

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RAYMOND MARTIN WILSON,

Defendant-Appellant.

UNPUBLISHED
October 24, 2000

No. 219004
Crawford Circuit Court
LC No. 98-001672-FC

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b); MSA 28.788(2)(1)(b) (penetration involving a person aged thirteen to sixteen by a relative). The trial court sentenced him to concurrent terms of 25 to 40 years, with credit for 201 days served. Defendant appeals as of right. We affirm.

Defendant asserts that his trial counsel's conduct amounted to ineffective assistance of counsel. Specifically, defendant argues trial counsel's failure to (1) object to certain hearsay statements, and (2) advise him of his right to request that lesser included offenses of CSC I be included in the jury instructions amounted to ineffective assistance of counsel. Because defendant did not raise the issue in the trial court and did not make a testimonial record regarding the alleged ineffective assistance, our review is limited to errors that are evident from the record. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999); *People v Plummer*, 229 Mich App 293, 308; 581 NW2d 753 (1998).

For defendant's claim that counsel's assistance was ineffective to succeed, defendant must satisfy this Court that counsel's performance was objectively unreasonable, and that he was prejudiced by counsel's defective performance to the extent that he was deprived of a fair trial. *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). This requires a showing that the errors made were so serious that the trial attorney was not operating as the "counsel" guaranteed by the Sixth Amendment. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *Rockey, supra*, 237 Mich App 76. Furthermore, this Court "will not substitute its judgment for that of

counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77.

Defendant argues that trial counsel's failure to object to hearsay statements made by one of the prosecution's key witnesses prejudiced his right to a fair trial because this witness corroborated the testimony of the victim. We disagree. This Court will not intervene where counsel's failure to object to these statements can be reasonably attributed to trial strategy. *Id.*

Defendant's second allegation of ineffective assistance of counsel relates to trial counsel's failure to advise him of the right to request that lesser included offenses be included in the jury instruction. The failure to request an instruction on a lesser included offense is generally considered to be a matter of trial strategy with which this Court will not interfere. *People v Armstrong*, 124 Mich App 766, 769; 335 NW2d 687 (1983); *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996). In the present case, defendant was questioned by the trial court on the record regarding his choice not to request that lesser included offenses be included in the jury instruction. Defendant's assertions on the record indicate that he was fully aware of his rights and his unequivocal waiver of these rights precludes a claim on appeal that counsel's assistance was ineffective. *Plummer, supra*, 229 Mich App 308.

Defendant also challenges on appeal the admission of certain evidence by the trial court. Defendant argues that the trial court did not adhere to MRE 403 when it admitted statements made by the victim that she voluntarily traveled to Michigan to report this crime and attend legal proceedings. We review a trial court's evidentiary rulings under MRE 403 for an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 59-60; 614 NW2d 888 (2000).

Generally, all relevant evidence is admissible. MRE 402. However, otherwise relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to one of the parties. MRE 403. Unfair prejudice does not arise from mere damaging evidence, as any relevant testimony will be damaging to some extent. *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified 450 Mich 1212; 539 NW2d 504 (1995), quoting *Sclafani v Peter S Cusimano, Inc.*, 130 Mich App 728, 735-736; 344 NW2d 347 (1983). Instead, unfair prejudice exists either where marginally probative evidence will be given undue or preemptive weight by the jury, substantially out of proportion to its logically damaging effect, or where it would be inequitable to allow the proponent of the evidence to use it. *Mills, supra*, 450 Mich 75-76.

All evidence offered by the parties is "prejudicial" to some extent, but the fear of prejudice does not generally render the evidence inadmissible. It is only when the probative value is substantially outweighed by the danger of unfair prejudice that evidence is excluded. [*Id.* at 75.]

We conclude that the trial court properly balanced the probative value of the evidence against the prejudicial effect to defendant. Although defendant may have suffered some prejudice from the admission of this evidence, this is not the type of prejudice that warrants the exclusion of evidence under MRE 403. *Mills, supra*, 450 Mich 75. We therefore hold that the

trial court did not abuse its discretion in admitting this evidence.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Michael R. Smolenski

/s/ William C. Whitbeck