

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODNEY SCOT ARMSTRONG,

Defendant-Appellant.

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UNPUBLISHED  
October 15, 1996

No. 183797  
LC No. 93-63701-FH

Before: Fitzgerald, P.J., and O'Connell and T.L. Ludington,\* JJ.

PER CURIAM.

Defendant was charged with two alternative counts of third-degree criminal sexual conduct, MCL 750.520d(1)(b); MSA 28.788(4)(1)(b),<sup>1</sup> and MCL 750.520d(1)(c); MSA 28.788(4)(1)(c)<sup>2</sup> for the sexual assault of his wife's fifty-three-year-old aunt who suffered from schizophrenia. Defendant argued that the victim's allegations against him were incredible and a result of her mental illness. The jury rejected this argument, and it found defendant guilty of CSC-3 through force or coercion. The trial judge sentenced defendant to ~~4~~to 15 years of imprisonment for this conviction. Defendant appeals as of right from his conviction. We affirm.

I

Defendant argues that the trial court erred when it refused to grant a mistrial as a result of the prosecutor's elicitation of a statement made by defendant in a police officer's presence that had not been disclosed in accordance with the trial court's discovery order. A trial court's grant or denial of a defendant's motion for a mistrial will not be reversed on appeal absent an abuse of discretion. *People v Cunningham*, 215 Mich App 652, 654; 546 NW2d 715 (1996). As a general rule, a mistrial should only be granted when an irregularity in the trial proceedings prejudices the defendant's rights and denies his ability to receive a fair trial. *Cunningham, supra* at 654. Defendant argues that the violation of the discovery order is such an irregularity that mandates a mistrial. Defendant bases his argument upon his reading of *People v Pace*, 102 Mich App 522; 302 NW2d 216 (1980). In *Pace*, this Court

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

determined that a violation of a discovery order, even done inadvertently and in good faith, was error requiring reversal “unless it is clear that the failure to divulge was harmless beyond a reasonable doubt . . .” *Id.* at 530-531. However, Michigan law no longer mandates this result.

This Court in *People v Taylor*, 159 Mich App 468, 481-482; 406 NW2d 859 (1987), revisited the issue and concluded that *Pace* and its progeny produced the following results:

1. Prosecutorial noncompliance with discovery orders or agreements, not only as to exculpatory but as to inculpatory evidence, is held to be an unconstitutional denial of due process;
2. Where there has been such noncompliance, the trial court has no discretion but must exclude the undisclosed evidence under pain of reversal unless the error is found to be harmless beyond a reasonable doubt, thereby excluding consideration of the causes of the noncompliance, good faith, degrees of negligence, the nature and degree of prejudice resulting, and whether some other remedy would be appropriate;
3. No exception is made for evidence of which defendant has independent knowledge, such as his own statements, not even for impeachment when the defendant has testified differently if not downright perjuringly.

As a result, the *Taylor* panel rejected the result in *Pace* and concluded:

The trial courts have discretion to deal with questions of noncompliance with discovery orders or agreements; that in fashioning remedies in the exercise of that discretion, there must be a fair balancing of the interests of the courts, the public, and the parties; and that the exclusion of otherwise admissible evidence is a remedy which should follow only in the most egregious cases. [*Id.* at 487.]

Our Supreme Court adopted the above conclusion in a new court rule. See MCR 6.201, effective January 1, 1995.

Here, the trial court did not abuse its discretion in denying defendant’s motion for a mistrial because such a remedy was unwarranted under the circumstances. The trial court concluded that the prosecutor’s failure to disclose defendant’s statement did not prejudice him. This conclusion is correct because no prejudice can be found when the undisclosed statement encompasses evidence to which the defendant has independent knowledge. *People v Young*, 212 Mich App 630, 642; 538 NW2d 456 (1995). Because no prejudice inured to defendant’s detriment, the trial court presented defendant with various options to correct the situation, most notably the opportunity to call or recall all relevant witnesses, even if this caused a delay in the trial, but defendant rejected all of the trial court’s remedies. Because these remedies were proper under the situation, we will not allow defendant to profit from his

own mistake. See, e.g., *People v Barclay*, 208 Mich App 670, 673; 528 NW2d 842 (1995) (defendant cannot harbor error as an appellate parachute).

## II

Defendant argues next that the trial court erred when it admitted evidence pursuant to MRE 404(b) that was unfairly prejudicial and irrelevant to prove motive or pattern of conduct. The admissibility of other bad-acts evidence is within the trial court's discretion. *People v Catanzarite*, 211 Mich App 573, 579; 536 NW2d 570 (1995). MRE 404(b) governs the admission of other bad acts, also known as similar acts, evidence, and this rule states:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

To be admissible under MRE 404(b), the proffered evidence must satisfy the following three requirements: (1) it must be offered for a proper purpose, (2) it must be relevant, and (3) its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Cadle*, 204 Mich App 646, 655; 516 NW2d 520 (1994), remanded on other grounds 447 Mich 1009; 526 NW2d 918 (1994).

