

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GORDON MICHAEL ZIEGLER,

Defendant-Appellant.

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UNPUBLISHED

February 6, 2007

No. 263169

Kent Circuit Court

LC Nos. 04-000258-FH

04-000605-FH

04-000606-FH

04-000764-FH

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of third-degree criminal sexual conduct (CSC III) MCL 750.520d(1)(b) (force or coercion),<sup>1</sup> for which the trial court sentenced him to four concurrent terms of 8 to 15 years in prison. We affirm.

I. Facts

Defendant, a nurse at Spectrum Hospital in East Grand Rapids, was accused by four patients (NT, DP, JG, and LG) of engaging in inappropriate sexual contact. The four cases, which were filed separately, were consolidated for trial by stipulation.

NT testified that she was admitted to Spectrum on November 26, 2003, with complaints of cramps and irregular heartbeat. According to her, defendant, the only nurse on duty, improperly “cupped” her breast while listening to her heartbeat through a stethoscope. Further, defendant, stating that he had to listen to her bowel sounds, pulled down her pants below the line of her pubic hair with an ungloved hand. He also touched a scar on her thigh. NT testified, “He went from touching me between my legs, he took his left hands [sic] spread my lips and fingered me with his – my clitoris with his right hand . . . .” NT testified that, after the incident, she left the room and told her roommate GG’s husband, who was in the hallway, about the incident. NT

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<sup>1</sup> Defendant was acquitted of one additional count of CSC III and one count of fourth-degree criminal sexual conduct (CSC IV), MCL 750.520e(1)(b) (force or coercion).

reported the incident to the nursing staff, risk management staff, and police. NT's allegations were widely reported in the local press.

GG, who was not a victim in this case, was hospitalized for dehydration, diarrhea, and salmonella. She testified that, after checking NT, defendant came to see her. Defendant asked GG's husband to exit the room and, when he did, listened to GG's bowel sounds with a stethoscope. She testified that his hands were shaking, but "he did nothing wrong" to her. When defendant left the room, NT told her what defendant had done to her. GG's husband testified that defendant returned to the room and GG stated, "This is like a criminal coming back to the scene. This man has no conscience."

DP testified that she was admitted to Spectrum on November 3, 2003, for surgery for a prolapsed vagina. Her doctor testified that her incision site was approximately two inches up the vagina and a peripad was placed outside that area. He also testified that it is the nurse's job to monitor the area. DP testified that, after the surgery, defendant passed a wand over her bladder to measure the amount of urine. He also used his finger to open her vaginal lips. The area where he touched her was in the same area as the peripad, but she was not sure what he touched because it happened so fast. She thought he said he was doing something pertaining to the surgery, but she was flustered and did not know what he said. After an article appeared in the newspaper about NT's charges, DP reported the incident to her doctor and her daughter.

JG underwent lung surgery on November 19, 2003 at Spectrum. JG testified that two days later, defendant indicated that he was going to check her Foley catheter. He manipulated her clitoris, which did not cause her any concern at the time. However, she felt he had crossed the line. He was in the clitoral region for approximately ten seconds. She told her husband not to leave her alone with defendant again. But she did not want to notify the hospital or the police based only on a gut feeling. She ultimately did contact the police after reading the article about NT's case in the newspaper.

LG testified that she was at Spectrum from October 29, 2003 to November 5, 2003 for aortic surgery that involved a groin incision several centimeters off the pubic bone. Defendant told her that he had to clean her vaginal area because she had an infection. LG told a Spectrum employee at discharge that she thought someone she believed to be a doctor put his fingers in her vagina. Other evidence demonstrated that LG in fact had a yeast infection. However, her doctor testified that a pelvic exam was not justified even if she had a yeast infection. LG also testified that defendant touched her in her vaginal area and looked at her in a "perverted way."

Michael Paul Frank, R.N., a unit nurse manager at St. Mary's Health Center was qualified as an expert witness for the prosecution. He testified that the nursing care provided to the four patients was medically unacceptable, as was defendant's failure to document the perineal cleaning on the patients' charts. With respect to defendant's failure to document the perineal cleaning, he testified that in light of the allegations, "to me it would say, covering something up. I don't understand why he wouldn't document something like that."

A former supervisor of defendant, Mary E. Rademacher, testified that defendant was caring and professional, was more thorough than other staff, and that his nursing skills were "very high." She also testified that perineal care involves direct vaginal contact, including spreading the lips and separating the tissues. She also testified that a Foley catheter always

involves going between the vaginal lips and that infections are common with Foley catheters. She also testified that a nurse is required to monitor a femoral artery incision site and is expected to clean a possible yeast infection.

In his defense, defendant first testified as to his educational and employment history, but did not disclose his separation from his previous employment with Sparrow Hospital. On cross-examination, the prosecutor questioned defendant about his termination notice from Sparrow Hospital. Defendant denied that he was fired, asserting that it was a mutual decision relating to his request for an afternoon shift.

Outside the presence of the jury, the trial court addressed whether the prosecutor would be permitted to elicit testimony about a 1998 complaint by a Sparrow Hospital patient regarding defendant's inappropriate sexual contact while he was a student. The incident came to light while detectives were investigating defendant regarding this case. Defendant had not been forthcoming when the detectives questioned him about the incident. The prosecutor argued that because the defense had elicited evidence that defendant was a good nurse and had a reputation for being a good nurse, he should be permitted to elicit testimony about this incident. Defense counsel argued that such testimony was not admissible because the prosecution had not provided pretrial notice as required by MRE 404(b). The trial court noted that evidence about the complaint was known since the detective's interview and was also known to both parties. The trial court also noted that it was not considering the evidence in light of MRE 404(b). While not citing any other court rule, the trial court noted that if the defense opens the door by presenting evidence of some aspects of defendant's performance as a nurse, the prosecution should be permitted to present evidence of "other aspects which may cast into doubt the high skill level of the defendant or high performance ratings in his field of nursing." In other words, the trial court stated, "If we're going to hear about the kudos, it seems to me the prosecution has the opportunity to expose the warts." The trial court further instructed, "If the defendant is questioned on the matter and acknowledges whatever it is that the prosecution has about this incident, the matter is then closed."

The prosecutor proceeded to ask defendant about the 1998 Sparrow complaint. Defendant admitted that he had been accused by a patient of inappropriate touching. Defendant denied that the detective asked him about this incident, stating that he understood the question to be whether he had been "in trouble at school." Defendant then testified about another incident concerning a doctor looking for a patient's chart. Defendant also stated that the Sparrow matter "was thoroughly investigated and I continued with schooling." The prosecution asked whether "thoroughly investigated" included Sparrow calling the police, as required by law. Defendant answered that he was not aware of this, but the police never contacted him. The prosecutor later asked defendant whether he told any of his defense witnesses about the 1998 Sparrow incident. He answered that he had not. Then he stated that he thought he told one witness and he thought another one knew. Then he stated that he needed to think about it. The prosecutor asked defendant whether he told the jury about the incident when he was going through his employment history. Defendant responded that he was not asked and "witnesses don't volunteer things in court."

Regarding the specific charges in this case, defendant testified that to perform perineal and Foley catheter care necessarily involves contact with the clitoral and vaginal area. He also stated that monitoring an incision site, including the vaginal area, is crucial to avoid infections

and detect hematomas. Concerning DP, defendant testified that he folded down her underpants slightly to perform bladder Dopplers and told her that he needed to look at the surgical incision. When he did, he noticed bleeding on her external genitalia. He wiped her perineum with sponges to absorb and clean off the blood on her genitalia. He also separated her labia and told her he was monitoring her incision site for bleeding and was concerned about a hematoma.

Regarding LG, defendant testified that he was responsible for her post-surgical care, including her abdominal and groin incision. In examining the groin incision, he noticed substantial discharge. Defendant provided perineum care. He also testified that he facially reacted to the unpleasant appearance and odor of the infection.

Regarding JG, defendant testified that it is impossible to perform proper Foley care without contacting the clitoral/vaginal areas. JG was unable to perform her own catheter care because she had tubes in her wrists and chest, oxygen tubing from her nose, and was in “agonal pain.”

Regarding NT, defendant testified that he had to attach five telemetry lead patches on her. He removed her gown to do so and left it down to listen to her heart and lung sounds. He also performed a head to toe assessment, including checking bowel sounds. She lowered her pants and showed him a surgical incision on her inner thigh from her knee to her groin. He did not use gloves because no bodily fluids were involved. He denied performing a vaginal examination and further stated there was no medical reason for doing one.

