

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNON GEORGE HARRINGTON,

Defendant-Appellant.

UNPUBLISHED

April 4, 1997

No. 200592

Oakland Circuit Court

LC No. 93-125028-FH

ON REMAND

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

PER CURIAM.

A jury convicted defendant of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). The trial court sentenced defendant to a term of two to twenty years' imprisonment. Defendant appeals as of right. Initially, this Court reversed defendant's conviction. *People v Harrington*, unpublished per curiam opinion of the Court of Appeals, Docket No. 176020, issued 9/27/96. The Supreme Court remanded the case to this Court "for reconsideration in light of *People v Mateo*, 453 Mich 203 (1996), and *People v Grant*, 445 Mich 535 (1994)." On remand, we affirm.

In *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994), the Court held that, as a general rule, issues that are not properly raised before a trial court cannot be raised on appeal absent compelling or extraordinary circumstances. Thus, a plain, unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases where prejudice is presumed or reversal is automatic. *Id.*, p 553. In *People v Mateo*, 453 Mich 203, 215; 551 NW2d 891 (1996), the Court held that the harmless error rule states that reversal is only required if the error was prejudicial. That inquiry focuses on the nature of the error and assesses its effect in light of the weight and strength of the untainted evidence. *Id.* Preserved nonconstitutional error should not be reviewed under the harmless beyond a reasonable doubt standard. *Id.*, p 216.

In our initial opinion, we held that the prosecutor improperly bolstered the credibility of the complainant. Defendant failed to raise this issue at trial. Accordingly, this Court may not consider the

issue unless the error could have been decisive of the outcome or unless it falls under the category of cases where prejudice is presumed or reversal is automatic. *Grant, supra*, p 553. We continue to believe that this error does not require reversal under this standard.¹

In our initial opinion, we also held that error occurred because of continued references to polygraph tests. It was only after the prosecutor requested a bench conference that defense counsel stated his concern regarding the references to the polygraph test. Even then, defendant expressed satisfaction with the jury instructions that included a caution against consideration of the polygraph test during deliberations. Accordingly, the same standard for unpreserved claims applies. *Id.* Once again, we continue to believe that this error does not require reversal.

In our initial opinion, we found error in the references made to defendant's drinking problem, his attendance at Alcoholics Anonymous meetings, and seeking therapy. Defendant failed to object to these references. We continue to believe that reversal is not required on this basis. *Id.*

Finally, in our initial opinion, we held that, although none of the errors required reversal on their own, their cumulative effect did require reversal. Defendant did not move for a mistrial on this basis before the trial court. The test for cumulative error is whether the defendant received a fair trial. *People v Smith*, 363 Mich 157, 164; 108 NW2d 751 (1961). Where the issue of whether a defendant received a fair trial is not preserved, there must be a showing of actual prejudice. See *People v Solomon*, ___ Mich App ___; ___ NW2d ___ (Docket No. 181158, issued 12/20/96); see also *People v Benton*, 402 Mich 47, 61, 65-66; 260 NW2d 77 (1977). Here, much of the prejudicial effect of the errors that occurred at trial would have been cured with timely instructions. See *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). In light of defendant's confession and the other evidence of defendant's guilt, defendant has not made a showing of actual prejudice as to the remaining error. *Grant, supra*, p 553; *Solomon, supra*; see *Mateo, supra*, p 215.

Affirmed.

/s/ Myron H. Wahls

/s/ Harold Hood

/s/ Roman S. Gibbs

¹ The issues are fully developed in our initial opinion. *People v Harrington*, unpublished per curiam opinion of the Court of Appeals, Docket No. 176020, issued 9/27/96.