

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL CLARE RADEMACHER,

Defendant-Appellant.

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UNPUBLISHED

March 21, 2006

No. 258149

Gratiot Circuit Court

LC No. 03-004633-FC

Before: Smolenski, P.J., Whitbeck, C.J., and O'Connell, J.

PER CURIAM.

Following a bench trial, defendant was convicted of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b). The complainant is defendant's daughter who was fifteen-years-old at the time of the incidents. Defendant was sentenced to concurrent prison terms of fifteen to thirty years for each offense. Defendant appeals as of right, and we affirm.

Defendant argues on appeal that the trial court erred when it denied a number of his discovery requests. We review a trial court's decision to compel or limit discovery for an abuse of discretion. *Reed Dairy Farm v Consumers Power Co*, 227 Mich App 614, 616; 576 NW2d 709 (1998). An abuse of discretion will only be found when an unprejudiced person considering the facts upon which the trial court based its opinion, would say that there was no justification or excuse for the ruling made. *People v McSwain*, 259 Mich App 654, 685; 676 NW2d 236 (2004).

Discovery in felony criminal proceedings is governed by MCR 6.201, which states, in relevant part:

(B) Discovery of Information Known to the Prosecuting Attorney. Upon request, the prosecuting attorney must provide each defendant:

(1) any exculpatory information or evidence known to the prosecuting attorney;

(2) any police report concerning the case, except so much of a report as concerns a continuing investigation;

(3) any written or recorded statements by a defendant, codefendant, or accomplice, even if that person is not a prospective witness at trial;

(4) any affidavit, warrant, and return pertaining to a search or seizure in connection with the case; and

(5) any plea agreement, grant of immunity, or other agreement for testimony in connection with the case.

Defendant requested all records generated as a result of the present allegations, all police records including any audio or video taped conversations with the complainant relative to this case, and all police records held by the investigating police agency, relative to any incidents involving the complainant. The prosecutor contends he provided defendant with a complete copy of the police investigation including audiotapes and the complete police file. Defendant does not argue that the reports he received were incomplete or that the prosecutor withheld relevant information. Accordingly, the court did not abuse its discretion in finding that the prosecutor properly furnished defendant with the complete report.

With regard to defendant's request for police notes, the court properly conducted an in camera review of the notes and provided defendant with copies of the notes the court found discoverable. *People v Stanaway*, 446 Mich 643, 649-650; 521 NW2d 557 (1994). This Court finds there was no abuse of discretion in conducting the in camera review because defendant does not allege the court abused its discretion, the notes were relevant to the content and direction of the taped conversation between the complainant and defendant, and the court properly reviewed the notes and provided copies to both parties.

With regard to defendant's request for the medical reports resulting from the medical examination conducted on the victim, the prosecutor never used any findings, or lack thereof, obtained during the medical examination. Pursuant to MCR 6.201(C)(2), defendant must demonstrate a good-faith belief, grounded in articulable fact, that there is a reasonable probability that records protected by privilege are likely to contain material information necessary to the defense. Neither in the record below nor in his appellate brief does defendant demonstrate any material information that may be in the report. Accordingly, defendant has not put forth a good-faith argument to refute the privilege, and therefore, no in camera review of the medical reports was necessary.

With regard to defendant's request for all records generated as a result of prior incidents or claims made by the complainant related to sexual activity or assaultive contact, either against the accused or any other person, the prosecutor has maintained that he has provided defendant with a copy of the complete report made available to him. Therefore, defendant has the same information as the prosecutor with regard to the police reports and any previous claims. Additionally, false claims would constitute exculpatory evidence, and the prosecutor is required to provide such information to defendant upon request. MCR 6.201(B)(1). The prosecutor has stated that he is not aware of any prior false claims, and therefore, he is unaware of any records with which to provide defendant. Defendant does not argue that the prosecutor is being untruthful, or that such records do exist. Accordingly, the court did not abuse its discretion in denying defendant's request for said records.

With regard to defendant's request for all records generated as a result of any prior claim made against defendant by any other person, such information is beyond the scope of this case and both the prosecutor and defense counsel have equal access to the requested information. The

prosecutor is not required to undertake discovery on behalf of a defendant where the defendant could retrieve the same information through the same methods. *People v McWhorter*, 150 Mich App 826, 832; 389 NW2d 499 (1986). Accordingly, the court did not abuse its discretion in denying defendant's discovery request for said records.

Next, defendant requested discovery of the records, notes and reports kept by any doctor, social worker, psychologist, advocate, or other care provider who examined or interviewed the complaining witness that would be used by the state. Defendant's request was specifically limited to information that would be used by the state, and the prosecutor maintained that he never intended to introduce any such records at trial and did not do so. Accordingly, the court did not abuse its discretion in denying defendant's request.