Regarding his interaction with the nonvictim GG, defendant testified that he had asked GG’s husband to be quiet a couple of times and finally had to ask him to leave the room for a few minutes.

Melva Ridgeway, a former supervisor of defendant at Battle Creek Health Systems, testified that, in providing Foley care to patients, a nurse may contact the female’s clitoris. She also testified that if a female patient had a femoral artery groin incision and what appeared to be a yeast infection, it would be important for the nurse to monitor and clean those areas. She further testified that defendant was professional, a hard worker, and worked with female coworkers very well. She never saw any problems with defendant. On cross-examination, the prosecutor asked her about the 1998 Sparrow complaint. After she stated she did not know about it, the prosecutor asked whether Sparrow turned the complaint in to the police and whether hospitals have “grave concern about liability in these issues.”

Defendant’s expert witness, Wendy Walsemann, testified, regarding LG, that her assessment would have included viewing her femoral artery groin incision site and, if there was an infection, cleaning it. She also testified that, with Foley care, contact with the clitoris is unavoidable and that the perineal area near the catheter should be cleaned twice daily to prevent infections. Regarding JG, Walsemann testified that she probably would have performed perineal care, which would bring a nurse in contact with the clitoris. Regarding DP, it would have been “accepted and essential” for a nurse to monitor and clean the surgical incision area.

The jury found defendant guilty of four counts of CSC III, one for each victim. Defendant was acquitted of one count of CSC III regarding JG and one count of CSC IV regarding NT. Defendant filed a motion for a new trial contending that he was denied his right

to constitutionally effective assistance of counsel. The trial court denied defendant's request for an evidentiary hearing, and denied his motion for a new trial.

## II. Analysis

### A. Evidentiary Issues

Although defendant raises a number of issues in his appeal, the alleged erroneous admission of testimony about the 1998 Sparrow Hospital complaint is the underlying basis for a majority of the issues. Defendant also asserts two other evidentiary errors in his ineffective assistance of counsel claim. Because it flows more logically, we first address the testimony regarding the 1998 Sparrow complaint and further determine whether there were any other evidentiary errors. Generally, a trial court's decision to admit evidence will be reversed only for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). When a trial court's decision regarding the admission of evidence involves a preliminary question of law, this Court reviews the issue de novo. *Id.*

#### 1. Testimony about the 1998 Sparrow Complaint

Defendant contends that the trial court erred in admitting testimony about the 1998 Sparrow complaint. We disagree.

Defendant was charged with CSC III (force or coercion), MCL 750.520d(1)(b). Force or coercion includes “[w]hen the actor engages in the medical treatment or examination of the victim in a manner or for purposes that are medically recognized as unethical or unacceptable.” MCL 750.520b(1)(f)(iv). As a major part of his defense, defendant presented nursing personnel to testify as to the quality of his care and his reputation as a good nurse. Defendant also testified as to his nursing background and to the quality of care he provided to his patients. To counter this testimony, the prosecutor sought to question defendant about the 1998 Sparrow complaint.

In granting the prosecutor's request, although the trial court did not cite to a particular court rule, it stated that the prosecutor could elicit testimony about the 1998 Sparrow complaint because the defense had presented other evidence that defendant was considered to be a good nurse. MRE 405(a) provides:

In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. *On cross-examination*, inquiry is allowable into *reports of relevant specific instances of conduct*. [Emphasis added.]

"Once a defendant has placed his character in issue, it is proper for the prosecution to introduce evidence that the defendant's character is not as impeccable as is claimed." *People v Vasher*, 449 Mich 494, 503; 537 NW2d 168 (1995). Accordingly, because defendant offered testimony that defendant was a good nurse, the trial court properly ruled that the prosecution could offer evidence of specific instances of conduct that would rebut this testimony. *Lukity, supra* at 498-499.

Defendant argues that, before admitting this evidence, the trial court was required to conduct a balancing test pursuant to *People v Whitfield*, 425 Mich 116; 388 NW2d 206 (1986). In *Whitfield*, our Supreme Court reversed the defendant's conviction for another reason; but, because it was remanding the case for a new trial, provided additional guidelines regarding the use of character evidence considering that, in the first trial, the defendant's use of character evidence resulted in the prosecution asking a character witness whether he had heard that the defendant "had committed a sexual assault on his then five-year-old male cousin." *Id.* at 127-129. On remand, the Court directed the trial court to rule in a motion in limine whether impeachment of the character witness by inquiry into the specified bad act would be permitted. *Id.* 133. It further stated:

At retrial, upon motion in limine and offer of proof by the defense as to the nature of the proposed character testimony, the trial court must rule in advance of trial, where time allows, whether impeachment of the character witnesses by inquiry into specified unconvicted bad acts of the defendant will be permitted. This procedure will allow defense counsel to make a discriminating choice of the use of character witnesses and the appropriate scope of questioning.

In ruling on the motion, among the factors the trial court should consider are whether the probative value of the line in questioning is substantially outweighed by the prejudicial effect under MRE 403, the likelihood that the alleged misconduct would have been known and discussed in the community so as to affect the witness' knowledge of the defendant's reputation, the basis for the prosecution's belief that the event being inquired about occurred, and the temporal relationship between the misconduct in question and the offense charged.

Once the trial court has ruled on the use of the questioning, the court should exercise its discretion under MRE 611 over the mode and order of interrogating witnesses to ensure fair treatment of the issue . . . . [*Id.* at 133-134.]

While we do not read *Whitfield* as requiring a trial court, in every case involving character evidence, to conduct a "balancing test" absent a motion in limine or offer of proof by the defense, we nonetheless address each of these guidelines in turn.

First, in this case, the probative value of the questions was not substantially outweighed by the "danger of unfair prejudice" under MRE 403. Evidence that another patient had complained about defendant inappropriately touching her was probative of defendant's reputation for being a good nurse, a matter to which defendant had opened the door. Further, the evidence was probative of defendant's veracity because he did not tell detectives about the incident, and did not mention the event when testifying about his professional history. While this evidence may have been prejudicial to defendant, it was not unfairly prejudicial. As the trial court pointed out, defendant elicited much testimony about his stellar reputation as a nurse. It was not unfairly prejudicial to present evidence that there had been a complaint about his less than stellar care in the past.

Second, the issue of whether the 1998 Sparrow complaint “would have been known and discussed in the community,” although relevant in *Whitfield*, is not relevant in this case in which the witnesses were co-workers, former supervisors, and defendant’s wife.

Third, the record reflects that defense counsel knew that the 1998 Sparrow complaint had in fact occurred. Further, defendant admitted on the stand that it had. Therefore, there is no question, as in *Whitfield*, regarding the basis for the prosecution’s belief that that the 1998 Sparrow complaint had occurred.

Fourth, the “temporal relationship” between the 1998 Sparrow complaint and the alleged conduct in this case was sufficiently close. Moreover, the temporal relationship is not the most significant issue in this case where both the alleged occurrences and the 1998 Sparrow complaint arose during defendant’s professional career and while he was acting in his capacity as a professional.

Finally, as will be discussed below, the trial court did not fail to properly control the proceedings under MRE 611 as the questions asked by the prosecutor concerning the 1998 Sparrow complaint were not improper.

The trial court did not err in permitting testimony regarding the 1998 Sparrow complaint.

## 2. Other Testimony

Defendant also contends it was improper for LG to testify that defendant looked at her in a “perverted way” during the alleged occurrence. Defendant asserts that this should have been excluded under MRE 701 because it was an opinion without underlying facts. We disagree. LG was the only person present during the alleged contact. She testified about how defendant touched her, what he said, and how he looked at her. She characterized the look as “perverted” because that was how she perceived the look at the time. This was not improper opinion testimony.

Defendant also contends that prosecution expert Michael Paul Frank, R.N. was improperly permitted to testify about his opinion regarding defendant’s guilt. We disagree. The prosecutor asked Frank, in light of the fact that other nurses noted perineal cleaning on the patients’ charts, what defendant’s failure to do the same signified to him. Frank responded, “With the allegations present, to me it would say, covering something up. I don’t understand why he wouldn’t document something like that.” Based on the other evidence already presented, the witness was stating that as a nurse, and considering that perineal cleaning was documented on the patients’ charts by other nurses, it indicates that defendant was covering something up. This was not an opinion of defendant’s guilt, it was an opinion about why defendant did not chart what he claimed was a standard procedure that was, in fact, charted by other nurses. There was no error in the admission of this evidence.

