STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARTIN PRENTIS PATTERSON,

Defendant-Appellant.

UNPUBLISHED
October 27, 1998

No. 201260
Marquette Circuit Court
LC No. 96-032411 FC

Before: Saad, P.J., and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b; MSA 28.788(2), and one count of distributing obscene matter to a minor, MCL 722.675; MSA 25.254(5). He was sentenced to terms of twenty-five to forty years' imprisonment for each CSC I conviction and sixteen to twenty-four months' imprisonment for the distributing conviction. He appeals as of right, and we affirm.

Defendant first argues that he was denied his constitutional right to a speedy trial because of a twelve month and one week delay. A determination regarding whether defendant was denied a speedy trial requires a balancing of the following factors: (1) length of delay; (2) reasons for delay; (3) whether defendant asserted his right to a speedy trial; and (4) prejudice resulting from the delay. *People v Daniel*, 207 Mich App 47, 51; 523 NW2d 830 (1994), citing *Barker v Wingo*, 407 US 514, 530; 92 S Ct 2182; 33 L Ed 2d 101 (1972). A delay of more than eighteen months triggers an inquiry into these factors because such a delay is presumed to be prejudicial. *People v Gilmore*, 222 Mich App 442, 459; 564 NW2d 158 (1997); *People v Wickham*, 200 Mich App 106, 109-110; 503 NW2d 701 (1993). The prosecution bears the burden of proving lack of prejudice to the defendant under those circumstances. *Id.* Where the delay is less than eighteen months, however, the defendant has the burden to prove that he was prejudiced by the delay. *Daniel, supra*. Defendant has not done so in this case.

Defendant's general allegations of prejudice are insufficient to establish that dismissal was warranted on speedy trial grounds. He simply asserts that the delay "caused him prejudice by allowing

memories of witnesses to fade, creating difficulty in locating some witnesses, developing undo anxiety and stress, and preventing the commencement of critical necessary medical attention." On appeal, he fails to explain how the memories of witnesses had faded, causing him prejudice. Moreover, he fails to identify how the testimony of a "possible" lost witness would have aided him. *People v Simpson*, 207 Mich App 560, 564; 526 NW2d 33 (1994). In addition, his claim that the delay caused him undo anxiety is not supported by any objective facts or evidence. Defendant's only serious claim of prejudice is that he was denied critical medical attention. A review of the record, however, leads to the conclusion that the medical attention was not critical to the health and safety of defendant. Defendant even concedes, in his brief on appeal, that there was no clear cut evidence that his medical condition deteriorated because of a failure to receive treatment.

Defendant next argues that reversal of his convictions is required because the prosecutor made improper comments about the evidence, which amounted to improper comments on his decision not to testify. We disagree.

The prosecution is never permitted to comment on a defendant's failure to testify. *People v Perry*, 218 Mich App 520, 538; 554 NW2d 362 (1996). A comment that certain inculpatory evidence is undisputed does not, however, necessarily constitute an improper comment on a defendant's failure to testify. *Id.*; *People v Guenther*, 188 Mich App 174, 177; 469 NW2d 59 (1991). If the comment is made when arguing the weight to be given to the testimony, it is not improper. *Id.*

Our review of the prosecutor's rebuttal argument reveals no error requiring reversal. His use of the terms “uncontroverted” and “undisputed” represented proper comments on the weight to be given to the victim’s testimony. Moreover, the trial judge instructed the jury, as a precaution, that it could not consider that defendant had failed to testify. In doing so, it made specific reference to the prosecutor's argument that the victim's testimony was undisputed. Thus, even if the comments had been improper, a curative instruction was given. We also note that the comments of the prosecutor were responsive to defense counsel’s argument that defendant had insufficient time, and therefore, insufficient opportunity, to engage in sexual contact with the victim. *People v Hart*, 161 Mich App 630, 638; 411 NW2d 803 (1987). Given that the comments were not improper, that the trial court nevertheless issued a precautionary, curative instruction, and that the comments were induced by defense counsel's argument, we find no miscarriage of justice, which would necessitate reversal of defendant's convictions.

