# STATE OF MICHIGAN

# COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TERRY KEITH LOVEGROVE,

Defendant-Appellant.

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UNPUBLISHED
July 7, 1998

No. 201979
Chippewa Circuit Court
LC No. 96-006231 FH

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

PER CURIAM.

Defendant appeals as of right from his conviction of attempted second-degree criminal sexual conduct (CSC II), MCL 750.520c; MSA 28.788(3). Appellant also pleaded guilty to being a second habitual offender, MCL 769.10; MSA 28.1082. Appellant's conviction was based on testimony by his daughter that appellant touched her breast sometime in November 1994. The trial court sentenced appellant to a one-year term in the county jail. We affirm.

## I. Facts

According to the daughter, one night in November 1994, appellant removed his jeans and, nude, lay down on her bed. At some point, the daughter testified, appellant sat up on the bed, while she stood facing him, and placed his hand underneath her shirt, touching her bare breast for an unspecified amount of time.

The daughter also testified that from around Mother's Day in 1994 until November 1994, which was around the time of her birthday, appellant engaged in other sexually oriented activities with her. The daughter testified that she and appellant had "French kissed,"[1] that appellant had made her give him a back rub, that appellant had asked her to come in the bathroom while he was taking a bath and wash his back on more than one occasion, that appellant had spoken to her about how he had sex when he was eleven years old, that appellant had cut his pubic hair in front of her, that appellant had inserted a suppository in front of her, that appellant had showed her photographs of nude men and women, that appellant had tied a piece of bubble wrap around his penis in front of her, that appellant had told her

that it was acceptable for family members to see one another naked and that appellant had come into her bedroom, removed his jeans, and lay on her bed, nude.

Appellant denied all of his daughter's allegations of improper conduct. According to appellant, he touched his daughter in the chest area once, approximately three to four years previously, in response to her complaint of chest pains. Appellant implied that the daughter's allegations arose as a result of his custody dispute with his wife, noting that they coincided with his wife's attempts to obtain custody of the daughter.

## II. Prior Bad Acts

Appellant argues the trial court abused its discretion when it admitted the daughter's testimony regarding prior sexually oriented incidents between her and appellant. Appellant argues that the ultimate effect of admitting his daughter's testimony regarding prior sexually oriented incidents was to give the daughter's testimony regarding the November incident an extra and improper aura of believability critical to his conviction.

Generally, we review a trial court's decision to admit prior bad acts evidence for an abuse of discretion. *People v Ullah*, 216 Mich App 669, 673; 550 NW2d 568 (1996). "[A]n abuse of discretion [] exists when an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling." *Ullah*, *supra* at 673. MRE 404(b) guides a trial court's decision to admit prior bad acts testimony. 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. [*Id.*]

These exceptions are nonexclusive. *People v Engelman*, 434 Mich 204, 212; 453 NW2d 656 (1990). However, evidence of bad acts is only admissible under MRE 404(b), if: (1) the evidence is offered for a purpose other than establishing a defendant's propensity to commit the offense; (2) the evidence is relevant; and (3) the probative value of the evidence is not substantially outweighed by the potential of unfair prejudice to the defendant. *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), modified on other grounds 445 Mich 1205 (1994).

### A. Purpose for Offering the Evidence.

Appellant claims that the prosecutor did not offer the daughter's testimony of prior bad acts to establish intent, motive, scheme or plan, but rather that the prosecutor used the testimony to argue that the daughter was credible. However, establishing that the victim is credible is a proper purpose for such evidence. *People v Wright*, 161 Mich App 682, 687; 411 NW2d 826 (1987). In *People v*

*DerMartzex*, 390 Mich 410, 413; 213 NW2d 97[2] (1973), the Michigan Supreme Court held that evidence of prior bad acts is admissible where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense. Here, the prosecutor attempted to put the charged incident in context by establishing that the appellant was "familiar" with his victim in the sense of the word as it was used in *DerMartzex*, namely that appellant was sexually familiar with his victim.

Moreover, even assuming arguendo that establishing the daughter's credibility were improper, the prosecutor *did* rely on the daughter's testimony for the purpose of establishing intent, motive, scheme and plan, by arguing that appellant was "grooming" his daughter for future sexual contacts. Therefore we conclude that the prosecutor did not offer the daughter's testimony to establish appellant's propensity to commit the crime.

