

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERWIN JAMES PLOUHAR,

Defendant-Appellant.

UNPUBLISHED

July 27, 1999

No. 197425

Recorder's Court

LC No. 95-007842

Before: Doctoroff, P.J., Markman and J.B.Sullivan,* J.J.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and one count of second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788(3)(1)(a). He was sentenced to concurrent prison terms of twenty to thirty years each for the first-degree criminal sexual conduct convictions and ten to fifteen years for the second-degree criminal sexual conduct conviction. He appeals as of right. We affirm.

Defendant, a resident of Washington State, made a four-day visit to Michigan in December 1994, staying at a Budgetel Motel in Southgate. The victim, his twelve-year-old granddaughter, stayed overnight with defendant at the motel room several times. The charged sexual acts were allegedly committed by defendant during his stay.

At trial, the victim testified that something "unusual" also occurred in the motel room during the period of sexual activity between defendant and the victim. She stated that defendant carried a brown case that held his toiletries, as well as "a needle and a bottle that he used to make himself hard." The victim testified that defendant would "stick the needle inside the bottle and draw liquid into it and then find a spot on his penis and then he injected himself" in the side of his penis. After the injection, defendant would rub his penis for a few minutes and then achieve an erection. The victim stated that she had not learned about the use of this medication through other sources.

*Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

I

On appeal, defendant argues that the trial court erred by denying his motion for a new trial on the basis that he was denied the effective assistance of counsel. Specifically, defendant argues that his trial attorney, Frederick M. Finn, had a conflict of interest because he also represented defendant's son, Martin Plouhar, on charges that he, too, had illegal sexual contact with the victim. Defendant argues that Finn forewent arguing that Martin Plouhar, not defendant, had sexually abused the victim, presumably at the Budgetel Motel, and was the sole source of her extensive sexual knowledge. Defendant contends that Finn was precluded from advancing this defense theory because of his loyalty to his former client, Martin Plouhar. We disagree.

A trial court may grant a defendant's motion for a new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B); *People v Leonard*, 224 Mich App 569, 580; 569 NW2d 663 (1997). The trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *Id.*

In order to prevail on his claim that a conflict of interest violated his Sixth Amendment rights, defendant must establish that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler v Sullivan*, 446 US 335, 348; 100 S Ct 1708; 64 L Ed 2d 333 (1980); *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Thus, the first question that this Court must decide is whether an actual conflict of interest existed, i.e., whether Finn's prior representation of Martin Plouhar on charges that he sexually molested the victim at his house in Romulus on Christmas Eve, 1994, materially limited Finn's representation of defendant. Michigan Rules of Professional Conduct 1.7(b) provides, as pertinent, that

[a] lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

- (1) the lawyer reasonably believes the representation will not be adversely affected; and
- (2) the client consents after consultation. . . .

Further, MRPC 1.9(a) provides:

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation.

We agree with the trial court's assessment that Finn's representation of Martin Plouhar and then defendant did not give rise to an actual conflict of interest. The cases were so factually separate that

they cannot be considered the same matter or substantially related matters. Neither party knew that the other had illegal sexual relations with the victim. The sexual activity between Martin Plouhar and the victim took place at Martin Plouhar's house in Romulus on Christmas Eve, 1994, while the sexual activity between defendant and the victim took place starting on December 26, 1994, at the Budgetel Motel in Southgate. Additionally, the acts between defendant and the victim involved pornography, hypnotism, and defendant's use of a "penal [sic] injection drug." The victim did not once testify or report that Martin Plouhar was in any way involved in the sexual activity that took place between her and defendant at the Budgetel Motel in late December 1994, and no other evidence supports this construction of the facts. Granted, had the victim reported or testified that Martin Plouhar and defendant somehow acted in concert to molest her, defendant might have an argument that his interests and that of Martin Plouhar were sufficiently adverse as to give rise to a legitimate conflict. However, defendant's argument is, in essence, that Finn's successive representations prevented him from blaming Martin Plouhar for sexually molesting the victim at the Budgetel Motel when she stayed there with defendant in December 1994, a view of the case unsupported by any evidence.

Further, even if an actual conflict of interest existed, it did not have an adverse effect on Finn's representation of defendant. Finn testified that he refrained from advancing the blame-shifting defense for several reasons that were completely unrelated to the remote possibility of a conflict of interest arising from his successive representation of Martin Plouhar and defendant. First, Finn testified that he did not want to mention that the victim made allegations of sexual abuse against Martin Plouhar, because in light of Plouhar's guilty plea to first-degree criminal sexual conduct, the victim's allegations were proven to be true. Thus, Finn believed that introduction of Martin Plouhar's conviction actually would bolster the victim's credibility. Second, Finn believed that if he told the jury that Martin Plouhar had been convicted of sexually molesting the victim, it would think "like father, like son." Third, Finn testified that he attempted to gather information from Martin Plouhar that might raise questions about the victim's credibility, but "Martin gave [him] nothing to say that [the victim] was a liar or she had some kind of pattern of deception, anything like that." In light of Finn's imminently reasonable explanations for why he did not attempt to blame Martin Plouhar for the victim's sexual abuse at that Budgetel Motel and his staunch denial that he avoided raising this defense because of his prior representation of Martin Plouhar, defendant failed to show that an actual conflict of interest prevented Finn from advancing a legitimate defense and, thus, adversely affected Finn's performance. See *People v Sawyer*, 222 Mich App 1, 3; 564 NW2d 62 (1997) ("[t]his Court will not substitute its judgment for that of trial counsel in matters of trial strategy.").

As a related issue, defendant argues that Finn avoided arguing that the victim gathered her vast, precocious sexual knowledge from her sexual contact with Martin Plouhar, rather than defendant, because this would have forced Finn to reveal confidential, secret information that he gathered in the course of his attorney-client relationship with Martin Plouhar. Apparently, defendant's position is that this would have violated MRPC 1.6(b)(3), which prevents a lawyer from using "a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure."

However, Finn testified that he could have argued that the victim learned about sex from sexual contact with her father. Indeed, he could have done so without violating the rule against exposing the secrets and confidences of former clients. Martin Plouhar freely admitted to sexually penetrating the victim. His act(s) became a matter of public record when he pleaded guilty to first-degree criminal sexual conduct. According to the official comment accompanying MRPC 1.9,

information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client.

Thus, Finn was free to argue from the fact of Martin Plouhar's guilty plea that the victim derived her extensive sexual knowledge from her contact with Martin Plouhar, not defendant. Again, however, Finn refrained from mentioning the fact of Martin Plouhar's conviction for several reasons, all reasonable. This Court will not second-guess Finn's choice of trial strategy. *Sawyer, supra*.

Additionally, defendant argues that Finn's prior representation of Martin Plouhar prevented him from informing the jury that Martin Plouhar was also accused of sexually abusing the victim, investigated, and eventually convicted of first-degree criminal sexual conduct. Defendant argues that it was necessary for Finn to disclose this information to the jury to prevent it from assuming that defendant was also responsible for uncharged acts in Romulus, when Romulus police actually investigated Martin Plouhar, not defendant.¹ Again, Finn could have mentioned the fact of Martin Plouhar's guilty plea without running afoul of the rules of professional conduct. However, he chose not to do so as a matter of trial strategy, which this Court will not disturb. *Id.* Not one witness testified that defendant was responsible for other uncharged crimes, nor did the prosecutor argue or imply that this was the case. Moreover, the trial court properly instructed the jury that it was to decide this case on the basis of properly admitted evidence. A jury is presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). There is no indication that the jury assumed defendant was responsible for other crimes based on Finn's refusal to elicit evidence of Martin Plouhar's guilty plea. Defendant has not shown that an actual conflict of interest adversely affected Finn's representation.²

Finally, defendant advances that the trial court abused its discretion by refusing to grant his motion for a new trial, because Finn's representation was ineffective for a myriad of other reasons. Defendant contends that Finn failed to investigate possible witnesses and defenses, failed to object to certain testimony on proper grounds, failed to object to the prosecutor's misconduct, failed to request a mistrial when the prosecutor referred to the victim's counseling, failed to object to certain hearsay testimony, failed to object to testimony that defendant ordered pornographic movies when he stayed at the Budgetel Motel with the victim, and failed to request jury instructions on lesser included offenses of second-degree criminal sexual conduct. We have carefully reviewed these allegations and conclude that defendant failed to prove that counsel's representation was ineffective, i.e., he failed to show that Finn's performance was so deficient that he was not functioning as "counsel" as guaranteed by the Sixth Amendment, or that Finn's performance so prejudiced the defense that defendant was denied a fair trial.

See *People v Reed*, 453 Mich 685, 694-695; 556 NW2d 858 (1996). Thus, we conclude that the trial court did not err in denying defendant's motion for a new trial based on ineffective assistance of counsel.

II

Next, defendant argues that the trial court abused its discretion by denying his request for an *in camera* review of the victim's counseling records to determine whether they contained evidence useful to his defense. He asks this Court to remand this case to the trial court and order it to conduct an *in camera* review of the records of the victim's sessions with sexual abuse counselor(s).

Records of confidential communications made to sexual assault counselors, social workers, and treating psychologists are generally privileged. MCL 600.2157a(2); MSA 27A.2157(1)(2) (sexual assault counselors); MCL 339.1610(1); MSA 18.425(1610)(1) (social workers); MCL 330.1750; MSA 14.800(750) (psychologists); *People v Stanaway*, 446 Mich 643, 658-661; 521 NW2d 557 (1994). Nonetheless, in an appropriate case, where the defendant establishes a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the otherwise privileged records are likely to contain material information necessary to the defense, the trial court has the option of conducting an *in camera* review of the records to determine whether the documents reveal evidence necessary to the defense. *Id.* at 677-679. However, the trial court need not pursue this option where the defendant generally alleges that review of privileged documents is necessary to unearth any prior inconsistent statements that the complainant may have made. *Id.* at 680-682. We review a trial court's decision to deny an *in camera* inspection of records containing privileged communications for an abuse of discretion. *Id.* at 680.

We find that the trial court did not abuse its discretion by denying defendant's discovery request. Defendant merely suggested that the victim's counseling records might contain material, necessary evidence because the victim's account of her sexual assault may have changed between the time she made her statements to police and the preliminary examination. Even without having access to the counseling records, defendant had all the information necessary with which to cross-examine the victim on the subject of the inconsistencies between her statements to the police and her testimony at the preliminary examination, as well as at trial. In any event, by defendant's own admission, he merely sought to unearth the victim's prior inconsistent statements. It is not necessary for the trial court to conduct an *in camera* review of the victim's privileged communications to accommodate this purpose. *Id.* at 680-682.

Defendant also argues that it was necessary for the trial court to conduct an *in camera* review of the victim's counseling records because she may have made other possibly false allegations of sexual abuse against additional family members. It is true that prior sexual conduct may be admissible to show a witness' bias, motive for false charge, or fact of prior accusations. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). Nevertheless, we believe that the trial court did not abuse its discretion by refusing to conduct an *in camera* review of the privileged records. Defendant never actually argued that the counseling records might contain information regarding other potentially false allegations of abuse. Instead, defendant believed that the victim's counseling records might indicate that her parents,