## B. Constitutionally Effective Assistance of Counsel

Defendant also contends that he was denied constitutionally effective assistance of counsel. In reviewing a claim of ineffective assistance of counsel when an evidentiary hearing was not held, our review is limited to the facts contained in the trial record before the defendant

is convicted. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). An ineffective assistance of counsel claim involves a mixed question of fact and constitutional law; constitutional questions are reviewed de novo, and a trial court’s factual findings are reviewed for clear error. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). See *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). “First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the ‘counsel’ guaranteed by the Sixth Amendment.” *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel’s performance constituted sound trial strategy. *Id.* at 690. “Second, the defendant must show that the deficient performance prejudiced the defense.” *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different. *Id.* at 694. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. See *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). [*People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001) (footnote omitted).]

Defendant contends that defense counsel was constitutionally ineffective for failing to file a motion in limine, pursuant to MRE 404(a)(1)<sup>2</sup> and 405(a), to preclude testimony about the 1998 Sparrow complaint. Defendant argues that if he had and the trial court had admitted the evidence, then “character and reputation evidence would have been scrupulously avoided.”

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<sup>2</sup> Defendant is mistaken that MRE 404(a)(1) applies to the prosecutor’s questioning about the 1998 Sparrow complaint. MRE 404(a)(1) provides:

- (a) Evidence of a person’s character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except;
  - (1) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same . . . .

Testimony about the complaint was not evidence of the defendant’s “character or trait of character” offered by the prosecution. Rather, the testimony concerned a report of a relevant specific instance of conduct. MRE 405(a).

Defendant asserts that defense counsel's decision to elicit character evidence cannot be presumed sound trial strategy because defense counsel did not know that the evidence would be admissible pursuant to MRE 405(a), and erroneously believed that MRE 404(b) pretrial notice would be required before evidence of the complaint could be admitted. However, the record does not reflect that defense counsel proceeded to present evidence of defendant's character only because he was unaware of MRE 405(a) and its meaning. The fact that defense counsel asked that the trial court preclude questioning about the complaint for failure to provide MRE 404(b) pretrial notice can reasonably be viewed as an attempt to avoid admission of the evidence despite defense counsel's awareness and understanding of MRE 405(a). Defense counsel need not rely on only one or the best method for excluding evidence.

Furthermore, presenting evidence of defendant's reputation as a nurse was a major component of defendant's trial strategy considering that the entire case revolved around whether defendant provided proper nursing care of the patients' genital regions or sexually assaulted them. There is no substantiation for defendant's assertion on appeal that if defense counsel had known before trial that evidence of the complaint would be admitted, "character and reputation evidence would have been scrupulously avoided." Considering the nature of the case, we can reasonably assume that defense counsel knew of the possibility that the evidence would be admitted under MRE 405(a), but nonetheless proceeded with the chosen strategy and attempted, through other means (MRE 404(b)), to have the evidence excluded.

Defendant also contends that his counsel was constitutionally ineffective because he did not inform defendant that the 1998 Sparrow complaint might be admitted and, if defendant had known this, he would have never agreed to the chosen trial strategy. In support of this assertion, defendant relies on his own affidavit, which he submitted to the trial court along with his motion for a new trial. However, after hearing oral argument on the motion and considering what defense counsel asserted was in defendant's affidavit, the trial court decided that an evidentiary hearing was not required on defendant's ineffective assistance of counsel claim. The trial court determined that during this long trial, defense counsel was well prepared having even presented a "lengthy PowerPoint presentation," which required extensive preparation. The trial court also noted that, in light of the nature of the charged offenses, to avoid the "super-nurse" defense would have knocked "a major pin" from under the defense. Having reviewed the record, we agree with the trial court that the well-developed trial record was not in need of expansion.<sup>3</sup> And, there not having been an evidentiary hearing, we are constrained only to review the trial record before defendant's conviction in deciding whether defendant was denied the effective assistance of counsel. *Ginther, supra* at 443; *Wilson, supra* at 352.

