STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 6, 2010
v	No. 292602 Wayne Circuit Court
ROBERT WILLIAM DUNCAN, Defendant-Appellee.	LC No. 08-003062

Before: METER, P.J., and MURRAY and BECKERING, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of third-degree criminal sexual conduct (CSC), MCL 750.520d(1)(a) (penetration with a person at least 13 years old, but less than 16). Prior to sentencing, defendant moved for a new trial. The trial court granted defendant's motion on the basis of the erroneous and repeated admission of hearsay evidence and evidence regarding defendant's prior criminal record, defense counsel's failure to object to the evidence, and a post-trial affidavit submitted by a witness. The prosecution appeals by delayed leave granted the trial court's order granting defendant a new trial. We affirm.

I. FACTUAL BACKGROUND

Defendant's convictions stem from two sexual encounters he allegedly had with a friend of his teenage daughters, Melissa Duncan and Sarah Duncan, in 2006. At the time of the offenses, the victim was 14 years old and defendant was 38 years old. The victim spent a lot of time at defendant's house, as she was a close friend of his daughters and lived nearby.

In regard to the first alleged encounter, the victim testified that when she was at defendant's house on homecoming weekend, he kissed her. He said that if she wanted more, she should follow him upstairs. The victim wanted more and followed him upstairs. They entered a bedroom. Defendant locked the door and turned off the lights. They took off their clothes and had vaginal intercourse on the floor. They stopped when they heard defendant's fiancé's vehicle pull into the driveway. The second alleged encounter occurred a few months later. According to the victim, she was at her house participating in a gift exchange with her sister and defendant's daughters. One of his daughters relayed a message to the victim that defendant wanted her to come over to his house. The victim went to defendant's house and found him lying in bed in his basement bedroom. She got into bed with him and they both took off their clothes. Defendant

then performed cunnilingus on the victim. After he was finished, the victim performed fellatio. She testified that she was a willing participant in the sexual activity.

Defendant testified that he never had any sexual contact with the victim. On homecoming weekend, the victim came over to defendant's house, explained that she was having problems at home, and asked defendant whether he and his fiancé would adopt her. According to defendant, the victim did not come to his house on the day of the alleged second encounter.

Following his jury trial convictions, defendant moved for judgment notwithstanding the verdict or a new trial. The trial court granted defendant a new trial. The prosecution now appeals by delayed leave granted.

II. DEFENDANT'S MOTION FOR A NEW TRIAL

We review a trial court's decision to grant or deny a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). "A mere difference in judicial opinion does not establish an abuse of discretion." *Id*. An abuse of discretion occurs when the outcome chosen by the trial court is not within the range of reasonable and principled outcomes. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

In this case, the trial court granted defendant's motion for a new trial pursuant to MCR 6.431. MCR 6.431(B) provides that "[o]n the defendant's motion, the court may order a new trial on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." The trial court held that the cumulative effect of the admission of hearsay evidence, the admission of evidence regarding defendant's prior criminal record, defense counsel's failure to object to the evidence, and the discovery of new evidence "denied defendant what otherwise would have been a fair trial and call[ed] into question the integrity and public reputation of [the court's] judicial proceedings." At trial, defense counsel objected only twice to the complained-of evidence. Preserved claims of evidentiary error are reviewed for an abuse of discretion, and reversal is only warranted if after reviewing the entire record, it affirmatively appears that it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 488, 495-496; 596 NW2d 607 (1999). Unpreserved claims are reviewed for plain error affecting substantial rights, "i.e., that the error affected the outcome of the . . . proceedings," and "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999) (quotation marks and citation omitted).

A. HEARSAY EVIDENCE

The trial court granted defendant a new trial, in part, because of the erroneous admission of hearsay evidence at trial. In moving for a new trial, defendant listed ten instances when impermissible hearsay evidence was admitted. We agree that nine of the statements highlighted by defendant constituted impermissible hearsay.

Hearsay "is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible except as provided by the rules of evidence. MRE 802.

