

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WAYNE MORRIS WALLACE,

Defendant-Appellant.

---

UNPUBLISHED

November 27, 2001

No. 222159

Wayne Circuit Court

LC No. 98-007791

Before: Neff, P.J., and Wilder and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction for second-degree criminal sexual conduct, MCL 750.520c(1)(a). Defendant was sentenced as a second habitual offender, MCL 769.10, to eight to seventeen years' imprisonment. We affirm.

Defendant's first argument on appeal is that the trial court erred in refusing defense counsel's request to re-question a prospective juror during voir dire whose wife had been sexually abused as a child. Defendant claims that this limitation in the scope of voir dire denied him due process and a fair trial because defendant was being tried for sexually assaulting a child of similar age. We disagree. The scope of voir dire examination is within the discretion of the trial court and will not be set aside on appeal absent an abuse of that discretion. *People v Daniels*, 192 Mich App 658, 666; 482 NW2d 176 (1992).

During jury selection, defendant's counsel questioned a prospective juror and passed him for cause. Subsequently, the prosecution examined the same juror, who revealed that his wife had been the victim of a sexual assault when she was between the ages of ten and twelve. Thereafter, the prosecutor also passed for cause. Before defense counsel began questioning the next group of jurors, defendant requested to re-visit the previous juror based on his answer to the prosecutor's question. The trial court denied defense counsel's request because he had already passed on the juror. Defense counsel ultimately used the remainder of his peremptory challenges on other jurors. The juror in question remained on the panel.

A defendant has the right to a fair and impartial jury. The purpose of voir dire is "to elicit sufficient information from prospective jurors to enable the trial court and counsel to determine who should be disqualified from service on the basis of an inability to render decisions impartially." *People v Sawyer*, 215 Mich App 183, 186; 545 NW2d 6 (1996). However, there are no hard and fast rules regarding what constitutes acceptable voir dire; rather, the trial court is

granted wide discretion in both the scope and conduct of voir dire. *Id.* at 186-187. When reviewing the scope and conduct of voir dire, “this Court must determine whether the trial court conducted a voir dire ‘sufficiently probing . . . to uncover potential juror bias.’” *Id.* at 187 (citations omitted). Furthermore, the “trial court may not restrict voir dire in a manner that prevents the development of a factual basis for the exercise of peremptory challenges.” *People v Tyburski*, 196 Mich App 576, 581; 494 NW2d 20 (1992) (citations omitted).

The instant voir dire was sufficient to serve its constitutional purpose. The scope of the voir dire was not so limited as to prevent defense counsel from determining whether the juror should be excused due to an inability to render an impartial decision. The juror, in fact, stated that nothing in his experience or the nature of the charges against defendant would prevent him giving defendant a fair trial. The trial court’s restriction on additional voir dire of the juror did not deny defendant a fair trial.

Defendant’s second argument on appeal is that the trial court improperly called and questioned a witness, thereby bolstering the credibility of the prosecution’s DNA evidence and violating defendant’s right to a fair and impartial judge. We agree but find that the error was harmless. “A 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).

A trial court may call and question witnesses in order to clarify or elicit additional relevant information. MRE 614 (a) and (b); *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996) (citations omitted). However, “[t]he principle limitation on a court’s discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality.” *Id.* A trial court’s conduct pierces the veil of judicial impartiality when its conduct unduly influences the jury and deprives the defendant of a fair and impartial trial. *Paquette, supra* at 340. When questioning witnesses, the trial court must use caution and restraint to ensure that its questions are not prejudicial or partial. *Davis, supra* at 50.

In this case, after the prosecution rested its case, the trial court called Paula Lytle, the senior and supervising serologist with the Detroit Police Department Forensic Services Division, to the witness stand. The trial court called Ms. Lytle to provide additional background information regarding the forensic evidence presented and to demonstrate the accuracy of her department’s work. We believe such questions by the trial judge, in the presence of the jury, could only be interpreted as bolstering the plaintiff’s evidence. Thus, we find that the trial court crossed the line of judicial impartiality.

When a trial court’s questions exhibit partiality, this Court applies the harmless error analysis. *Davis, supra* at 51. In the instant case, defendant did not contest the presence of his semen in the victim’s clothing. Rather, defendant claimed that it was from a “wet dream” that defendant had while he was sleeping next to the victim. Consequently, any error on the part of the trial judge in questioning Ms. Lytle about the accuracy of her department’s DNA reports was harmless.

Lastly, defendant purports that he was denied the effective assistance of counsel when his trial counsel failed to object to the prosecution’s cross-examination of defendant regarding privileged statements defendant allegedly made to his wife. We disagree.

To fully preserve the issue of effective assistance of counsel, a defendant must move for an evidentiary hearing or a new trial before the trial court. *People v Sabin*, 242 Mich App 656, 658; 620 NW2d 19 (2000). In this case, defendant's motion for a new trial before the lower court was denied. Therefore, our review of this issue is limited to mistakes apparent on the existing record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999).

To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel and he must overcome the strong presumption that counsel's performance was not sound trial strategy; and (2) that this deficient performance prejudiced him to the extent that, but for counsel's error, the result of the proceedings would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Defense counsel's performance must be measured against an objective standard of reasonableness. *People v Williams*, 240 Mich App 316, 331; 614 NW2d 647 (2000). Moreover, "[t]his 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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant argues that the statements were privileged and that defense counsel was constitutionally ineffective for failing to object to their admission. The marital communication privilege "bars one spouse from testifying 'as to any communications made by one to the other during the marriage' without the consent of the other." *People v Smith*, 243 Mich App 657, 682; 625 NW2d 46 (2000), quoting *People v Hamacher*, 432 Mich 157, 162; 438 NW2d 43 (1989). This privilege extends to cross-examination of a defendant regarding statements he may have made to a spouse. *People v Salisbury*, 218 Mich 529, 535; 188 NW 340 (1922). Thus, defendant's statements to his wife during their marriage were privileged and improper questions on cross-examination.

Nonetheless, a review of the record convinces this Court that defense counsel's failure to object to this line of questioning did not deprive defendant of the effective assistance of counsel. Defendant has failed to establish that his trial counsel's conduct so prejudiced him that, but for counsel's error, the outcome of the trial would have been different. In fact, defendant testified that he could not recall the communication with his wife. Moreover, the evidence against defendant was overwhelming. Consequently, we find that the prosecution's improper questions had no affect on the trial's outcome.

Furthermore, defendant has failed to overcome the presumption that his counsel's conduct was sound trial strategy. This Court will not second guess counsel regarding trial strategy. Accordingly, defendant failed to overcome the presumption that he received effective assistance of counsel.

Affirmed.

/s/ Janet T. Neff  
/s/ Kurtis T. Wilder  
/s/ Jessica R. Cooper