

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JAMES BROWN,

Defendant-Appellant.

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UNPUBLISHED

June 14, 2005

No. 250867

Wayne Circuit Court

LC No. 02-011661-01

Before: Gage, P.J., and Whitbeck, C.J., and Saad, J.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for two counts of first-degree criminal sexual conduct, MCL 750.520(b)(1)(d) (aided or abetted by another person through the use of force or coercion). Defendant was sentenced to twelve to twenty years in prison on each conviction. We affirm.

The victim attended a festival in Detroit on May 18, 2002. She went to a bar and met a friend, with whom she went to the Liberty Rider's Motorcycle Club. The victim met defendant and codefendant at the club. After speaking briefly with both men, defendant grabbed the victim, placed her over a pool table, and inserted his penis into her vagina from behind. At the same time, defendant pushed the victim's head and forced her to perform oral sex on codefendant, who was seated in front of her. After this incident, the victim went into the bathroom. Soon after, codefendant entered the bathroom, slit the victim's throat, and stabbed her in the back. The victim was later transported to the hospital, where a rape kit was performed. Although semen samples were retrieved, the forensic serologist was unable to make a positive identification. The victim positively identified defendant and codefendant from a photographic lineup.

Defendant argues that he was denied his right to a fair trial when the trial court granted the prosecution's motion to consolidate defendant's and codefendant's offenses and when the trial court denied defendant's motion for separate juries. A trial court's decision to sever or join defendants is reviewed for an abuse of discretion. *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994); MCR 6.121(D). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say that there is no justification or excuse for the trial court's decision. *People v Ackerman*, 257 Mich App 434, 443; 669 NW2d 818 (2003).

The use of separate juries is a partial form of severance, which is to be evaluated under the same standard applicable to motions for separate trials. *Hana, supra* at 351. MCR 6.121(A) provides that the court may consolidate the trial of two or more defendants who are charged with two or more offenses when (1) each defendant is charged with accountability for each offense, or (2) the offenses are related. MCR 6.120(B) defines offenses as related if they relate to: (1) the same conduct, or (2) a series of connected acts or acts constituting part of a single scheme or plan. The court must sever offenses that are not related. The court must sever related offenses when a defendant demonstrates that severance is necessary to avoid prejudice to his substantial rights.

Joinder is permitted against two defendants where there is a significant overlapping of issues and evidence, the charges constitute a series of events, and there is substantial interconnectedness between defendants, trial proofs, and factual and legal bases of the crimes charged. *People v Missouri*, 100 Mich App 310, 349; 299 NW2d 346 (1980). In *Missouri*, the Court stated that, although there was not a genuine interconnectedness between the first and second counts, there was significant overlapping of issues and evidence, and joinder provided a benefit to the court and to the administration of justice. In addition, even if defendants were improperly joined, it is not error requiring reversal absent an affirmative showing of prejudice to substantial rights of the accused. *Id.* Defendant did not make an affirmative showing of prejudice to his substantial rights. Accordingly we conclude that the trial court did not abuse its discretion in granting the prosecution's motion to consolidate defendant and codefendants trials. In addition, we conclude that the trial court did not abuse its discretion in denying defendant's motion for separate juries.

Defendant next asserts that he was denied his right to counsel because trial counsel failed to allow defendant to testify and failed to call expert witnesses. Whether a defendant 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 must first find the facts and then decide whether those facts constitute a violation of defendant's constitutional right to effective assistance of counsel. *Id.* We review a trial court's finding of facts for clear error and questions of constitutional law de novo. *Id.*

To establish ineffective assistance of counsel, a defendant must show that the counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and that the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Defendant bears the heavy burden of overcoming the presumption that counsel's representation was effective, and he must overcome the presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003); *LeBlanc, supra* at 578; *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

A defendant's decision whether to testify is deemed a strategic decision best left to defendant and his counsel. *People v Martin*, 150 Mich App 630, 640; 389 NW2d 713 (1986). If a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right to testify is deemed waived. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985). The trial court asked defendant if he wanted to exercise his right to remain silent, if

he understood that he had a right to testify, and if he still wanted to remain silent. Defendant answered “Yes” to all of these questions. At defendant’s *Ginther*<sup>1</sup> hearing, he testified that he had spoken with his lawyer regarding his desire to testify. Defendant admitted that trial counsel advised him, based on her experience, not to testify because it would hurt his case, and therefore he followed her advice. At the *Ginther* hearing, the trial court stated that “[a]fter seeing him testify for five minutes, I can see why she did not put him on the stand.” There is nothing in the record to indicate that allowing defendant to testify would result in a different outcome of the proceedings. Accordingly, defendant has failed to overcome the presumption that counsel’s performance constituted sound trial strategy. Trial counsel’s decision not to call defendant to testify did not fall below the standard of reasonableness for an attorney.

Defendant argues that he was denied effective assistance of counsel when his trial counsel failed to request a DNA expert, medical doctor, or sexual assault examiner to substantiate the defense of consent. Because defendant failed to raise this issue at the *Ginther* hearing, this issue has not been preserved for appellate review, and our review is limited to mistakes apparent on the record. *People v Sabin*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Defendant presented no evidence of consent at trial, sentencing, or the *Ginther* hearing.

At trial, the victim denied consenting to sexual intercourse with defendant. She testified that she told defendant that she was on her period, but he did not care. Defendant asserts an expert could have substantiated defendant’s defense of consent, as well as impugned the victim’s assertion that the encounter was not consensual. Defendant refers to the victim’s assertion that she was menstruating on the evening of the attack, the victim’s testimony regarding being punched in the nose, and the sexual assault examiner’s testimony regarding her findings from the sexual assault examination. Defendant’s argument that an expert witness would have substantiated his consent defense is not sufficient to establish that there was a reasonable probability that presenting an expert witness would have resulted in a different outcome of the proceedings. There is nothing to indicate that a DNA expert, medical doctor, or sexual assault examiner was necessary to defendant’s defense. The ability of an expert witness to testify whether the victim was menstruating, whether she had sustained vaginal injury, whether she had a broken nose, or other analogous testimony regarding similar evidence, does not substantiate a defense of consent. As a result, there is nothing in the record to indicate that defense counsel’s failure to request an expert fell below the standard of reasonableness for an attorney.

Affirmed.

/s/ Hilda R. Gage  
/s/ William C. Whitbeck  
/s/ Henry William Saad

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