The victim testified that she told Melissa that the rumors of a sexual affair between herself and defendant were true. She later testified that she telephoned defendant and told him that she had confirmed the rumors of their affair to Melissa. The victim's testimony invoked her prior out-of-court statements, which were consistent with her trial testimony, and was offered to prove that those statements were true. Indeed, jurors would be more likely to believe the victim's testimony that an affair occurred if they knew the victim told others she and defendant were having an affair. A witness's prior statement that is consistent with the witness's trial testimony is inadmissible hearsay where the prior statement is used to prove the truth of the matter asserted. *People v Malone*, 445 Mich 369, 387-388; 518 NW2d 418 (1994), citing *People v Hallaway,* 389 Mich 265, 276-277; 205 NW2d 451 (1973) (BRENNAN, J.) (stating that "[w]here the prior extra-judicial statement of a witness agrees with his testimony, the out-of-court remark is self-serving, and is not generally permitted under any established exception to the hearsay rule"). In most cases, such statements are "simply irrelevant bolstering." *Id*. at 388. Under MRE 801(d)(1), a prior consistent statement is not hearsay if it "is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive," or is a statement of identification made after perceiving the person. MRE 801(d)(1)(B), (C). Here, however, there was no charge of recent fabrication or improper influence or motive, nor were the victim's statements ones of identification. Contrary to the prosecution's assertion on appeal, the statements were offered to prove the truth of the matter asserted. Accordingly, the trial court erred in admitting the statements.

The trial court also erred in admitting certain testimony of Charlotte Sopo, defendant's ex-wife and the mother of Sarah and Melissa. Sopo testified that she told the victim's mother that "there was something going on" between the victim and defendant, and, more particularly, that "they had sex." Sopo's testimony invoked a prior consistent statement and was offered to prove the truth of the matter asserted, i.e., that there was something of a sexual nature going on between the victim and defendant. This was inadmissible hearsay. See MRE 801(c); *Malone*, 445 Mich at 387-388.

Next, the victim testified that she told the participants of the gift exchange that she was leaving to go to defendant's house. This hearsay was admissible under MRE 803(3) as a then existing mental, emotional, or physical condition. MRE 803(3) provides an exception to the hearsay rule where the statement pertains to "the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health)." A victim's declarations about her intent to go somewhere or do something is generally admissible under MRE 803(3). *People v Furman*, 158 Mich App 302, 315-316; 404 NW2d 246 (1987). Here, the challenged statement expressed the victim's intent and plan to go to defendant's house. Thus, the trial court did not err in admitting this testimony. On the other hand, the victim's testimony that, during the gift exchange, Sarah told her that defendant was on the telephone and wanted her to go to his house is not admissible under MRE 803(3). The victim was not testifying as to her own intent or plan; rather she testified regarding Sarah's out-of-court statement, which was offered to prove the truth of the matter asserted. See MRE 801(c). The

prosecution provides no rationale for the admission of the statement, and we must conclude that it was admitted in error.

Melissa testified that she confronted the victim about the rumors of her having a sexual affair with defendant, and that the victim admitted the rumors were true. Melissa's testimony constitutes hearsay because it invoked an out-of-court statement by the victim, which was offered to prove the truth of the matter asserted, i.e., that the victim and defendant engaged in a sexual affair. See *id*. As indicated, jurors would be more likely to believe the prosecution's theory that an affair occurred if they knew the victim told others she and defendant were having an affair. There is no merit to the prosecution's argument that the testimony was admissible as a present sense impression under MRE 803(1). A present sense impression is defined as "[a] statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." MRE 803(1). The victim's statement to Melissa was not made while the victim was perceiving an event or condition, or immediately thereafter. The trial court erred in admitting Melissa's testimony.

