

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LINDA LOU PETERS,

Defendant-Appellant.

UNPUBLISHED

April 11, 1997

No. 188442

Oakland Circuit Court

LC Nos. 93-126524-FH

93-126525-FH

93-126526-FH

93-126527-FH

93-126528-FH

93-126529-FH

93-126530-FH

Before: Fitzgerald, P.J., and MacKenzie and Taylor, JJ.

PER CURIAM.

A jury convicted defendant of seven counts of third-degree criminal sexual conduct involving two minors at least thirteen years of age and under sixteen years of age, MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). Defendant was sentenced to six to fifteen years' imprisonment on each count, to be served concurrently. Defendant appeals as of right. We affirm.

Defendant was allegedly involved in sexual relationships with two teenage boys over a period of months. Defendant first argues that the trial court erred in granting the prosecution's motion to consolidate the charges involving both of the teenage boys.

Our review of a trial court's decision to sever is two part. First, we review de novo whether the joined offenses are related as a matter of law and thus eligible for joinder. MCR 6.120(B); *People v Tobey*, 401 Mich 141, 153; 257 NW2d 537 (1977). Second, if we conclude that the offenses are related as a matter of law and thus eligible for joinder, we next review the trial court's grant of the prosecution's motion for an abuse of discretion. *Id.*

MCR 6.120(A) provides that two or more informations or indictments against a single defendant may be consolidated for a single trial. However, MCR 6.120(B) provides that:

On the defendant's motion, the court must sever unrelated offenses for separate trials. For purposes of this rule, two offenses are related if they are based on

- (1) the same conduct, or
- (2) a series of connected acts or acts constituting part of a single scheme or plan.

A review of the transcript reveals that joinder of the offenses in this case finds support in the "single plan or scheme" provision of the rule. The offenses were connected in time, and connected in terms of similarity of what occurred – that is, the second relationship began when the first relationship ended and involved similar types of conduct. Given the complainants' testimony, the evidence offered by the prosecution established that defendant committed the offenses as part of a series of acts constituting a single plan or scheme. Given defendant's failure to object to joinder of the offenses,¹ it cannot be said that the trial court abused its discretion in joining the offenses for trial.

Defendant also argues that she was denied effective assistance of counsel due to defense counsel's failure to object to the prosecution's motion for consolidation. To prove ineffective assistance of counsel, the defendant must prove that trial counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's error, the outcome of the trial would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). Trial counsel is presumed competent, and the defendant has the burden of proving that the complained of conduct is not within sound trial strategy. *Id.* We disagree with defendant's argument that counsel's failure to object fell below an objective standard of reasonableness and conclude that defendant has failed to sustain his burden of proving that counsel's failure to object was not sound trial strategy.

Defendant also claims that counsel was ineffective for failure to investigate and develop an insanity defense, by introducing into evidence defendant's taped interview and transcript with the police, by proceeding with trial in defendant's absence, and by failing to communicate the possibility of a plea bargain. We have reviewed the record with respect to each of defendant's alleged instances of ineffective assistance of counsel and find that the complained of conduct was either not below an objective standard of reasonableness or was within sound trial strategy. *Stanaway, supra*. Further, the record does not establish whether a plea was offered, and thus, we are unable to review the issue.

Defendant next maintains that she was denied a fair trial by the trial court's questioning of a prosecution witness. We disagree. The trial court's questions neither unjustifiably aroused suspicion in the mind of the jury concerning the witness's credibility nor indicated any partiality. The questions were not intimidating, argumentative, prejudicial, unfair, or partial, *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996), and did not deny defendant a fair trial.

Defendant also argues that she was denied a fair trial because the prosecution impeached her with statements she made to the forensic psychiatrist. Defendant did not object to the line of questioning. Therefore, appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *People v Nantelle*, 215 Mich App 77, 86-87; 544 NW2d 667 (1996).

Pursuant to MCL 768.20a; MSA 28.1043(1), statements made by a defendant to a forensic center psychiatrist are inadmissible on any issue other than the defendant's mental illness at the time of the alleged offense. If a defendant elects not to assert the insanity defense at trial, statements made to a psychiatrist during a court-ordered examination are inadmissible. *People v Jacobs*, 138 Mich App 273, 276; 360 NW2d 593 (1984). On cross-examination, the prosecution asked defendant about her discussion with the forensic center psychiatrist. Since defendant had abandoned an insanity defense, the prosecution's impeachment of defendant regarding prior inconsistent statements made to the psychiatrist was improper.

However, a curative instruction could have eliminated any prejudicial effect. *Nantelle, supra*. If there had been a timely objection by defense counsel when the prosecutor asked defendant about her conversations with the psychiatrist, the trial court could have cautioned the prosecutor not to proceed along that line of questioning and could have instructed the jury to disregard the questions. The prosecution's impeachment of defendant was limited and not to such an extent that the jury was influenced.

Next, defendant argues that she was denied a fair trial by certain questions asked by the prosecutor during questioning of a witness and by comments regarding the answers given during closing arguments. Again, defendant did not object to the allegedly improper comments, and appellate review is precluded unless a curative instruction could not have eliminated the prejudicial effect or failure to consider the issue would result in a miscarriage of justice. *Nantelle, supra*. Because the prosecutor explained to the jury that the evidence was to be used only for credibility purposes, and the judge instructed the jury accordingly, our failure to review the issue will not result in a miscarriage of justice.

Lastly, defendant asserts that the trial court erred by failing to give her credit against her sentence for time spent on a tether. We disagree. While defendant may have been confined to her home, this is not the equivalent of jail as that term is commonly used and understood. *People v Smith*, 195 Mich App 147, 151-152; 489 NW2d 135 (1992); *People v Reynolds*, 195 Mich App 182, 183-184; 489 NW2d 128 (1992). Thus, defendant was not entitled to credit for time spent on a tether.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Barbara B. MacKenzie
/s/ Clifford W. Taylor

¹ A joint trial is frequently chosen when one incident is likely to be admissible as other bad acts evidence in the trial of the other incident. MRE 404(b).