Defendant next argues that the trial court abused its discretion by failing to sever the charge of distributing obscene matter to a minor from the CSC I charges. He claims that the charges stem from unrelated offenses. We disagree.

Defendant supplied the victim with pornographic videotapes, which depicted scenes of sexual contact like those the victim ultimately engaged in with defendant. We find that defendant's acts of distributing pornographic materials to the victim aided defendant in accomplishing the criminal sexual conduct at issue. They were part of defendant's ultimate plan or scheme to induce the victim to engage in sexual acts. Therefore, the joinder of the charges did not constitute an abuse of discretion. MCR 6.120(B); *People v Daughenbaugh*, 193 Mich App 506, 509-510; 484 NW2d 690 (1992). See also *People v Miller*, 165 Mich App 32, 43-45; 418 NW2d 668 (1987), remanded 434 Mich 915,

on remand 186 Mich App 660; 465 NW2d 47 (1990), where this Court held that two distinct acts of criminal sexual conduct, which occurred at different times, could be tried together because the facts indicated "a single plan or scheme on the part of defendant to sexually molest the victim when the opportunity presented itself."[1]

Defendant next argues that the trial court erred by failing to grant his motion for a directed verdict of acquittal on the CSC I charges, which were brought under MCL 750.520b(1)(b); MSA 28.788(2)(1)(b). He maintains that the prosecution presented insufficient evidence to show that he either "coerced" the victim to submit to sexual contact or that he and the victim were members of the same "household". We disagree and find that, viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could conclude that the essential elements of the crime were proved beyond a reasonable doubt. *People v Warren,* 228 Mich App 336, 345; 578 NW2d 692 (1998), lv pending.

There was sufficient evidence to find that defendant and the victim were members of the same household at the time of the criminal conduct. The Legislature intended the term "household" to be "an all-inclusive word for a family unit residing under one roof for *any time other than a brief or chance visit*." *People v Garrison,* 128 Mich App 640, 646; 341 NW2d 170 (1983) (emphasis added). It "assumes a close and ongoing subordinating relationship that a child experiences with a member of his or her family or with a coercive authority figure." *Id.* at 646-647. In this case, there was evidence that defendant often referred to the victim as his son or step-son; that the victim had his own room in the home where defendant resided; and that the victim was expected to abide by defendant's rules, which included keeping his room clean, picking up after himself and going to school. Under the facts of the case, the victim was not at defendant's home for a chance visit, and although there was testimony that the victim's stay was not to be permanent, the length or permanency of residence is not determinative. *Id*. The trial court therefore properly denied a directed verdict because the prosecution supported the elements of MCL 750.520b(1)(b)(i); MSA 28.788(2)(1)(b)(i).

There was also sufficient evidence, in the alternative, of coercion. Coercion includes, *but is not limited to,* physical force or violence, threats of force, threats of retaliation, inappropriate medical treatment, or concealment or surprise. MCL 750.520b(1)(f); MSA 28.788(2)(1)(f) (emphasis added); *People v Malkowsi,* 198 Mich App 610, 613; 499 NW2d 450 (1993). The existence of coercion is determined in light of all of the circumstances; it is not limited to acts of physical violence. *Id.*; *People v Brown,* 197 Mich App 448, 450; 495 NW2d 812 (1992). In this case, defendant got the fifteen year old victim drunk. When the victim told defendant that he did not wish to drink anymore, defendant informed the victim that he would have to repay defendant if he did not consume the last shot of alcohol. The victim testified that he thought defendant was referring to his doing "something sexual" for defendant. Defendant then told the victim to come over, on his knees, to the chair where defendant was sitting. We find that defendant's conduct amounted to coercion. Although we are mindful that the victim appeared to actually have initiated the sexual contact after first refusing to crawl to defendant on his knees, we do not find that this fact negates defendant's coercion of the victim. The trial court properly denied the directed verdict.

