

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

UNPUBLISHED

August 13, 1996

Plaintiff-Appellee,

v

No. 156279

LC No. 91-009572

RAMONE RICHARDSON,

Defendant-Appellant.

Before: Hood, P.J., and Griffin and J. F. Foley,* JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2), and one count of felonious assault, MCL 750.82; MSA 28.277. He was sentenced to fifteen to forty years' imprisonment on each of the criminal sexual conduct convictions and thirty-two to thirty-eight months' imprisonment on the felonious assault conviction, all to be served concurrently. He appeals as of right. We affirm.

Instructional error should not be considered on appeal unless the issue has been preserved by an objection to the instruction in the trial court. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993). Absent an objection, this Court's review is limited to the issue whether relief is necessary to avoid manifest injustice to the defendant. *People v Haywood*, 209 Mich App 217, 230; 530 NW2d 497 (1995). In the instant case, the trial court's failure to sua sponte instruct the jury that the victim's prior consistent out-of-court statement should not be considered as substantive evidence did not result in manifest injustice to defendant.

The trial court's instructions on aiding and abetting did not lead the jury to believe it could convict one defendant based solely upon the intent of the other. The jury instructions given by the court clearly reflected the state of the law in Michigan. *People v Turner*, 213 Mich App 558, 568-569; 540 NW2d 728 (1995).

The trial court's failure to sua sponte give a cautionary "addict-testimony" instruction was not error. The jury was sufficiently instructed on its obligation to determine credibility and the factors it

* Circuit judge, sitting on the Court of Appeals by assignment.

should consider when doing so. *People v Atkins*, 397 Mich 163, 169-170; 243 NW2d 292 (1976), and its progeny are not applicable to this case. The victim was not an addict-informer. Defendant did not request an instruction and made no objection to the jury instructions.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. Issues of misconduct by a prosecutor are decided on a case by case basis. The reviewing court must examine the pertinent portion of the record and evaluate a prosecutor's remarks in context. *People v Bahoda*, 448 Mich 261, 272; 531 NW2d 659 (1995). If defense counsel fails to object, appellate review is foreclosed unless the prejudicial effect of the remark was so great that it could not have been cured by an appropriate instruction and this Court's failure to consider the issue would result in a miscarriage of justice. *People v Duncan*, 402 Mich 1, 15-16; 260 NW2d 58 (1977); *People v Cross*, 202 Mich App 138, 143; 508 NW2d 144 (1993).

The prosecutor is free to argue the evidence and all reasonable inferences from the evidence as it relates to the prosecutor's theory of the case. *People v Lee*, 212 Mich App 228, 255; 537 NW2d 233 (1995). However, it is improper for the prosecutor to appeal to the jury to sympathize with the victim. *People v Dalessandro*, 165 Mich App 569, 580-581; 419 NW2d 609 (1988). Here, although it was improper for the prosecutor to remark about "how painful" the victim's injuries were, the statement did not deny defendant a fair and impartial trial or result in a miscarriage of justice. Any possible prejudice could have been cured by an appropriate instruction.

Prosecutorial arguments are considered in light of defense arguments. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). The prosecutor's remarks during rebuttal argument were responsive and not impermissible in light of defense counsel's arguments.

Affirmed.

/s/ Harold Hood
/s/ Richard Allen Griffin
/s/ John F. Foley