other family members, the police, or the prosecutor influenced her to accuse defendant of criminal sexual conduct. Defendant was unable to point to a demonstrable fact supporting this belief, other than his unconfirmed idea that the victim accused her father of sexual abuse first, and then accused himself after she had extensive contact with police, her parents, and counselors. It was the *trial court* that, apparently misinterpreting defendant's weak argument, assumed defendant was searching for evidence of false allegations of abuse made against other family members. In responding to questions from the trial court on the subject, the prosecutor acknowledged that the victim had accused other family members of abuse and promised to make this evidence available to defendant. Because evidence concerning the victim's other accusations of sexual abuse was available to defendant from sources other than the victim's counseling records, the trial court did not abuse its discretion by refusing to conduct an *in camera* review of the privileged counseling records. Defendant does not otherwise contend that the prosecutor improperly withheld the evidence he sought. Accordingly, we find no basis to remand this matter for additional proceedings.

III

Next, defendant contends that he was severely prejudiced by the trial court's admission of certain testimony.

First, defendant's sister, Louise Biggs, testified that she visited defendant in Washington State in 1994. Biggs noticed a fairly large bottle of liquid in defendant's refrigerator. The bottle had a rubber top, which caused Biggs to believe that it contained an injectable medication. Defendant told Biggs that, because he experienced sexual impotence, he used this medication, Prostaglandin, to achieve erections by injecting it into his penis. Biggs denied that she told the victim, or anyone the victim might know, about defendant's impotence and the use of this medication. Although defendant had brought a motion in limine to exclude Biggs' testimony concerning his use of this impotence medication, the trial court decided that Biggs' testimony was admissible, and thus denied defendant's motion to exclude it.

On appeal, defendant argues that the trial court abused its discretion by admitting Biggs' testimony on the subject of his use of impotence medication, because the testimony was irrelevant, being beyond the *res gestae* of defendant's offenses, and more prejudicial than probative. We disagree.

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Gibson*, 219 Mich App 530, 532; 557 NW2d 141 (1996). An abuse of discretion exists only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Warren*, 228 Mich App 336, 341; 578 NW2d 692 (1998).

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." MRE 401. Under several views of the evidence, Biggs' testimony met this definition of relevance. First, the victim testified, *inter alia*, that defendant attempted to penetrate her vagina with his penis. In light of defendant's apparent impotence problem, he may have had the opportunity to argue that it was physically impossible for him to commit a sexual act involving penile

penetration. Evidence concerning defendant's use of Prostaglandin, or "Caverject," as this medication is known commercially, made it more probable that defendant could achieve an erection and attempt the sexual contact about which the victim testified. Second, Biggs' testimony confirmed that defendant suffered from impotence and used Caverject to treat this problem. The evidence showed that the victim, a young girl, was somehow aware of this medication and defendant's use of it. Her inappropriate knowledge of defendant's intimate problem further supported the inference that defendant and the victim had illegal sexual contact. Third, a jury is generally entitled to learn the facts and circumstances of the entire criminal transaction, not just evidence that establishes the elements of the charged offenses. See *People v Sholl*, 453 Mich 730, 740-742; 556 NW2d 851 (1996).

Defendant's implied assertion that the prosecutor is not permitted to elicit evidence to corroborate the victim's testimony is patently incorrect. A prosecutor is not permitted to make an argument or present testimony to the effect that she or anyone else possesses special knowledge that a witness' testimony is truthful. See *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995). However, it is beyond cavil that, notwithstanding the foregoing precept and rules of evidence limiting the admissibility of evidence, the prosecutor is free to elicit evidence that has the effect of corroborating a witness' testimony.

Defendant further contends that Biggs' testimony was unfairly prejudicial. MRE 403 provides that, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Biggs' testimony, like most evidence introduced against a criminal defendant, was damaging to the defense. See *People v Pickens*, 446 Mich 298, 336-337; 521 NW2d 797 (1994). However, the evidence was prejudicial on this basis alone, not because it injected considerations extraneous to the merits of the case against defendant, e.g., the jury's bias, sympathy, anger, or shock. *Id.* We find that MRE 403 did not bar admission of Biggs' testimony on the subject of defendant's impotence.

Defendant further contends that the trial court abused its discretion by admitting the testimony of Arthur Lambke, an expert witness who testified about the effects and method of using Prostaglandin to treat impotence, and Biggs' additional testimony that defendant had written a book containing a scene in which a boy and a girl kiss and the boy experiences premature ejaculation. The prosecutor sought to use Biggs' testimony on this subject to corroborate the victim's testimony that, during her stay in defendant's motel room, defendant showed her a book containing "sex parts" that featured a girl and boys who "were trying to put their penises inside her." However, because defendant failed to object in the trial court, our review of this issue is limited to whether manifest injustice resulted from admission of this evidence. *People v Ramsdell*, 230 Mich App 386, 404; 585 NW2d 1 (1998). Our review of the trial court record leads us to conclude that manifest injustice did not occur. We decline to address this issue further.

IV

Next, defendant argues that numerous instances of prosecutorial misconduct denied him a fair and impartial trial. Defendant failed to object to the many instances of alleged misconduct. Appellate review of alleged prosecutorial misconduct is precluded if a defendant failed to timely and specifically object at trial. *Stanaway, supra* at 687. Review of unpreserved allegations of prosecutorial misconduct is foreclosed unless the prejudicial effect of the remarks was so great that it could not have been cured by an appropriate instruction. *People v Turner*, 213 Mich App 558, 575; 540 NW2d 728 (1995). We have carefully reviewed every allegation of alleged misconduct and conclude that the prejudicial effect of the alleged misconduct was nonexistent, or so minimal that it could have been cured by an appropriate limiting instruction. We decline to address this issue further.

VI

Finally, defendant argues that he is entitled to resentencing because his sentences are disproportionate.³ We disagree.

This Court reviews the trial court's imposition of a particular sentence for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). Here, the trial court sentenced defendant to four terms of twenty to thirty years' imprisonment for the first-degree criminal sexual conduct convictions and a term of ten to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction, the sentences to be served concurrently. Defendant's sentences are within the applicable sentencing guidelines range, and thus they are presumptively neither excessively severe nor unfairly disparate. *People v Kennebrew*, 220 Mich App 601, 609; 560 NW2d 354 (1996).

Nonetheless, a sentence within the guidelines range can conceivably violate proportionality in unusual circumstances. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990). Defendant's employment history and his lack of a criminal history are not unusual circumstances that overcome the presumption of proportionality. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994). Defendant argues that his advanced age and the fact that he will most likely die in prison constitute unusual circumstances. While age could constitute an unusual circumstance for the trial court to consider when imposing sentence, see *People v Piotrowski*, 211 Mich App 527, 532-533; 536 NW2d 293 (1995), we disagree that defendant's advanced age constituted an unusual circumstance in this case. Finally, defendant's unsurprising religious

conversion perhaps can be viewed in a positive light, but it is not an unusual circumstance. Defendant has not presented facts to rebut the presumptive proportionality of his sentences.

Affirmed.

/s/ Martin M. Doctoroff

/s/ Stephen J. Markman

/s/ Joseph B. Sullivan

¹ For instance, the victim's mother testified that she first took the victim to police in Romulus, not Southgate, when the victim "reveal[ed] something" to her.

² Defendant also argues that the trial court gravely erred by neglecting to inform him of Finn's conflict of interest and the risks pursuant thereto, and by neglecting to ascertain whether defendant had consented to counsel's representation when and if Finn disclosed the extent of his conflict. Since defendant failed to establish the existence of an actual conflict of interest, it is unnecessary to address this issue.

³ Defendant also argues that the sentencing guidelines were scored incorrectly. We refuse to address his contention. Because the guidelines do not have the force of law, a challenge to a trial court's calculation of the sentencing variables based on its discretionary interpretation of unchallenged facts does not state a cognizable claim for relief. *People v Mitchell*, 454 Mich 145, 176; 560 NW2d 600 (1997).