# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 24, 2000 |
| v | No. 217559<br>Ingham Circuit Court |
| SIDNEY DARRIEL MARTIN,<br><br>Defendant-Appellant. | LC No. 98-073178-FH |

Before: Wilder, P.J., and Smolenski and Whitbeck, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a). Defendant received a sentence of 15 to 30 years' imprisonment. He appeals as of right from his conviction. We affirm.

Defendant first argues that the prosecutor's questioning of potential jurors during voir dire denied defendant an impartial jury. During voir dire, the prosecutor asked the potential jurors if they or any of their family were members of the Michigan Militia. Because defense counsel did not object to the prosecutor's question at trial, defendant raises this issue for the first time on appeal. Where a defendant fails to timely and specifically object to a prosecutor's allegedly improper conduct, this Court will only review the defendant's claim for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). Further, "[n]o error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction." *Id*. at 721. Defendant argues that the prosecutor's question implied that defendant was a member of the Michigan Militia, and therefore biased the jury against him. Our review of the record reveals no indication that the prosecutor's question biased the jury. Rather, we believe that the prosecutor's question was legitimately posed to discern jury bias. "The purpose of voir dire is to elicit enough information for development of a rational basis for excluding those who are not impartial from the jury." *People v Tyburski*, 445 Mich 606, 618; 518 NW2d 441 (1994). We conclude that no plain error occurred. Even if we accepted defendant's argument that the prosecutor's question was improper, any error could have been cured by a timely instruction. Therefore, defendant is not entitled to relief on this issue.

Defendant next argues that the trial court committed error requiring reversal by utilizing electronically pre-recorded jury instructions. Because defense counsel failed to object to the jury instructions at trial, the alleged error is unpreserved, and we review this issue for plain error. *People v Carines*, 460 Mich 750, 764-765; 597 NW2d 130 (1999). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id.* at 763, citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Defendant argues that this Court has strongly disapproved the use of electronically recorded jury instructions, citing *People v Cavanaugh*, 127 Mich App 632, 641-643; 339 NW2d 509 (1983) and *People v Small*, 120 Mich App 442, 445-446; 327 NW2d 504 (1982). However, defendant fails to acknowledge two separate court rules, effective on September 1, 1998, which expressly permit a trial court to provide electronically recorded instructions during jury deliberations. MCR 2.516(B)(5); MCR 6.414(G). Because the case law on which defendant relies pre-dates the adoption of these court rules, we do not find that authority controlling here. Instead, we must examine the language of the court rules to determine whether the trial court committed error requiring reversal.

MCR 2.516(B)(5) provides:

> Either on the request of a party or on the court's own motion, the court may provide the jury with
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> (a) a full set of written instructions,
>
> (b) *a full set of electronically recorded instructions,* or
>
> (c) a partial set of written *or recorded instructions* if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided.
>
> If it does so, the court must ensure that such instructions are made a part of the record. [Emphasis added.]

Further, MCR 6.414(G) provides:

> The court may permit the jury, on retiring to deliberate, to take into the jury room a writing, other than the charging document, setting forth the elements of the charges against the defendant and any exhibits and writings admitted into evidence. On the request of a party or on its own initiative, the court may provide the jury with a full set of written instructions, *a full set of electronically recorded instructions,* or a partial set of written *or recorded instructions* if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided. If it does so, the court must ensure that such instructions are made a part of the record. [Emphasis added.]

Neither rule expressly addresses whether the trial court may pre-record instructions and play that electronic recording during the initial jury instructions. Rather, the rules seem to address those materials which the trial court may provide for the jury's review during deliberations. Nevertheless, both rules provide that the court "may provide the jury with . . . a full set of electronically recorded instructions," as long as those instructions "are made a part of the record." Because the plain language of MCR 2.516(B)(5) and MCR 6.414(G) does not expressly prohibit the trial court from pre-recording jury instructions, we do not believe that the trial court committed plain error.

Defendant next argues that the trial court committed error requiring reversal because the electronically recorded instructions incorrectly stated that defendant was charged with more than one crime. "Jury instructions are to be read as a whole rather than extracted piecemeal to establish error. Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Bell*, 209 Mich App 273, 276; 530 NW2d 167 (1995), internal citations omitted. The transcript of the jury instructions provides as follows:

> Many things are not evidence and you must be careful not to consider them as such. I will now describe some of the things that are not evidence. The fact that the Defendant is charged with a crime and is on trial is not evidence. Likewise, the fact that he is charged with more than one crime – that's incorrect, I shouldn't have left that in there. He is not charged with more than one crime, he is only charged with one crime, ignore that.