The trial court further erred in admitting the hearsay testimony of Stacy Vespremi, the victim's assistant principal. Vespremi sat in on a discussion between Sarah, Melissa, and a detective investigating the offenses. During that discussion, the detective questioned Sarah and Melissa about a group meeting that the girls had with defendant, defendant's mother, the victim, and the victim's sister concerning the affair. At trial, the prosecutor asked Vespremi what the participants of that group meeting decided in regard to disclosing the affair. According to Vespremi, Melissa told the detective that she was instructed by people at the group meeting not to discuss the affair. Melissa's statement to the detective, which Vespremi repeated at trial, was an out-of-court statement offered to prove the truth of the matter asserted, see MRE 801(c), and constituted inadmissible hearsay. The prosecution again argues that the statement was admissible as a present sense impression under MRE 803(1). But Melissa's statement was not made while she was perceiving the event in question—the group meeting with defendant and others—or immediately thereafter. Melissa made the statement several months after the group meeting, during the investigation. Vespremi's testimony regarding Melissa's statement to the detective was admitted in error.

The victim's mother testified that approximately one week after homecoming, she observed the victim wearing sweats that were not her own and were "very, very big." The victim's mother testified that she asked the victim whose sweats she was wearing, and the victim said they were defendant's sweats. The prosecution argues that the victim's statement to her mother was not hearsay because it was not introduced to prove that the victim was wearing defendant's sweats, but rather, to show that the victim made such a statement. We are unconvinced that the testimony was introduced for a reason other than to prove the truth of the matter asserted. See MRE 801(c). A reasonable juror could have concluded that there was something improper about the relationship between defendant and the victim if the victim was wearing defendant's clothing. At a minimum, the fact that the victim was wearing his clothing one week after their first sexual encounter allegedly occurred makes the existence of an affair more likely than it would be otherwise. The victim's statement was improperly admitted.

Finally, the prosecution concedes on appeal that the following statements constituted inadmissible hearsay: the victim's sister's testimony that the victim told her that she was at defendant's house on the night of the gift exchange, and the victim's sister's testimony that

defendant's mother stated to defendant, "you really messed up this time," in regard to the affair. We agree that these hearsay statements were admitted in error. Defense counsel raised a late objection to the first statement, and the trial court failed to rule on the objection. Defense counsel also objected to the second statement. The trial court sustained the objection, but failed to instruct the jury to disregard the testimony or explain to the jury the meaning of the term "sustained."

B. EVIDENCE OF PRIOR CRIMINAL RECORD

In granting defendant a new trial, the trial court also held that the evidence concerning his prior criminal record was improperly admitted. We disagree with the trial court.

Evidence regarding defendant's prior record was repeatedly admitted at trial. On two separate occasions, the victim testified that defendant told her that they needed to keep their sexual relationship a secret because if he were convicted of a criminal offense because of their relationship, it would be his third felony conviction and he would go to jail for life. The victim's sister testified that defendant had prior felony convictions, and he told her that "if this [word of the affair] ever got out" he would go to jail. Defense counsel did not object to any of the testimony. Later, defense counsel elicited testimony from defendant that he had a prior felony record for drug possession.

The prosecution's argument that the evidence was admissible as res gestae evidence is without merit. Under the res gestae principle, evidence of a prior bad act, such as a conviction, is admissible where that act is so blended or connected with the charged offense that proof of one incidentally involves the other or explains the circumstances of the charged offense. *People v Robinson*, 128 Mich App 338, 340; 340 NW2d 303 (1983). Defendant's prior convictions for drug possession are not so blended or connected with the charged CSC offenses that proof of one incidentally involves the other. Prior convictions or not, anyone convicted of third-degree CSC is subject to incarceration. See MCL 750.520d(2). Therefore, anyone facing third-degree CSC charges would have a motive to silence the victim. Defendant's prior record does not rise to the level of res gestae evidence.

Equally unpersuasive is the prosecution's argument that the evidence was admissible as threats to the victim. Defendant's remarks concerning his prior record do not constitute threats. Defendant merely expressed what he believed would happen to him if he were convicted of CSC, not that any harm would come to the victim.

Additionally, we note that defendant's prior record was not admissible for impeachment purposes because his prior drug crimes do not contain an element of dishonesty, false statement, or theft as required by MRE 609(a)(1) and (2); nor was the evidence admissible to prove his character, as that is prohibited by MRE 404(b).