B. Relevance.

As a general rule any evidence that is relevant is admissible. MRE 402; *VanderVliet*, *supra* at 60-61. At trial, the daughter's credibility was at issue. Appellant implied (1) that the daughter lied in order to effect the outcome of the custody dispute between him and her mother, (2) that the daughter delayed reporting these incidents to her mother, and (3) that the daughter mistook the November incident for a harmless incident several years earlier where appellant touched her breast because she complained of chest pain. The issue on appeal is whether the daughter's testimony regarding appellant's prior sexual activity with her was relevant to her credibility as a witness.

In *DerMartzex*, *supra*, the Michigan Supreme Court held that evidence of the accused's prior crimes was not barred to establish the credibility of an alleged victim in a criminal sexual assault case: "the probative value of [evidence tending to show the commission of prior crimes] may outweigh the [prejudice] where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense." *Id. at* 413. The Court explained that the admission of "antecedent sexual acts preceding the charged assault is especially justified where an inchoate offense is charged against a member of the victim's household." *Id*. at 415. Otherwise, the Court reasoned, the victim's testimony regarding the charged conduct would appear to be an isolated, "incredible" incident. *Id*.

Here, the daughter's testimony regarding the appellant's prior sexual contact was relevant to resolve the appellant's implied allegations regarding both his daughter's motives for testifying against him and the possibility of his daughter's mistaking the November, 1994 incident for the incident years earlier.

Finally, in *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 30 (1996), this Court posited, in dicta, that evidence of prior conduct towards the victim in a first degree criminal sexual conduct case was relevant to explain the victim's delay in reporting criminal sexual activity. We find that reasoning persuasive to resolve appellant's remaining challenge to his daughter's credibility, that she delayed to inform her mother.

C. Balancing Probative Value Against Potential Unfair Prejudice.

Appellant cites *People v Starr*, 217 Mich App 646, 647-648; 553 NW2d 25 (1996), *lv gtd* 454 Mich 877 (1997), for the proposition that allegations of similar acts that are "so horrendously prejudicial" should not be introduced under the "rubric" that they are being introduced for purposes of establishing a scheme, plan or mistake. However, since the date appellant filed his brief, *Starr* was reversed in *People v Starr*, ___ Mich ___; ___ NW2d ___, slip op (rel'd June 2, 1998). Indeed, were we to rule on appellant's theory, we would find that appellant's acts, though repugnant, were not "so horrendously prejudicial" as to rise to the level of severity contained in the facts of *Starr,* 217 Mich App 646 (recounting how defendant Starr was convicted of CSC I and CSC II for engaging in oral sex with his six year old adopted daughter in addition to sexual contact with his four year old half sister which, over several years, eventually culminated in intercourse). Rather, we find the reasoning in *People v Hammer*, 98 Mich App 471; 296 NW2d 283 (1980) to be persuasive. In *Hammer*, this Court, citing *DerMartzex*, *supra*, held that testimony regarding prior sexual acts between the defendant and his daughter, the victim, was admissible on the grounds that the evidence revealed the credibility of the victim more than it potentially prejudiced the defendant. *Id*. at 475.

Because the evidence satisfies all three prongs of *VanderVliet*, we conclude that the trial court's decision to admit this testimony was not an abuse of discretion.

III. Prosecutorial Misconduct

Appellant argues that the prosecutor's comments during closing and rebuttal arguments were improper and that, despite defense counsel's failure to object and thereby preserve the issue for appeal, we should review for manifest injustice. Specifically, appellant argues that the prosecutor (1) improperly vouched for the credibility of the daughter, (2) urged the jurors to sympathize with the daughter, and (3) urged the jurors to perform their "civic duty" by convicting appellant, all prejudicial errors whose prejudice could not be overcome by a curative instruction. In *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994), the Michigan Supreme Court held

> Appellate review of improper prosecutorial remarks is generally precluded absent objection by counsel because the trial court is otherwise deprived of the opportunity to cure the error… An exception exists if a curative instruction could not have eliminated the prejudicial effect or where failure to consider the issue would result in a miscarriage of justice."

A. Vouching For Truthfulness

Appellant argues the prosecutor bolstered the credibility of the daughter's testimony in his closing comments by two arguably impermissible means: First the prosecutor used the first person voice regarding the credibility of the victim's testimony.

[*T*]*o me*, she is a very truthful little girl.

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[Y]ou who agree *with me*." [emphases added].

Second, in the same comment, the prosecutor referred to the authority of the police.

You, who agree with me, and the police, and [the daughter], stick with your beliefs.

A prosecutor is permitted to argue that a witness should be believed, *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984). However, a "prosecutor cannot vouch for the credibility of [a] witness[] to the effect that he has some special knowledge concerning [the] witness' truthfulness." *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). Further, the "prosecutor may not ask the jury to convict a defendant on the basis of the prosecutor's personal knowledge or the prestige of the office, or that of the police. *People v Kulick*, 209 Mich App 258, 260; 530 NW2d 163 (1995). However, "The allowance of otherwise improper argument is often not reversible error when made in response to a defendant's argument." *Wise*, *supra* at 103.

Prior to making the statements at issue, the prosecutor specifically stated:

> I want to comment just briefly on the opening statement by the defense that this was equated to a 1691 witch hunt….

Furthermore the trial court instructed the jury that:

> The lawyers' statements and arguments are not evidence. They are only meant to help you understand the evidence and each side's legal theories.

Although some of the prosecutor's comments may have been arguably improper, they are not grounds for reversal. The allegedly improper remarks were induced by, and responsive to, defense counsel's arguments, and a curative instruction was given. *People v Hart*, 161 Mich App 630, 637; 411 NW2d 803 (1987). Therefore we conclude that no miscarriage of justice occurred.

B. Sympathy For The Victim

A prosecutor is generally not permitted to appeal to the jury to sympathize with a victim. *Wise*, *supra* at 104. Here, the prosecutor stated:

> The young girl doesn't even like the word breast now. That's what you get when you are sexually assaulted.

and

> [T]he only person in this court who talked about love is [the daughter]. She loves her dad, but she said I don't understand why he did these things.

However, prosecutorial remarks that appeal to the jury's sympathy must be considered in light of the appellant's arguments. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997). Here, defense counsel sought sympathy for his own client. A plea for sympathy by the prosecutor is a proper response to a previous plea of sympathy by defense counsel. *People v Delisle*, 202 Mich App 658, 671; 509 NW2d 885 (1993). Furthermore, defense counsel attacked the sincerity of the daughter's behavior (crying) on the stand. In *Messenger*, *supra*, 221 Mich App 181, this Court found that the prosecutor was not seeking sympathy, but rather responding to defense counsel's argument that a witness who cried on the stand was not sincere. We find that the prosecutor's various comments were in response to defense counsel's implication that the daughter's crying was contrived.

Therefore we find that the prosecutor's arguable invocation of sympathy for the daughter did not constitute error requiring reversal and that, necessarily, no curative instruction was required at trial.

C. Civic Duty

A prosecutor is not permitted to urge the jury to perform its civic duty by convicting the defendant, *Bahoda*, *supra* at 282, because this introduces an issue broader than the defendant's innocence or guilt by requesting that the jurors suspend their own judgment. *People v Crawford*, 187 Mich App 344, 354; 467 NW2d 818 (1991). Appellant argues that the following comment shows that the prosecutor tried to use his influence to urge the jurors to perform their civic duty:

> And the People would ask that you who agree with me, and the police, and [the daughter]. Stick with your beliefs. We ask for a conviction as charged to the crime of criminal sexual conduct in the second degree. Stick with us on this particular charge.

This was not a request to convict based on some broader civic duty than determining appellant's guilt or innocence. Rather, is was an observation that the position of the police and prosecution was consistent with the daughter's version of events. Moreover, appellant failed to object to the allegedly improper statement. We hold that there was no miscarriage of justice and that, necessarily, no curative instruction was required at trial.

IV. Ineffective Assistance of Counsel

Appellant argues that he received ineffective assistance of counsel based on his attorney's failure to object: (1) to the timeliness of the prosecution's motion to introduce alleged prior sexual acts between appellant and his daughter; (2) to allegedly improper statements made by the prosecution during its closing and rebuttal arguments; (3) to the trial court's instruction regarding the lesser included charge of "attempt" when, appellant maintains, there was no evidence to support the instruction; and (4) to the introduction of a victim impact statement drafted by appellant's former wife.

To establish a claim of ineffective assistance of counsel, appellant must show that (1) "counsel's performance was below an objective standard of reasonableness under professional norms…[, and (2)] that there is a reasonable probability that, but for defense counsel's error, the result of the proceeding would have been different." *Stanaway*, *supra* at 687-88. Further, "[appellant] must overcome a

strong presumption that [the former defense] counsel's assistance constituted sound trial strategy." *Stanaway*, *supra* at 687. Indeed, we will not substitute our judgment for that of trial counsel regarding strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Because appellant did not move for an evidentiary hearing at trial to develop this issue, our review is limited to the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

A. Failure To Object To Motion

In *VanderVliet*, *supra* at 89, n 51, the Michigan Supreme Court explained that the purpose of pretrial notice is to protect a defendant from unfair surprise and to give the defendant an opportunity to marshal arguments regarding relevancy and unfair prejudice. Here, because defense counsel had the opportunity to construct his arguments, it is unlikely that an objection based on inadequate notice would have been sustained. Therefore, defense counsel's failure to object to the prosecutor's allegedly unreasonable delay in noticing his intent to use prior bad acts evidence did not affect the outcome of appellant's trial.

B. Failure To Object To Prosecutor's Statements.

Trial counsel's failure to object to allegedly improper statements during closing and rebuttal arguments may have constituted sound trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996), holds that the appellant bears the burden of showing that trial counsel's conduct did not constitute sound trial strategy. Our analysis of the record convinces us that trial counsel may have concluded that objecting to the prosecution's remarks would have only *underscored them*. See *People v Rone (On Second Remand)*, 109 Mich App 702, 717-718; 311 NW2d 835(1981). We will not second guess trial strategy. *Barnett*, *supra* at 338.

C. Failure To Object To Instructions.

Because appellant had been charged with second-degree criminal sexual conduct, a general intent crime, appellant had fair notice to defend against the charge of attempt because the proofs for both charges are substantially the same. *People v Leo*, 188 Mich App 417, 425; 470 NW2d 423, 425 (1991). Therefore, any objection to this instruction would have been denied. Therefore, trial counsel's failure to object therefore did not amount to ineffective assistance.

D. Failure To Object To Consideration Of Victim Impact Statement.

The victim impact statement, authored by the daughter's mother, was included as a portion of appellant's presentence investigation report. The purpose of the presentence investigation report is to gather information to present the trial court regarding the appellant's background. *People v Kisielewicz*, 156 Mich App 724, 729; 402 NW2d 497 (1986). Although a statement of the victim is included as a matter of statutory right, MCL 780.764; MSA 28.122287(764), statements by the *minor victim's mother*, among others, are permitted to further the goal of obtaining a broad scope of information. *Kisielewicz*, *supra* at 728. The trial court therefore properly considered information

contained in the victim impact statement. Trial counsel's failure to object had no impact on appellant's sentencing because the information would have been considered regardless of any objection.

E. *Ginther* Hearing

Appellant argues that he attempted to replace trial counsel but the trial court denied him the opportunity to do so. However, there is no evidence of such an attempt in the trial court record or in appellant's motion for a new trial. Appellant contends that in order to provide a factual record of this allegation, we should remand appellant's case to the trial court for further evidentiary hearing.

An appellant who seeks further evidentiary hearing regarding ineffective assistance of counsel, a matter not on the record, must satisfy one of two conditions: (1) the appellant must first attempt to raise the issue before the trial court or (2) if the record "manifestly shows" that the trial court would have refused to grant such a hearing, the appellant may request this Court to order such a hearing. *Ginther*, *supra* at 443-444

Here, appellant first failed to address this issue before the trial court. On appeal, appellant's brief is silent as to whether the trial court record "manifestly shows" that such a request would have been denied. Therefore, we decline to review this issue.

Affirmed.

/s/ Stephen J. Markman
/s/ Richard Allen Griffin
/s/ William C. Whitbeck

[1] The daughter testified that defendant "[p]ut his tongue in my mouth."

[2] In *Engelman*, *supra* at 222, the Michigan Supreme Court declined to follow *DeMartzex* with regard to the issue of acts involving persons other than the victim.