

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL LORENZO MARTIN,

Defendant-Appellant.

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UNPUBLISHED

March 15, 2005

No. 249227

Wayne Circuit Court

LC No. 02-012080-01

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

PER CURIAM.

Defendant was convicted by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(f), and was sentenced to concurrent prison terms of three to ten years. He appeals as of right. We affirm.

Defendant first argues that the trial court erroneously permitted the prosecutor to file an amended information adding a third count of first-degree criminal sexual conduct after closing argument concluded. Because defendant did not object at trial to the submission of three counts of first-degree criminal sexual conduct to the jury, this issue is not preserved for appellate review. Therefore, our review is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Reversal is warranted only if the error resulted in conviction despite defendant's actual innocence or if it seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of his innocence. *Carines*, *supra* at 763; *Knox*, *supra* at 508.

Defendant erroneously states that the prosecutor filed an amended information during trial. A review of the record shows that the third charge of first-degree criminal sexual conduct was added at the conclusion of defendant's preliminary examination, and defendant was bound over on three charges of criminal sexual conduct in the first degree. Defendant's primary concern appears to be the late notice to the jury of the third charge. At the beginning of trial, the court informed the jury that defendant was charged with two counts of criminal sexual conduct, but then told the jurors before closing arguments that defendant was actually charged with three counts of criminal sexual conduct. Defendant contends that the late notice prejudiced him and that the jurors must have thought that the court had found the victim's testimony credible and therefore added the third charge. The record, however, contravenes this theory. When the jurors reentered the courtroom after the trial court became aware of the third charge, the court informed

them that on the previous day the court was looking at only the first page of the information when it told the jurors that defendant had been charged with only two counts. The court stated that the second page of the information charged a third count. Thus, the jurors could not have reasonably speculated that the trial court's personal beliefs regarding the victim's credibility led to the third charge.

Further, the trial court accurately informed the jurors of the charges against defendant, and defendant was aware of the third charge because he had been bound over on that charge. Defendant's argument that defense counsel had no motive or reason to cross-examine or challenge the evidence presented with respect to the third penetration is meritless. Defendant's defenses at trial did not focus on each individual penetration, but focused on the alleged conduct as a whole, including the third penetration. Defendant's position was that the conduct did not occur. Moreover, defense counsel testified at the *Ginther*<sup>1</sup> hearing that she knew that defendant was charged with three counts because she was at the preliminary examination when the third charge was added. Accordingly, defendant did not suffer prejudice as a result of the jury being informed of the third charge after the presentation of the evidence.

Defendant next contends that the trial court erred by permitting the prosecutor to elicit improper hearsay testimony from Officer Shemika Newman that corroborated the victim's testimony. We disagree. This Court reviews a trial court's decision regarding the admission of evidence for an abuse of discretion. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). An abuse of discretion occurs only if an unprejudiced person, considering the facts on which the trial court relied, would find that there was no justification or excuse for the ruling made. *Id.* A decision on a close evidentiary question ordinarily cannot constitute an abuse of discretion. *People v Sabin (After Remand)*, 463 Mich 43, 67; 614 NW2d 888 (2000); *Aldrich, supra* at 113.

The trial court ruled that Newman's testimony was admissible as an excited utterance under MRE 803(2). Defendant contends that this ruling was erroneous because the process of police questioning deprived the statements of the spontaneity necessary for an excited utterance. MRE 803 provides, in relevant part:

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

\* \* \*

(2) Excited Utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Hearsay testimony that would otherwise be excluded is admissible under this rule because it is generally believed that a person who is under the "sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any

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

utterance will be spontaneous and trustworthy.” *People v McLaughlin*, 258 Mich App 635, 659; 672 NW2d 860 (2003), quoting *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19. Evidence is admissible under this exception if “(1) there was a startling event and (2) the resulting statement was made while the declarant was under the excitement caused by that event.” *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91 (1999). The pertinent inquiry is not whether sufficient time has elapsed for the declarant to fabricate a statement, but rather “whether the declarant is so overwhelmed that she lacks the capacity to fabricate.” *McLaughlin*, *supra* at 659-660.

