

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
August 27, 2013

v

DAVID PAUL MORIKAWA,
Defendant-Appellant.

No. 308016
Iron Circuit Court
LC No. 11-009129-FH

Before: TALBOT, P.J., and JANSEN and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). The trial court sentenced defendant to concurrent terms of 20 months to 15 years in prison. We reverse and remand for a new trial.

Defendant contends that his trial attorney rendered ineffective assistance of counsel. Effective assistance of trial counsel is presumed. *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). To establish ineffective assistance of counsel, a defendant must show “that counsel’s performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel’s error.” *Id.* The defendant must also show that “the attendant proceedings were fundamentally unfair or unreliable.” *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

After the jury began its deliberations, the trial court received a note indicating that the jury was deadlocked. The court gave the jurors the “deadlocked jury” instruction and ordered them to continue deliberations. About two and half hours later, the jury sent another note stating, “[w]e cannot come to a conclusion. The vote is now the two opposing jurors will not change their minds. We are hopelessly deadlocked.” After discussing the matter with counsel, the trial court sent the jury home with orders to continue deliberations the next morning.

The next day, the jury sent another note saying, “[t]he jury is deadlocked. The two jurors will not change their mind [sic]. Help.” The trial court read the “deadlocked jury” instruction again. Approximately an hour later, the court received a note indicating that one of the jurors, Juror K, had disclosed a sexual-misconduct investigation in his past. Juror K was questioned. Juror K revealed that four or five years before the trial, he had been at a Christmas party and had touched a young girl during a group picture. He later learned that he had been investigated and

cleared of any wrongdoing. He was surprised and upset that he had been accused because he had not done anything wrong. Juror K did not reveal the incident during voir dire because he did not believe it would affect his judgment and he did not want to bring attention to himself. He then indicated that he had received a lot of peer pressure in the jury room, and, without prompting, he volunteered to the court that he was one of the holdouts. He also indicated that he had conveyed the incident to his fellow jurors, although they were not swayed by his story. Thereafter, the trial court stated that it was going to excuse Juror K as a juror “given his disclosures of information.” Defense counsel moved for a mistrial, which the trial court denied. The trial court sat an alternate juror and instructed the jury to resume deliberations. The court asked the attorneys if they had “any comments [or] any record to be made, with regard to the [c]ourt’s instructions to the jury.” Defense counsel explicitly answered, “No, Judge, thank you.”

MCR 6.411 states, in part, that “[i]f an alternate juror replaces a juror after the jury retires to consider its verdict, the court shall instruct the jury to begin its deliberations anew.” It is plain error if the court fails to instruct the jury to begin deliberations anew, and errors in instructing the jury are of a constitutional magnitude. *People v Tate*, 244 Mich App 553, 567; 624 NW2d 524 (2001). Given the intense debates and “peer pressure” that had obviously been occurring in the jury room, with numerous individuals arguing for conviction, we find the accession to the improper jury instruction by defense counsel to be below an objective standard of reasonableness. Given the existence of the original two “holdouts,” this was obviously a close case, and, when viewed in light of the error discussed *infra*, we find that it could indeed have had an effect on the outcome of the trial if the jury had begun deliberations anew with a new member and the fresh perspective that member would bring.¹

Counsel’s error was compounded by his failure to object properly to improper character testimony by Sergeant Kristine Grabowski. Although counsel did initially raise an objection based on “improper . . . character” evidence, the trial court essentially responded that the objection was premature. The court left defendant free to object when and if the prosecution introduced improper character evidence to attack defendant’s credibility. Counsel thereafter raised several objections, but none of them dealt specifically with the propriety of introducing evidence attacking defendant’s character.²

The prosecutor had the following exchange with Grabowski:

Q. How long have you worked with Trooper [defendant]? Or former Trooper [defendant]?

A. I believe he came to the Iron River Post in August or September of 2008.

¹ We also note that, unlike in *Tate*, there is no indication that the trial court instructed the existing jurors to share their prior deliberations with the alternate. *Tate*, 244 Mich App at 567-568.

² Counsel withdrew one objection that came close to touching upon the subject, stating “[n]o objection” to the admission of an exhibit pertaining to defendant’s work schedule.

Q. And you're familiar with others who work there?

A. Yes.

Q. And familiar with [defendant]?

A. Yes.

Q. And based upon your familiarity with him and with other troopers can you come to a conclusion or an opinion as to his credibility and veracity being truthfulness? Do you have an opinion?

A. Yes, I do.

Q. What is it?

A. He is not credible.^[3]

The prosecutor then had the witness clarify that when she said "credible" she meant "truthful." Defense counsel did not object.

Generally, relevant evidence is admissible. *People v Roper*, 286 Mich App 77, 91; 777 NW2d 483 (2009). However, character evidence is highly prejudicial, so it is strictly limited. *Id.* MRE 404(a) provides, in pertinent part:

(a) 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:

(1) Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same

Under MRE 404(a), the only way the prosecution can introduce evidence of a non-testifying defendant's character is if the defendant first opens the door by offering evidence of that character trait. Here, defendant did not open the door by offering testimony that he was truthful or credible. Therefore, improper character evidence was introduced when Grabowski testified that, in her opinion, defendant was not truthful. Given that this case was obviously a "close call," counsel's failure to object in this instance and in the jury-instruction instance constituted ineffective assistance of counsel.

Defendant has sufficiently established a claim of ineffective assistance of counsel⁴ and shown a fundamental unreliability with respect to his trial, and thus we accede to his request for

³ During closing arguments, the prosecution emphasized this testimony by Grabowski to argue that defendant had been dishonest in reporting his whereabouts during the time of the alleged crimes; defense counsel did not object.

a new trial. Given our resolution of the case, we need not address the additional arguments raised on appeal.

Reversed and remanded for further proceedings. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Kathleen Jansen

/s/ Patrick M. Meter

⁴ We acknowledge that defendant's ineffective-assistance claim on appeal focuses on other aspects of counsel's performance. However, defendant does indeed discuss the issues we deem dispositive today, and we note that we may address any issue that justice requires. *LME v ARS*, 261 Mich App 273, 287; 680 NW2d 902 (2004); see also MCR 7.216(7).