Unpreserved evidentiary issues are reviewed for plain error affecting defendant's substantial rights. *Carines, supra; People v Coy,* 243 Mich App 283, 287; 620 NW2d 888 (2000). A preserved nonconstitutional error is not grounds for reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity,* 460 Mich 484, 495-496; 596 NW2d 607 (1999). The alleged sexual relationship in this case came to light because the complainant's parents found and read the letters. It appears that the letters were offered to explain how the charged sexual relationship was discovered, a non-hearsay purpose. Even if it was error to admit the evidence, however, the information in the letters that the complainant was "seeing this guy named Mike" and that she believed defendant would leave his girlfriend was cumulative to other evidence. Indeed, it was consistent with defendant's theory of the case that the complainant had a crush on him and fantasized a relationship with him. Any error in admitting the evidence was therefore harmless and did not affect defendant's substantial rights. *Lukity, supra*; *Carines, supra*.

Finally, defendant contends that he was denied a fair trial because of the cumulative effect of the alleged errors. Because we have rejected defendant's claims of error, reversal under this theory is unwarranted. *People v Sawyer,* 215 Mich App 183, 197; 545 NW2d 6 (1996).

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[1] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Christopher M. Murray
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell