

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DUANE CLARENCE EDWARDS,

Defendant-Appellant.

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UNPUBLISHED

March 23, 2006

No. 258147

St. Clair Circuit Court

LC No. 04-000600-FH

Before: Owens, PJ, and Kelly and Fort Hood, JJ

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of mingling poison or a harmful substance with food or drink, MCL 750.436, and two counts of furnishing alcohol to a minor, MCL 436.1701. He was sentenced to eighty-eight months' to twenty-two years, six months' imprisonment for the poisoning conviction, and to sixty days in jail for each furnishing alcohol conviction.<sup>1</sup> We affirm.

Defendant first argues that the prosecution presented insufficient evidence to support his conviction under MCL 750.436. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecutor and determine whether a rational trier of fact could find the essential elements of the crime proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999). MCL 750.436 provides in pertinent part that a person shall not:

Willfully mingle a poison or harmful substance with a food, drink, nonprescription medicine, or pharmaceutical product, or willfully place a poison or harmful substance in a spring, well, reservoir, or public water supply, knowing or having reason to know that the food, drink, nonprescription medicine, pharmaceutical product, or water may be ingested or used by a person to his or her injury.

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<sup>1</sup> Although the trial court stated at sentencing that defendant was sentenced to sixty-three days, both the judgment of sentence and the amended judgment of sentence indicate that defendant was sentenced to sixty days, and a trial court speaks through its written orders. *People v Davie*, 225 Mich App 592, 600; 571 NW2d 229 (1997).

Defendant asserts the prosecution failed to present sufficient evidence that a poison or harmful substance was mingled with the victim's drink, that it was mingled willfully, and that it was defendant who mingled the alleged poison or harmful substance with the victim's drink. However, the victim testified defendant gave her a glass of root beer to drink, and he had prepared it outside her presence. She said defendant told her she needed to finish all the root beer before he would give her anything else to drink. She thought it tasted funny and poured it out at which time she saw a white, powdery substance in the bottom of the glass. There was evidence that she experienced hallucinations and memory loss over the course of the weekend. When she was taken to the hospital the following Monday, amphetamine, methamphetamine, and benzodiazepine were found in her body. Considering this evidence in the light most favorable to the prosecution, a rational fact-finder could find beyond a reasonable doubt that defendant willfully mingled a harmful substance with a beverage he gave to the victim.

Defendant next argues the trial court abused its discretion and denied defendant his due process right to a fair trial when it denied defendant's motion to sever the furnishing alcohol charges from the poisoning charge. Again, we disagree. This Court reviews the denial of a motion to sever related charges for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). To the extent that defendant's argument is premised on MCR 6.120(C),<sup>2</sup> he has preserved this issue for appellate review. To the extent that defendant's argument is premised on MCR 6.120(B), however, he has not preserved this issue, and review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

With regard to severance under MCR 6.120(C), a trial court does not abuse its discretion by denying a defendant's motion for severance when evidence pertaining to the severed charges would have been admissible in the other trial as evidence of intent. *Duranseau, supra* at 208. To be admissible under MRE 404(b), other-acts evidence generally must satisfy 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 Sabin (After Remand)*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). Showing a plan or system in doing an act is an expressly stated proper purpose in MRE 404(b). Further, evidence that about two weeks before the incident giving rise to the poisoning charge defendant had put alcohol (another substance illicit to give a minor) in two young girls' drinks was relevant to the poisoning charge with respect to the issue of intent. The probative value of this evidence was high and was not substantially outweighed by the danger of unfair prejudice. Accordingly, the trial court did not abuse its discretion when it denied the motion to sever. *Duranseau, supra*.

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<sup>2</sup> Effective January 1, 2006, MCR 6.120 was changed. Essentially, MCR 6.120(B) now relates to permissive joinder and severance, while MCR 6.120(C) now relates to mandatory severance. Because the trial court decided this issue before January 1, 2006, and the parties have argued the issue under the old rule, we will review the decision under the rule in effect at the time the decision was made. However, we note that because we are analyzing both permissive and mandatory severance, we would reach the same result under the current version of the rule.

With regard to severance under MCR 6.120(B), the court is required to sever charges only if they are unrelated. MCR 6.120(B). Charges are related if they are based on either the same conduct or on “a series of connected acts or acts constituting part of a single scheme or plan.” *Id.* Here, the two incidents giving rise to the three charges against defendant were part of a single scheme or plan. Defendant was accused of inviting young victims to his home when he knew no one else would be present and, on his own initiative, giving them illicit substances to ingest. Hence, defendant was not entitled to severance under MCR 6.120(B).

Defendant next argues the trial court abused its discretion and denied him his due process right to present a defense when it denied his request for discovery of the victim’s medical records and when it barred him from introducing evidence of the victim’s previous drug use. We disagree. This Court reviews a trial court’s decision regarding discovery requests for an abuse of discretion. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998). Similarly, the decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). This Court reviews de novo issues regarding due process violations. *People v Izarraras-Placante*, 246 Mich App 490, 493; 633 NW2d 18 (2001).

