STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of RYAN JOHNSON, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

RYAN JOHNSON,

Respondent-Appellant.

UNPUBLISHED
December 7, 1999

No. 210513
Marquette Circuit Court
Family Division
LC No. 97-005626 DL

In the Matter of LOWELL RAYMOND MILLER, Minor.

PEOPLE OF THE STATE OF MICHIGAN,

Petitioner-Appellee,

v

LOWELL RAYMOND MILLER,

Respondent-Appellant.

No. 211379
Marquette Circuit Court
Family Division
LC No. 95-004903 DL

Before: Griffin, P.J., and Sawyer and Smolenski, JJ.

PER CURIAM.

In these consolidated appeals, respondents Johnson and Miller appeal as of right from orders of disposition entered following delinquency proceedings in Marquette Circuit Court, Family Division. The

two respondents and another corespondent, Luke Ayres, were alleged to have engaged in conduct tantamount to second-degree criminal sexual conduct, MCL 750.520c(1)(a); MSA 28.788 (3)(1)(a), with younger boys, ages four to six years old, in their neighborhood. Following a joint trial in January 1998,[1] the jury found that respondents had committed the offense of second-degree criminal sexual conduct. At their ensuing dispositional hearings, both respondents received three years' probation and, among other conditions imposed, were required to complete one hundred hours of community service and attend counseling. Respondents Johnson and Miller now appeal as of right from the March 16, 1998, and April 14, 1998, orders of disposition, respectively. We affirm.

I

Docket No. 210513

Respondent Johnson raises twenty-four allegations of error on appeal, eighteen of which allege ineffective assistance of counsel. After filing his claim of appeal in the present matter, respondent Johnson also filed a motion to remand for an evidentiary hearing, alleging that his trial counsel was ineffective. In an order dated October 13, 1998, this Court granted respondent's motion, but expressly limited the scope of the hearing to certain issues raised by respondent Johnson.[2] The trial court then held a *Ginther*[3] hearing, took testimony from various witnesses, and ultimately concluded that respondent Johnson was not deprived of the effective assistance of counsel with regard to the enumerated claims.

In order to justify reversal of an otherwise valid conviction on the basis of ineffective assistance of counsel, "a defendant must show that a counsel's performance fell below an objective standard of reasonableness, and that the representation so prejudiced the defendant as to deprive him of a fair trial." *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). See also *People v Ho*, 231 Mich App 178, 191; 585 NW2d 357 (1998). The defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991).

A

Respondent Johnson first argues that his trial counsel was ineffective for not presenting an alibi defense. As noted above, this Court's remand order was expressly limited to certain issues; this issue was not among those to be explored at the evidentiary hearing and was not in fact addressed by the trial court in its ensuing opinion. However, because the issue was discussed in some detail at the evidentiary hearing and the record thus permits review, *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995), we will address respondent's claim.

Respondent's trial counsel, James Jessup, explained at the evidentiary hearing that he was provided with information from respondent's father about respondent's whereabouts on June 19, 1997, the date originally alleged in the petition as the date when the incident in question occurred. However, Jessup did not file a notice for an alibi defense because he understood that the prosecutor intended to allege that incidents occurred on more than one date. Counsel did not believe that he could account for

respondent's whereabouts on all the dates and considered it bad trial practice to account for some dates, but leave others to speculation.

A decision regarding what witnesses to call at trial involves a matter of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses. Where there is a claim that counsel was ineffective in failing to raise a defense, a defendant must show that he made a good-faith effort to avail himself of the right to present a particular defense and the defense of which he was deprived was substantial, i.e., one that might have made a difference in the trial's outcome. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). This Court will not substitute its judgment for that of trial counsel in matters of trial strategy, assess counsel's competence with the benefit of hindsight, or find ineffective assistance merely because a strategy backfires. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995); *People v Duff*, 165 Mich App 530, 545-546; 419 NW2d 600 (1987).

In this case, Jessup's testimony on this subject demonstrates that he made a conscious trial strategy decision not to pursue an alibi defense given that the prosecutor intended to supplement the petition with allegations of additional incidents and dates (see issue V, *infra*) that the defense would have to take into consideration. This was a matter of trial strategy which, successful or not, this Court will not second guess. *Duff, supra*. Respondent has not otherwise shown that his trial counsel's performance was so deficient that it deprived him of a substantial defense. *People v McMillan*, 213 Mich App 134, 141; 539 NW2d 553 (1995); *Kelly, supra*.

B

Respondent next contends that his counsel was ineffective for not properly pursuing certain issues relating to respondent's mental health and not challenging his competency to stand trial. This issue was developed at the evidentiary hearing on remand pursuant to this Court's order, and the trial court found respondent's claim to be lacking in merit.

Jessup's testimony at the evidentiary hearing reveals that he made a strategic decision that the psychological evidence would not have been helpful at trial. Jessup concluded that respondent's psychological problems, including attention deficit hyperactivity disorder, oppositional defiant disorder, and depression, were not probative of the facts and issues to be decided at trial and did not provide a defense to the charges. Jessup further testified that he was never concerned about Johnson's competency to assist him at trial. While respondent appeared to be a quiet child, he was able to communicate directly on issues with Jessup, and if not, he communicated through his parents.

The trial court concluded after the evidentiary hearing that nothing in the counselor's report supported a finding that respondent Johnson lacked either criminal responsibility or competency to assist in his own defense. The court further held that the counselor's opinion about whether respondent Johnson committed this offense was not admissible as character evidence because it was legally irrelevant to the proceedings at the time the report was written (after the adjudicative hearing); counsel was therefore not ineffective for failing to investigate or offer inadmissible evidence. Moreover, the trial court found that Jessup was not ineffective in failing to present another witness, respondent's therapist,

at trial because his report did not show that respondent could not have formed the criminal intent or could not assist his attorney. As to respondent's competency to stand trial, the trial court found that he was not incompetent for purposes of participating in his trial.

We find no clear error in the trial court's findings, MCR 2.613(C), and conclude, based on our de novo review of the record, that respondent was not denied effective assistance of counsel because evidence of his psychological state was not presented at trial or his competency questioned. Respondent has not shown that his counsel's conduct deprived him of a substantial defense, *Kelly, supra,* or overcome the presumption that the challenged action might be considered sound trial strategy. *Tommolino, supra*.

C

Respondent next argues that ineffective counsel arose out of attorney Jessup's failure to advise him of a conflict of interest. Jessup and corespondent Ayres' attorney, William Rekshan, had offices in the same building and owned the building together. When the Johnsons appeared at Jessup's office to discuss the case but he was not present, the secretary referred the Johnsons to Rekshan's office because the Johnsons were familiar with Rekshan. Rekshan was also asked to fill in for Jessup at the dispositional hearing when Jessup had to be in court in another county at the same time. Respondent argues that this alleged conflict posed by Rekshan's representation was never explained to him or his parents, thereby rendering Jessup's representation ineffective. However, respondent has not established that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998).

Contrary to respondent's contention, there was no evidence that Rekshan was jointly representing respondent and corespondent Ayres at the time of the adjudicative hearing. Although housed in the same office building, the testimony at the evidentiary hearing indicated that Jessup and Rekshan maintained separate offices and maintained their clients' respective confidentialities. Because there was a unified trial strategy, joint and frequent communication between the attorneys and the clients was necessary to coordinate their strategy. Respondent Johnson has not shown, however, that this frequent communication created a conflict of interest. We therefore find no merit in respondent's contention that a conflict of interest fostered ineffective assistance of counsel.

As to respondent's claim that he was prejudiced because Jessup deferred to Rekshan in certain circumstances, the record indicates that in pursuing a joint defense strategy with the attorneys for the other respondents, if there was a lead counsel, it was usually the attorney for respondent Miller, not respondent Ayres' counsel. However, the overall defense strategy was arrived at by consensus of all three attorneys.

Respondent also asserts that there was a conflict of interest arising out of Rekshan's representation of respondent at his dispositional hearing. However, MCR 6.005(F)(3), the court rule on which he relies, states that joint representation of defendants is not prohibited if it "in all probability will not cause a conflict of interest." The joint representation of respondents by the same attorney at the dispositional hearing does not involve a conflict of interest in and of itself. A client is required to consent

to the joint representation of another defendant only if the representation of the other client would be directly adverse to him, or the responsibilities to him would be materially limited. MRPC 1.7. Here, the court gave respondent the sentence, three years' probation, that was recommended by the probation department. Respondent has not otherwise shown facts supporting a finding that there was a conflict of interest or that Rekshan's loyalty to respondent Ayres adversely affected his performance on respondent Johnson's behalf at the dispositional hearing.

D

Respondent Johnson also contends that his counsel was ineffective for not advising respondent of his right to testify at the adjudicative hearing. Based on the evidence taken at the *Ginther* hearing, the trial court concluded that, given the defense's strategy and respondent's young age, counsel was not ineffective because he did not obtain a waiver from respondent not to testify. The decision whether to call a party to testify is a matter of trial strategy. *People v Alderete*, 132 Mich App 351, 360; 347 NW2d 229 (1984).

Our review of the *Ginther* hearing record supports the trial court's conclusions. Respondent stated that he was asked not to testify, although he wanted to testify. The defense attorneys decided, consistent with their joint trial strategy, that it was not in the best interests of the defense as a whole to have one of the boys testify and the others not testify; since the respondents had not implicated each other. Moreover, there was concern over what respondent would say if he took the stand, particularly given his age and the pressure of cross-examination. Thus, the decision was made not to call him to testify.

