

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL ELON JOHNSON,

Defendant-Appellant.

UNPUBLISHED

October 16, 2001

No. 221042

Alpena Circuit Court

LC Nos. 98-005143-FC

98-005144-FC

98-005145-FC

Before: K. F. Kelly, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial in three separate cases, defendant was convicted of a total of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) and one count of second-degree CSC, MCL 750.520c(1)(a). Defendant was sentenced as an habitual offender, second offense, MCL 769.10(1)(b), to concurrent terms of life imprisonment for each of the CSC I convictions, and fifteen to 22-1/2 years' imprisonment for the CSC II conviction. He appeals as of right. We affirm.

The prosecutor presented evidence that defendant sexually molested three young girls, his adopted daughter and two daughters of defendant's girlfriend who shared the home with defendant, between early December 1997 and early January 1998.

I. Evidentiary Issue

Defendant first argues that the trial court erred in denying defense counsel's request to call Dr. Dana Panknin, to whom the emergency-room physician referred the three complainants for testing for sexually transmitted diseases. We disagree. The decision whether to admit evidence is within the trial court's discretion and is reviewed on appeal for an abuse of discretion. *People v Bahoda*, 448 Mich 261, 288; 531 NW2d 659 (1995). This includes a trial court's conduct of discovery. See *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

At a pretrial hearing, defense counsel expressed interest in showing that one of the victims had a sexually transmitted disease, and stated that "the records I have from Panknin in the hospital—Panknin, in particular, suggests that there's genital herpes in one of the girls."

Defense counsel thus indicated that he had records from Dr. Panknin in hand, and additionally showed no desire to make further use of the doctor.

Then, near the end of proofs, defense counsel asked the trial court to endorse Dr. Panknin as a witness, asserting a need to elicit information from Dr. Panknin not included within hospital records presently available to counsel. In particular, counsel wished to use Dr. Panknin to confirm the emergency-room physician's finding of no damage to the hymen of one complainant, or to the anus of another, in order to make the point that the physical trauma reported by the prosecutor's expert who saw those two girls six months after the fact must have occurred after defendant was incarcerated in connection with the present case. Counsel further suggested that the jury could suppose that the emergency-room physician overlooked evidence of penetration that the later expert found, but that the jury was less likely to believe that two experts who saw the girls close in time to the alleged abuse would have overlooked any such evidence had it been there.

The trial court demanded an offer of proof concerning what defense counsel hoped to elicit from Dr. Panknin. The one difference defense counsel indicated existed between the findings of the emergency-room physician and Dr. Panknin was that the former had found one girl's hymen intact whereas the latter found it mildly inflamed. As defense counsel conceded at the time, Dr. Panknin's finding in that particular was more inculpatory than exculpatory. The trial court additionally established that defense counsel had the pertinent medical records in hand. The court further elicited from defense counsel that what he was really after was a second expert to confirm certain of the findings of the first expert. The trial court disallowed the witness on the ground that it would be redundant and would cause undue delay in the proceedings.

A trial court has the discretion to exclude relevant evidence for "considerations of . . . waste of time, or needless presentation of cumulative evidence." MRE 403. An abuse of discretion occurs only where a court's action is so violative of fact and logic as to constitute perversity of will or defiance of judgment. *People v Laws*, 218 Mich App 447, 456; 554 NW2d 586 (1996).

On appeal, defendant argues that a second expert confirming a lack of physical evidence of sexual activity shortly after the alleged assaults would have tended to persuade the jury to rely more on that earlier diagnosis than on the findings of the prosecutor's expert, who examined two of the victims six months later. Although this argument has some plausibility, the matter rested with the trial court's discretion, and the court's rejection of the argument did not constitute a perversity of will or defiance of judgment. Because the standard of review for an abuse of discretion is so deferential, and because a trial court is explicitly authorized by the court rules to disallow cumulative evidence, the trial court's having extracted from defense counsel in this instance that the witness counsel wished to bring would provide testimony cumulative to that of an expert already heard, except in one particular that tended to help the prosecution, renders the court's decision to exclude that second witness unassailable on appeal.¹

¹ Further, to the extent that Dr. Panknin would have spoken to a lack of physical evidence of penetration, the exculpatory nature of that evidence would have been slight, considering that penetration for purposes of criminal sexual conduct may be very slight, not necessarily of a
(continued...)

II. Assistance of Counsel

Defendant alternatively argues that defense counsel's failure to list Dr. Panknin as a prospective witness in the course of discovery rendered defense counsel ineffective. We disagree.

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To obtain relief, a defendant must not only identify attorney error, but additionally must show that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair or unreliable. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

There were obvious strategic reasons for not listing Dr. Panknin as a witness in the first instance, in that her findings included one instance of mild vaginal inflammation that the emergency-room physician had apparently missed. This would not only have tended to remind the jury that the prosecutor's expert also found indications of sexual activity that the emergency-room physician had possibly missed, but it would have added to the body of evidence tending to prove that sexual abuse took place. Under these circumstances, we cannot conclude that counsel's failure to endorse Dr. Panknin constituted a failure to perform at an acceptable standard of competence.

Further, the record does not suggest that the outcome would have been different had Dr. Panknin been called as a witness. The testimony from the three child witnesses was compelling, as was expert testimony that, in the first place, the sexual conduct alleged would not necessarily result in physical evidence, and, in the second place, that there was in fact some physical evidence. A third expert testifying that the hymens were intact, but that one vagina was mildly inflamed, would have comported with, and in fact bolstered, the prosecution's case. For these reasons, this claim of ineffective assistance of counsel must fail.

Defendant also alleges ineffective assistance in connection with defense counsel's failure to object when the trial court instructed the jury that, on the two counts of first-disagree CSC, the jury was to consider the lesser included offense of second-degree CSC only if the jury found defendant not guilty of first-degree CSC. Indeed, the court should have told the jury that it was free to consider second-degree CSC upon finding defendant not guilty of CSC I, *or* if it could not agree on CSC I. *People v Handley*, 415 Mich 356, 361; 329 NW2d 710 (1982). Although *Handley* sets forth a clear rule to this effect, in that case the Supreme Court nonetheless declined to grant relief because there had been no objection at trial. *Id.* at 360. In recognition of the latter, defendant here eschews asking for relief because of instructional error and instead frames the issue as one of ineffective assistance of counsel.

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nature that would leave physical evidence.

In arguing that it is likely that the result would have been different but for counsel's oversight, defendant points out that the question of penetration was much at issue, and asserts that the jury may have been precluded by the imperfect instructions from ever considering the lesser offense. Defendant overstates the significance of the error.

Although the effect of the instructional error was to make it harder for the jury to reach the question of the lesser charge of CSC II, this minor error should have had little, if any, effect on the deliberations, and none on the verdict. In light of the testimony from the two victims plainly stating that defendant had penetrated them, and in light of some medical evidence to that effect, it seems unlikely that the jury initially failed to agree on CSC I but then convicted of CSC I as the result of excessively belabored deliberations in that regard without considering CSC II.

"It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998). Thus, because the jury was instructed that conviction required unanimous agreement that each element was proved beyond a reasonable doubt, the jury's agreement on CSC I means that the prosecutor proved those elements and that consideration of CSC II was unnecessary.

Because defendant has failed to prove that the result would have been different but for defense counsel's error, this additional claim of ineffective assistance of counsel must also fail.

III. Additional Instructional Error

Defendant argues that the trial court's explanation why one of the complainants was unavailable to appear for trial tended to credit the allegations against defendant. We agree that the court erred in announcing its conclusion that the witness had suffered a loss of memory because of physical or psychological conditions or factors, but conclude that the court's other instructions rendered its error harmless.

A criminal defendant is entitled to a neutral and detached magistrate. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). The test for determining whether a judge's comments pierced the veil of judicial impartiality is whether the comments may well have unjustifiably aroused suspicion in the minds of the jurors as to a witness' credibility, and whether the indications of partiality could have influenced the jury to the defendant's detriment. *People v Conyers*, 194 Mich App 395, 405; 487 NW2d 787 (1992).

In this case, when the jury was brought in to receive the reading of the transcript of the complainant's testimony from the preliminary examination, the trial court instructed the jury, in pertinent part, as follows:

The third alleged victim in this case . . . was on the witness stand yesterday, and as a result of her testifying yesterday, before me, in your absence, I came to the conclusion that she has suffered a lack of memory because of psychological or physical condition, or combination of both.

* * *

. . . I've made that decision, and that's my job to make that as the judge. And if I'm wrong in making that, we've explained during the orientation that there's three appellate judges looking over my shoulder, and the Supreme Court. I've made that decision that she has had a lapse of memory, either because of psychological or physical factors.

The trial court's two statements of its belief that the witness' lack of present memory was caused by psychological or physical conditions or factors are troubling. Although the court did not state specifically that the psychological or physical pressures acting on the witness stemmed from defendant's sexual abuse of her, because this was the essence of the question before the jury, the jury could hardly have failed to sense that a connection might exist.

However, contrary to defendant's arguments on appeal, the court did have an evidentiary basis for its conclusion. On the separate record, the witness had stated that she had great trouble remembering the particulars of defendant's conduct at issue "[b]ecause I blocked them out of my mind and I had bad dreams and stuff about it." And the court specifically commented, outside of the jury's presence, that the witness' demeanor revealed great stress in the matter. Still, the question just what defendant had done to the girl was wholly for the jury to decide, and the trial court should not have, impliedly or otherwise, expressed any opinion about it.

Our inquiry does not end there, however. This Court reviews jury instructions in their entirety, not piecemeal, to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). In this case, the trial court instructed the jury that it must decide the case solely on the basis of the evidence, and that the court's own comments and rulings were not evidence. More to the point, the court admonished the jury,

during the course of trial, if you think I've conducted and made comments or any statements that would express to you my opinion as to the guilt or innocence of the defendant, you should disregard that, because that would be improper on my part. So if you think I have been telegraphing any opinion to you—I don't think I have—please disregard it if you think so. Because you, and only you, are the judges of the facts in this case . . .

Further, the trial court instructed the jury that the one child witness testified only through the reading back of her preliminary examination testimony "because we had determined that she was not available for *legal* purposes" (our emphasis), and added that the jury was to consider her testimony only as it would that of any other witness. The court additionally admonished the jury to apply all jury instructions as a whole. Again, jurors are presumed to follow their instructions. *Graves, supra* at 487.

A defendant pressing a claim of preserved, nonconstitutional error "has the burden of establishing a miscarriage of justice under a 'more probable than not' standard." *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (appendix) (1999), citing *People v Lukity*, 460 Mich 484; 596 NW2d 607 (1999). In this case, the trial court's abundance of proper instructions concerning the need to consider only the evidence, and on how to consider both the court's own comments plus the preliminary examination testimony of the one complainant, should have well enough counterbalanced any inclination of the jury to infer guilt from the court's gratuitous announcement that the witness had lost her memory because of psychological or physical

conditions or factors. Because it is not more likely than not that the error actually influenced the verdict, we conclude that the error was harmless.

IV. Sentencing

Finally, defendant argues that his life sentences constitute an abuse of discretion. We disagree. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

First-degree CSC is punishable by imprisonment for life or any term of years. MCL 750.520b(2). Additionally, defendant was sentenced as a second habitual offender, which, in this instance, likewise authorized a sentence of life or any term of years. MCL 769.10(1)(b).

Defendant points out that the sentencing guidelines² recommended a minimum range of 180 to 360 months, or life, and, naturally, emphasizes the short end of the recommendation and de-emphasizes the high end. In any event, because the recommendation under the guidelines included natural life, were the guidelines applicable the sentence would be presumptively proportionate for that reason alone. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Beyond that, defendant was sentenced as an habitual offender, and "appellate review of habitual offender sentences using the sentencing guidelines is inappropriate." *People v Gatewood*, 450 Mich 1025; 456 NW2d 252 (1996).

We further note that the specific recommendation within defendant's presentence investigation report is that, in the interest of protecting the children of this state, defendant be imprisoned for life.

Defendant relies on *Milbourn, supra*, in which our Supreme Court stated, "Where a given case does not present a combination of circumstances placing the offender in either the most serious or least threatening class with respect to the particular crime, the then trial court is not justified in imposing the maximum or minimum penalty, respectively." *Id.* at 654. See also *People v Cramer*, 201 Mich App 590; 507 NW2d 447 (1993) (finding a sixty-year minimum sentence excessive for a defendant who sexually molested a twelve-year-old boy and also admitted having sex with his girlfriend's children). In arguing that the present case is not representative of the most serious of criminal sexual conduct, defendant points out that he came to court with but a scanty criminal record. However, because that record included a 1986 conviction for sexual misconduct involving a minor, it tends to confirm the accounts of the present victims that defendant's sexual predation has been pervasive over a period of years.

Punishing the offender and protecting society are legitimate considerations in sentencing. *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972), citing *Williams v New York*, 337 US 241; 69 S Ct 1079; 93 L Ed 1337 (1949). In this case, defendant's history of sexually molesting

² Because the conduct for which defendant was convicted occurred before January 1, 1999, our discussion concerns the judicial guidelines promulgated by the Michigan Supreme Court, as opposed to the legislative guidelines enacted pursuant to MCL 769.34.

several youngsters over a period of years suggests that he is a danger to children, which is a compelling reason to keep him in secure confinement indefinitely. Further, the rape of one's own minor child "represents one of the most egregious forms of the crime of first-degree criminal sexual conduct because of the helplessness and harm to the victim when so abused by a parent," and "represents an act that has been historically viewed by society and this Court as one of the worst types of sexual assault." *People v Sabin (On Second Remand)*, 242 Mich App 656, 662-663; 620 NW2d 19 (2000). Criminal sexual conduct taking this particularly pernicious form may thus justify "imposing a sentence approaching the maximum allowed under the law." *Id.* at 663 (affirming a life sentence for CSC I, habitual offender second).

For these reasons, we agree with the trial court that the circumstances of this offender and these offenses warrant the sentences imposed.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald