STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LADON DARNELL MOORE,

Defendant-Appellant.

UNPUBLISHED
May 22, 1998

No. 199258
Muskegon Circuit Court
LC No. 96-139261 FC

Before: Markey, P.J., and Griffin and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right his convictions by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of felonious assault, MCL 750.82; MSA 28.277. The trial court sentenced defendant as an habitual offender-fourth to concurrent terms of fifty-five to ninety years' imprisonment for each conviction of first-degree criminal sexual conduct, and ten to fifteen years for felonious assault. We affirm.

I. The DNA Evidence

Defendant argues that the trial court erred in admitting expert testimony regarding DNA evidence because the trial court failed to make a preliminary determination whether generally accepted laboratory procedures were used for analyzing the DNA. Defendant further asserts that the DNA statistical analysis evidence was unfairly prejudicial. We disagree.

Defendant did not preserve this issue for appeal by making timely objections. In order to preserve for review an issue regarding a ruling admitting evidence, counsel must make an objection at trial specifying the grounds for the objection, if not apparent from the context. Further, the ruling admitting the evidence must have affected a substantial right of the party. MRE 103(a)(1); *People v Grant*, 445 Mich 535, 545; 520 NW2d 123 (1994). However, this Court may consider plain, unpreserved errors in evidentiary rulings that affect substantial rights. *Id.*, 552-553. We review decisions whether to admit evidence for an abuse of discretion. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

Michigan follows the *Davis-Frye* rule,[1] that allows the admission of novel scientific evidence shown to have gained general acceptance in the scientific community. *People v McMillan*, 213 Mich App 134, 136-137; 539 NW2d 553 (1995); *People v Lee*, 212 Mich App 228, 262; 537 NW2d 233 (1995). Here, the PCR method for DNA testing was used to determine whether defendant's DNA matched that of the sperm found on the victim's bedsheets. In *Lee*, this Court held that the PCR method is generally accepted in the scientific community as being reliable and, therefore, Michigan courts may take judicial notice of the reliability of this method. *Id*,. 282-283. However, before a court admits the test results into evidence, the prosecution must show that generally accepted laboratory procedures were followed in conducting the DNA testing. *McMillan, supra*, 137; *Lee, supra*, 283.

In this case, the testimony of DNA experts Spillane and Matthews showed that the DNA testing was performed pursuant to established laboratory protocols that were strictly adhered to and have been proven to work appropriately for the lab. Control samples were used to make sure that the lab procedures were working properly. The laboratory procedures used were described in detail throughout the experts' testimony. The testimony also showed that laboratory quality-control measures that prevent contamination of evidentiary samples were employed. At the conclusion of her testimony, Matthews, responding to the trial court's inquiry, stated that generally accepted laboratory procedures were followed to arrive at the DNA test results.

Therefore, we conclude that the prosecutor elicited sufficient expert testimony to show that generally accepted laboratory procedures were followed. As it relates to defendant's assertion that the trial court erred in determining this at the end of Matthews' testimony, instead of before the DNA test results were admitted, we find no error. The prerequisite is that the prosecution show that generally accepted laboratory procedures were followed, not that the court first make a formal determination in this regard. *McMillan, supra*, 137; *Lee, supra*, 283. The prosecution made such a showing. Defendant's assertion that the trial court should have conducted a separate pretrial hearing to determine whether proper laboratory procedures were used is also without merit. Our decisions have not required a separate pretrial hearing for this purpose; the prosecution need only make the preliminary showing that generally accepted laboratory procedures were followed. The prosecution in this case fulfilled this burden. Accordingly, the trial court did not abuse its discretion in admitting the DNA evidence.

Defendant also argues that the methods used for the DNA statistical analysis should have first been subjected to a determination of whether they had attained general acceptance in the scientific community as being reliable. However, we have held that DNA statistical analysis evidence need not be subjected to scrutiny under the *Davis-Frye* test. *People v Chandler*, 211 Mich App 604, 611; 536 NW2d 799 (1995). The trial court, therefore, did not abuse its discretion in admitting the statistical analysis in this case absent a preliminary determination of whether the method used was generally accepted as reliable. Moreover, challenges to DNA statistical evidence are relevant to its weight, not its admissibility. *Id.* We find no error.

II. Alleged Prosecutorial Misconduct

Defendant argues that he was deprived of a fair trial where he changed his mind about testifying, and the prosecution remarked in the closing argument that the state's evidence stood undisputed.

Defendant asserts that the prosecution violated defendant's right not to have his silence used against him and that the cumulative effect of the prosecutor's misconduct denied him a fair trial. We disagree.

The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial. *People v Paquette*, 214 Mich App 336, 342; 543 NW2d 342 (1995). Here, defense counsel, in his opening statement, indicated that defendant would take the stand and testify that he believed he was being framed. Defense counsel further indicated that defendant would explain where he actually was on the nights in question. However, defendant ultimately did not testify. In his closing argument, the prosecution stated in pertinent part:

> That Sunday night, what evidence matches that penetration? That child told you what happened. Willie, Junior, told you things ... 10-year-olds don't know[,]... that he saw ... defendant, on top of his sister, going up and down. This child [the victim] has a sexually transmitted disease, both vaginally and anally. This child has a yeast infection in her vagina and in her mouth. This defendant's sperm is on her sheets, and the only explanation you have heard in this courtroom about how it got there is this child saying he moved his hand up and down on his penis and made sperm come out.

Defendant argues that it was impermissible commentary on defendant's failure to testify. Specifically defendant argues that the prosecution's statement that the victim's explanation was the only one proffered regarding how defendant's sperm got on her sheets was improper, especially because defendant was the only one who could contradict this evidence.

The prosecution may not comment on a defendant's failure to testify. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). However, the prosecution's argument that certain evidence is undisputed does not constitute comment regarding a defendant's failure to testify, especially where someone other than the defendant could have provided contrary testimony. *Id.*

Defendant was not the only other person who could have provided contrary testimony. The victim's brother, Willie, Jr., was present during the incidents and testified that he saw defendant undressed, in the victim's bedroom, and on the bed with the victim. Although he was not asked, Willie, Jr. may have had another explanation or may have disputed the victim's testimony about how defendant's sperm got on the bedsheet. Where the prosecution limits its comments about undisputed evidence to testimony that was subject to contradiction by witnesses other than the defendant, no impropriety inures from such comments. *Id.*, 539. Because the prosecution limited its remarks regarding otherwise unexplained evidence to a matter which potentially could have been contradicted by a witness other than defendant, in particular Willie, Jr., the prosecution's comment was not improper.

Defendant also argues that the cumulative effect of the prosecution's repeated remarks on cross-examination and during closing argument regarding the character of defendant's witnesses, and the prosecution's comments in closing argument regarding defendant's guilt, denied defendant a fair trial.

The cumulative effect of a number of errors may constitute error warranting reversal. *People v Dilling*, 222 Mich App 44, 56; 564 NW2d 56 (1997). However, "only actual errors are aggregated

to determine their cumulative effect." *People v Bahoda,* 448 Mich 261, 292 n 64; 531 NW2d 659 (1995). However, the prosecution may argue from the facts that a witness is not worthy of belief, *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996), and need not frame these arguments in the blandest possible terms, *People v Ullah,* 216 Mich App 669, 678; 550 NW2d 568 (1996). Here, the record shows that the prosecution properly cross-examined the defense witnesses and its closing arguments were drawn from the evidence.

Furthermore, the prosecution did not improperly comment on defendant's guilt. The prosecution is free to argue all reasonable inferences from the evidence as it relates to the theory of the case, *Bahoda, supra,* 282. Here, the prosecutor did not impermissibly express his personal opinion of defendant's guilt, *id.* at 282-283. Accordingly, we find no error.

III. Effective Assistance of Counsel

Defendant argues that he was denied effective assistance of counsel. We disagree. When asserting a claim of ineffective assistance of counsel, a defendant must first be heard by the trial court by way of a motion for a new trial or evidentiary hearing to establish a record of the facts pertaining to such a claim. *People v Kesl,* 167 Mich App 698, 702; 423 NW2d 365 (1988) (citing *People v Ginther,* 390 Mich 436, 443; 212 NW2d 922 (1973)). Here, defendant did not preserve this issue by moving for a new trial or evidentiary hearing. Where defendant fails to move for a new trial or a *Ginther* hearing, we may still grant review if the appellate record contains sufficient detail to support defendant's position. *People v Sharbnow,* 174 Mich App 94, 106; 435 NW2d 772 (1989). If so, our review is limited to the record, and trial counsel is presumed to have provided effective assistance. *Id.* "[T]o find that a defendant's right to effective assistance of counsel was so undermined that it justifies reversal of an otherwise valid conviction, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens,* 446 Mich 298, 338; 521 NW2d 797 (1994).

Here, defendant raises seven different claims of ineffective assistance of counsel. Defendant first argues that he was unduly prejudiced by his attorney's stipulation to the admission of a police report that defendant claims was otherwise inadmissible for lack of trustworthiness. However, defense counsel had stated that, with the keeper of the police records present, the report would be admissible. Instead of carrying out the matter, defense counsel stipulated to the report's admission. Therefore, defense counsel may have been attempting to forgo further emphasis of damaging evidence to the jury. Evidentiary decisions are presumed to be trial strategy, see *People v Mitchell,* 454 Mich 145, 163; 560 NW2d 600 (1997), and in such matters we will not second-guess trial counsel, *People v Barnett,* 163 Mich App 331, 338; 414 NW2d 378 (1987). In any event, there is nothing in the record to indicate that the material at issue in the police report was taken in response to other than a routine complaint or that the report contained matters observed by the police. The record does not reflect that defendant and police were in an adversarial posture at the time or that the preparer of the report was motivated to misrepresent.

Based on this, the report was admissible under MRE 803(8)(B), *People v Stacy*, 193 Mich App 19, 34-35; 484 NW2d 675 (1992). Counsel is not required to present a frivolous or meritless argument. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991).

Defendant's six remaining ineffective assistance of counsel claims assert various instances of attorney incompetence for consenting to certain evidence, failing to object to or present other evidence, and for failing to call and properly impeach witnesses. However, in each instance, the existing record shows that defense counsel acted reasonably and that defendant was not prejudiced.

In any event, a lawyer does not render ineffective assistance by conceding certain points at trial; only a complete concession of guilt constitutes ineffective assistance of counsel. *People v Krysztopaniec*, 170 Mich App 588, 596; 429 NW2d 828 (1988). Here, defense counsel did not concede guilt by consenting to the evidence defendant now complains of and the existing record does not show that defendant did not otherwise consent to his attorney's actions. Without benefit of a further developed record via a *Ginther* hearing, that defendant failed to request, we cannot and will not determine that defendant failed to acquiesce in his attorney's actions.

We hold that the concessions, lack of objections, and decisions by defense counsel not to present certain evidence in this case did not prejudice defendant and may have constituted trial strategy. Again, evidentiary decisions and decisions on whether to call witnesses are presumed to be trial strategy that this court will not second-guess. *Mitchell*, *supra*, 163; *Barnett*, *supra*, 338. Accordingly, defendant was not denied effective assistance of counsel.

Affirmed.

/s/ Jane E. Markey
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] *People v Davis*, 343 Mich 348; 72 NW2d 269 (1955); *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923).