

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KEVIN LEE CHITTICK,

Defendant-Appellant.

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UNPUBLISHED

March 20, 2007

No. 264033

Lapeer Circuit Court

LC No. 04-008257-FC

Before: Sawyer, P.J., and Fitzgerald and Donofrio, JJ.

PER CURIAM.

A jury convicted defendant, a Lapeer County deputy sheriff, of 14 counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a), 5 counts of fourth-degree criminal sexual conduct, MCL 750.520e(1)(a), and one count of willful neglect of duty, MCL 750.478.<sup>1</sup> The trial court sentenced defendant to prison terms of 7 years, 11 months to fifteen years for each third-degree CSC conviction and 16 to 24 months for each fourth-degree CSC conviction, as well as a jail sentence of 270 days for willful neglect of duty. Defendant appeals as of right. We affirm.

Defendant first argues that he is entitled to dismissal of the charges or a new trial before a different prosecutor because the prosecutor reviewed materials from defendant's computer that involved attorney-client matters. Defendant did not move in the trial court for dismissal of the charges or for disqualification of the prosecutor. Rather, defense counsel, noting that the materials consisted primarily of inadmissible self-serving statements, asked that the prosecutor be prohibited from utilizing any of the attorney-client privileged information in any way during trial, and the prosecutor and the trial court agreed to this remedy. A defendant may not harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 214; 612 NW2d 144 (2000). "Because error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence, defendant has waived appellate review of this issue." *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Appellate review of such an error is precluded because "when a party invites the error, he waives his right to seek appellate review, and any

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<sup>1</sup> 17 of the CSC charges involve one victim, M, and 2 of the charges involve another victim, C.

error is extinguished.” *People v Jones*, 468 Mich 345, 352 n 6; 662 NW2d 376 (2003); see *Carter, supra* at 214-215.

In the alternative, defendant argues that he was denied the effective assistance of counsel by counsel’s failure to move to disqualify the prosecutor. Because an evidentiary hearing on defendant’s claims of ineffective assistance has not been held, this Court’s review is limited to mistakes apparent on the record. See *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

The record does not support defendant’s assertion that “the prosecution purposefully undermined the right to counsel to uncover defense strategy.” The police seized defendant’s computer pursuant to a search warrant. Defendant’s alleged comment that the computer contained privileged material did not transform the search pursuant to the search warrant into a search to uncover defense strategy. Indeed, in his supplemental brief, defendant implicitly acknowledges the lack of truth in this purported motive when he “stresses” that “Defendant is not saying that the police cannot seize documents which an accused says are privileged.”

Defense counsel recognized that the material at issue in this case consisted almost entirely, if not entirely, of defendant’s self-serving statements and that the statements would likely not be admissible at trial.<sup>2</sup> Defense counsel agreed that any impropriety in the prosecutor’s viewing of the privileged documents could be remedied by the prosecutor’s agreement not to use at trial any of the information gleaned from the documents. Conspicuously absent from defendant’s briefs is any proof that the prosecutor used any of this information at trial,<sup>3</sup> much less any proof that defendant was prejudiced by the use of the information.<sup>4</sup> Under these circumstances, defendant has failed to show plain error affecting his substantial rights and has failed to demonstrate that it is reasonably likely the outcome of the trial would have been different absent counsel’s agreement to the remedy. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999).

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<sup>2</sup> Defendant asserts in his supplemental brief that he was surprised on the first day of trial by the prosecutor’s pronouncement of the existence of the documents retrieved from defendant’s computer and that the prosecutor failed to provide discovery of these documents to defendant. The record does not support this statement. It is clear from defense counsel’s statements at trial that he was aware of the content of the documents.

<sup>3</sup> Indeed, defendant notes in his brief that “there might not have been any direct evidence introduced in the Case from the seizure.” Defendant suggests that that the prosecutor’s impeachment questions of defendant’s wife “serve as just one of numerous *possible* examples of where the Prosecutor incorporated areas identified by the Defendant and his wife in their memos to the attorney” (emphasis added). This suggestion, however, is mere speculation and cannot be confirmed by a review of the record.

<sup>4</sup> This Court is not privy to the content of the documents. Defendant’s “Supplemental Brief and Brief in Support of Remand” states that a copy of the seized documents was being filed under seal with this Court. However, this Court’s docket entries reveal that the Motion to Remand was denied, as was the Motion to File Certain Documents Under Seal, and the documents were returned to defense counsel.

Defendant also argues that he was denied a fair trial by the admission, during the cross-examination of defendant's wife, of hearsay as well as other acts evidence for which the prosecutor was required to file, before trial, a notice of intent under MRE 404(b)(2). Defendant failed to object in the trial court to admission of the challenged evidence. Therefore, defendant did not preserve this issue for this Court's review. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003). Therefore, the issue is reviewed plain error. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001). To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. *Carines, supra* at 763-764. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. *Id.* at 763. And, the defendant bears the burden of persuasion with respect to prejudice. *x Id.* Reversal is only warranted if the "error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Taylor*, 252 Mich App 519, 523; 652 NW2d 526 (2002).

MRE 404(b) provides:

(1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

(2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (1), for admitting the evidence.

Here, the prosecutor cross-examined defendant's wife with regard to whether her younger sister ever complained about defendant. She stated that her sister told her that defendant once made fun of her underwear and once put his hand on her belly, both of which made her sister uncomfortable. The response was not an admission of "other crimes, wrongs, or acts" as contemplated by MRE 404(b).<sup>5</sup> Nor is the testimony hearsay, as it was not offered to prove the truth of the matter asserted. Even assuming that the evidence was erroneously admitted, defendant has not been able to establish that his substantial rights were affected in light of the overwhelming evidence of guilt presented at trial. MRE 103(a). Even if the issue had been preserved, the error was harmless beyond a reasonable doubt because this brief testimony is not

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<sup>5</sup> Clearly, evidence that a teenage girl live in the house clearly is not evidence of "other crimes, wrongs, or acts" under MRE 404(b).

likely to have changed the jury's verdict in the six-day trial. *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995).

Defendant's claim that his trial counsel was ineffective for failing to object to the testimony is likewise without merit. "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). To overcome this presumption, a defendant must show that his counsel's performance was deficient and that there is a reasonable probability that, but for counsel's defective performance, the result of the proceedings would have been different. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). A defendant must also overcome the strong presumption that counsel's performance constituted sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

Even assuming that the evidence at issue was improper MRE 404(b) evidence, as defendant argues, it is entirely plausible that defense counsel elected not to object to this brief 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. *Matuszak, supra* at 58. Defendant has failed to overcome the presumption that counsel's failure to object was sound trial strategy.

Next, defendant maintains that the opinion testimony of C's brother that defendant was a "sicko" and a "pedophile" was erroneously admitted. Defendant did not object to the admission of this evidence. Thus, this issue is reviewed for plain error affecting defendant's substantial rights. *Carines, supra*.

The witness testified that he observed defendant engage in childish play with C and M. He observed defendant snuggling on the couch with M while C was present. He also observed blankets and sleeping bags in the hayloft and, when he walked into the barn, M jumped up out of the hayloft. Defendant was in the hayloft with M. The prosecutor asked the witness if he had an opinion of defendant based on his observations. The witness indicated that he did not like defendant and that he "seemed weird, like a sicko, like a pedophile." When the prosecutor next attempted to ask the witness about his opinion, defense counsel objected on the ground that the prosecutor needed to lay a foundation for the opinion. The prosecutor then asked the witness what led to this conclusion that defendant was a "sicko." The witness stated, "He's like 35 hanging out with little girls and buying them gifts and taking them for rides."

MRE 701 states that when a witness "is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." "Recent panels have liberally applied MRE 701 in order to help develop a clearer understanding of facts for the trier of facts." *People v Oliver*, 170 Mich App 38, 50; 427 NW2d 898 (1988), modified on other grounds 433 Mich 862 (1989). Thus, lay witnesses may testify to their opinions on matters that are not "overly dependant upon scientific, technical, or other specialized knowledge." *Id.*, quoting *Mitchell v Oldford & Sons, Inc*, 163 Mich App 622, 629-630; 415 NW2d 224 (1987); see also *People v McLaughlin*, 258 Mich App 635, 657-659; 672 NW2d 860 (2003).

Defendant does not object to the witness's testimony regarding the facts underlying his opinion but, rather, the label that the witness placed on his perception of defendant's behavior. But the prosecutor laid a foundation for the witness's opinion, which was rationally based on his perceptions and was helpful to the determination of a fact in issue – i.e., defendant's conduct with a minor. Defendant has failed to establish plain error affecting his substantial rights.

Alternatively, defendant argues that his trial counsel's failure to object to the admission of the challenged evidence and to request a curative instruction amounted to ineffective assistance of counsel. Defendant has failed to show that there is a reasonable probability that, but for counsel's failure to object to the witness's opinion of defendant, the result of the proceedings would have been different. *Pickens, supra*.

Defendant also argues that the trial court erred when it allowed M's uncle, a police officer, to offer an opinion on the believability of M's allegations. The decision whether to admit evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). Even if a trial court abuses its discretion in admitting or excluding evidence, reversal is warranted only if it affirmatively appears, after review of the entire record, that it is more probable than not that the error was outcome determinative. *Id.* at 495-496.<sup>6</sup>

A lay witness may not give an opinion on the believability of the complainant's allegations, *People v Smith*, 425 Mich 98, 113; 387 NW2d 814 (1986), because the jury has the sole authority to determine whether a particular witness was credible, *People v Buckey*, 424 Mich 1, 17; 378 NW2d 432 (1985). Further, a witness is not permitted to comment on the credibility of another witness. *Id.* While it was improper for the prosecutor to ask the witness whether he initially believed M, the witness never specifically responded to the question, stating only that he was "skeptical." When the witness was asked whether his opinion changed after talking with M, the prosecutor withdrew the offense question after a timely objection was raised. Since the witness did not specifically answer the question, no inadmissible evidence was received.<sup>7</sup> A prosecutorial question itself is not evidence.

Defendant also argues that the trial court might have erred in denying his request for production of the victim's counseling records with Drs. Grosenbach and Cook. Defendant does not dispute that the victim's counseling records are privileged. In *People v Stanaway*, 446 Mich 643, 649-650; 521 NW2d 557 (1994), the Court held that where 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 his defense, a trial court must

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<sup>6</sup> Defense counsel did not object when the prosecutor asked the witness whether he initially believed M at the commencement of his discussions with M and whether the witness responded that he was skeptical. Defense counsel did object when the prosecutor asked the witness whether his opinion changed during the discussions, after the witness stated that his opinion did change but before the witness expressed the manner in which his opinion changed.

<sup>7</sup> Although the witness stated that his opinion changed, he did not state how his opinion changed.

conduct an in camera review of the records to ascertain whether they contain evidence that is reasonably necessary to the defense.

In this case, M testified that she was seeing a therapist, Dr. Grosenbach, because she was having trouble sleeping at night and was suffering from anxiety. She later described a time while turkey hunting with her father that she momentarily worried, because of her experiences with defendant, that her father might make a sexual advance. Before cross examining M, defense counsel, outside the presence of the jury, requested the trial court to conduct an in camera interview of Dr. Grosenbach's records to determine if the records contained information relevant to the defense.<sup>8</sup> Defense counsel simply stated that he was not aware that M "has been seeing a counselor about an incident with her father turkey hunting." The court agreed to conduct an in camera examination of the records. Defense counsel then expressed that he was particularly concerned with whether the records revealed any evidence that someone else might have molested M. When M later revealed that she had seen another therapist, Dr. Cook, the trial court expanded its ruling to include review of Dr. Cook's records.

After conducting an in camera review of Dr. Grosenbach's records the court found that the records contained no information relevant to the issues before the court and made a determination that "there was nothing in here that should be discoverable." The Court sealed the records of both Dr. Grosenbach and Dr. Cook for purposes of appeal.

Defendant argues that this Court must make its own in camera review of the counselors' records to determine whether the trial court properly exercised its discretion.

MCR 6.201(C), which governs prohibited discovery, provides in relevant part:

(1) Notwithstanding any other provision of this rule, there is no right to discover information or evidence that is protected from disclosure by constitution, statute, or privilege, including information or evidence protected by a defendant's right against self-incrimination, except as provided in subrule (2).

(2) If a defendant demonstrates a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense, the trial court shall conduct an in camera inspection of the records.

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(c) Regardless of whether the court determines that the records should be made available to the defense, the court shall make findings sufficient to facilitate meaningful appellate review.

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<sup>8</sup> A side bar was conducted before the court went back on the record outside the presence of the jury. Of course, this Court is not privy to the content of that discussion.

(d) The court shall seal and preserve the records for review in the event of an appeal.

(i) by the defendant, on an interlocutory basis, if the court determines that the records should not be made available to the defense . . .

Defendant did not file an interlocutory appeal of the court's determination that the records did not contain discoverable material.

Although the trial court agreed to conduct an in camera review of the records, it does not appear that defendant demonstrated "a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense." Defendant did not substantiate any facts to support a belief that the records contained information material to the defense. Nonetheless, after a review of the records of both Dr. Grosenbach and Dr. Cook we find that the trial court properly denied defendant discovery of the records. None of the information contained in the records is material to the defense. That is, the information was not sufficient to give rise to a "reasonable probability" that, had the defense been granted access to the records, the trial's outcome would have been different. *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

Lastly, defendant asserts that this Court should remand this case to the trial court to allow defendant to bring a motion for a new trial based on the "manifest weight of the evidence." He contends that this issue must first be decided by the trial court because the trial court is permitted to act as a "thirteenth juror" when deciding such motions. Defendant does not suggest that the evidence presented was insufficient to support the convictions. Indeed, he recognizes that the victims' testimony, if believed, was sufficient to support the convictions. In support of his argument, defendant cites *People v Herbert*, 444 Mich 466, 473; 511 NW2d 654 (1993), overruled *People v Lemmon*, 456 Mich 625; 576 NW2d 129 (1998). In *Herbert*, the Court recognized the authority of a court to act as a thirteenth juror and direct a verdict of acquittal based on this fact. But the *Lemmon* Court overruled *Herbert*.

A trial court may grant a motion for a new trial based on the great weight of the evidence "only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Lemmon, supra* at 627. But the trial judge does not sit as the "thirteenth juror" and "may not repudiate a jury verdict on the grounds that he disbelieves the testimony of the witnesses for the prevailing party." *Id.* at 636 (citation and internal punctuation omitted). Generally, "[c]onflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial." *Id.* at 647. Thus, absent exceptional circumstances, the trial judge may not substitute its view of witness credibility for that determined by the jury. *Id.* at 642. Exceptional circumstances may occur when "the testimony contradicts indisputable physical facts or laws," *id.* at 643, "where testimony is patently incredible or defies physical realities," *id.* at 643-644, or "where a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror." *Id.* at 644.

Here, the evidence consisted primarily of testimony. In order to find that the jury's verdict was against the great weight of the evidence, the trial court would have to determine that the witnesses presented by the prosecution were not worthy of belief. None of these witnesses

gave testimony that was either contradicted by indisputable physical facts or inherently implausible. The question of the witnesses' credibility is properly left to the jury as required by *Lemmon*. Thus, remand for the trial court to consider a motion for new trial based on the great weight of the evidence is not warranted.

Affirmed.

/s/ David H. Sawyer  
/s/ E. Thomas Fitzgerald  
/s/ Pat M. Donofrio