The trial court did not err by admitting Newman’s testimony under the excited utterance exception to the hearsay rule. The victim’s statement to Newman was made while she was under the stress and excitement of a startling event. The police questioning did not deprive the victim’s statements of their spontaneity such that the excited utterance exception was inapplicable. Newman testified that she made the police report at 3:50 a.m., only three or four hours after the event occurred, and that the victim was “really shaky” and crying. The report was also made while the victim was at the hospital as a result of the incident. These facts are sufficient to show that the statements were made while the victim was under the excitement caused by the event. *Layher*, *supra* at 582.

Defendant erroneously relies on *People v Gee*, 406 Mich 279; 278 NW2d 304 (1979), and *People v DeWitt*, 173 Mich App 261; 433 NW2d 325 (1988), for the proposition that the process of questioning deprives statements of their spontaneity necessary for application of the excited utterance exception. These cases do not stand for this proposition. Rather, the *Gee* and *DeWitt* Courts held that the statements at issue in those cases were improperly admitted because they were made after the declarants had time to contrive or misrepresent. *Gee*, *supra* at 282-283; *DeWitt*, *supra* at 267. Indeed, this Court has upheld the admission of testimony under the excited utterance exception when the statements at issue were made in response to police questioning. See *McLaughlin*, *supra* at 259-660; *People v Sanders*, 163 Mich App 606, 611; 415 NW2d 218 (1987). Accordingly, the trial court properly admitted Newman’s testimony under the excited utterance exception. Because this testimony was properly admitted under the excited utterance exception to the hearsay rule, we need not address the trial court’s other rationale for admitting the evidence, namely that it was admissible as evidence of prior consistent statements under MRE 801(d)(1)(B) to rebut the charge of recent fabrication.

Defendant next contends that the trial court erred by refusing to permit his expert witness, attorney Sarah Hunter, to testify at the *Ginther* hearing. We disagree.

Defendant relies on MRE 702 and *Meehan v Michigan Bell Telephone Co*, 174 Mich App 538; 436 NW2d 711 (1989), in support of his argument. MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The purpose of this provision is to “assist[] the trier of fact through the introduction of reliable ‘scientific, technical, or other specialized knowledge.’” *Gilbert v DaimlerChrysler Corp*, 470 Mich 749, 790-791; 685 NW2d 391 (2004).

Here, the trial court opined that MRE 702 was inapplicable because Hunter could offer no assistance to the court in understanding the evidence or determining a fact in issue. We agree. Whether a defendant has been denied the effective assistance of counsel is a mixed question of law and fact. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). A court must first find the facts and then determine whether those facts constitute a violation of the defendant’s right to the effective assistance of counsel. *Id.* The trial court was capable of making factual findings and conclusions of law without the assistance of an expert witness. Indeed, trial courts make such determinations on a routine basis. Under MRE 702, a trial court may permit expert testimony only if the court determines that such testimony would assist the trier of fact to understand the evidence or determine a fact in issue. In addition, MRE 702 merely authorizes a trial court to permit expert witness testimony and does not require that such testimony be admitted. Thus, even if the court determined that expert witness testimony would be helpful in deciding the pertinent issues, it was not required to allow Hunter’s testimony. Accordingly, the trial court did not abuse its discretion by denying defendant’s motion to admit Hunter’s testimony.

Defendant’s reliance on *Meehan, supra*, is misplaced. In that case, the plaintiff called his previous criminal attorney to testify as an expert witness in his civil case alleging malicious prosecution and abuse of process. *Meehan, supra* at 541, 545-546. This Court held that the trial court did not abuse its discretion by allowing the testimony. *Id.* at 554. This Court agreed with the trial court that the attorney’s specialized knowledge would assist the jury and held that the testimony met the standard articulated in MRE 702. *Id.* Unlike *Meehan*, in this case the factual determinations and legal conclusions pertaining to defendant’s motion for a new trial were to be made by the trial court, not a jury. Thus, while an attorney’s expert testimony may have been helpful to laypersons sitting on the jury in *Meehan*, such testimony would not have assisted the trial court in this case as the court correctly determined. Accordingly, the trial court did not abuse its discretion by disallowing Hunter’s testimony.