Finally, defendant requested all police records of any jurisdiction involving the complainant and all court records pertaining to her, including but not limited to sexual assault complaints, probate court records, protective service reports, and other records, emanating from any home in which she has resided. The prosecutor is not required to undertake discovery on behalf of defendant where defendant could retrieve the same information through the same methods. *McWhorter, supra* at 832. Accordingly, the court did not abuse its discretion in denying defendant's discovery request.

Defendant next argues that the court erred in denying defendant's motion for a new trial where the bailiff made inappropriate comments to the jury. We review a trial court's denial of a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003).

The court held a hearing regarding the incident in question. The bailiff testified that he knocked on the jury door and all of the jurors were present. He stated that one of the jurors asked what was going on and he explained to the jurors that the court dismissed the rest of the defense witnesses and that the jury should get ready to go back into the courtroom.

The court questioned the jurors individually. Seven of the jurors stated that they did not hear the bailiff make the comment in question and that their individual decisions regarding the verdict were not affected by the bailiff's comment. Five of the jurors said they heard the bailiff make a comment regarding whether they would hear additional witnesses, but they all stated that his comment did not affect their verdict. One of the jurors said he remembered the bailiff commenting that the defense was not going to call any more witnesses and that to do so would cause more harm than good. The juror explained that the bailiff's comment was not a topic of discussion and that the comment did not affect his individual decision regarding the verdict. Another juror said he heard the bailiff say, in response to a juror's question regarding whether or not the jury was going to hear more witnesses, something to the effect of, 'do you really think it is going to help?' The juror classified the bailiff's comment as derogatory, but explained that it was not a topic of conversation among the jurors and did not affect his individual decision regarding the verdict.

The right to a fair and impartial jury is a bedrock of our judicial system. See *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). As the Michigan Supreme Court noted in *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997):

During their deliberations, jurors may only consider the evidence that is presented to them in open court. See *United States v Navarro-Garcia*, 926 F2d 818, 820 (CA 9, 1991). Where the jury considers extraneous facts not introduced in evidence, this deprives a defendant of his rights of confrontation, cross-examination, and assistance of counsel embodied in the Sixth Amendment. See *Hughes v Borg*, 898 F2d 695, 700 (CA 9, 1990).

In *Budzyn, supra*, the Michigan Supreme Court set forth the test for determining whether extrinsic influence was error requiring reversal.<sup>1</sup> The Court stated:

First, the defendant must prove that the jury was exposed to extraneous influences. Second, the defendant must establish that these extraneous influences created a real and substantial possibility that they could have affected the jury's verdict. Generally, in proving this second point, the defendant will demonstrate that the extraneous influence is substantially related to a material aspect of the case and that there is a direct connection between the extrinsic material and the adverse verdict. If the defendant establishes this initial burden, the burden shifts to the people to demonstrate that the error was harmless beyond a reasonable doubt. [*Budzyn, supra* at 88-89 (internal citations omitted).]

The court, when considering the factors in determining whether the extrinsic influence created a real and substantial possibility of prejudice, may consider:

(1) whether the material was actually received, and if so how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict. [*Id.* at 89 n 11, citing *Marino v Vasquez*, 812 F2d 499, 506 (CA 9, 1987).]

In the present case, neither defendant nor plaintiff contests whether the improper comment was made. Therefore, the only issue on appeal is whether the bailiff's comment could have affected the jury's verdict. *Budzyn, supra* at 88-89. Based on the jurors' statements, the comment occurred before the jury was instructed or began its deliberations. It does not appear that the jurors discussed the bailiff's comment or that it was a factor during their deliberations. Although improper, it appears to be a fleeting comment not heard by a majority of the jurors. Those who heard the comment either only remember the bailiff commenting on the number of witnesses or thought the comment was unprofessional. Regardless of the extent of the communication, all of the jurors agreed that the bailiff's comment did not influence their individual decision as to whether or not defendant was guilty. Accordingly, this Court finds that,

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<sup>1</sup> Defendant relies on *People v France*, 436 Mich 138; 461 NW2d 621 (1990). However, *France* is limited to communication with a deliberating jury and is therefore not applicable. See *France, supra* at 163-164.

although improper, the bailiff's comment did not affect the verdict and therefore there was no prejudice to defendant.

Defendant next argues that the court abused its discretion when it held that the rape-shield statute prohibited counsel from asking the investigating officer about conversations that occurred between the officer and the victim. In order to preserve an evidentiary issue for review, the party opposing the admission of the evidence must object at the time of the admission and specify the same ground for objection it asserts on appeal. MRE 103(a)(1); *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). Because defendant did not object at trial on the same ground he is presenting on appeal, the issue is not preserved. An unpreserved claim of error is reviewed for plain error affecting substantial rights. *People v Young*, 472 Mich 130, 143; 693 NW2d 801 (2005).

