

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES EARL MCRAE, JR.,

Defendant-Appellant.

---

UNPUBLISHED

October 19, 2004

No. 248040

Kent Circuit Court

LC No. 02-001883-FC

Before: Griffin, P.J., and Saad and O’Connell, JJ.

PER CURIAM.

Defendant appeals as of right his convictions of three counts of criminal sexual conduct in the first degree (CSC I), MCL 750.520b, one count of first-degree home invasion, MCL 750.110a(2), one count of kidnapping, MCL 750.349, and one count of possession of a firearm during the commission of a felony, MCL 750.227b, entered after a jury trial. We affirm defendant’s convictions, but remand for modification of the maximum sentence imposed on defendant’s home invasion conviction and for preparation of a corrected judgment of sentence. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Complainant testified that she could not identify the man who sexually assaulted her at gunpoint and forced her to leave her home because he was wearing a mask. An expert in human DNA testing testified that defendant’s DNA profile matched that of the male DNA recovered from complainant to a reasonable degree of scientific certainty, and that the odds of a random match in the African-American population were 4.1 quadrillion to one. The expert testified that controls minimized the possibility of error, but acknowledged that he did not know the laboratory’s error rate, and that it was probable that some errors occurred in the laboratory.

The jury found defendant guilty as charged. The trial court sentenced defendant as a third habitual offender to terms of life, twenty to sixty years, and forty to eighty years in prison for CSC I, first-degree home invasion, and kidnapping, respectively, and to a consecutive two-year term for felony-firearm.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541

US \_\_\_\_; 124 S Ct 1354; 158 L Ed 2d 177 (2004). We review a claim of prosecutorial misconduct de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and state constitutions. US Const, Am VI; Const 1963, art 1, § 20; *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 600.

Defendant argues that he was denied due process and a fair trial by the prosecutor's characterization of his defense as a "smoke screen." We disagree and affirm defendant's convictions. Defendant did not object to the prosecutor's remark; therefore, absent plain error, he is not entitled to relief. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The prosecutor's remark suggested that defense counsel was attempting to distract the jury from the truth; however, the remark was made in response to defense counsel's suggestion during closing argument that, because the error rate of the laboratory that performed DNA testing in this case was not revealed, it was logical to assume that error likely occurred in this case. The prosecutor did not act improperly by suggesting that the jury should concentrate on the evidence as a whole, rather than on isolated possibilities of error emphasized by defense counsel. *Schutte, supra*. Any prejudicial effect of the prosecutor's comment could have been cured by a timely instruction that the jury was the sole judge of the evidence. *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). No plain error occurred, *Carines, supra*, and counsel's failure to object to the prosecutor's remark did not result in prejudice. *Carbin, supra*.

The statutory maximum term of imprisonment for first-degree home invasion is twenty years. MCL 750.110a(5). That term may be doubled if the defendant is sentenced as a third habitual offender. MCL 769.11(1)(a). We set aside the maximum term imposed for defendant's conviction of first-degree home invasion and remand for modification of the judgment of sentence to reflect that the maximum term for that conviction is forty years, rather than sixty years. MCL 769.24; *People v Thomas*, 447 Mich 390, 393; 523 NW2d 215 (1994).

Defendant's convictions are affirmed, but the matter is remanded for modification of the maximum sentence imposed on his home invasion conviction and for preparation of a corrected judgment of sentence. We do not retain jurisdiction.

/s/ Richard Allen Griffin  
/s/ Henry William Saad  
/s/ Peter D. O'Connell