Defendant next advances various claims of ineffective assistance of counsel, none of which have merit. To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that counsel’s representation so prejudiced the defendant that it deprived him of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Westman*, 262 Mich App 184, 191; 685 NW2d 423 (2004). With respect to the prejudice requirement, a defendant must demonstrate a reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Moorner*, 262 Mich App 64, 75-76; 683 NW2d 736 (2004). A defendant must also overcome the strong presumption that counsel’s actions constituted sound trial strategy. *Toma, supra* at 302. This Court reviews a trial court’s factual findings for clear error and its legal conclusions de novo. *Matuszak, supra* at 48.

Defendant first argues that trial counsel, Deborah Ford, was ineffective for failing to fully inform him of a plea offer. The trial court did not clearly err in finding that defendant was fully advised and informed regarding the plea offer. Defendant testified that Ford told his father about

the offer on the Friday before trial and that his father conveyed the offer to him. Defendant then called Ford, who confirmed the offer. Defendant testified at the *Ginther* hearing that Ford told him that she could not explain and had no defense for the victim's broken zipper and inner thigh bruises. The trial court did not clearly err in finding Ford's testimony credible in that she urged defendant to accept the offer in the context of that discussion. In addition, as the trial court noted, trial was delayed while Ford was conferring with defendant on the morning of the first day of trial. The prosecutor testified that when Ford returned from that discussion, in response to the prosecutor's inquiry, Ford said, "He didn't do it. He want's [sic] a trial." This evidence corroborates Ford's version of events. Accordingly, the trial court did not clearly err in finding that Ford had fully communicated the plea offer to defendant.

Defendant also argues that counsel was ineffective for failing to present a consistent, coherent, and reasonable theory of defense at trial. Generally, this Court does not substitute its judgment for that of trial counsel on matters involving trial strategy. *Matuszak, supra* at 58. In addition, this Court does not make an assessment of trial counsel's competence with the benefit of hindsight, and "[a] particular strategy does not constitute ineffective assistance of counsel simply because it does not work." *Id.* at 58, 61. During the *Ginther* hearing, Ford testified that she pursued numerous theories of defense at trial, including showing inconsistencies in the victim's testimony so that she would not be believed, arguing that no penetration occurred, contending that the victim had voluntarily engaged in sexual intercourse on previous occasions and that she reciprocated defendant's advances, arguing that the victim made up the charges because she was jilted, and arguing that she flip-flopped regarding her feelings about defendant. It is evident from the record that Ford did not choose to stick to one solitary theory of defense. This was a matter of trial strategy, however, which this Court will not second-guess.

Defendant focuses on Ford's opening statement in which Ford stated that this case is a "change your mind type of case." Defendant argues that Ford's statement implied that the victim and defendant engaged in voluntary sexual intercourse on the night of the incident, while later during trial she argued that no penetration occurred. At the *Ginther* hearing, Ford testified that by "change of mind" she meant that the victim kept changing her mind regarding whether she wanted to be with defendant and whether or not she wanted to become romantically involved with him. Regardless of whether Ford's opening statement implied that sexual penetration had occurred, however, Ford's representation did not deprive defendant of the effective assistance of counsel. Ford's apparent approach was to present as many theories as possible in the hope that the jury would believe at least one. In fact, the jury did believe at least one and acquitted defendant of one of the charges. As the trial court recognized, this strategy was not unreasonable, given Ford's admission that she was unable to explain and did not have a defense for the broken zipper or inner thigh bruises. Accordingly, defendant has not overcome the strong presumption that Ford's actions constituted sound trial strategy and that he received the effective assistance of counsel.

Defendant also argues that counsel was ineffective because her cross-examination of the victim lacked focus and failed to subject the victim's version of events to a meaningful adversarial test. Defendant fails to cite any particular line of questioning and makes only vague and general assertions involving Ford's strategy of pursuing multiple theories of defense. As discussed above, Ford's trial strategy did not deprive defendant of the effective assistance of counsel at trial.

Defendant further contends that Ford was ineffective for stipulating to a lab report indicating that some sperm activity was detected. Defendant argues that this conclusion fails to meet the standard for admissibility under MRE 702. At the *Ginther* hearing, Ford testified that her decision to stipulate to this statement was a matter of trial strategy and that her stipulation also recognized that there was not enough DNA to match anything to defendant. Ford testified that the victim maintained that defendant had ejaculated inside her and that the stipulation showed that there was nothing to support her testimony. Contrary to Ford's belief, the victim told Newman that defendant did not ejaculate. Nonetheless, viewing the entire stipulation as a whole, defendant was not denied the effective assistance of counsel because the stipulation also stated that nothing could be traced to defendant. Thus, while it may have been preferable had the stipulation not stated that some sperm activity was detected, in light of the conclusion that no DNA could be matched to defendant, defendant has not demonstrated a reasonable probability that the result of the proceeding would otherwise have been different. *Toma, supra* at 302-303; *Moorer, supra* at 75-76.