During the investigation, the complainant agreed to the investigating officer's request to record a telephone conversation between her and defendant. As the officer listened to the conversation, he wrote down questions for the complainant to ask defendant. One of these questions was what would happen if the complainant became pregnant or contracted a sexually transmitted disease as a result of the sexual assault. Defense counsel explained that he did not seek to ask the complainant if she had sex with other people or if she was a virgin. Rather, he said he wanted to ask the officer whether the complainant gave him any information to lead him to believe she could have been pregnant or contracted a disease as the result of these alleged acts. Counsel claimed that he did not seek to expand his line of questioning beyond the complainant's interactions with defendant, but rather, his purpose was to show that the investigating officer was trying to get her to lie to defendant during the taped conversation.

Michigan's rape-shield statute, MCL 750.520j, states in relevant part:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Additionally, MRE 404(a) provides, in relevant part:

Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

\* \* \*

(3) Character of an alleged victim of sexual conduct crime. In a prosecution for criminal sexual conduct, evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

There is a disconnect between defendant's argument at trial and his argument on appeal. At trial, defendant argued that his questions did not run afoul of the rape-shield statute because he did not intend to ask the victim about her sexual experiences with anyone other than defendant. However, on appeal, defendant argues his line of questioning would not run afoul of the rape-shield statute because, in the case of a child complainant, there may be a proper purpose for introduction of evidence of prior sexual conduct. Defendant cites *People v Morse*, 231 Mich App 424; 586 NW2d 555 (1998), wherein the court held that under narrowly drawn circumstances, evidence of a child's prior sexual conduct is admissible to rebut "the inferences that flow from a display of unique sexual knowledge. . . ." *Id.* at 434, citing *People v Hill*, 289 Ill App 3d 859, 862-865; 683 NE2d 188 (1997). It therefore appears that on appeal, defendant is attempting to argue he should have been allowed to question the victim's past sexual experiences, while at trial, defendant argued he had no intention of doing so. Because defendant did not object at trial on the same ground he is presenting on appeal, the issue is not preserved. MRE 103(a)(1). Thus, as noted above, our review of this issue is only for plain error affecting substantial rights.

There was no plain error in the court's ruling. On appeal, defendant cites two sections of the rape-shield statute wherein evidence of specific instances of an alleged victim's sexual conduct may be admitted: evidence of the complainant's past sexual conduct with the actor and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

Relevant to the exception that admits evidence of the victim's past sexual conduct with the actor, defendant cites *Morse, supra*. The defendant in *Morse* was charged with seven counts of first-degree criminal sexual conduct and two counts of second-degree criminal sexual conduct against his former wife's eight-and nine-year-old daughters. *Id.* at 426, 427. The defendant in *Morse* argued that the offenses were similar to previous assaults of which the girls had been victims and if the jury was not allowed to learn of the previous offenses, the jury would conclude that the complainants' highly age-inappropriate sexual knowledge could only come from defendant having committed such acts. *Id.* at 426. However, this reference is inapposite to the facts of the current case. The victim's knowledge of sex can be independently explained from her encounters with defendant. The current victim and the complaining witnesses in *Morse* are incomparable as there is a large age difference between the girls, and what might be age-inappropriate for an eight year old to understand would not be age-inappropriate for a fifteen year old in high school to understand.

Defendant also cites the exception that allows evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. However, neither defendant nor the prosecution has argued that the complainant was either pregnant or contracted a sexually transmitted disease from defendant or any third party. Therefore, there is no need for defendant to present evidence relative to a pregnancy or disease of which the complainant is not complaining nor defendant alleging. Accordingly, the court did not plainly err in prohibiting

defendant from asking questions in violation of the rape-shield statute, given that the exceptions to which defendant refers are inapplicable.

Defendant next argues that the trial court abused its discretion when it allowed the prosecutor to present other acts evidence pursuant to MRE 404(b). The admissibility of other acts evidence is within the trial court's discretion and will be reversed on appeal only when the trial court has clearly abused its discretion. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998).

Pursuant to MRE 404(b), the prosecutor wished to introduce evidence of three prior incidents: 1) after the second incident with which defendant had been charged, defendant attempted to engage in sexual relations with the complainant by touching her body and attempting to take down her shorts; 2) defendant took a digital photograph of the complainant while she was topless and holding a dildo; and 3) defendant would frequently grab the complainant's nipples through her clothing and twist them. Following a hearing, the court allowed the prosecutor to present the evidence.

