

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM T. CARLESS,

Defendant-Appellant.

UNPUBLISHED

May 21, 2002

No. 227152

Jackson Circuit Court

LC No. 99-097252-FH

Before: Sawyer, P.J., and Murphy and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by jury of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a).¹ The trial court sentenced defendant to 24 months' to 15 years' imprisonment. We affirm.

Defendant first argues that he was denied the effective assistance of counsel for several reasons. We disagree. Because no *Ginther*² hearing has been held, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000).

To warrant a new trial based on a claim of ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness and that the representation so prejudiced him that he was denied a fair trial. *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999); *People v Pickens*, 446 Mich 298, 303, 338; 521 NW2d 797 (1994); *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). To demonstrate prejudice, a defendant must establish a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *Hoag, supra* at 6; *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). We will not second-guess the presumption that a challenged action might be considered sound trial strategy. *Id.* at 331-332.

¹ The jury acquitted defendant of two additional counts of CSC II.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

First, defendant argues that defense counsel was ineffective because he failed to properly introduce evidence that the victim, defendant's stepdaughter, previously had made allegations of molestation. Defendant asserts that defense counsel should have filed the appropriate pretrial motions to introduce this testimony. From the record before us, we cannot conclude that the evidence was excluded because defendant's trial counsel had not filed a pretrial motion seeking admission of this evidence. Indeed, this evidence is generally excluded because of the rape-shield law. See MCL 750.520j(1). To the extent that defendant suggests that defense counsel failed to explain to the jury how his stepdaughter could have known about sexual matters, his claim is without merit. Defense counsel elicited testimony from the victim's mother and defendant about the previous occasions where the victim had been caught watching a pornographic movie and reading pornographic magazines, and the victim admitted that she had watched a pornographic movie.

Second, defendant argues that defense counsel was ineffective because he failed to thoroughly investigate, interview witnesses, and prepare witnesses to testify. We disagree. Decisions concerning what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy, *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997), and the failure to call witnesses or present other evidence constitutes ineffective assistance of counsel only when it deprives the defendant of a substantial defense, *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996); *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Here, defendant has not demonstrated what the grandmother, who defense counsel did not call as a witness, would have testified to. Defendant also has not overcome the presumption that defense counsel did not call the grandmother to testify as a matter of trial strategy. Likewise, defendant has not shown that the results would have been different if defense counsel had interviewed his son and a neighbor before trial. Nor was defense counsel ineffective because he filed the witness list the day before trial. Before trial, defense counsel admitted that he had filed the witness list the day before, but also stated that it was not until the day before trial that defendant told him about the witnesses and whether they would testify. Further, there is no evidence that defendant was not allowed to call any of these witnesses to testify. Thus, even if defense counsel had acted unreasonably, there is no evidence that defendant was prejudiced. Further, to the extent that defendant argues that defense counsel failed to cross-examine prosecution witnesses and this evidenced unpreparedness, we disagree. As previously stated, whether to question witnesses is presumed to be trial strategy. *Mitchell, supra*; *Davis, supra*. Here, defense counsel cross-examined the victim, her mother, and the investigating officers, and called the victim's mother as a witness during defendant's case. We will not substitute our judgment for that of defense counsel regarding matters of trial strategy, nor will we assess counsel's competence with the benefit of hindsight. *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Defendant has failed to overcome the presumption that defense counsel's actions were trial strategy. *Williams, supra*.

Third, defendant argues that defense counsel was ineffective because he elicited the following testimony during the cross-examination of the investigating officer:

Q: All right. Deputy, and I know we spoke in the hallway so I'm not trying to backhand you on this one, but I think it's fair for you to answer this. Are there

times when you interview children, minors, in these type of cases where you will go to the Prosecutor and say I don't find that person credible?

A: Yes, there is. I've done that many times.

Defendant argues that this testimony was harmful because it implied that police officers found the victim credible because the case had made it to trial. We disagree.

It is self-evident that the police officers and the prosecutor found the victim credible because the case was being tried. Contrary to defendant's argument, the inquiry did not require comment on the credibility of any witness. Further, defense counsel was clearly trying to establish that there were cases where victims had fabricated allegations of criminal sexual conduct.