Defendant finally argues numerous instances of conduct, which he alleges amount to ineffective assistance of counsel. In order to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's error, there was a reasonable probability that the result of the proceeding would have been different. *People v Mitchell*, 454 Mich 145, 157-158; 560 NW2d 600 (1997); *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant "must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Mitchell, supra.* A motion for new trial or an evidentiary hearing is a prerequisite to appellate review unless the record contains sufficient details relating to the alleged deficiencies in representation to allow this Court to adequately analyze the issue. *People v Laidlaw*, 169 Mich App 84, 95; 425 NW2d 738 (1988). Where defendant fails to move for a new trial or evidentiary hearing, our review is limited to errors that are apparent from the trial court record. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996).

In this case, defendant failed to move for an evidentiary hearing or new trial on grounds of ineffective assistance of counsel. The record before us lacks sufficient detail to evaluate defendant's claims that: 1) his counsel should have addressed concerns to the court that two jurors had observed defendant in shackles; 2) his counsel should have moved to require the prosecution to honor an offered plea bargain; 3) his counsel should have objected to testimony about statements defendant made during interrogation; and 4) if his counsel did not request CJI 2d 4.5, he should have done so and if he did request it, he should have pursued the trial court's decision not to give it. Because the record is insufficient to review any of these allegations of ineffective assistance of counsel, appellate review is precluded. We also decline to accept defendant's request to remand for an evidentiary hearing on these issues. Defendant never moved this Court for such a remand pursuant to MCR 7.211. Moreover, defendant has failed to provide this Court with any idea as to what information may be revealed during an evidentiary hearing, which would provide a basis for relief.

We find, however, that the record is sufficient to review defendant's claim that his counsel was ineffective for questioning the victim's mother in such a manner as to "open the door" to allegations that defendant molested their mutual daughter. Defense counsel questioned the victim's mother about threats she had made to defendant to file "child molestation charges against" him. Based on the record, it is clear that this questioning was part of defense counsel's trial strategy to discredit the witness and cast doubt over whether the victim and defendant had ever engaged in sexual acts together. Counsel attempted to make it clear that defendant was accused of the sexual misconduct with the victim after he and the victim's mother argued over their mutual daughter. We will not second guess defense counsel's trial strategy. *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Moreover, we note that, when introduced as a trial tactic, even intentional references to damaging evidence fail to support a claim of ineffective assistance of counsel. *People v Armstrong*, 100 Mich App 423, 426; 298 NW2d 752 (1980). We also note that defense counsel elicited further testimony from the victim's mother that defendant was not charged with any crimes as a result of her allegations of abuse toward their mutual daughter and that there was never any physical evidence that the daughter had been assaulted. Thus, we find that defendant has failed to prove that he was prejudiced in anyway by his counsel's strategy. *Mitchell, supra.*

Defendant also argues with regard to his claims of ineffective assistance of counsel that his counsel was generally ineffective because he used leading questions, made improper objections or failed to object, and generally appeared to be unfamiliar with the rules of evidence, including an instance where the court had to explain to defense counsel the proper procedure for impeaching a witness with preliminary examination testimony. Defendant's claim appears to be a catch-all, general claim. He basically argues that in he was prejudiced by his counsel's general conduct. In making this argument, however, defendant has failed to affirmatively demonstrate that his "counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial." *Mitchell, supra.* Therefore, this claim of ineffective assistance of counsel does not require reversal.

Affirmed.

/s/ Henry William Saad
/s/ Harold Hood
/s/ Roman S. Gribbs

[1] In making our ruling, we note that defendant is correct that he would have been entitled to severance if the offenses were unrelated. *Daughenbaugh, supra* at 510. Joinder of unrelated offenses is not proper simply because evidence of the unrelated offenses may be admissible as other bad-acts evidence under MRE 404(b). *Id.*