We find, however, that the evidence regarding defendant's statements concerning his prior record was admissible under MRE 801(d)(2). After the trial in this case, this Court issued *People v Schaw*, ___ Mich App ___; ___ NW2d ___; 2010 WL 1558973 (Docket No. 286410, issued April 20, 2010). In *Schaw*, this Court found that the defendant's audio-recorded statements to the victim that he was a felon and had spent time in prison were part of a concerted effort to manipulate the victim so that she would recant her earlier statements and change her

anticipated trial testimony.[1] *Id*. at 4. This Court held that the defendant's statements were relevant because they showed consciousness of guilt, *id*., citing MRE 402 and *People v Mock*, 108 Mich App 384, 389; 310 NW2d 390 (1981), and were admissible as admissions under MRE 801(d)(2), *id*. The evidence was not more prejudicial than probative under MRE 403 because the statements were highly probative of consciousness of guilt and the jury was informed that the defendant's prior conviction was different in nature than the charges for which he was on trial. *Id*. at 4-5. Here, defendant informed the victim and the victim's sister about his prior record and the anticipated heightened criminal consequences in an attempt to silence them regarding the alleged sexual affair. Like the statements in *Schaw*, defendant's statements regarding his prior record showed consciousness of guilt and were admissible as admissions under MRE 801(d)(2). The jury was informed that defendant's prior record resulted from offenses different in nature than the charged offenses. Therefore, we must conclude that the evidence was properly admitted.

C. INEFFECTIVE ASSISTANCE OF COUNSEL

The trial court concluded, as do we, that defense counsel was ineffective for failing to object to the repeated, erroneous admission of hearsay evidence at trial.

A claim of ineffective assistance of counsel should be raised by a motion for new trial or an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Defendant raised his ineffective assistance claim in his motion for a new trial, but because no evidentiary hearing was held on the claim, our review is limited to mistakes apparent on the record. A trial court's findings of fact, if any, are reviewed for clear error, and the ultimate constitutional issue arising from an ineffective assistance claim is reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, defendant must show that his trial counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that counsel's performance constituted sound trial strategy. *Id*.

As indicated, hearsay evidence was repeatedly and erroneously admitted at trial. Defense counsel objected only twice. On one occasion, defense counsel raised a late objection and the trial court made no ruling on the objection. On the second occasion, defense counsel timely objected and the trial court sustained the objection, but the court failed to explain to the jury the meaning of the term "sustained" and counsel did not request such an explanation. Although "this

[1] At one point, the defendant told the victim, "'[l]ook . . . I don't need to go to prison for this because if I go they're going to keep me there for a long time because I'm already a convicted felon. I've already been there once.'" *Id*. at 4, n 3.

Court will not second-guess counsel regarding matters of trial strategy," *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999), we agree with defendant and the trial court that there was no tactical reason that would justify defense counsel's failure to object to the remainder of the improper evidence. The evidence only served to undermine defendant's credibility and to bolster the victim's credibility. For the reasons discussed below, defense counsel's failure to object coupled with the other errors at trial served to deny defendant a fair trial.

D. NEWLY DISCOVERED EVIDENCE

In support of his motion for a new trial, defendant presented an affidavit from Sopo, in which she stated that she is a recovering alcoholic who was drinking heavily during the events to which she testified, that at the time of her testimony, she could not recall many details of the events, and that she felt pressured to testify as she did because the prosecutor threatened to have her children removed if she did not provide testimony consistent with the prosecution's case. The trial court concluded that the affidavit, "while troubling in certain respects, is not alone, enough to warrant a new trial. The people are correct that the affidavit is not a classic recantation, rather it is a rant. She [Sopo] artfully stops short of stating she lied at trial." The court further concluded that although the prosecutorial misconduct alleged by Sopo was insufficient, in and of itself, to warrant a new trial, and that Sopo's affidavit could not be viewed as a recantation meriting review, "her interactions with the police and people are legitimate areas of cross exam inquiry which may shed light on her credibility." We agree with the trial court's analysis.

"For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *Cress*, 468 Mich at 692 (quotation marks and citations omitted).