But even if we were to consider defendant's affidavit, in light of the entire record, we are not convinced that defense counsel's trial strategy was unsound. As the trial court pointed out and as noted above, given the nature of the charges, it was a sound trial strategy to present

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<sup>3</sup> A defendant may be granted an evidentiary hearing if the record has not been sufficiently developed, and defendant can show evidence of a factual dispute which might, if further developed, possibly be resolved in his favor. *Ginther, supra* at 443-444; see also *People v McMillan*, 213 Mich App 134, 141-142; 539 NW2d 553 (1995).

evidence of defendant's reputation for being a good nurse. Furthermore, even if defense counsel's performance could be considered deficient, his choice to pursue this defense despite the consequential admission of the 1998 Sparrow complaint was not so prejudicial to defendant that it would have affected the outcome of the case. As the trial court pointed out, there was other evidence casting similar doubt on defendant's "super-nurse" defense, namely the Sparrow Hospital personnel report that listed defendant as deficient in areas of nursing care, defendant's response to being confronted with that report, and the fact that defendant had omitted any reference to his work history at Sparrow Hospital. Further, we note the substantially incriminating fact that defendant did not chart the procedures that the victims complained involved inappropriate sexual touching but defendant claimed were legitimate nursing procedures. In light of this evidence, we cannot conclude that, even without the 1998 Sparrow complaint, the outcome of the trial would have been different.

Defendant also contends that defense counsel was constitutionally ineffective for failing to object to the testimony Michael Paul Frank, R.N. and to LG's testimony about defendant's "perverted" way of looking at her. As discussed above, this testimony was properly admitted. Similarly, defendant contends that defense counsel should have objected to the prosecutor's questioning of G.G.'s husband. But, as discussed below, this questioning was not improper. "Trial counsel is not required to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2002).

Therefore, we conclude that defendant has failed to demonstrate that he was denied his right to constitutionally effective assistance of counsel.

### C. Prosecutorial Misconduct

Defendant also contends that the prosecutor's misconduct in questioning witnesses about the 1998 Sparrow complaint, prejudicial innuendo, and misstatement of law in closing argument denied him a fair trial. He further argues that the trial court failed to properly control the proceedings under MRE 611 by permitting the prosecutor's misconduct in referring to the 1998 Sparrow complaint. This Court reviews unpreserved issues of prosecutorial misconduct for plain error. *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). To avoid forfeiture, defendant must show that there was plain error that affected his substantial rights. *Id.*

"This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *Id.* at 110. Although a prosecutor may not make a statement of fact to the jury that is unsupported by the evidence, he is free to argue reasonable inferences arising from the evidence as they relate to his theory of the case. *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Prosecutors "may use 'hard language' when it is supported by the evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

Defendant contends that evidence about the 1998 Sparrow complaint was admitted for a limited purpose and the prosecutor's questioning went beyond the limitation. Pursuant to MRE 405(a), once defendant presented evidence of the quality of his nursing care, on cross-examination inquiry was "allowable into reports of relevant specific instances of conduct." The trial court, in ruling that the evidence was admissible, did not cite this rule, but rather, gave its

own summary of the rule stating, “If we’re going to hear about the kudos, it seems to me the prosecution has the opportunity to expose the warts.” It then stated,

I think it should be pointed out, however, that if the defendant is questioned on the matter and acknowledges whatever it is that the prosecution has about this incident, then matter is then closed.

Neither MRE 405(a) nor the trial court’s limitation on the ruling precluded the questions that were asked. MRE 405(a) states that “inquiry is allowable into report of relevant specific instances of conduct.” The trial court stated that the matter would be closed when defendant “acknowledge[d] whatever it is that the prosecution has about this incident.”

Our review of the record reveals that defendant was not forthcoming in acknowledging facts regarding the 1998 Sparrow complaint. He denied that he attempted to hide the incident from detectives and vaguely asserted that the matter was “thoroughly investigated.” In follow up, the prosecutor asked whether Sparrow did its own investigation of the complaint, whether Sparrow turned the complaint over to police as required by law, whether defendant had initially denied that compliant to an investigating police officer, whether he told his witnesses about the complaint, and whether he failed to tell the jury about the complaint when he testified about his nursing history. All of these questions fall within the bounds of MRE 405(a) and the trial court’s ruling.

