

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GEORGE T. GARTIN,

Defendant-Appellant.

UNPUBLISHED

November 12, 1999

No. 207440

Recorder's Court

LC No. 96-009611

Before: Collins, P.J., and Sawyer and Cavanagh, JJ.

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). The trial court sentenced defendant to sixteen to thirty years' imprisonment for each of the first-degree criminal sexual conduct convictions, and ten to fifteen years' imprisonment for the second-degree criminal sexual conduct conviction. Defendant appeals as of right. We reverse and remand for a new trial.

Defendant first argues that the court's conduct during trial denied him a fair trial. Specifically, defendant contends that the trial court spoke to defense counsel in a disrespectful manner in the presence of the jury, bolstered the victim's credibility, discredited defense attempts to impeach the credibility of the victim's testimony, and repeatedly assumed the role of prosecutor. The trial court has wide, but not unlimited, discretion and power in the matter of trial conduct. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). The principal limitation on a court's discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality. *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). The test is whether the court's questions and comments may have unjustifiably aroused suspicion in the mind of the jury concerning a witness' credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case. *People v Cheeks*, 216 Mich App 470, 480; 549 NW2d 584 (1996). When reviewing a claim of judicial misconduct, portions of the record should not be taken out of context in order to show bias against the defendant; rather, the record should be reviewed as a whole. *Paquette, supra*.

Defendant argues numerous instances in which, he contends, the trial court spoke to defense counsel in a hostile or sarcastic manner before the jury. However, after reviewing the alleged instances of misconduct in context, we conclude that the challenged comments were not of such a nature as to have influenced the jury to the detriment of defendant's case. A number of the heated exchanges between the court and defense counsel that defendant cites were aggravated by direct challenges to the court by defense counsel. See *People v. Dixon*, 170 Mich App 508, 513-514; 429 NW2d 197 (1988), mod on other grounds 433 Mich 852 (1989).

We also conclude that the court did not assume the role of prosecutor. Although the court did interrupt during defense counsel's voir dire of a prosecution witness, the court's questioning of that witness did not indicate bias toward the prosecution. The trial court may question witnesses in order to clarify testimony or elicit additional relevant information. MRE 614(b); *Davis, supra* at 49-50. With regard to defendant's contention that, on numerous occasions, the court interrupted defense counsel in the absence of any objection by the prosecution, we note that the court also interrupted the prosecution without benefit of an objection from defense counsel, albeit not as frequently. We find that any difference in this regard did not evidence bias or partiality.

However, we find that the trial court's responses to defendant's attempts to show bias or motive to fabricate on the part of the victim and her mother, and its bolstering of the victim's testimony, indicated partiality that quite possibly could have influenced the jury to the detriment of defendant's case.

The victim in this case is the daughter of defendant's former girlfriend. The defense theory was that the former girlfriend convinced her daughter to fabricate allegations of abuse by defendant. During her opening statement, defense counsel stated that the evidence would show that the victim's mother told defendant's mother that she would "get" defendant because defendant ended a romantic relationship with her and began seeing another woman. After the prosecutor objected, the trial court made the following comments:

Let me tell you this, Ladies and Gentlemen. And again, I'm gonna ask you to concentrate on the issues that-- we're not going-- This is not divorce court. This is not, you know, let's make a date or whatever that other thing was on TV and all those other things. This is a case that deals with whether or not [defendant] perpetrated these acts against this young lady.

Now, [defendant] may have done a whole bunch of other things. [Defendant] may have a whole string of women. He's free to have 'em all he wants and they can have him. We're not here to decide that and we're not here to decide whether everybody's happy that a romance has broken up. Maybe everybody isn't. *That doesn't make a hill of beans of difference.* The question is, did [defendant] do these acts? [Defense counsel] says that all of these things may have been. Fine, so be it. But the question again becomes, did [defendant] perpetrate these acts against [the victim], no matter what his relationship is with [the victim's] mother, [], or when it broke up or what woman he wanted to see or who wanted to get him. [Emphasis added.]

On at least two other occasions during trial, the court commented that defendant's relationship with the victim's mother had no relevance to proving whether defendant had sexual relations with the victim.¹ Further, when defense counsel was attempting to impeach the victim's mother regarding the amount of time it took her to contact the police and doctor after learning the victim had been assaulted, the trial court asked, "What difference does it make?" At the same time, the trial court's question to defense counsel during cross-examination of the victim's mother (see n 1 above), "Does that suggest that [defendant] didn't sexually assault this youngster?" and his statement that "the youngster said he did it," bolstered the victim's testimony.

