STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIAM ALBERT BROWN,

Defendant-Appellant.

UNPUBLISHED
December 29, 1998

No. 201135
Tuscola Circuit Court
LC No. 95-006808 FC

Before: MacKenzie, P.J., and Bandstra and Markman, JJ.

PER CURIAM.

Defendant appeals as of right from his jury convictions of two counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). Defendant's convictions were based on testimony from his daughter that he forced her to engage in sexual relations with him in November 1987 when she was eight years old. Defendant was sentenced to a term of life imprisonment on the first CSC I conviction, forty to sixty years' imprisonment on the second CSC I conviction, and fifteen to thirty years' imprisonment for each of the CSC II convictions. We affirm.

Defendant first argues that he was denied his constitutional right to a fair trial before an impartial jury because one juror was an acquaintance of an investigating officer involved in defendant's case. The officer had been an occasional customer of the juror's service station for twenty years, although they had never socialized beyond that. Whether reversal is required because of jury bias depends on whether review of defendant's trial, under the totality of the circumstances, reflects that he was denied his right to a fundamentally fair trial before an impartial jury. *People v Delisle*, 202 Mich App 658, 669; 509 NW2d 885 (1993). We note that the purpose of voir dire is to allow counsel the opportunity to elicit information and make a rational determination whether to challenge a juror for cause or exercise a peremptory challenge. *People v Smith (After Remand)*, 122 Mich App 202, 206-207; 332 NW2d 401 (1981). A defendant is denied his right to a fair trial before an impartial jury when a juror falsely answers questions or fails to disclose matters that would have led counsel to challenge that juror. *Id.* In addition, "jurors are presumed to be competent and impartial and the burden of proving otherwise is

on" the defendant. *People v Badour,* 167 Mich App 186, 188; 421 NW2d 624 (1988), rev'd on other grounds, *People v Beckley,* 434 Mich 691; 456 NW2d 391 (1990).

First, we note that defendant waived any complaints regarding the relationship between the complained of juror and investigating officer by failing to either challenge the juror for cause, or to exercise a peremptory challenge to excuse the juror during voir dire, after the juror fully disclosed his relationship with the officer. *People v Stephens*, 58 Mich App 701, 708; 228 NW2d 527 (1975), *People v McKee*, 7 Mich App 296, 299; 151 NW2d 869 (1967). Second, notwithstanding this waiver, we conclude that defendant was not denied his right to a fair trial before an impartial jury. The juror's acquaintance with the investigating officer appears far less intimate than a juror's personal friend-witness, see *Badour, supra* at 189, or an investigating officer-witness who formerly resided with a juror's parents, *People v Glover,* 83 Mich App 249-250; 268 NW2d 362 (1978), both of whom this Court found competent. In addition, the juror specifically indicated that he would not give the testimony of this acquaintance greater weight than any other witness, affirming his impartiality. *Glover, supra* at 250. Further, the officer in this case never testified. Fourth, defense counsel had two remaining peremptory challenges when this particular juror was seated, failed to exercise a peremptory challenge to remove the juror, and failed to challenge the juror for cause. A review of the totality of the circumstances, *Delisle, supra* at 669, indicates, in our judgment, that defendant was not denied his right to a fair trial before an impartial jury. Because "counsel may not harbor error to be used as an appellate parachute in the event of jury failure," *People v Bart (On Remand),* 220 Mich App 1, 15; 558 NW2d 449 (1995), we conclude that defendant waived this issue.

Defendant next argues that he was denied his right to a fair trial because of the prosecutor's improper "appeal for sympathy" with the victim. We review allegations of prosecutorial misconduct by evaluating the prosecutor's comments in context, *People v Paquette,* 214 Mich App 336, 342; 543 NW2d 342 (1995), with full reference to defense arguments and the nature of the evidence admitted at trial, *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992). A prosecutor need not use the blandest terms possible when making arguments, *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996), and when attempting to extrapolate inferences from the evidence, to support her theory of the case. *People v Bahoda,* 448 Mich 261, 282; 531 NW2d 659 (1995).

Here, the prosecutor commented that the victim may have potentially died from the herpes condition that she allegedly contracted from defendant. However, prior to this, in his closing argument, defense counsel: (1) stated that the victim was a liar; (2) implied that she fabricated her allegations to protect another unnamed sexual partner; (3) indicated that she fabricated her allegations to retaliate against defendant for suspending her driving privileges; (4) stated that she fabricated her allegations to blame someone for her herpes diagnosis; and (5) stated, "I don't know why [the victim] hates her father." We conclude that the prosecution's admittedly questionable remarks do not require reversal because they: (1) addressed issues first raised by defense counsel, *People v Wise*, 134 Mich App 82, 104; 351 NW2d 255 (1984); (2) were induced by and were responsive to issues first raised by defense counsel, *People v Messenger,* 221 Mich App 171, 181; 561 NW2d 463 (1997); and (3) represented a response to defendant's initial plea for sympathy from the jury, *Delisle, supra* at 671. In addition, the trial court gave an instruction to the jury not to let sympathy or prejudice influence their

decisionmaking process. *Hart, supra* at 638. Therefore, in our judgment, defendant was not denied his right to a fair trial based on the prosecutor's statement.

