

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PIENELL SPILLER,

Defendant-Appellant.

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UNPUBLISHED

May 10, 2005

No. 253393

Saginaw Circuit Court

LC No. 02-022174-FC

Before: Cavanagh, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under thirteen years of age), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under thirteen years of age). We affirm.

On appeal, defendant argues that he was denied due process and the effective assistance of counsel because the two informations were consolidated for a single trial and his attorney failed to move for severance. We disagree. Because a hearing was not conducted pursuant to *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973), our review is limited to mistakes apparent on the record.

To establish ineffective assistance of counsel, defendant must show that his counsel's performance fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel's caused errors, the outcome of the trial would have been different. See *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Defendant argues that his counsel was ineffective because he did not move for severance of the offenses for separate trials pursuant to MCR 6.120(B) and, consequently, he was denied due process. MCR 6.120(B) provides that severance of unrelated offenses for separate trials is required on defendant's motion. It further provides that offenses are related if they are based on (1) the same conduct, or (2) a series of connected acts or acts constituting a single plan or scheme.

Here, the trial court noted during oral argument on defendant's motion for a new trial premised on this ground that the charges against defendant arose from CSC conduct that occurred against both children, on the same evening, at about the same time, and while defendant was babysitting them. Defense counsel agreed with the trial court's rendition of facts. Further, the trial court's findings of fact were supported by the evidence. Because the offenses arose "out of substantially the same acts committed at the same time" and the same testimony would be

relied on for conviction, joinder was proper. See *People v Johns*, 336 Mich 617, 622-623; 59 NW2d 20 (1953).

However, even if the sexual abuse against each child occurred at different times, the motion for severance would have been denied under MCR 6.120(B)(2) because the offenses were related, i.e., acts constituting part of a single plan or scheme to sexually abuse these children, in their home, when their parents were not home, and under the pretext of babysitting them. See *People v Tobey*, 401 Mich 141, 151-153; 257 NW2d 537 (1977); *People v Miller*, 165 Mich App 32, 43; 418 NW2d 668 (1988). Thus, joinder was proper, defendant was not denied due process because of this joinder, and his counsel was not ineffective for failing to move for severance. Further, defendant's claim that his attorney was ineffective for failing to move for severance under MCR 6.120(C) is also without merit because the same witness testimony and evidence would be admissible in both cases, the potential for confusion was remote in this fairly straightforward case, and considerations of judicial economy and witness convenience weigh in favor of joinder. See *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997).

Next, defendant argues that fairness mandated severance of the charges because the evidence was unfairly prejudicial under MRE 403, i.e., "testimony of both counts, in its constant repetition, must have had a strikingly emotional impact upon the jury." We disagree. As discussed above, the same evidence would be relevant and admissible in both trials even if the charges were severed, including to rebut the defense of fabrication and to establish that the touching was not accidental. See *People v Sabin (After Remand)*, 463 Mich 43, 63; 614 NW2d 888 (2000). Evidence is not unfairly prejudicial merely because it is damaging. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, modified 450 Mich 1212 (1995). The probative value of the evidence was not substantially outweighed by the danger of unfair prejudice. Further, defendant has failed to establish plain error affecting his substantial rights with regard to this unpreserved issue, i.e., an error that was outcome determinative. See *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

Finally, defendant argues that he was denied due process because the prosecutor presented a rebuttal witness that had not been listed on the witness list. We disagree. Because defendant did not preserve this issue for appeal, our review is for plain error affecting his substantial rights. See *id.*

Pursuant to MCL 767.40a(3), thirty days before trial the prosecutor is required to provide defendant with a definitive list of witnesses it will produce to testify at trial. However, the prosecutor can add or delete witnesses from the list at any time upon leave of the court and with a showing of good cause or by stipulation of the parties. MCL 767.40a(4). Here, defendant's friend, Rhonda Hogg, showed up at the trial on her own accord and sent the trial judge a note requesting to testify on defendant's behalf. Defense counsel indicated to the court that he did not know anything about her until the day before when she left him a message at his office that she wanted to testify on defendant's behalf. The court gave defense counsel an opportunity to interview her in the hallway, after which counsel and defendant decided not to call her as a witness. The prosecution interviewed her out in the hallway as well and decided to call her as a rebuttal witness without objection. It is apparent that the trial court found good cause existed to permit amendment of the prosecution's witness list in light of the fact that the prosecution was unaware that this witness existed, just as defense counsel was unaware. The trial court did not abuse its discretion in finding good cause to support the late endorsement. See *People v Canter*,

197 Mich App 550, 563; 496 NW2d 336 (1992). In any event, in light of the overwhelming evidence of defendant's guilt, even if admission of the testimony was in error, defendant has failed to establish that the error was outcome determinative. See *Taylor, supra*.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Kathleen Jansen  
/s/ Hilda R. Gage