

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT DRANGINIS,

Defendant-Appellant.

UNPUBLISHED

October 9, 2001

No. 222891

Oakland Circuit Court

LC No. 99-164334-FC

Before: Collins, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Defendant was convicted by a jury of one count of first-degree criminal sexual conduct, MCL 750.520b(1)(b), but was acquitted of a second count of first-degree CSC. He was sentenced to a term of fifteen to thirty years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court's ex parte communication with the jury, wherein the court granted the jury's request for a fifteen minute break, deprived him of a fair trial. We disagree.

Defendant concedes that the ex parte communication in question is properly characterized as a "housekeeping" communication. *People v France*, 436 Mich 138, 161, 163-164; 461 NW2d 621 (1990). Because we agree that defendant failed to make a firm and definite showing of prejudice arising from the court's ex parte communication, this issue does not warrant appellate relief. *Id.*; see also *People v Gonzalez*, 197 Mich App 385, 402-403; 496 NW2d 312 (1992).¹

Defendant also argues that the trial court erred in admitting evidence of other bad acts through both the victim and the victim's brother. We disagree. A trial court's decision to admit or exclude evidence is reviewed for abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998); *People v Lukity*, 460 Mich 484, 494-495, 497; 596 NW2d 607 (1999).

¹ We have not considered the affidavit submitted by defendant in connection with this issue because it was not presented to the trial court. A defendant may not enlarge the record on appeal. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), aff'd on other grounds 462 Mich 415; 615 NW2d 691 (2000).

The evidence was offered to provide context for the charged incidents of abuse, to rebut charges of recent fabrication, and to fend off defendant's attacks on the victim's credibility, proper purposes under MRE 404(b). Further, the evidence was logically relevant to contested issues at trial. *People v Sabin (After Remand)*, 463 Mich 43, 55-58, 60, 66-67; 614 NW2d 888 (2000); *People v DerMartzex*, 390 Mich 410, 415; 213 NW2d 97 (1973). Although the prosecutor indicated that she would not be calling the victim's brother for this purpose, defendant was allowed a full and fair opportunity to address the issue at trial and, as discussed above, the evidence was admitted for a proper purpose. The trial court did not abuse its discretion in admitting the challenged evidence.

Defendant next argues that the trial court abused its discretion by limiting his expert witness' testimony concerning whether the victim's behavior was typical of sexual abuse victims.

Our Supreme Court has held that

(1) an expert may testify in the prosecution's case in chief regarding typical and relevant symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an actual abuse victim, and (2) an expert may testify with regard to the consistencies between the behavior of the particular victim and other victims of child sexual abuse to rebut an attack on the victim's credibility. [*People v Peterson*, 450 Mich 349, 352-353, 375; 537 NW2d 857 (1995), reaffirming *People v Beckley*, 434 Mich 691; 456 NW2d 391 (1990).]

Defendant maintains that, because the decisions discussing this issue are motivated by a concern that a jury might convict a defendant based on an expert's opinion rather than the evidence, they apply only to an expert offered by the prosecution. See *Peterson, supra* at 374, 376. As such, a defense expert should be permitted to testify, consistent with the rules of evidence applicable to expert testimony generally, see MRE 702 – 705, concerning a victim's post-incident behavior and credibility.

Assuming that the trial court abused its discretion in limiting defendant's expert witness' testimony, the defense expert was nevertheless permitted to testify about common behavior patterns or characteristics of sexual abuse victims, albeit without comparing them to the victim's behavior in this case. The difference between the testimony that was allowed and the testimony sought by defendant was only a matter of degree. Further, counsel was free to make the desired comparisons, based on the expert's testimony and the victim's conduct, during closing argument. Under the circumstances, it is not "more probable than not" that the outcome was affected by any error in restricting the expert's testimony. Accordingly, this issue does not warrant reversal. *Lukity, supra* at 494, 495, 497.

Defendant next argues that the trial court's conduct during jury voir dire denied him a fair trial. Because defendant did not object to the challenged conduct, and further, failed to exercise all of his peremptory challenges and passed on the jury as seated, this issue is not preserved. Accordingly, our review of this issue is limited to plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The record indicates that the trial court excused for cause those jurors who questioned whether they could remain fair

and impartial. Further, it is not plainly apparent that the trial court failed to ask sufficiently probing questions to permit an intelligent exercise of challenges for cause or peremptory challenges. *People v Tyburski*, 445 Mich 606, 619; 518 NW2d 441 (1994). Accordingly, appellate relief is not warranted.

Defendant also argues that the trial court's conduct evidenced partiality and thereby deprived him of a fair trial. Once again, because defendant did not object to the trial court's conduct at trial, or raise the issue in a post-trial motion, the issue is not preserved and appellate review is precluded absent plain error affecting defendant's substantial rights. *Carines, supra*. After reviewing the record, we find that defendant has failed to show that the court's comments and rulings support a finding of partiality. *People v McIntire*, 232 Mich App 71, 104-105; 591 NW2d 231 (1998), rev'd on other grounds 461 Mich 147. Indeed, many of the challenged comments occurred outside the jury's presence and, therefore, could not have unduly influenced the jury against defendant. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995). Defendant has failed to show plain error affecting his substantial rights.

Finally, in view of the foregoing, we find no merit to defendant's claim that he was denied a fair trial because of the cumulative effect of several errors. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Affirmed.

/s/ Jeffrey G. Collins
/s/ William B. Murphy
/s/ Kathleen Jansen