The proffered evidence that defendant had sexually assaulted the victim on previous occasions was admissible under this rule of evidence. The evidence had the proper purpose of rebutting the appearance of incredibility that an isolated sexual assault against a family member presents. *People v DerMartzex*, 390 Mich 410, 415; 213 NW2d 97 (1973) (allowing admission of evidence of antecedent sexual acts may be admissible under some circumstances). Further, even had this evidence been admitted improperly, we would find the error to have been harmless in light of the dual-edged nature of the evidence – while the evidence could have prejudiced defendant, it also could have undermined the credibility of the complainant, an older, schizophrenic woman who had, in the past, heard sexually-oriented voices in her head and who believed herself possessed by demons. As noted by the trial court, given the precarious mental state of the complainant, the proffered evidence could have worked to defendant's advantage in that it “might [have] cause[d] the jury to further doubt the testimony of the witness based on repetitive allegations of conduct which viewed in the abstract to be highly improbable and therefore might shed some doubt on the testimony.” In sum, we believe the evidence to have been properly admitted, but, even if it had not been, we would not find the error to warrant reversal.

## IV

Defendant also argues that several instances of prosecutorial misconduct denied his right to a fair trial. We disagree. For allegations of prosecutorial misconduct, this Court examines the pertinent portion of the record below and evaluates the prosecution's conduct to determine whether it denied the defendant a fair trial. *People v Legrone*, 205 Mich App 77, 82; 517 NW2d 270 (1994). Generally, the test for prosecutorial misconduct is whether the prosecution's actions denied the defendant a fair trial. *People v Livery Clark*, 172 Mich App 407, 420; 432 NW2d 726 (1988). Such issues are considered on a case-by-case methodology utilizing a review of the record below to evaluate the prosecution's actions in context. *Legrone, supra* at 82. Thus, this Court must read the prosecution's remarks as a whole and evaluate them in light of the defense's arguments and their relationship to the evidence introduced at trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

#### A

First, defendant asserts that the prosecutor is guilty of misconduct because she elicited testimony concerning an undisclosed statement. As shown, the trial court properly attempted to remedy this situation, but defendant refused all of its suggestions. In other words, defendant was not denied a fair trial on this ground. Because the test for prosecutorial misconduct is premised upon whether the actions of the prosecutor denied defendant a fair trial, no prosecutorial misconduct can be found on this ground. See *Livery Clark, supra* at 420.

#### B

Second, defendant asserts that the prosecutor's comment on this statement in her closing argument also constitutes misconduct. However, the trial court found that the statement was admissible, so the undisclosed statement was evidence on the record. A prosecutor may freely argue reasonable inferences that may be drawn from the evidence to the jury. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995). Therefore, no misconduct can be found on this ground either.

#### C

Last, defendant asserts that the prosecutor's elicitation of testimony concerning his wife's reaction upon viewing the sheets from which the DNA evidence was obtained constitutes misconduct. Nevertheless, this issue is unpreserved because defendant failed to specifically object to the elicitation of this testimony. *People v Stanaway*, 446 Mich 643, 694; 521 NW2d 557 (1994). This Court need not review this issue unless a failure to review the issue would result in a miscarriage of justice. *Id.* at 687. A miscarriage of justice will not be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *People v Rivera*, 216 Mich App 648; 651-652; \_\_\_ NW2d \_\_\_ (1996). No miscarriage of justice can be found on this ground because any prejudice caused by the testimony could have been cured by a timely instruction.

### III

On appeal, defendant also submitted an *in propria persona* brief containing additional issues on appeal. None of the issues contained within this brief are preserved because they are being raised for the first time on appeal. This Court need not review such issues. *People v Heim*, 206 Mich App 439, 441; 522 NW2d 675 (1994). Nevertheless, a cursory review will be conducted.

Because there is no requirement that such facts be disclosed in a hearing conducted out of the hearing of the jury, the trial court properly allowed the prosecutor to lay the foundation for the admission of the sheet in the presence of the jury. The other challenges to the evidence go to its weight and not its admissibility. See, e.g., *People v White*, 208 Mich App 126, 130-131; 527 NW2d 34 (1994). The assistance of defendant's trial counsel was effective because defendant offers no evidence from the record to support his allegations. Moreover, trial counsel was not obligated to make the futile motions that are suggested by defendant. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Last, MCL 750.520h; MSA 28.788(8) is constitutional. This statutory provision, which provides that the testimony of a sexual assault victim need not be corroborated, does not prevent defendant from attacking the credibility of the victim on cross-examination. See *People v Mikula*, 84 Mich App 108, 115; 269 NW2d 195 (1978).

Affirmed.

/s/ E. Thomas Fitzgerald  
/s/ Peter D. O'Connell  
/s/ Thomas L. Ludington

<sup>1</sup> Sexual penetration through force or coercion.

<sup>2</sup> Sexual penetration of a mentally incapable or mentally incapacitated individual.