Fourth, defendant argues that his trial counsel was ineffective because he failed to object to the prosecutor's use of other "bad acts" during cross-examination of defendant. Even assuming that the evidence at issue is improper MRE 404(b) evidence, as defendant argues, it is entirely plausible that defense counsel elected not to object to this testimony as a matter of trial strategy. In other words, defendant's trial counsel may have concluded that it was better not to object to this testimony than to object and risk focusing the jury's attention on this testimony. See *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994) (this Court will not second-guess counsel's trial tactic of admitting guilt of a lesser offense).

Nevertheless, we are mindful of the fact that defense counsel could have objected out of the presence of the jury, eliminating the possibility of focusing the jury on the testimony, while alerting the trial court to that fact that this testimony was presented without notice as required by MRE 404(b)(2), and possibly, in violation of MRE 404(b)(1). Further, defendant's trial counsel could have asked the trial court to instruct the jury on the purpose of this testimony to ensure that it was not used by the jury as propensity evidence.

In any event, we conclude that defendant's ineffective assistance of counsel claim fails because defendant was not prejudiced by this testimony. Specifically, defendant explained during his testimony that, while he looked through the bathroom window at the victim and her friend, he did it as a "joke," which is consistent with defendant's overall defense of this case. In particular, defendant argued throughout the trial that he touched the victim's breasts "[i]n a playful fashion" to "pinch" and to "harass" her, rather than for sexual gratification. Therefore, defendant's response to the prosecutor's questions simply reiterated for the jury that defendant's actions were done for purposes other than for sexual gratification. Thus, defendant cannot demonstrate that, if defense counsel had objected to this questioning, the outcome of the proceedings would have been different. *Hoag, supra*.

Fifth, defendant argues that defense counsel was ineffective because he repeatedly denigrated defendant during closing argument. During closing argument, defense counsel referred to defendant as a "jerk", stated that defendant had exercised "poor judgment" at times, including when he called his stepchildren names, and characterized defendant's family unit as "very dysfunctional." According to defendant, these comments essentially confirmed the prosecutor's theory of the case or that defendant was a bad person.

We disagree with defendant that this conduct was unreasonable. We find this situation analogous to a situation where there is a concession of guilt on an offense by a defendant's attorney. In such a situation, we have explained that a concession of guilt is not ineffective assistance of counsel, unless it is a complete concession of guilt. See *People v Walker*, 167 Mich App 377, 382; 422 NW2d 8 (1988), overruled on other grounds 456 Mich 693 (1998) ("Where the evidence obviously points to defendant's guilt, it can be better tactically to admit to the guilt and assert a defense or admit to guilt on some charges but maintain innocence on others."); *People v Kryzstopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Here, defendant's trial counsel conceded that defendant was a "jerk," while stressing to the jury that this did not make defendant guilty of second-degree criminal sexual conduct. We find this trial strategy entirely appropriate. Thus, the concession that defendant did act inappropriately did not amount to unreasonable conduct. This is particularly true where, as here, defendant was found not guilty of two counts of second-degree criminal sexual conduct.

Sixth, defendant argues that defense counsel was ineffective because he failed to object to two separate instances of prosecutorial misconduct. Defendant argues that the first instance occurred during the prosecutor's cross-examination of defendant where the prosecutor inquired about defendant's opinion of the police officers' testimony.

Defendant is correct that it is not proper "for a prosecutor to ask a defendant to comment on the credibility of prosecution witnesses since a defendant's opinion on such a matter is not probative and credibility determinations are to be made by the trier of fact," *People v Knapp*, 244 Mich App 361, 384; 624 NW2d 227 (2001), quoting *People v Loyer*, 169 Mich App 105, 117; 425 NW2d 714 (1988), however, defendant was not so prejudiced by his trial counsel's failure to object that he was denied a fair trial, *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) (the test for prosecutorial misconduct is whether the defendant was denied a fair trial). Any error here was harmless where defendant clarified that witnesses may have misunderstood him and even offered an explanation for why there could have been confusion over his statement. *Loyer, supra* (error harmless where defendant "dealt rather well with the questions").