On appeal, the prosecution contests only the fourth prong of the newly discovered evidence test, arguing that defendant cannot establish Sopo's affidavit makes a different result probable on retrial. See *id*. We agree with the prosecution and the trial court that because Sopo did not explicitly state that her trial testimony was untrue, her affidavit cannot be considered a recantation subject to review as such. Nonetheless, the affidavit does create legitimate questions regarding Sopo's credibility as a witness and the reliability of her trial testimony. Sopo's memory of the details of the events to which she testified and her conversations with the prosecution before trial are certainly areas to be explored on cross-examination, and may shed light on her credibility.

E. CUMULATIVE EFFECT

In granting defendant a new trial, the trial court held that the cumulative effect of the repeated, erroneous admission of hearsay evidence and evidence regarding defendant's prior criminal record, defense counsel's failure to object to the evidence, and Sopo's affidavit warranted a new trial under MCR 6.431. We find that the admission of the hearsay evidence and defense counsel's failure to object to its admission warranted a new trial.

As indicated, reversal is only warranted on the basis of preserved, evidentiary error if after reviewing the entire record, it affirmatively appears that it is more probable than not that the error was outcome determinative. *Lukity*, 460 Mich at 488, 495-496. When the error is unpreserved, "[r]eversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Carines*, 460 Mich at 763. "For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that . . . the new evidence makes a different result probable on retrial." *Cress*, 468 Mich at 692. In addition, the "cumulative effect of several minor errors may warrant reversal where the individual errors would not." *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). "[I]n order to reverse on the basis of cumulative error, the effect of the errors must [be] seriously prejudicial in order to warrant a finding that defendant was denied a fair trial." *Id*. (quotation marks and citation omitted).

This case was, in essence, a credibility contest between the victim and defendant. There were no eye-witnesses to the alleged offenses, nor was there any physical evidence establishing that the offenses actually occurred. Both the victim and defendant testified at trial, and their testimonies were diametrically opposed. In regard to the alleged encounter during homecoming weekend, the victim testified that she and defendant engaged in vaginal intercourse in an upstairs bedroom of defendant's house. In regard to the second alleged encounter, the victim testified that she was participating in a gift exchange at her house when defendant telephoned and requested that she come to his house. The victim went to defendant's house and found him lying in bed in his basement bedroom. Defendant performed cunnilingus on the victim, and she performed fellatio. Defendant, on the other hand, testified that on homecoming weekend, the victim came over to his house, explained that she was having problems at home, and asked defendant whether he and his fiancé would adopt her. They had no sexual contact. According to defendant, the victim never came to his house on the day of the alleged second encounter. Defendant's daughter, Christine Sturgill, testified that she was at defendant's house the entire day and never saw the victim, and that she would have seen and heard the victim had she entered the house and gone into the basement.

The hearsay evidence admitted at trial, including that the victim told several people the rumors of a sexual affair between herself and defendant were true, that Sopo reported the rumors to the victim's mother, that Sarah told the victim that defendant wanted her to go to his house during the gift exchange, that Sarah and Melissa were instructed not to discuss the affair, that the victim told her mother she was wearing defendant's sweats, that the victim told her sister she was at defendant's house the day of the gift exchange, and that defendant's mother told him, "you really messed up this time," in regard to the affair, was erroneously admitted and only served to bolster the victim's credibility and her version of the events, and to damage defendant's credibility. Defense counsel objected only twice to the admission of this improper evidence, and the jury was not instructed to disregard any of the evidence, even the evidence counsel actually objected to. Defense counsel could not have had any strategic reason for allowing the evidence to be admitted. Additionally, Sopo's affidavit suggests that her trial testimony may have been less than credible—an issue that could be further explored on cross-examination.

As the trial court concluded, "[i]t is likely the cumulative effect of these improprieties created an arena where defendant was convicted due to rumor, innuendo and unreliable

testimony rather than factual reliable evidence," and that defendant was denied a fair trial. Given that this case comes down, in large part, to a credibility contest between the victim and defendant, and considering the amount of improper hearsay evidence admitted without objection and that served to bolster the victim's credibility and version of the events, we cannot conclude that the trial court abused its discretion in ordering a new trial. See *Cress*, 468 Mich at 691.

Affirmed.

/s/ Patrick M. Meter
/s/ Jane M. Beckering