Defendant also argues that the sentencing court committed an abuse of discretion when it sentenced him to life imprisonment for his first CSC I conviction, forty to sixty years' imprisonment for his second CSC I conviction, and fifteen to thirty years' imprisonment for each CSC II conviction. However, a sentencing court has broad discretion in determining an offender's sentence. *People v Coles*, 417 Mich 523, 537; 339 NW2d 440 (1983), overruled in part on other grounds *People v Milbourn*, 435 Mich 630; 461 NW2d 1 (1990). The sentencing court does not abuse its discretion unless it violates the "principle of proportionality," which requires that an offender's sentence be proportionate to the circumstances surrounding the immediate offense and his prior criminal behavior. *Milbourn, supra* at 635-36.

Defendant's sentences of life imprisonment and forty to sixty years' imprisonment for his CSC I convictions are both within the minimum guideline range of twenty to forty years *or life.* See Michigan Sentencing Guidelines, Grids - Criminal Sexual Conduct (2d ed), at 47. Therefore, his CSC I convictions are presumed to be neither unfairly disparate nor excessively severe, *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987), because they fall within the minimum guideline range, albeit at the high end, *People v Vettese*, 195 Mich App 235, 246-247; 489 NW2d 514 (1992). Because defendant failed to advance any unusual circumstances mitigating his offense, *Sharp, supra* at 505, we conclude that the sentence did not violate the principle of proportionality.[1] *Milbourn, supra* at 661.

Defendant next argues that he was denied his right to the effective assistance of counsel because counsel failed to have him psychologically evaluated regarding his criminal responsibility. Defendant failed to preserve this issue by creating a testimonial record through a motion for an evidentiary hearing or a new trial, *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), and our review is therefore limited to the lower court record, *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). To establish a claim of ineffective assistance of counsel, the defendant must show (1) that defense counsel's performance fell below an objective standard of reasonableness measured by professional norms; (2) that but for defense counsel's error, there was a reasonable probability that the result of the proceedings would have concluded differently; and (3) that the result of the proceeding was unreliable or fundamentally unfair. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997). Further, defendant has the burden of overcoming a presumption of effective assistance, *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996), by establishing that defense counsel failed to perform some essential duty that prejudiced him or by illustrating that counsel failed to meet a minimum level of competence. *People v Jenkins*, 99 Mich App 518, 519; 297 NW2d 706 (1980). We review the issue of defense counsel's performance by applying an objective standard of reasonableness and do not engage in the benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). With regard to issues of trial strategy, we will not substitute our judgment for that of defense counsel. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Regarding the failure to request that defendant be evaluated regarding his criminal responsibility, we recognize that the failure to have a defendant with a history of psychological problems evaluated

regarding criminal responsibility before counseling him to plead guilty to a criminal offense may potentially constitute ineffective assistance. *People v Nyberg*, 140 Mich App 160, 166; 362 NW2d 748 (1984). However, because defendant here maintained his innocence, counsel was obligated "to follow his client's wishes and argue that he was innocent at trial rather than raise an insanity defense." *People v Newton (After Remand)*, 179 Mich App 484, 490; NW2d (1989). Therefore, based on the trial court record, we find that defense counsel's failure to plead an insanity defense represented a matter of trial strategy and will not substitute our judgment for that of counsel with the benefit of hindsight. *Id.* at 493.

Defendant next argues that the trial court abused its discretion when it excluded the victim's "shot and immunization records" as irrelevant. Because the decision to admit or exclude evidence is within the trial court's discretion, we will not reverse unless we conclude that "an unprejudiced person, considering the facts on which the trial court acted, would say there is no justification or excuse for the ruling made." *People v Gould*, 225 Mich App 79, 88; 570 NW2d 140 (1997). Generally, all evidence with "any tendency to make the existence" of a material fact more or less probable is admissible. MRE 401, 402; *People v VanderVliet*, 444 Mich 52, 60-61; 408 NW2d 114 (1993). Evidence is relevant if it is helpful in "throwing light" on a material point. *People v Kozlow*, 38 Mich App 517, 524-525; 196 NW2d 792 (1972). Although evidence need not relate to an element of the crime charged or a defense to be material, it must be within the range of litigated matters in controversy. *People v Brooks*, 453 Mich 511, 518; 557 NW2d 106 (1996). Materiality and relevance are governed by the elements of the charge, theories of admissibility, and defenses asserted. *Id.*

Although a defendant is entitled to a reversal of his conviction when a trial court improperly excludes evidence supporting an element of his theory of the case, *Brooks, supra* at 289, an abuse of discretion does not occur when the trial court excludes evidence that is speculative or irrelevant. *People v Price*, 112 Mich App 791, 799-800; 317 NW2d 249 (1982). Defendant sought the introduction of the "shot and immunization" records at trial specifically in order to "establish the fact that at the time when the children [of defendant] were being seen for their innoculations at the health department, those records will establish the fact that [the victim] had never had sex." Our independent review of the victim's "shot and immunization records" discloses no information in support of this proposition and, therefore, confirms the analysis of the trial court. Therefore, we conclude that the trial court did not commit an abuse of discretion by excluding these records.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Richard A. Bandstra
/s/ Stephen J. Markman

[1] Although the sentencing court's comment that defendant was a "worthy candidate" for capital punishment may, to some, appear hostile or biased to defendant, it is well settled that sentencing is the appropriate time for comments regarding felonious, antisocial behavior and that a court need not use "tepid" language when levying its penalty. *People v Antoine*, 194 Mich App 189, 191; 486 NW2d 91 (1992).