Defendant also argues that a second instance of prosecutorial misconduct occurred when the prosecutor misstated the law during closing argument. Defendant claims that the prosecutor's argument implied that the jury did not have to find that defendant possessed the intent to touch the victim's breasts for sexual gratification at the time the touching occurred.

We find no misconduct here because the prosecutor's statements were merely an attempt to respond to defense counsel's arguments. See *People v Watson*, 245 Mich App 572, 592-593; 629 NW2d 411 (2001) (the prosecutor's remarks must be evaluated in light of the defense counsel's remarks). During closing argument, defense counsel repeated to the jurors that they had heard no testimony that defendant committed these acts for sexual gratification. The prosecutor simply responded to this argument by pointing out that the evidence before the jurors would allow them to conclude that defendant did touch the victim for sexual gratification. The prosecutor reminded jurors that this was not one isolated incident. The prosecutor also told the jurors to look at the kind of touching that was involved. Finally, the prosecutor agreed with defense counsel that there had been no direct testimony that defendant had done this for sexual gratification, but also explained that defendant would never "announce" such a purpose. Thus, the prosecutor was simply responding to defense counsel's arguments.

Finally, with respect to his ineffective assistance of counsel claims, defendant argues that the cumulative effect of the alleged errors denied defendant a fair trial and warrants reversal. Because either no error occurred or no prejudice resulted from the errors, defendant was not denied a fair trial and reversal is not warranted. *Knapp, supra* at 87-88.

Next, defendant argues that he was denied a fair trial on the basis of the two previously described alleged instances of prosecutorial misconduct. As noted, defense counsel did not object in either of the two claimed instances. In order to avoid forfeiture of an unpreserved claim, the defendant must demonstrate outcome determinative plain error. *Watson, supra* at 586. We decide issues of prosecutorial misconduct case by case, examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. *Noble, supra* at 660. "The test is whether defendant was denied a fair trial." *Id.*

With regard to defendant's argument that the prosecutor's cross-examination of defendant was misconduct because he was forced to comment on the credibility of police officers, we agree that plain error occurred. *Knapp, supra* at 384. However, defendant has failed to demonstrate that this error was outcome determinative. Defendant dealt well with the prosecutor's questions. See *Loyer, supra* at 116-118. Moreover, had defense counsel objected to this questioning, a cautionary instruction would have cured any error. *Watson, supra; Knapp, supra* at 385. Contrary to defendant's alternative argument that the failure to object constituted ineffective assistance of counsel, we cannot say that defense counsel's failure to object so prejudiced defendant that he was denied a fair trial. *Hoag, supra.*

With regard to defendant's argument that the prosecutor misstated the law during closing argument, we find no error. In the context of defendant's ineffective assistance of counsel claim, we explained that this was not misconduct because it was an attempt to respond to defense counsel's arguments. See *Watson, supra* at 592-593. Thus, defendant has not demonstrated plain error.

Finally, defendant argues that the trial court erred in scoring ten points under offense variable 9 (OV-9), which deals with the number of victims involved. MCL 777.39. However, the prosecution points out that offense variable 13 (OV-13), which deals with continuing pattern of criminal behavior, was also improperly scored at zero instead of 25 points.³ MCL 777.43. Had the trial court properly scored both of these variables, the minimum sentence under the guidelines would have been greater than that imposed on defendant. Because the prosecution does not seek resentencing to increase defendant's sentence, we find the error of which defendant complains harmless. In fact, the scoring error is to defendant's benefit.

Affirmed.

/s/ David H. Sawyer
/s/ William B. Murphy
/s/ Joel P. Hoekstra

³ Cross appeal is not necessary to urge an alternative ground for affirmance. *Middlebrooks v Wayne Co*, 446 Mich 151, 166, n 41; 521 NW2d 774 (1994); *Boardman v Dep't of State Police*, 243 Mich App 351, 358; 622 NW2d 97 (2000).