In this case, the court immediately corrected itself when the erroneous instruction issued. Reading the instructions as a whole, we believe that they fairly presented the issues to be tried. We do not believe that the trial court committed a plain error affecting defendant's substantial rights.

Defendant next argues that a malfunction during playback of the electronic recording caused a plain error requiring reversal. *Carines, supra*, 460 Mich 764-765. Defendant does not specify what language the electronic recording failed to convey to the jury, arguing simply that there was "some sort of omission" from the jury instructions. Our review of the record reveals that the problem occurred during the reading of CJI2d 3.5(5), and that the instructions which the jury heard lacked the following language: "The lawyers' statements and arguments are not evidence." CJI2d 3.5(5). The electronic recording properly played the remainder of the instruction, including the statement that "[t]he lawyers' questions to witnesses are not evidence. . . . You should only accept things the lawyers say that are supported by the evidence or by your own common sense and general knowledge." No error results from the omission of an instruction if the instructions as a whole cover the substance of the omitted instruction. *People v Messenger*, 221 Mich App 171, 177-178; 561 NW2d 463 (1997). We believe that the instructions heard by the jury adequately conveyed the substance of the omitted instruction. Therefore, we do not believe that the trial court committed a plain error affecting defendant's substantial rights.

Defendant next argues that the trial court improperly admitted prior bad acts testimony regarding other incidents when defendant allegedly molested the victim, as well as other incidents when defendant allegedly molested an unidentified child. At trial, defendant did not preserve these issues by

raising an objection under MRE 404(b). Therefore, we review this issue for plain error. *Carines*, *supra*, 460 Mich 764-765. Rule 404(b) prohibits the admission of evidence used "solely to show the criminal propensity of an individual to establish that he acted in conformity therewith." *People v VanderVliet*, 444 Mich 52, 65; 508 NW2d 114 (1993), modified 445 Mich 1205 (1994). To be admissible under MRE 404(b), other acts evidence must: (1) be offered for a proper purpose, (2) be relevant, (3) its probative value must not be substantially outweighed by its potential for unfair prejudice, and (4) on request, the trial court shall provide a limiting instruction. *VanderVliet*, *supra* at 74. MRE 404(b) lists possible proper purposes for the admission of prior bad acts, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake. MRE 404(b)(1).

The allegedly improper testimony arose in two contexts. First, the victim testified that defendant had molested her on five separate occasions, when he was only charged with a single assault. We believe that this testimony was properly admitted because it was relevant to the victim's credibility. In *People v DerMartzex*, 390 Mich 410, 414-415; 213 NW2d 97 (1973), our Supreme Court held that a sexual assault victim properly testified regarding the defendant's prior, uncharged sexual assaults against her, because "[l]imiting her testimony to the specific act charged and not allowing her to mention acts leading up to the assault would seriously undermine her credibility in the eyes of the jury. Common experience indicates that sexual intercourse and attempts thereat are most frequently the culmination of prior acts of sexual intimacy." *Id*. In this case, the testimony provided a similar context which assisted the jury in weighing the victim's credibility. Therefore, we do not believe the evidence was offered solely to show defendant's propensity to commit sexual assaults and his action in conformity with that propensity.

Further, we believe that the victim's testimony regarding defendant's prior sexual assaults was admissible to prove a common plan or scheme. MRE 404(b)(1). In *People v Sabin*, 463 Mich 43, 63; 614 NW2d 888 (2000), our Supreme Court recognized two different situations where evidence of prior bad conduct can be used to prove a common plan or scheme: (1) where the other acts are pieces of a larger plan, or (2) where the defendant devises one plan and repeats it to perpetuate separate, but similar crimes. We believe the present case falls within the latter category. The victim testified that all of defendant's assaults occurred in the bathroom. In each instance, defendant would isolate the victim in the bathroom, fondle her with his hand, and then commit penile penetration. Because we are satisfied that the victim's testimony tended to establish that defendant repeated his common plan of assaulting the victim in the same manner and the same location, we believe that the evidence was properly admissible under MRE 404(b).

The second instance of prior bad acts evidence arose during the testimony of the emergency room nurse. The nurse testified that the victim was reluctant to talk about the sexual assault because defendant had told her that he had molested another young child, and nobody had believed that child. As the nurse testified:

> She told me that [defendant] told her not to say anything to her mother because she would not be believed, because [defendant] had done this to another child that was

a friend of the family, and that child had told and nobody believed and nothing had happened.