Defendant also argues that Ford was ineffective for failing to object to the late filing of the amended information and to the jury being instructed on three criminal sexual conduct charges instead of two. As discussed previously, the prosecutor did not file an amended information during trial adding the third criminal sexual conduct charge. Rather, the charge was added at the end of the preliminary examination, and defendant was bound over on all three counts. Ford admitted that she did not remember whether or when the prosecutor filed an amended information but that she knew that defendant had been charged with three counts of criminal sexual conduct because she was at the preliminary examination when the third charge was added. Accordingly, Ford was not ineffective for failing to object during trial when the trial court informed the jury of the third charge. Counsel was not obligated to object and advocate a meritless position. *Westman, supra* at 192.

Defendant further argues that counsel was ineffective for failing to call character witnesses to testify regarding defendant's good and law-abiding character. A trial attorney's failure to call witnesses is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). As Ford explained, her decision was a matter of trial strategy, and she thought that calling only defendant's sister and his sister's boyfriend was a "crisper neater" strategy. Moreover, defendant's proposed witnesses were not eyewitnesses who were at the scene and could offer testimony regarding the truth of the allegations. They were merely character witnesses who could attest to defendant's character, but offer no opinion regarding what happened on the night in question. If no physical evidence existed, and the case was merely a credibility contest, then perhaps the character witnesses may have been beneficial. Given the physical evidence, however, defendant has not overcome the presumption that Ford's decision not to call character witnesses was sound trial strategy. *Id.*

Finally, defendant argues that counsel was ineffective for failing to object to the trial court's reasoning allowing Newman's hearsay testimony. Ford's initial objection to the testimony, however, was sufficient to preserve the issue for appellate review. She was not required to further object to the court's reasons for allowing the disputed evidence. Moreover, the evidence was properly admitted, and counsel was not ineffective for failing to make meritless objections. *Matuszak, supra* at 58.

Defendant next argues that the prosecutor improperly bolstered the complainant's credibility by asking the jury to personally identify with her. Defendant also contends that defense counsel was ineffective for failing to object to the prosecutor's comments. We disagree. Because defendant failed to preserve this issue by objecting to the prosecutor's remarks at trial, this Court's review is limited to plain error affecting defendant's substantial rights. *Moorer, supra* at 78; *People v Leshaj*, 249 Mich App 417, 419; 641 NW2d 872 (2002). No error requiring reversal will be found if the prejudicial effect of the prosecutor's remarks could have been cured with a timely jury instruction. *Moorer, supra* at 78; *Leshaj, supra* at 419. Allegations of prosecutorial misconduct must be examined in their full context. *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003). A prosecutor's arguments must be read as a whole and evaluated in light of defense arguments and the relationship that they bear to the evidence presented at trial. *Id.*

A prosecutor may not vouch for the credibility of a witness or suggest some special knowledge of the veracity of a witness. *Matuszak, supra* at 54. Viewing the portions of the record that defendant identifies in their full context, the prosecutor's arguments were not improper. It is clear from the record that the prosecutor was emphasizing that the victim's testimony alone, if believed, was enough to support a conviction. The prosecutor was not urging the jurors to personally identify with the victim. In addition, the prosecutor's remarks did not improperly suggest that she had some special knowledge of the victim's truthfulness. Rather, viewed in context, the prosecutor was arguing that defendant had not established a motive for the victim to lie or fabricate her story. Accordingly, the prosecutor's remarks were proper. Because defense counsel was not obligated to object and advocate a meritless position, counsel was not ineffective. *Westman, supra* at 192.

Defendant next contends that the cumulative effect of the errors denied him a fair trial. Because defendant's individual claims of error lack merit, there exists no cumulative error. *McLaughlin, supra* at 649.

Affirmed.

/s/ Kurtis T. Wilder  
/s/ E. Thomas Fitzgerald  
/s/ Kirsten Frank Kelly