

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD LESLIE JACKSON,

Defendant-Appellant.

UNPUBLISHED

June 21, 2002

No. 230034

St. Clair Circuit Court

LC No. 00-001149-FH

Before: Holbrook, Jr., P.J., and Gage and Meter, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a victim under thirteen years of age). The trial court sentenced defendant to 8 to 22-½ years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that he was denied due process because (1) testimony regarding two of the three alleged attacks by defendant established that the acts occurred outside the time period specified in the information, and (2) the court invited the jury to merge these two attacks with the third incident and thus render a compromise verdict. Because defendant did not preserve these issues by raising them in the trial court, he must demonstrate that a plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999); *People v Sabin*, 223 Mich App 530, 531-532; 566 NW2d 677 (1997), remanded on other grounds 459 Mich 924 (1998). An error has affected substantial rights only if it could have been outcome determinative. Even if the defendant shows outcome determinative plain error, we may reverse his conviction only if he was actually innocent or the error seriously affected the fairness, integrity or public reputation of the judicial proceedings. *Carines, supra*.

The primary purpose of a criminal information is to plainly apprise a defendant of the offense with which he is charged. *People v Rios*, 386 Mich 172, 175; 191 NW2d 297 (1971). The information should inform the defendant of (1) the nature of the crime charged, (2) the time of the offense "as near as may be," but "[n]o variance as to time shall be fatal unless time is of the essence of the offense," and (3) the location where the charged crime occurred. MCL 767.45(1). The following test applies to a determination regarding the sufficiency of an indictment:

Does it identify the charge against the defendant so that his conviction or acquittal will bar a subsequent charge for the same offense; does it notify him of the nature and character of the crime with which he is charged so as to enable him to prepare his defense and to permit the court to pronounce judgment according to the right of the case? [*People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001) (quotations omitted).]

We find no plain error that affected defendant's substantial rights arising from the fact that two of the three charged instances of CSC II fell outside the period specified within the information.¹ First, defendant suffered no disadvantage or surprise because he had knowledge at least as early as his preliminary examination hearing, which took place nine months before trial, that the prosecution intended to elicit testimony from the victim alleging acts of abuse that took place in the residence defendant had shared with his former wife until 1993. Second, "no variance as to time shall be fatal unless time is of the essence of the offense," MCL 767.45(1)(b), and "[i]n criminal sexual conduct cases, especially those involving children, time is not usually of the essence or a material element." *Sabin, supra* at 532. Third, the discrepancy between the dates of two of the attacks within the victim's testimony and the date range stated within the information did not affect the outcome of the trial because defendant won acquittal on two of three counts.² The jury convicted defendant on only one count when the victim's testimony clearly established that one count occurred within the date range in the information. We note that sufficient evidence of the third attack, which included the testimony of the victim and corroborative testimony by two of the victim's siblings, supported defendant's conviction. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992).

With respect to defendant's challenges to the jury instructions, we observe that the trial court must instruct a jury on applicable matters of law, MCL 768.29, and that a defendant has the right to have his case decided by a properly instructed jury. *People v Mills*, 450 Mich 61, 80-81; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). The jury generally is presumed to have followed the court's instructions unless a defendant clearly shows that the jury did not. *People v Wolverton*, 227 Mich App 72, 77; 574 NW2d 703 (1997). A criminal trial jury verdict must be unanimous. MCR 6.410(B).

After reviewing the trial court's instructions to the jury, we find no error, plain or otherwise, to support defendant's suggestion that the instructions invited the jury to merge the

¹ While the information charged that all three acts of CSC II occurred between 1994 and 1996, the victim testified that at least two acts occurred in the residence that her mother and defendant shared before their divorce in 1993. The victim, who was born in 1985, also testified regarding a separate act that occurred in the residence shared by defendant and his second wife when the victim was approximately ten years old.

² We note that even assuming the two incidents that apparently occurred outside the information's time frame were not intended as charged offenses, the victim's testimony regarding defendant's similar, prior acts of abuse would have been admissible pursuant to MRE 404(b)(1) because the evidence showed defendant's pattern or scheme used in committing the third attack. *People v Dreyer*, 177 Mich App 735, 737-738; 442 NW2d 764 (1989).

evidence regarding the three attacks. Contrary to defendant's arguments on appeal, the trial court plainly advised the jury in accordance with CJI2d 3.20 that it had to consider separately three distinct counts of CSC II charged by the prosecution. The trial court also instructed the jury repeatedly, and consistently with CJI2d 2.25, that the jury must reach a unanimous verdict.

Defendant next raises a third unpreserved issue, arguing that the jury's verdict was tainted because the trial court allowed the jury to hear argument regarding proposed testimony by a police officer who investigated an incident of defendant's sexual misconduct that had occurred thirteen years earlier. The court excluded the testimony, and therefore the jury heard only the prosecution's intimations that the officer's testimony would contain "tacit" or "limited" admissions by defendant regarding the incident.

Rulings on the admissibility of hearsay statements in a criminal case should be conducted outside the hearing of the jury. MRE 104(c); *People v Creith*, 151 Mich App 217, 227; 390 NW2d 234 (1986). If the jury hears testimony that is later ruled inadmissible, the initial error in allowing the testimony may not be considered harmless if the testimony appears too graphic or persuasive under the circumstances of the case. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996).

In this case, the trial court should have excused the jury before hearing the parties' arguments regarding the officer's recollection of defendant's statements. MRE 104(c); *Creith*, *supra* at 227. Any error in this respect was harmless, however, for two interrelated reasons. First, the trial court instructed the jury that it should consider only the evidence in reaching a verdict, and that the statements and arguments of the attorneys were not evidence. Second, the objectionable portions of the prosecution's arguments were not sufficiently detailed, graphic or persuasive to overcome the presumption that the jury followed its instructions. *Ullah*, *supra* at 674; *Wolverton*, *supra* at 77-78.

Defendant lastly argues that he received ineffective assistance of counsel because his attorney failed to object to the three alleged errors examined thus far. Because defendant failed to request a *Ginther*³ hearing or a new trial on the basis of ineffective assistance, our review of his claim is limited to mistakes apparent on the record. *People v Rodgers*, 248 Mich App 702, 713-714; ___ NW2d ___ (2001).

To prevail on a claim that counsel provided ineffective assistance, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) a reasonable probability exists that, but for counsel's error, the result of the proceedings would have been different, and (3) the attendant proceedings were fundamentally unfair or unreliable. The defendant bears a heavy burden to overcome the strong presumption that his counsel provided effective assistance. *Rodgers*, *supra* at 714. Counsel cannot be deemed ineffective for failing to advocate a futile or meritless position. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

³ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 912 (1973).

With respect to the information-proofs discrepancy, defendant fails to rebut the presumption of sound trial strategy because the discrepancy enabled defendant's attorney to argue for and win defendant's exoneration with regard to the two incidents that occurred before the dates in the information. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Concerning the jury instructions, it would have been futile for counsel to object because the instructions were not erroneous. *Snider, supra* at 425. With respect to the prosecution's argument before the jury regarding the officer's proposed testimony, an objection would not have been futile. However, because the objectionable portions of the argument were not particularly graphic or persuasive in the context of this case, defendant fails to show that his counsel's action in allowing the argument to occur before the jury fell below an objective standard of reasonableness, or any likelihood that an error affected the outcome of his case or deprived him of a fair trial. *Rodgers, supra* at 714.

Affirmed.

/s/ Donald E. Holbrook, Jr.

/s/ Hilda R. Gage

/s/ Patrick M. Meter