STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 21, 2000
v	No. 210558 Oakland Circuit Court
MICHAEL J. WOODWORTH, Defendant-Appellant.	LC No. 96-149149-FH

Before: Hood, P.J. and Gage and Whitbeck, JJ.

PER CURIAM.

A jury convicted defendant Michael J. Woodworth of third-degree criminal sexual conduct ("CSC III"), MCL 750.520d(1)(b); MSA 28.788(4)(1)(b). The trial court sentenced Woodworth to a term of 2-1/2 to 15 years' imprisonment. He appeals as of right. We affirm.

I. Facts And Procedural History

The complainant in this case and Woodworth were, at one time, married and had a son. They separated in March 1996 and, ultimately, divorced in 1997. According to the complainant, on August 13, 1996, she went to Woodworth's parents' home to allow Woodworth to have court-ordered visitation with their one-year-old son. When the complainant arrived at the home, she went upstairs with Woodworth and their son to record some music from defendant's compact discs to cassette tapes. Woodworth later took their son downstairs to eat dinner, but he returned upstairs, saying that he was not hungry. Woodworth sat with the complainant on the bed and began tickling her. He eventually maneuvered her onto her back, sat on her, and pinned her arms over her head. The complainant asked Woodworth to stop, but instead of stopping he asked her for a kiss. Against her wishes, Woodworth kissed her and said that the kiss "felt right." Woodworth then pulled down her shorts and underwear without her consent, took out his penis, and penetrated her "a few times." He only stopped when he noticed that the complainant was crying. Following the sexual act, Woodworth told her that he was "so sorry," and asked her if she was okay, but the complainant left the house with her son.

Woodworth saw the events at his parents' house differently. Although Woodworth admitted having sexual intercourse with the complainant on August 13, 1996, he claimed that he began

performing oral sex on the complaint and only stopped because the complainant jerked up and gave him a strange look. At that point, he put his penis in the complainant's vagina, but did not ejaculate. This activity was consensual in his opinion. Woodworth stopped the penetration when the complainant indicated that she did not want to have sex and, because the complainant was upset, he tried to calm her. Later, Woodworth walked downstairs with the complainant and their child and the complainant kissed him before she left.

There were two trials in this case. The first ended in a mistrial after Detective John Kirken, a prosecution witness, testified that Woodworth had taken a polygraph test despite the prosecutor's stipulation that Detective Kirken would not mention the polygraph test. In the second trial, the jury convicted defendant of CSC III. The trial court refused to vacate Woodworth's conviction on the basis of the double jeopardy clauses of the Michigan and United States Constitutions, rejecting Woodworth's argument that defense counsel at the first trial was "goaded into moving for a mistrial" by the prosecutor.

On appeal, Woodworth contends that the trial court erred when it refused to vacate his conviction because it violated his constitutional protections against double jeopardy. In the alternative, he argues that he is entitled to a new trial because the trial court excluded the complainant's prior inconsistent statements and his trial counsel was ineffective.

II. Double Jeopardy

A. Standard Of Review

We review constitutional questions, such as whether a defendant was convicted in violation of his rights against double jeopardy, de novo. *People v White*, 212 Mich App 298, 304-305; 536 NW2d 876 (1995).

B. The Protection Against Double Jeopardy

The double jeopardy provision of the United States Constitution, US Const, Am V, and its counterpart in the Michigan Constitution, Const 1963, art 1, § 15, protect individuals from successive prosecutions for the same offense. *People v Harding*, 443 Mich 693, 699; 506 NW2d 482 (1993). In *People v Dawson*, 431 Mich 234; 427 NW2d 886 (1988), the Michigan Supreme Court set forth the parameters for determining when double jeopardy bars retrial following a defendant's successful motion for a mistrial:

> Where the motion for mistrial was made by defense counsel, or with his consent, and the mistrial was caused by innocent conduct of the prosecutor or judge, or by factors beyond their control, or by defense counsel himself, retrial is also generally allowed, on the premise that by making or consenting to the motion the defendant waives a double jeopardy claim.
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> Where a defendant's motion for mistrial is prompted by intentional prosecutorial conduct, however, the defendant may not, by moving for a mistrial, have waived double

> jeopardy protection. The United States Supreme Court has held that the Double Jeopardy Clause bars retrial where prosecutorial conduct was intended to provoke the defendant into moving for a mistrial.
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> * * *
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> Retrials are an exception to the general double jeopardy bar. Where a mistrial results from apparently innocent or even negligent prosecutorial error, or from factors beyond his control, the public interest in allowing a retrial outweighs the double jeopardy bar. The balance tilts, however, where the judge finds, on the basis of the "objective facts and circumstances of the particular case," that the prosecutor intended to goad the defendant into moving for a mistrial. [*Id*. at 253, 257 (citations omitted).]