When a defendant can demonstrate a good-faith belief, grounded in articulable fact, that there is a reasonable probability that the privileged documents contain material information necessary to a defense, a trial court must conduct an in camera review of the records to ascertain whether they contain evidence that is reasonably necessary to the defense. *People v Stanaway*, 446 Mich 643, 649-650; 521 NW2d 557 (1994). A generalized assertion of a need to attack the credibility of an accuser does not establish the threshold showing sufficient to overcome the relevant statutory privileges. *Id.* at 650. Defendant’s motion for discovery included no affidavits. The motion stated merely that “[e]vidence has been discovered that [the victim] . . . had been a user of drugs prior to October 17-20, 2003.” Further, at the hearing on defendant’s motion, defendant stated only that he believed the victim “had other drug related problems” and admitted that he did not know this for certain. These assertions appear to be nothing more than the generalized assertions that the *Stanaway* Court specifically noted were insufficient to meet the burden of proof necessary to obtain in camera review of privileged documents. Accordingly, the trial court did not abuse its discretion when it denied the discovery motion.

The trial court also did not abuse its discretion when it barred defendant from introducing evidence of the victim’s alleged previous drug use. Defendant’s argument for introducing this evidence is, essentially, that because the victim allegedly used drugs in the past, she may have used them again, and this might provide an alternate source for the drugs found in her system, thus exculpating defendant. This purpose is exactly what MRE 404(b) seeks to exclude, i.e., evidence of a prior bad act to show action in conformity therewith. Therefore, we conclude that the trial court did not abuse its discretion when it barred defendant from introducing evidence of the victim’s alleged previous drug use.

Defendant next argues the prosecutor denied him his due process right to a fair trial when she engaged in various instances of misconduct. We disagree. Because defendant failed to preserve his assertions of prosecutorial misconduct, we review for plain outcome-determinative error affecting defendant’s substantial rights. *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003). 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 misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *Id.*

Defendant first asserts that the prosecutor elicited inaccurate testimony from her expert witness. When a prosecutor knowingly presents false testimony, there may be grounds for reversal of a defendant's convictions. *People v Canter*, 197 Mich App 550, 558; 496 NW2d 336 (1992). Looking at the challenged testimony in context, we conclude that the prosecution did not elicit inaccurate testimony. Moreover, evidence that some forms of benzodiazepine could be used as "date rape" drugs, benzodiazepine was found in the victim's system, and the victim's reaction was consistent with a form of benzodiazepine used for date rape, supported a reasonable inference that the victim was given a date rape drug. Defendant also asserts the prosecutor engaged in misconduct by asking the jury to speculate regarding a motive for the victim's poisoning. We find no error here; a prosecutor is allowed to argue reasonable inferences from the presented evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995).

However, we agree that when the prosecutor asserted that the victim had told the principal of her school that she had not used drugs, the prosecutor was arguing facts not in evidence. *Stanaway*, *supra* at 686. Moreover, in asserting that defendant mixed illicit drugs with either Kool-Aid or a strawberry wine cooler, the prosecutor was arguing facts not in evidence. *Id.* With regard to prosecutorial statements, "instructions are presumed to cure most errors." *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). In the present case, the court explicitly instructed the jury that it must decide the case on the admitted evidence, and the attorneys' statements and arguments were not evidence. Accordingly, defendant is not entitled to reversal of his convictions on this basis. Defendant also asserts that the cumulative effect of these errors denied him a fair trial. Because we find that the two errors were cured by the cautionary instruction, defendant's cumulative error argument is without merit. *People v Knapp*, 244 Mich App 361, 387-388; 624 NW2d 227 (2001).

We also reject defendant's argument that he was denied the effective assistance of counsel. A defendant bears the burden of overcoming the presumption that counsel was effective and must meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance was deficient as measured against objective reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial. *Id.* To demonstrate prejudice, he must show a reasonable probability that but for counsel's unprofessional errors the trial outcome would have been different. *Id.* at 302-303.

Defendant first asserts that trial counsel was ineffective in failing to object to the prosecutor's improper conduct. However, because the trial court effectively cured these errors by giving a cautionary instruction, *Abraham*, *supra* at 279, defendant has failed to demonstrate a reasonable probability that, but for this error, the trial outcome would have been different. Defendant also asserts trial counsel was ineffective when he elicited certain testimony during direct and cross-examination, when he failed to use certain evidence in conducting his cross-examination, and when he failed to obtain and present the testimony of an expert witness on defendant's behalf. It is presumed that decisions with respect to what evidence to present and whether to call or question witnesses are matters of trial strategy. *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002). We will not substitute our judgment for that of counsel on

matters of trial strategy, nor will we assess competence using hindsight. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). Accordingly, none of these alleged errors support an ineffective assistance claim.

Defendant further asserts that trial counsel was ineffective in failing to challenge the qualifications of the prosecution's expert witness in the field of toxicology. However, the record shows the prosecution's expert witness was qualified by both education and experience. MRE 702. Defendant also asserts trial counsel was ineffective when he failed to timely move to sever the furnishing alcohol charges from the poisoning charge and when he failed to move for a directed verdict of acquittal on the poisoning charge. Because defendant was not entitled to severance, and the prosecution presented sufficient evidence of the poisoning charge, counsel was not required to advocate the meritless positions. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2002).

Defendant also asserts trial counsel was ineffective in failing to challenge the sentencing judge's reliance on inaccurate information at sentencing. He consequently argues the trial court committed plain error in sentencing him because it based its sentence on inaccurate information. The specific statement defendant claims is inaccurate was the court's statement that the victim was given a date rape drug. However, as previously concluded, this was a reasonable inference that could have been drawn from the evidence. Therefore, we conclude that no error occurred on the part of the trial court or counsel with respect to this issue.

Affirmed.

/s/ Donald S. Owens  
/s/ Kirsten Frank Kelly  
/s/ Karen M. Fort Hood