Defendant also complains that the prosecutor asked Melva Ridgeway about whether she knew of the complaint and, after she answered in the negative, whether, in her training and experience, she was aware that hospitals have “grave concerns about liability in these issues.” In conjunction with the latter question, the prosecutor appended the question whether she knew if the hospital notified the police about the complaint. Defendant also complains that the prosecutor asked defendant’s expert witness whether defendant told her about the complaint and asked defendant’s former wife if she knew about the complaint. These questions are certainly within the bounds of MRE 405(a). Further, considering defendant’s testimony that the matter was “thoroughly investigated,” they were appropriate under the trial court’s ruling. We discern no misconduct on the part of the prosecutor in questioning these witnesses about the 1998 Sparrow complaint.

Defendant also contends that the prosecutor misstated the law in closing argument when he argued, “There was no effort to assassinate his character here, and the defendant would like you to set that all aside. But you can’t. It’s evidence. It is evidence that has been admitted by the Court for you to consider when determining the two elements of this offense.” Defendant suggests that this argument incorrectly stated that the character evidence could be used as substantive evidence to prove the elements of the charged offense. However, this characterization is incorrect. In stating that the evidence was for the jury to “consider when determining the two elements of the offense,” the prosecutor was simply stating that the evidence was not meant simply to make defendant look bad in general, but could be used to affect the verdict, which is true. If defendant’s entire case rested on the evidence that he provided proper nursing care and was supported by evidence of his professional and truthful character, then evidence rebutting his character evidence could be considered by the jury in determining whether the care defendant rendered was proper or criminal. There was no misconduct in regard to this argument.

Even if there was, the trial court clearly instructed the jury, “It is my duty to instruct you on the law. You must take the law as I give it to you. If a lawyer has said something different about the law, you are to follow what I say in that regard.” It later stated,

You have heard evidence offered about the character of the defendant, Mr. Ziegler, for truthfulness and also about his reputation in the nursing field. You may consider this evidence together with all the other evidence in the case in deciding whether you believe the testimony of Mr. Ziegler and in deciding how much weight to give that testimony.

The prosecutor has cross-examined some of the defendant’s character witnesses as to whether they had heard anything bad about the defendant. You should consider such cross-examination only in deciding whether you believe the character witnesses and whether they have described the defendant fairly.

Therefore, even if the prosecutor’s closing argument did incorrectly state the law, the trial court instructed the jurors to disregard any such misstatement and jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

Defendant also contends that the prosecutor committed misconduct when he suggested, in closing argument, that the defense was choreographed and defendant was coached to look at the jury or at a registered nurse on the jury when testifying. Unlike in *People v Matuzak*, 263 Mich App 42, 54; 687 NW2d 342 (2004), the prosecutor’s comments did not improperly denigrate defense counsel or imply that the prosecutor had special knowledge of the veracity of the witness. As stated above, the prosecutor need not make arguments in the blandest possible terms. *Id.* at 55-56.

Defendant also contends that it was improper for the prosecutor to ask GG’s husband what *he* thought when defendant returned to the room after the alleged occurrence. GG’s husband responded, “Well, my wife made a comment to me, she said, ‘This is like a criminal coming back to the scene. This man has no conscience.’ ” The prosecutor’s question was not improper in this case, based largely on circumstantial evidence, in which part of the defense theory was that NT was not credible and all the victims only complained of defendant’s conduct after they read the article about NT. This questioning was properly used to demonstrate that immediately after NT’s encounter with defendant, she told GG and GG’s husband, and the three discussed the matter. Furthermore, we note that the prosecutor did not ask a question designed to elicit the testimony given; GG’s husband’s answer was not responsive to the question posed.<sup>4</sup> We conclude that defendant has failed to demonstrate that there was any prosecutorial misconduct in this case.

#### D. Cumulative Error

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<sup>4</sup> Defendant also asserts that defense counsel was ineffective for failing to object to this “obviously prejudicial hearsay and improper opinion testimony” instead choosing to cross-examine the witness about his comment. After reviewing the record, we conclude that this was a matter of trial strategy that defendant has failed to demonstrate was less than sound.

Defendant finally contends that the cumulative effect of the “actual errors in the aggregate” denied defendant a fair trial. Only actual errors may be aggregated to determine if the cumulative effect of multiple errors deprived a defendant of a fair trial. *LeBlanc, supra* at 591-592 n 12. Here, defendant has not established that any errors occurred. Therefore, reversal is not warranted under a cumulative error theory.

Affirmed.

/s/ William B. Murphy  
/s/ Michael R. Smolenski  
/s/ Kirsten Frank Kelly