

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN MARK LEDESMA,

Defendant-Appellant.

UNPUBLISHED

May 4, 2004

No. 245156

Lenawee Circuit Court

LC No. 01-009253-FC

Before: Wilder, P.J. and Hoekstra and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree criminal sexual conduct (CSC-I), MCL 750.520b(1)(f) (force or coercion) and fourth-degree criminal sexual conduct (CSC-IV), MCL 750.520e(1)(a) (victim between thirteen and sixteen and defendant at least five years older). The trial court sentenced defendant to six to twenty years in prison for the CSC-I conviction, and nine to twenty-four months in prison for the CSC-IV conviction. We affirm.

Defendant first argues that the trial court abused its discretion in excluding evidence regarding defendant's sexually transmitted disease. We disagree.

We review a trial court's ruling on evidentiary issues for an abuse of discretion. *People v Smith*, 456 Mich 543, 549; 581 NW2d 654 (1998). Relevant evidence means "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Generally, relevant evidence is admissible. MRE 402. But relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice . . ." MRE 403.

Here, defendant sought admission of a medical report showing treatment in 1997 for genital warts as proof that, if he had engaged in sexual intercourse with the victim, she would have noticed or contracted the warts. But the victim testified that she never saw defendant's penis, and therefore, even if defendant had warts on his penis at the time of the assault, the victim would not have noticed them. Furthermore, defendant was diagnosed with this disease two years before the assault occurred and the report indicated that many people do not have a visible reoccurrence and that the probability of a sexual partner contracting the disease could not be determined. Thus, even if defendant had the disease at the time of the assault, the victim

would not have necessarily contracted it. Therefore, the trial court did not abuse its discretion in excluding this evidence because it was irrelevant, and, even if it was relevant, it was more prejudicial than probative.

Defendant next argues that he was denied effective assistance of counsel when trial counsel failed to seek separate trials on the charges. We disagree.

Defendant did not move for a new trial or *Ginther*¹ hearing in the trial court, and therefore, we must review this issue on the basis of the existing record. *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). “Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law.” *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court’s findings of fact for clear error and questions of constitutional law de novo. *Id.*

To establish a claim of ineffective assistance of counsel, “a defendant must show that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial.” *Smith, supra* at 556. The defendant must overcome a strong presumption that counsel’s assistance constituted sound trial strategy. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The defendant must also show that there is a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 302-303.

Pursuant to MCR 6.120(A), “[a]n information or indictment may charge a single defendant with any two or more offenses. Each offense must be stated in a separate count. Two or more informations or indictments against a single defendant may be consolidated for a single trial.” Defendant only has an unqualified right to severance if the offenses are unrelated. MCR 6.120(B). Offenses are considered related if they are based on the same conduct or a series of connected acts or acts constituting part of a single scheme or plan. MCR 6.120(B). Our Supreme Court has summarized the three circumstances under which offenses may be deemed

related:

The commentary accompanying the Standards explains that “same conduct” refers to multiple offenses “as where a defendant causes more than one death by reckless operation of a vehicle.” “A series of acts connected together” refers to multiple offenses committed “to aid in accomplishing another, as with burglary and larceny or kidnapping and robbery.” “A series of acts . . . constituting parts of a single scheme or plan” refers to a situation “where a cashier made a series of false entries and reports to the commissioner of banking, all of which were designed to conceal his thefts of money from the bank.” [*People v Toby*, 401 Mich 141, 151-152; 257 NW2d 537 (1997).]

Applying these terms to the present case, we conclude that the charges against defendant were related. Defendant’s acts were “part of a single scheme or plan” to obtain sexual contact

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

with girls who were brought into his home through their friendship with defendant's son. Because the charged offenses were related, pursuant to MCR 6.120(B), the trial court would not have been required to sever the cases had defense counsel objected to consolidation or moved for severance. Therefore, defense counsel was not ineffective for failing to move for separate trials.

Defendant also argues that the prosecution's comments and questions regarding defendant's inadmissible prior bad act deprived him of his right to a fair trial. We disagree.

"Appellate review of allegedly improper conduct by the prosecutor is precluded where the defendant fails to timely and specifically object[.]" *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). During trial, defendant failed to object to the comments made by the prosecutor regarding defendant assaulting his son, and therefore, has failed to preserve this issue for review. As such, we will only review defendant's claim for a plain error affecting his substantial rights. *Id.*, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

In reviewing claims of prosecutorial misconduct, this court must examine the remarks in context to determine whether they denied defendant a fair trial. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995). Generally, prosecutors are accorded great latitude in their arguments and conduct. They are allowed to argue the evidence and all reasonable inferences therefrom as it relates to their theory of the case. *Id.* at 282.

Here, the direct examination of defendant's son by defense counsel revealed that defendant had hit his son. The prosecutor later questioned defendant about the date of the assault and the date his son moved out. The prosecutor also mentioned the assault in her closing argument. We find that these questions and comments were permissible. Once a defendant opens the door to an issue on direct examination, the prosecutor may then question the defendant on the matter during cross-examination. *People v Lukity*, 460 Mich 484, 498; 596 NW2d 607 (1999). Defendant was not prejudiced by the prosecutor's mention of the assault during her closing argument, as the issue had been fully discussed at trial.

Defendant also argues that the evidence was offered for an improper purpose under MRE 404(b). But, once again, defendant introduced the evidence, not the prosecution. Furthermore, MRE 404(b) involves the admission of other crimes, wrongs or acts to prove the character of a person. This evidence was not introduced as character evidence, but rather, to explain why defendant's son lost touch with the victims. Defendant is not allowed to assign error on appeal to something his own counsel deemed proper at trial. *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998). "To do so would allow a defendant to harbor error as an appellate parachute." *Id.* For these reasons, defendant has failed to show a plain error with respect to the admission of this evidence.

Defendant finally argues that he was denied the effective assistance of counsel when trial counsel failed to object to or take any measures to mitigate the damage caused by her own witness' outburst. We disagree.

As stated above, defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Toma, supra* at 302-303. Here, defendant claims that counsel was ineffective for failing to request a mistrial or a cautionary

instruction when his son testified that defendant had hit him. Defendant also claims counsel erred when she failed to object to the prosecution's exploitation of the information. But there is nothing on record that would indicate that the results of the proceeding would have been different without the evidence. There was ample evidence presented at trial to convince a jury beyond a reasonable doubt that defendant committed both alleged crimes. Therefore, defendant has failed to overcome the presumption that he received effective assistance of counsel.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly