

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN PATRICK EMERICK,

Defendant-Appellant.

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UNPUBLISHED  
December 3, 2002

No. 236065  
St. Clair Circuit Court  
LC No. 00-001829-FC

Before: O’Connell, P.J., and White and B.B. MacKenzie,\* JJ.

PER CURIAM.

Defendant appeals as of right his convictions of seven counts of first-degree criminal sexual conduct, MCL 750.520b, and one count of second-degree criminal sexual conduct, MCL 750.520c. The trial court sentenced defendant to seven concurrent prison terms of thirty to sixty years for the CSC 1 convictions, and a concurrent term of ten to fifteen years for the CSC 2 conviction. We affirm.

I

The two alleged victims were defendant’s daughters (referred to as T.E., dob 7-3-82, and K.W., dob 11-6-91), by different mothers (Carla Emerick and Christine Wickings, respectively). The information charged that the events occurred between 1988 and 1996. The first four counts pertained to T.E. and the last four to K.W. Both daughters testified at trial that their father engaged in repeated sexual acts with them. T.E. testified that the acts, including cunnilingus, fellatio, attempted intercourse and manual stimulation of him and by him, occurred from the time she was six until she was twelve, when she asked him to stop. K.W., aged nine at trial, testified that the acts occurred from when she was about age four to age six. Defendant denied all charges, maintained that both his daughters had denied any sexual activity with him in 1997, and asserted that T.E. had been induced to fabricate charges against him.

II

Defendant argues that the trial court’s determination to allow other bad act evidence, consisting of a 1985 out-of-state incident not resulting in a conviction, was an abuse of discretion that denied defendant a fair trial. The trial court ruled that the prosecutor would be allowed to

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

delve into the 1985 Florida matter to test defendant's credibility, despite defendant's objections on a number of grounds. Defendant argues that the evidence was not admissible under MRE 405 because neither defendant's character nor any trait of character were an essential element of the charged offenses. Nor was it admissible to attack his credibility under MRE 608 or MRE 609. Defendant argues that the evidence was manifestly that of other crimes or wrongs, i.e., character evidence, expressly prohibited by MRE 404(b)(1), that the prejudicial impact of a prior sexual case involving a minor child was devastating to the defense, and that the trial court's failure to address the issue of prejudice under MRE 403 constituted an abuse of discretion necessitating reversal.

This Court reviews the trial court's determination to admit evidence for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Preserved nonconstitutional error is not ground for reversal, unless it is more probable than not that the error was outcome determinative. *People v Cornell*, 466 Mich 335, 363-364; 646 NW2d 127 (2002).

The prosecutor does not assert that the evidence was admissible under any of the rules of evidence mentioned above. Rather, it is asserted that the evidence was admissible to impeach defendant's testimony, in response to the prosecutor's question whether defendant would agree "that a person who molests their children would do so in a way as not to be caught," that he could not say because he does not know about child molesters other than what they are accused of. We agree with defendant that the testimony regarding the nolo contendere plea in the 1985 Florida matter was of such marginal value in impeaching defendant's testimony that the probative value was vastly outweighed by the potential prejudice. The trial court undertook no balancing under MRE 403, despite defendant's requests that it do so, and admission of the evidence given the prejudice to defendant and its marginal probative value was an abuse of discretion. However, the court gave a cautionary instruction,<sup>1</sup> and it was for the jury to decide whether defendant's daughters' were credible. Given their testimony, we cannot say that it was more probable than not that the error in admitting the Florida matter was outcome determinative. *Cornell, supra* at 363-364; *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

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<sup>1</sup> On defendant's request, the trial court gave a limiting instruction:

You've heard evidence that was introduced to show that the Defendant was previously involved in an incident in Florida. This evidence was admitted for a limited purpose, that is, to consider whether you believe the Defendant testified as a truthful witness in response to the Prosecutor's witness—question. You must not consider this evidence for any other purpose. For example, you must not decide that it shows the Defendant is a bad person or the Defendant is likely to commit crimes. You must not convict the Defendant here because you think he is guilty of other bad conduct.

### III

Defendant next asserts that the joinder of the two cases in one information for purposes of charging him violated the court rules and was an abuse of discretion by the prosecutor that denied him a fair trial. Defendant notes that the acts underlying the four counts concerning K.W. began when she was four or five, i.e., 1995 or 1996, and that the acts complained of thus involve two individual complaining witnesses during two entirely different time-frames. Defendant acknowledges that he did not raise this issue below. MCR 6.120 allows for permissive joinder and provides for a defendant's motion to sever. Given defendant's failure to file such a motion, he has not shown a court rule violation, or prosecutorial abuse of discretion.

Defendant also asserts that his counsel's failure to object and move for severance constituted ineffective assistance of counsel and denied him a fair trial. This Court reviews ineffective assistance of counsel claims de novo to determine whether counsel's performance was so deficient as not to be functioning as contemplated by the Sixth Amendment, and whether there is a reasonable probability that the outcome of the proceeding would have been different but for counsel's errors. *People v Pickens*, 446 Mich 298; 521 NW2d 797 (1994).

Defendant had not established that counsel was ineffective in not filing a motion to sever. Even had a motion to sever been made and granted, the evidence pertinent to K.W. may have been admissible in a trial of the counts pertaining to T.E. to explain when T.E. first mentioned her father's abuse, and maybe even to show a scheme or plan. Counsel may very well have concluded that rather than face two trials, defendant would be better off trying to create reasonable doubt in one jury, resulting in an acquittal of all charges.

### IV

Defendant also asserts that prosecutorial misconduct denied him a fair trial. Claims of prosecutorial misconduct are reviewed de novo. *People v Pfaffle*, 246 Mich App 282, 288; 632 NW2d 162 (2001). 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). Appellate review of allegedly improper conduct is precluded if the defendant failed to timely and specifically object, unless an objection could not have cured the error or failure to review the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). 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. *Watson*, *supra* at 586.

In closing argument the prosecutor stated:

The term "dysfunctional family" doesn't even get close. You can put any psycho-babble you want to put on this. This is a place where there were no boundaries. There were no appropriate boundaries in that home. You know it and I know it. Everybody in this room knows it. This Defendant saw nothing wrong with bringing a buddy over to meet the family – his wife, his kids, his girlfriend who has his kid, who's pregnant at the time living in the same bed with them, her kids. Apparently he didn't have any problem with that being way off base. So does this person have appropriate boundaries when it comes to sexuality? Is he a person that sees a sexual relationship the way everybody else does?

Defendant takes issue with the prosecutor's arguments that the three shared the same bed, that Ms. Wickings becoming pregnant by defendant "maybe lends context to this whole scenario," and that "they were part of almost communal living, it sounds like, sharing beds and people coming into bedrooms in the middle of the night." Defendant argues that the remarks were improper character arguments, denied defendant a fair trial, and that reversal is appropriate because the comments went beyond warranted vigorous advocacy and served to inflame the jury.

We conclude that the prosecutor's remarks went beyond fair response to defense counsel's "dysfunctional family" argument and constituted improper character arguments. Defendant failed to object, however, and it appears that any prejudicial effect could have been cured by a timely instruction. Defendant was not denied a fair trial by the challenged prosecutorial remarks, given that T.E., Christine Wickings, and Carla Emerick all testified about the unusual living arrangements in the Rawlins Street house, including that the two women and defendant slept in the same bed and that Ms. Wickings became pregnant by defendant while living with defendant and his wife.

Affirmed.

/s/ Peter D. O'Connell  
/s/ Helene N. White  
/s/ Barbara B. MacKenzie