MRE 404(b)(1) provides:

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

To be admissible under MRE 404(b), bad acts evidence must satisfy three requirements: (1) the evidence must be offered for a proper purpose rather than to prove defendant's character or propensity to commit a crime, (2) the evidence must be relevant to an issue or fact of consequence at trial, and (3) the probative value of the evidence must not be substantially outweighed by the danger of unfair prejudice. *People v VanderVliet*, 444 Mich 52, 55; 508 NW2d 114 (1993); *People v Layher*, 238 Mich App 573, 585; 607 NW2d 91 (1999).

First, the evidence must be offered for a proper purpose rather than to prove defendant's character or propensity to commit a crime. *Layher, supra* at 585. Relative to child sexual abuse cases, the *Layher* court stated:

“In *People v DerMartzex*, 390 Mich 410; 213 NW2d 97 (1973), the Supreme Court held that evidence of other sexual acts between a defendant and his victim may be admissible if the defendant and the victim live in the same household and if, without such evidence, the victim's testimony would seem incredible.” [*Layher, supra* at 585 (citations omitted).]

In the present case, the prosecutor sought to introduce evidence of acts that were sexual in nature. Evidence of defendant's attempt to initiate sexual contact with the complainant by touching her body is consistent with the sexual acts previously initiated by defendant. The photograph defendant allegedly took of the complainant showed her topless and holding a sexual

item. Both elements of the photograph sexualized the complainant. Similarly, there was evidence that defendant would grab and twist private areas on the complainant's body. Therefore, the court did not abuse its discretion in finding that evidence of all of these acts showed defendant's improper sexual interest.

It was undisputed that the complainant and defendant lived in the same household during defendant's visitation times with her every other weekend. Additionally, it is likely the complainant's story would have appeared incredible without the evidence of other incidents because the jury would have had difficulty understanding how the two incidents occurred in isolation if there were no prior or subsequent incidents. As noted in *DerMartzex*, limiting a witness's testimony to the specific acts charged and not allowing her to mention acts leading up to the assault undermines the witness's credibility. *DeMartzex, supra* at 414-415. The court noted, "[c]ommon experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy." *Id.* at 415. In this case, the evidence of the photograph and defendant's grabbing of the complainant's nipples showed defendant's prior sexual interest and serves to explain what led up to the two incidents. Similarly, evidence of defendant's subsequent attempts to initiate sexual intimacy with the victim explained why the abuse stopped.

Additionally, defendant admits the prosecutor's case relied heavily on the victim's credibility. The defense theory at trial was that the complainant fabricated these charges because she was mad at her father, and her testimony regarding the incidents was inconsistent and generally not credible. Defendant attempted to diminish her credibility by portraying her as an untruthful witness with a motive to fabricate her story. The Michigan Supreme Court has held that prior sexual acts between a defendant and his alleged victim are admissible to rebut the defendant's claim that the charges were groundless or fabricated. See *People v Starr*, 457 Mich 490, 501-502; 577 NW2d 673 (1998). Accordingly, the court did not abuse its discretion in finding that, pursuant to the exception found in *DerMartzex*, the evidence was offered for a proper purpose other than to prove defendant's character or propensity to commit a crime.

Next, the evidence must be relevant to an issue or fact of consequence at trial. *Layher, supra* at 585. Defendant was charged with criminal sexual conduct, and therefore, for the reasons discussed above, the court did not abuse its discretion in finding that previous and subsequent sexual conduct between defendant and the complainant would have some tendency to make the occurrence of the sexual acts for which defendant was charged were more or less probable.

Finally, the probative value of the evidence must not substantially outweigh the danger of unfair prejudice. *Layher, supra* at 585. However, *DerMartzex* and its progeny have continually noted that previous and subsequent sexual acts between a defendant and the alleged victim are highly probative and outweigh the danger of unfair prejudice because they bolster the complainant's credibility and explain the progression of events that led to the incidents with which the defendant was eventually charged. *DerMartzex, supra* at 413-415; *People v Wright*, 161 Mich App 682, 687-688; 411 NW2d 826 (1987).

Accordingly, pursuant to *DerMartzex*, the trial court did not abuse its discretion in admitting the other acts evidence at issue.

Finally, defendant argues that the court denied his right to a jury trial by scoring the sentencing guidelines range based on facts not specifically determined by the jury beyond a reasonable doubt in violation of the rule in *Blakely v Washington*, 542 US 296; 124 S Ct 2531, 159 L Ed 2d 403 (2004). However, in *People v Drohan*, 264 Mich App 77, 89 n 4; 689 NW2d 750 (2004), leave granted 472 Mich 881 (2005), this Court held that *Blakely* does not apply to the Michigan sentencing guidelines. Thus, defendant is not entitled to relief based on this issue.

Affirmed.

/s/ Michael R. Smolenski

/s/ William C. Whitbeck

/s/ Peter D. O'Connell