We conclude that the overall effect of the court's comments was to lend credibility to the victim's testimony and discredit defense attempts to impeach her version of events. The trial court's comments rendered meaningless defendant's argument that the victim's mother had a motive to seek revenge against defendant, thereby inhibiting defendant's ability to present a fair defense. Therefore, we find that reversal is required.

Defendant next argues that the trial court abused its discretion when it excluded several of defendant's witnesses from testifying. Although the trial court initially indicated that the witnesses would be excluded because defense counsel did not comply with a discovery order, the trial court later informed defense counsel and the prosecutor that it wanted to hear the witnesses' testimony to determine whether any of it was relevant to defendant's case. After making this request, the trial court learned that the potential witnesses were in the courtroom during the morning proceedings. The court then ruled that those witnesses would not be allowed to testify because they were present in the courtroom in violation of the trial court's sequestration order. Accordingly, we address whether the trial court erred in excluding defense witnesses on the basis that they violated sequestration order. The decision to sequester witnesses and to exclude witnesses that violate a sequestration order is within the discretion of the trial court. *People v Nixten*, 160 Mich App 203, 209-210; 408 NW2d 77 (1987).

In ordering sequestration, the trial court stated as follows: "[T]he witness who is going to testify will and the witness that will be called to testify and all potential witnesses will be out of this courtroom while others testify." After the court ruled that the defense witnesses would not be allowed to testify because they had violated its sequestration order, defense counsel pointed out to the court that when the witnesses were in the room, no other witnesses were testifying.² The trial court stated it did not matter if testimony was taking place while the witnesses were in the room because the sequestration order was for the entire trial.

When reviewing this type of issue in the past, this Court has focused on the amount of testimony heard by a witness sought to be excluded for violating a sequestration order. In *People v Dickerson*, 62 Mich App 457, 459-460; 233 NW2d 612 (1975), this Court found that the trial court did not abuse its discretion when it excluded a witness that had been present in the courtroom for the first two days of trial and was also present on the day which she was to be called as a witness. In *People v Jones*, 75 Mich App 261, 277-278; 254 NW2d 863 (1977), this Court found that a witness who was in attendance throughout the course of the trial was properly excluded from testifying. However, in *People v Boose*, 109 Mich App 455, 475; 311 NW2d 390 (1981), this Court found that even though a witness violated a sequestration order four separate times, the trial court did not abuse its discretion in

refusing to exclude the testimony of that witness. This Court noted that the witness's presence in the courtroom was very brief and that any other testimony heard by the witness did not relate to matters which he testified about. Accordingly, we conclude that because the witnesses defendant intended to call were not in the court while others were testifying, the trial court abused its discretion when it excluded them from testifying.

Defendant next argues that the trial court abused its discretion when it admitted evidence that the victim had chlamydia, since this evidence was substantially more prejudicial than probative. We disagree. The decision whether to admit evidence is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). We will find an abuse of discretion only where an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made. *People v Riegle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Starr*, *supra* at 497. Evidence is relevant if it has "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; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Even if relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin*, 223 Mich App 530, 536; 566 NW2d 677 (1997). Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury. *Crawford*, *supra* at 389.

Here, where defendant's theory was that the victim's allegations of abuse had been fabricated, evidence that she tested positive for chlamydia, coupled with testimony that chlamydia is contracted through sex, was relevant because it tended to corroborate her claims of abuse. Because the evidence was not linked to defendant, however, the probative value of the evidence was slight. At the same time, we do not believe that the danger of unfair prejudice was high. Defendant testified that he was tested for sexually transmitted disease at the Wayne County Jail and was not informed that he tested positive. Further, the court informed defendant that he could bring in whatever evidence he had of the tests performed at Wayne County Jail. Because defendant was not completely precluded from presenting evidence that would help him prove that he was not the source of the victim's sexually transmitted disease, we cannot conclude that the challenged evidence was unfairly prejudicial. Therefore, the trial court did not abuse its discretion in admitting it.

Defendant's final argument on appeal is that the trial court erred in ruling that testimony concerning the sexual relationship between defendant and the victim's mother was barred by the rape shield. We agree. MCL 750.520j; MSA 28.788(10), commonly known as Michigan's rape shield act, provides, in pertinent part:

- (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge

finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

- (a) Evidence of the victim's past sexual conduct with the actor.
- (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

In *People v Adair*, 452 Mich 473, 480-481; 550 NW2d 505 (1996), our Supreme Court addressed the purpose of the rape-shield statute:

The rape-shield statute was aimed at thwarting the then-existing practice of impeaching the victim's testimony with evidence of the victim's prior consensual sexual activity, which discouraged victims from testifying "because they kn[e]w their private lives [would] be cross-examined." House Legislative Analysis, SB 1207, July 18, 1974. A complainant's sexual history with others is generally irrelevant with respect to the alleged sexual assault by the defendant.

Clearly, the rape-shield statute was not intended to protect all witnesses, but only victims. Here, the challenged evidence concerned the sexual relationship between defendant and the victim's mother, not any previous sexual activity involving the victim. Therefore, that evidence was not precluded by the rape shield. Moreover, evidence of defendant's relationship with the victim's mother was relevant to show that the victim's mother had a motive to encourage her daughter to fabricate allegations of abuse against defendant, and its potential for unfair prejudice did not substantially outweigh its probative value. *Crawford, supra; Sabin, supra*. Therefore, we find that the trial court abused its discretion in excluding the evidence.

Reversed and remanded for a new trial before a different judge. We do not retain jurisdiction.

/s/ Jeffrey G. Collins
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

¹ During cross-examination of the victim's mother, the court foreclosed defense counsel from inquiring into the mother's assertion that she had never lived with defendant:

THE COURT: . . . So what do we care about her relationship to your client and your client's relationship to her or whether they ever lived together?

[*DEFENSE COUNSEL*]: Because the whole issue is, your Honor, as I've discussed before, the motive, the breakdown of a relationship and the spreading of untruths to other people, getting them involved.

THE COURT: But ma'am, she has, she has talked to you about her relationship. What are you suggesting? She has said that I've known this man for most

of my life, I even had a very close familial relationship, she says, for some three and a half years, maybe '89 to '90 it started, and it ended some time-- If you go from '89 to '90, you can count up the years, can use the reason and count up those years whatever the reasons. But what, ma'am has that got to do with whether or not he sexually assaulted [the victim]?

[DEFENSE COUNSEL]: Just as I stated before—

THE COURT: But you want to say that. Are you suggesting, ma'am, that you're going to bring out through witnesses, this witness, that she somehow or another has indicated to [the victim] that she ought to say some Godawful things relative to your client and that's how this all got here?

[DEFENSE COUNSEL]: Absolutely, your Honor.

THE COURT: Well, what has that got to do with—

[DEFENSE COUNSEL]: It's credibility your Honor.

THE COURT: Credibility of who, ma'am?

[DEFENSE COUNSEL]: Credibility of the mother and credibility of the child.

THE COURT: But she has not said one word about your client. In fact, she called your client a dear friend to the family.

[DEFENSE COUNSEL]: But she also said they never lived together, your Honor.

THE COURT: Well it don't matter. What does it matter if they lived together as to whether or not he sexually assaulted this child or not?

[DEFENSE COUNSEL]: Because the whole case is based upon credibility, your Honor.

THE COURT: What credibility? You talking about-- Say she's lying. You're lying. You say the lady is lying about the fact that they lived together. Does that suggest that he didn't sexually assault this youngster?

[DEFENSE COUNSEL]: In the totality of —

THE COURT: No, the youngster said he did it.

Later, when defense counsel asked victim's mother if she ever told defendant's mother that "I'm gonna get George if it's the last thing I do," defense counsel objected and the court told the jury:

I know, ma'am. Listen, listen, I'm gonna leave it to this fine jury that both of you have picked to cut through this. We ain't here to decide if there's some niffnaw conversation. You know, having grown up in the world and being a man of 36 years at the bar handling any number of cases, both civil and criminal, dealing with divorce, whatever, people talk about their current relationships, their want-a relationships, their past relationships. They talk about it with everybody.

Ladies and Gentlemen, we're not here to determine whether she talked to a whole bunch of folks about her relationship to George or what she felt about George or anything. We're here for one sole purpose: Did he or did he not have sexual connection with this youngster as alleged.

² During the time the challenged witnesses were in the courtroom, the court was conducting a hearing on defendant's motion for mistrial and disqualification of the court.