STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2010
v ROBERT DALE POSNER, Defendant-Appellee.	No. 291416 Macomb Circuit Court LC No. 08-004689-FC

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
v ROBERT DALE POSNER, Defendant-Appellant.	No. 291508 Macomb Circuit Court LC No. 2008-002475-FC

Before: HOEKSTRA, P.J., and MARKEY and DAVIS, JJ.

PER CURIAM.

In docket no. 291416, defendant was convicted by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b, and two counts of second-degree criminal sexual conduct, MCL 750.520c. He was sentenced to 25 to 50 years' imprisonment for each conviction of first-degree criminal sexual conduct, and to 9 to 15 years' imprisonment for each conviction of second-degree criminal sexual conduct, with credit for 304 days served. In docket no. 291508, defendant was convicted by a jury of one count of first-degree criminal sexual conduct and sentenced to 25 to 50 years' imprisonment. The sentences are to run concurrently. Defendant appeals his convictions by right. Defendant's cases were consolidated for trial, and we have consolidated them on appeal. We affirm.

Defendant met Robin Clark in the summer of 2007. The two began a dating relationship on or about New Years Eve of that year, and defendant moved into Clark's St. Clair Shores, Michigan home shortly thereafter. Also living in the home were Clark's six children, whose ages spanned from 3 to 14 years old at the time of the January 2009 trial. Defendant resided with Clark and her family until early April 2008, when Clark moved to a new home in Warren,

Michigan. During the approximately four-month period he and Clark resided together in St. Clair Shores, defendant engaged in numerous and repeated sexual activities with Clark's two oldest sons, LC and KC, aged 12 and 10, respectively, at the time. The incidents included fellatio and masturbation, among other acts. Neither boy reported any of the incidents. Defendant and Clark separated in early April before Clark moved to Warren with her children. Nevertheless, on April 25, 2008, Clark learned that she was pregnant with defendant's child. She informed defendant that night. Later on that same night, defendant was at Clark's Warren home. He went to the basement to wash clothes and asked LC to join him. In the basement, defendant asked LC to stand in a corner and remove his pants. Defendant then fellated LC. KC followed LC to the basement, witnessed the incident, and reported it to Clark. Defendant was first charged with first-degree criminal sexual conduct for the April 25, 2008, incident in the Warren basement (Case No. 08-002475-FC). He was subsequently charged in a second case with four additional counts of first and second-degree criminal sexual conduct arising from the numerous incidents in St. Clair Shores (Case No. 08-004689-FC). The cases were joined on the first day of trial pursuant to an agreement of the parties, and tried simultaneously.

On appeal, defendant argues that the trial court abused its discretion when it allowed the two cases to be joined. However, where the parties agreed in open court to join the cases, as they did here, the issue is waived, and defendant may not seek appellate review because his waiver extinguishes any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Nevertheless, we note that "[w]hether defendant's charges are related is a question of law that we review de novo." *People v Girard*, 269 Mich App 15, 17; 709 NW2d 229 (2005). The trial court's ultimate decision to join charges is reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). MCR 6.120(B) allows the parties to agree to joinder of multiple cases against a single defendant. It provides, in pertinent part: "(1) Joinder is appropriate if the offenses are related. For purposes of this rule, offenses are related if they are based on. . . (c) a series of acts constituting parts of a single scheme or plan."

Here, the facts demonstrated that defendant had a common scheme or plan to regularly sexually assault and molest LC and KC over a period of more than fourth months when he had access to them. The incidents were similar between both boys, and often involved oral sex or masturbation. The last assault on LC on April 25, 2008, differs from the previous assaults in St. Clair Shores only because it occurred in the Warren home. We therefore conclude joinder was permissible and appropriate.

Moreover, we reject defendant's argument related to whether the evidence from one case would have been offered and admitted in the other if separate trials were held. Under MCL 768.27a, all evidence brought against defendant in the instant trial could have been presented in separate trials had the cases not been joined. *People v Pattison*, 276 Mich App 613, 619-620; 741 NW2d 558 (2007). Thus, the same victims would have testified against defendant in each separate case. We conclude that the trial court did not abuse its discretion when it joined the cases against defendant. Plain error did not occur.

Next, defendant argues that defense counsel's failure to object to the joinder amounted to ineffective assistance of counsel. "Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because defendant did not obtain an evidentiary hearing, our review is limited to the mistakes apparent in the trial record. *People v Snider*, 239 Mich App

393, 423; 608 NW2d 502 (2000) (citation omitted). "Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). A defendant must show that his attorney's conduct fell below an objective standard of reasonableness according to prevailing professional norms and that the representation so prejudiced defendant that he was deprived a fair trial. *Id*. To prove the latter, defendant must show that the result of the proceeding would have been different but for defense counsel's error. *Id*. at 663-664.

Here, the record indicates that counsel's decision to join the case was a trial strategy, see *People v Smith*, 90 Mich App 20, 26-27; 282 NW2d 227 (1979), and certainly did not fall below an objective standard of reasonableness. By combining the cases, defense counsel argued that LC and KC fabricated the sexual assaults to incriminate defendant after they found out that he had impregnated Clark. Having the cases joined and tried together effectively allowed defense counsel to present this theory. And, as previously stated, joinder was permissible and appropriate. Moreover, defendant has not shown prejudice. As previously indicated, the evidence of sexual abuse in the Warren home could have been introduced in a trial for the abuse that occurred at the St. Clair Shores home, and vice versa. MCL 768.27a.

Finally, defendant argues that the prosecutor improperly vouched for the credibility of LC and KC by stating during closing argument that they testified truthfully and honestly. We review unpreserved claims of misconduct for plain error affecting defendant's substantial rights to determine if defendant was denied a fair trial. *People v Thomas*, 260 Mich App 450, 453-454; 678 NW2d 631 (2004). "Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). "The propriety of the prosecutor's remarks depends on all the facts of the case." *Id.*

Here, to support its trial strategy that LC and KC fabricated the sexual assaults, defense counsel on several occasions cross-examined witnesses as to whether the boys would have a motive to lie. The prosecutor's challenged comments addressed this strategy. *Rodriguez*, 251 Mich App at 31. Nothing in the record supports that the prosecutor's comments suggested some kind of special knowledge as to the witnesses' truthfulness. *People v McGhee*, 268 Mich App 600, 630; 709 NW2d 595 (2005). And, even if the comments were prejudicial, the trial court's instructions as to how to assess credibility and that the lawyers' arguments were not evidence cured any prejudice. *People v Callon*, 256 Mich App 312, 330-331; 662 NW2d 501 (2003). Defendant was not denied a fair trial.

We affirm.

/s/ Joel P. Hoekstra
/s/ Jane E. Markey
/s/ Alton T. Davis