

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT MICHAEL MORRIS,

Defendant-Appellant.

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UNPUBLISHED  
December 2, 2003

No. 242158  
Macomb Circuit Court  
LC No. 99-000871-FC

Before: Owens, P.J., and Fitzgerald and Saad, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (victim under the age of thirteen), and second-degree CSC, MCL 750.520c(1)(a) (victim under the age of thirteen). The trial court sentenced defendant to concurrent terms of twelve to thirty years in prison for the first-degree CSC conviction and ten to fifteen years in prison for the second-degree CSC conviction. We affirm.

I. Plea Agreement

Defendant contends that defense counsel was ineffective for failing to inform him of the sentencing guidelines range, which led to his rejection of the prosecutor's plea agreement. "Because defendant failed to move for a new trial or request a *Ginther*<sup>1</sup> hearing below, our review of this issue is limited to mistakes apparent on the appellate record." *People v Davis*, 250 Mich App 801, 368; 649 NW2d 94 (2002). "To establish ineffective assistance of counsel, a defendant must show (1) that the attorney's performance was objectively unreasonable in light of prevailing professional norms and (2) that, but for the attorney's error or errors, a different outcome reasonably would have resulted." *People v Werner*, 254 Mich App 528, 534; 659 NW2d 688 (2003).

We reject defendant's claim because the record reflects that, while defense counsel may have initially misstated the minimum sentence for defendant's conviction, before he rejected the plea offer on the record, defendant was clearly informed that he could face a minimum term of

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<sup>1</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

eight years in prison and a maximum term of life in prison. Defendant was further advised that he could serve “several years more” than the eight-year minimum. With this knowledge, defendant clearly rejected the plea offer and no other evidence indicates that defendant misunderstood the potential punishment for his conviction.

## II. Evidence of Prior Allegations

Defendant asserts that the trial court erred by excluding evidence of the victim’s prior allegations of assaults by staff members at her school. On the first day of trial, defense counsel asked the trial court to admit the testimony of Beverly Ratemberg, the victim’s school principal at the time of the CSC incidents. Defense counsel argued that Ratemberg investigated and could testify about the victim’s false allegations of assaults. The trial court denied admission under MRE 608 and defendant does not challenge that ruling on appeal. Rather, defendant argues that the trial court should have admitted the evidence under MRE 404(b). Defense counsel initially sought to admit the evidence under MRE 404(b) to show that the victim had a motive to be untruthful because she hoped to be removed from her home and sent to live with her grandmother. The record reflects that the trial court did not rule on the motion under MRE 404(b) and defense counsel did not press the issue after the evidence was excluded under MRE 608. Defendant now claims error by the trial court and, alternatively, argues that defense counsel was ineffective for failing to also argue that the evidence shows “a common plan or scheme of making fabricated assault claims against authority figures . . . .”

As this Court explained in *People v Magyar*, 250 Mich App 408, 413-414; 648 NW2d 215 (2002):

To be admissible under MRE 404(b)(1), bad acts evidence 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. A proper purpose is one other than establishing the defendant's character to show his propensity to commit the offense. [Citing *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), amended 445 Mich 1205 (1994).]

The evidence was inadmissible under MRE 404(b). The two incidents involved (1) the victim’s allegedly false accusation that a school staff member pulled a chair out from under her and caused her to fall, and (2) the victim’s allegedly false accusation that a school staff member grabbed her by the arm. This evidence is not logically relevant to establish a common scheme or plan in this case. The two assault allegations at school are not sufficiently similar to show a common plan or scheme to leave home and, defendant has failed to show that the accusations are at all similar to the incidents of sexual assault by a relative at home. Indeed, the evidence would only be relevant to suggest what is clearly prohibited by 404(b) - that the victim has a character for untruthfulness and that she acted in conformity therewith in accusing defendant in this case. The trial court did not err by excluding this evidence and defendant was not prejudiced by defense counsel’s failure to pursue this issue.