Defendant argues that the nurse's testimony was erroneously admitted, in violation of MRE 404(b). Because defendant did not object to this testimony, the prosecutor was never required to articulate a permissible purpose for the testimony under MRE 404(b). Nevertheless, the nurse's testimony was admissible to show why the victim was reluctant to report the molestation. Testimony was presented at trial that the victim initially told her mother about the sexual assault, that she recanted these allegations en route to the hospital, and that she renewed the allegations when talking to emergency room personnel. The nurse's testimony constitutes evidence which tends to prove that the victim's reluctance to report the abuse was based on her belief that another child facing the same situation had not been believed. We therefore believe that the evidence was properly admitted under MRE 404(b).

We further find that the value of testimony regarding defendant's other alleged sexual assaults was not substantially outweighed by unfair prejudice under MRE 403. MRE 403 is not intended to prohibit prejudicial evidence, but only that which is unfairly prejudicial. *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury" *Id.* The evidence presented in this case was not marginally probative, but was highly relevant to the charge for which defendant was on trial. In addition, the trial court properly provided the jury with a limiting instruction regarding the other acts evidence. Given defense counsel's failure to object to this testimony and the limiting instruction read by the trial court, we do not believe that plain error occurred.

Defendant next argues that the prosecutor's misconduct during closing arguments deprived defendant of due process. In rebuttal to the defense counsel's closing arguments, the prosecutor argued that the defense theory was "smoke and mirrors," comparing defense counsel's tactics to that of a squid injecting ink into the water to obscure itself. Because defense counsel did not object to the prosecutor's comments at trial, defendant raises this issue for the first time on appeal. We review this unpreserved issue for plain error, and will not reverse if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction. *Schutte, supra*, 240 Mich App 720-721. "Issues of prosecutorial misconduct are decided case by case, with the reviewing court examining the pertinent portion of the record and evaluating the prosecutor's remarks in context. The test is whether defendant was denied a fair trial." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Because the prosecutor made the above remarks in rebuttal to defense counsel's argument that something other than sexual penetration caused the victim's injuries, they do not require reversal. *People v Duncan*, 402 Mich 1, 16; 260 NW2d 58 (1977). The prosecutor need not use the least prejudicial evidence available to establish a fact at issue, *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995), and prosecutors need not "phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). We do not believe that the prosecutor's remarks constituted plain error.

Finally, defendant argues that his trial attorney's failure to object to all of the above alleged errors constituted ineffective assistance of counsel, which entitles defendant to a new trial. A claim of

ineffective assistance of counsel should be raised by a motion in the lower court for a new trial or an evidentiary hearing. Where a defendant fails to develop a testimonial record of his claim that his trial counsel was ineffective, this Court's review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

> To establish a claim of ineffective assistance of counsel, a defendant must show that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation prejudiced him so as to deprive him of a fair trial. A defendant must show that, but for the error, the result of the proceedings would have been different and that the proceedings were fundamentally unfair or unreliable.
>
> We presume that a defendant has received effective assistance of counsel and a heavy burden of proving otherwise rests on a defendant. Nor do we avail ourselves of the benefit of hindsight when considering a claim of ineffective assistance of counsel. We presume that a challenged action might be considered sound trial strategy, that we will not second-guess. The fact that the strategy chosen by defense counsel did not work does not constitute ineffective assistance of counsel. [*People v. Williams*, 240 Mich App 316; 614 NW2d 647 (2000), internal citations omitted.]

Because the prosecutor's voir dire question was properly posed to discern jury bias, we do not find that the failure of defendant's trial counsel to object to that question was objectively unreasonable. Because the court rules permit a trial court to provide a jury with electronically recorded instructions, and because the instructions given in this case fairly presented the issues to be tried and protected defendant's substantial rights, we find no error in defense counsel's failure to object to those instructions. Further, because the prosecutor's closing remarks were made in rebuttal to defense counsel's closing argument, we find no error in defense counsel's failure to object to those remarks. "Defense counsel is not required to make frivolous or meritless motions." *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

Finally, we note our conclusion that the victim properly testified regarding defendant's prior sexual assaults against her, and that the emergency room nurse properly testified regarding defendant's alleged prior acts of molestation of another child. Given that this evidence was properly admissible, we find that defendant suffered no prejudice from trial counsel's failure to object to that evidence at trial. Because defendant does not argue that the record requires supplementation in order to resolve his ineffective assistance of counsel claim, no hearing is required under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Kurtis T. Wilder
/s/ Michael R. Smolenski
/s/ William C. Whitbeck