Thus, we examine the trial court record to determine whether Detective Kirken intentionally mentioned the polygraph test, and if so, whether he mentioned the polygraph test for reasons out of the control of the prosecutor or trial judge.

C. The Record

Before the prosecutor called Detective Kirken to testify regarding statements Woodworth made *after* he took the polygraph test, defense counsel argued that Detective Kirken should not be permitted to testify regarding the test itself. The prosecutor replied:

> Your Honor, this officer [Detective Kirken], this detective was not the person who administered the lie detector test. This was a discussion that occurred after this was taken. *The detective knows not to mention the polygraph or the results thereof. He's merely going to testify to his conversation that was taken, conversation with the defendant that was taken post Miranda.* [Emphasis supplied.]

After the trial court ruled that Woodworth had voluntarily waived his rights against self-incrimination in connection with his statements following the polygraph examination, Detective Kirken testified during the prosecutor's direct examination that Woodworth admitted performing oral sex on the complainant, saw that she was frightened and confused, knew that she did not want to have sex, but he still proceeded to have sexual intercourse with her.

During cross-examination, the following exchange occurred between *defense counsel* and Kirken:

> [Defense Counsel]: Other than what the defendant said to you, do you have any personal knowledge of this alleged crime?
>
> [Detective Kirken]: I'm sorry, sir, could you please speak up.

[Defense Counsel]: Had you ever read any other police reports that were made in this matter?

[Detective Kirken]: I'm sorry, sir, I'm having a hard time hearing you.

[Defense Counsel]: Did you ever read any of the other police reports that were made in this matter?

[Detective Kirken]: Yes, I did.

[Defense Counsel]: And what reports were those?

[Detective Kirken]: I would have been furnished with copies of all of the written reports in reference to the incident.

[Defense Counsel]: Would that have included other reports that contained results of interviews with [Woodworth]?

[Detective Kirken]: Yes, sir. Well, I take that back. I don't think prior to this incident, I do not think [Woodworth] was ever interviewed, as I recall.

[Defense Counsel]: You don't believe that, that he ever was interviewed?

[Detective Kirken]: I'm sorry?

[Defense Counsel]: You don't believe he was ever interviewed prior to that?

[Detective Kirken]: I believe that's correct, as I can best recall?

[Defense Counsel]: You don't recall reading in the police reports that he was interviewed on August 13, 1996?

[Detective Kirken]: *Well what I can tell you is that on the day of the polygraph examination I did read the report –*

[Defense counsel]: Your Honor, I would ask for a mistrial.

[Trial court]: Excuse me. Take the jury out for a moment.

(Jury left the courtroom)

[Trial court]: Please sit down.

Prosecutor, there's a motion for mistrial.

[Prosecutor]: Should we –

[Trial court]: No, I want you to respond.

[Prosecutor]: Your Honor, I would ask for a limiting instruction.

[Trial court]: You would ask for a limiting instruction? What kind of a limiting instruction do you think I can give that would hold up in any court in this country? Can you think of one?

[Prosecutor]: No, your Honor.

[Trial court]: Do you oppose the motion for a mistrial?

[Prosecutor]: No, your Honor.

[Trial court]: What were you thinking, Detective?

[Witness]: *I apologize, your Honor*.

[Trial court]: I hope you did it unconsciously and it wasn't premeditated, Officer.

[Witness]: *It was not, sir*.

[Trial court]: Well, you don't oppose the motion for a mistrial. Mistrial granted. [Emphasis supplied.]

D. Analysis

The principles articulated in *Dawson*, *supra*, compel the conclusion that the trial court did not err in denying Woodworth's motion to vacate his conviction based on double jeopardy principles. The record clearly reveals that Detective Kirken mentioned the polygraph test inadvertently. Neither the trial judge nor the prosecutor had a recognizable role in eliciting this improper testimony given that defense counsel was conducting the examination at the time Detective Kirken made the statement; there is no evidence whatsoever that the prosecutor or trial court engaged in intentional misconduct to provoke the statement. Rather, Detective Kirken only made the statement after defense counsel repeatedly asked him whether he had read all the police reports in the case. Afterward, Detective Kirken was contrite and indicated that his statement was unintentional. There simply is no contrary evidence on the record and, in the absence of such evidence, we can only interpret the speed with which defense counsel moved for a mistrial as evidence that he, independently and not because of any "goading" by the prosecutor, put defendant in the position of being retried.

Based on our review of the objective facts and circumstances of the case, we agree with the trial court's conclusion that Detective Kirken's statement during cross-examination was inadvertent and out of the prosecutor's control, and that there is no indication that the prosecutor provoked defense counsel into moving for a mistrial. *Dawson, supra*. Accordingly, double jeopardy did not bar retrial

because the mistrial, granted on Woodworth's own motion, waived the double jeopardy protections. *Id*.; see also *People v Gaval*, 202 Mich App 51, 53; 507 NW2d 786 (1993).

III. Prior Inconsistent Statements

A. Standard Of Review

As noted above, Woodworth also argues that he is entitled to a new trial because the trial court improperly precluded Detective Byrd from testifying that the complainant made allegedly inconsistent statements regarding whether she sent her son downstairs before Woodworth assaulted her and whether her boyfriend was waiting for her at her apartment after the assault. Whether to grant a new trial is within the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *People v Jones*, 236 Mich App 396, 404; 600 NW2d 652 (1999).

B. MRE 613(b)

MRE 613(b) provides:

> Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 801(d)(2).

Before attempting to impeach a witness with a prior inconsistent statement, a litigant must lay a proper foundation in accordance with the court rule. *People v Weatherford*, 193 Mich App 115, 122; 483 NW2d 924 (1992). To do so, the proponent of the evidence must ask the witness to admit or deny making the first statement, then ask the witness to admit or deny making the later, inconsistent statement, and finally allow the witness to explain the inconsistency. *Id*., citing *People v Barnett*, 165 Mich App 311, 315; 418 NW2d 445 (1987). Only then can a litigant offer extrinsic evidence of the inconsistent statement to impeach the declarant. MRE 613(b).

However, under the circumstances in this case, we need not decide whether defense counsel laid the proper foundation for admission of extrinsic evidence under MRE 613(b). Defense counsel *conceded* during trial that he failed to do so. "Defendant may not 'assign error on appeal to something which his own counsel deemed proper at trial.'" *People v McCurdy*, 185 Mich App 503, 507; 462 NW2d 775 (1990), quoting *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988).

IV Ineffective Assistance Of Counsel

A. Standard Of Review

In a related argument, Woodworth contends that he is entitled to a new trial because he was denied the effective assistance of trial counsel when defense counsel conceded that he failed to lay a

proper foundation for admission of the proposed extrinsic evidence under MRE 613(b). We review the record de novo when a defendant claims that his counsel's performance denied him effective assistance.

B. Legal Standard

We presume that a defendant received effective assistance of counsel, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing norms and that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.* at 302-303, 326. A defendant must also overcome the presumption that the challenged action or inaction was trial strategy. *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996).

C. Trial Strategy

After reviewing the record, we conclude that Woodworth has not overcome the presumption that trial counsel's actions amounted to trial strategy. Here, defense counsel apparently decided to concede that a proper foundation had not been laid and to continue questioning Detective Byrd without attempting to admit the extrinsic evidence. See *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999) (decisions regarding what evidence to present and whether to question witnesses are presumed to be matters of trial strategy). Given the limited evidentiary value of the extrinsic evidence and the fact that the complainant never denied making the statements to the police, defense counsel may have decided that the statements were insignificant and it was not necessary to challenge them through impeachment. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Furthermore, defense counsel has no obligation to put forth meritless arguments. *People v Gist*, 188 Mich App 610, 613; 470 NW2d 475 (1991). Here, it was clear that defense counsel failed to establish the proper foundation for the impeachment evidence. Defense counsel's decision to acknowledge his mistake and to proceed with the examination may very well have been aimed at not alienating the trial court by wasting its time insisting that he had laid the proper foundation. See *People v Caballero*, 184 Mich App 636, 639; 459 NW2d 80 (1990). We cannot discount the value of this decision as a legitimate trial strategy.

D. Effect On The Result

Even assuming that defense counsel was ineffective for conceding his failure to lay the proper foundation for the extrinsic evidence to impeach the complainant, it is unlikely that, but for counsel's concession, the result of the proceedings would have been different given the complainant's direct testimony concerning Woodworth's actions. *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). Although Woodworth claims that the proposed extrinsic evidence was relevant to the complainant's general credibility, the proposed evidence would have done little to impeach the complainant's credibility because she did not deny making the prior statement to the police. In addition,

the discrepancy between the complainant's trial testimony and her prior statements was insignificant and the jurors knew from defense counsel's cross-examination of the complainant that her trial testimony differed slightly from her previous statement to the police. Accordingly, Woodworth has not shown how defense counsel's concession so prejudiced him as to deprive him of a fair trial.

Affirmed.

/s/ Harold Hood
/s/ Hilda R. Gage
/s/ William C. Whitbeck