## III. Psychological Testing

In his Standard 11 brief, defendant alleges that he was denied a fair trial because the prosecutor refused to fulfill her agreement to allow psychological testing of the victim. As the prosecutor notes, however, the hearing transcripts clearly show that the prosecutor never agreed to a psychological examination of the victim and, indeed, she repeatedly objected to one. Therefore, the record does not support defendant's allegation of misconduct.

#### IV. Discovery of Victim Records

Defendant further asserts that the trial court erred by denying him discovery access to the victim's psychological records, school disciplinary records and records from New Directions of Detroit and Macomb Family Services. "Discovery in criminal cases . . . is left to the discretion of the trial court." *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994).

Defendant requested an *in-camera* review of the records because he alleged they would reveal inconsistent statements regarding the sexual assaults and would reveal instances of the victim's propensity to lie. The records at issue were privileged and they were not in the possession of the prosecutor; however, the prosecutor did not object to the trial court's *in-camera* review. Notwithstanding the prosecutor's waiver, the victim's counseling records are protected by an absolute privilege under MCL 330.1750 and should not have been produced without her direct consent. *Stanaway, supra* at 675-676, 683-684. However, because the records were already reviewed by the trial court, we will not further address that error.

As our Supreme Court explained in *Stanaway, supra* at 679 n 40, "[t]he determination to be made after looking at the record is whether the evidence is material and necessary to the defense, with material meaning exculpatory evidence capable of raising a reasonable doubt about the defendant's guilt." The record reflects that the trial court found no such evidence and, on appeal, defendant asserts no demonstrable facts or reasonable probability that the records were material to cast doubt on the trial court's review. "The defendant's generalized assertion of a need to attack the credibility of his accuser [does] not establish the threshold showing of a reasonable probability that the records contain information material to his defense sufficient to overcome the various statutory privileges." *Id.* at 650. Here, defendant was able to attack the victim's credibility and her reputation for truthfulness through his examination of other witnesses. Thus, defendant has not shown that the evidence would be anything but cumulative. Further, as the prosecutor observes, on the basis of the record and defendant's arguments on appeal, this discovery request amounted to nothing more than a fishing expedition.

#### V. Failure to Produce Witness

Defendant asserts that the prosecutor failed to exercise due diligence to produce a witness, Lisa Langford, in violation of MCL 767.40a(5). The record reflects that defense counsel requested the production of Langford on the fifth day of trial.<sup>2</sup> The prosecutor indicated

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<sup>2</sup> While defendant contends that he asked for the production of Langford on a prior date, March 5, 2002, the only evidence of that request is defense counsel's assertion on April 3, 2002 that his notes indicate that he made the request. Defendant has not produced any transcripts or motions to support that assertion.

that phone calls were made to locate Langford, but the trial court denied defendant's request for further assistance because the request was untimely and Langford's testimony would have been hearsay and merely cumulative of other testimony.

Langford was not a res gestae witness and she was not endorsed as a prosecution witness. Therefore, "the prosecution's burden under MCL 767.40a [was] to give initial and continuing notice of all known res gestae witnesses, identify witnesses the prosecutor intends to produce, and provide law enforcement assistance to investigate and produce witnesses the defense requests." *People v Long*, 246 Mich App 582, 585; 633 NW2d 843 (2001). As noted, defense counsel requested assistance in locating Langford during trial and the trial court denied the request because her testimony would be cumulative or otherwise inadmissible. Defendant does not challenge the trial court's decision or its reasoning. Accordingly, the record does not support a claim of prosecutorial misconduct and we decline to further address the issue.<sup>3</sup>

Affirmed.

/s/ Donald S. Owens  
/s/ E. Thomas Fitzgerald  
/s/ Henry William Saad

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<sup>3</sup> Because defendant has identified no actionable error, we reject his claim that the cumulative effect of several errors denied him a fair trial. *People v Sawyer*, 215 Mich App 183, 197; 545 NW2d 6 (1996).