Given the prosecution's strong case against respondent, in the form of the victims' testimony, even if respondent had taken the stand, it is unlikely that the result of this case would have changed. Respondent has therefore not shown that he was prejudiced by his counsel's conduct. *Pickens, supra*.

E

We have reviewed respondent Johnson's remaining claims of ineffective assistance of counsel and have determined that these issues are without merit. These issues either pertain to matters of strategy, which we will not second-guess, *Duff, supra*, or lack the requisite prejudice, *Pickens*, *supra*, that would mandate reversal.

II

Respondent Johnson next argues that the trial court erred when it did not include in its final instructions CJI2d 3.7, an instruction to be used in cases involving multiple defendants. There was neither an objection to the court's instructions as given nor a request that CJI2d 3.7 be given to the jury. We find no manifest injustice under the circumstances. *People v Van Dorsten*, 441 Mich 540, 544-545; 494 NW2d 737 (1993).

Trial courts are not required to use the Michigan Criminal Jury Instructions, which do not have the official sanction of the Michigan Supreme Court. *People v McFall*, 224 Mich App 403, 414; 569

NW2d 828 (1997). In any event, the instructions as a whole adequately informed the jury that it had to consider each respondents' case separately, insuring that no respondent would be convicted based on the crime of another respondent. *Id*. at 412-413.

III

Respondent next contends that the trial court erred when it interviewed a prosecution witness in chambers without the presence of respondent or his attorney and then closed the courtroom, permitting the witness to testify with special arrangements without following the requisite procedures set forth in MCL 600.2163a; MSA 27A.2163(1).

In the absence of an objection by respondent's counsel to either the trial court meeting with the witness in chambers before he testified or to clearing the courtroom before the witness' testimony was given, this issue has not been properly preserved for appellate review. Respondent has not otherwise demonstrated that the error, if any, in the procedure used by the trial court affected his substantial rights, i.e., the outcome of the lower court proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

IV

Respondent Johnson next contends that the trial court erred in referring to the complainants as "victims" during the preliminary jury instructions. However, because there was no objection to the portions of the court's instructions now challenged on appeal, this issue has not been preserved for appellate review. *People v Messenger*, 221 Mich App 171, 177; 561 NW2d 463 (1997); *People v Gregg*, 206 Mich App 208, 211; 520 NW2d 690 (1994). Although this Court may still review unpreserved, instructional issues to avoid manifest injustice, *VanDorsten*, *supra* at 544-545, respondent has shown neither that the trial court's instructions substantially varied from the standard jury instructions nor, to the extent he is arguing that the trial court's statement is indicative of bias against him, that the use of the term "victim" instead of "complainant" suggested that the trial court believed that respondents were guilty of this crime. We are not convinced that the court's reference to the young children as "victims" would predispose the jury to a finding that respondent was the guilty party. Defendant's argument in this regard is meritless.

Respondent also argues that the alleged instructional error was compounded because during the final instructions, the trial court omitted language that would have made it clear to the jury that the petition was not evidence. Respondent contends that the trial court erred when it did not follow CJI2d 3.5. However, our review of the record indicates that the court's actual instructions on this subject conveyed the same principles to the jury. The court made it clear that the petition was not evidence of respondent's guilt, but was only introduced to explain why the jury was hearing this matter. Respondent has therefore not shown that manifest injustice resulted from the court's instructions to the jury. *VanDorsten, supra*.

V

Respondent Johnson next cites error in the trial court's decision to allow the prosecution to amend the petition relative to the dates of this incident.

MCL 712A.11(6); MSA 27.3178(598.11)(6) provides that a petition in juvenile proceedings "may be amended at any stage of the proceedings as the ends of justice require." In criminal matters, an information may be amended for substantive defects without interrupting the trial process where the amendment would not prejudice the defendant. *People v Weathersby*, 204 Mich App 98, 103; 514 NW2d 493 (1994). This prejudice must be unacceptable prejudice to the defendant to meet the charges against him, such as unfair surprise, inadequate notice, or insufficient opportunity to defend. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

During the trial in this case, the trial court allowed the prosecution to amend the petition to allege additional dates, but not different or additional charges (the date of the incident giving rise to the charged offense was changed from June 19, 1997, to "May or June" 1997). In so ruling, the court decided to "allow the jury to consider all of the evidence that's on the videotapes and not just limit it to the particular date that is listed on these petitions, the date of June 16th [sic, June 19th]. . ." The jury, however, deliberated on only a single count of second-degree criminal sexual conduct.

Noting that there was no objection by respondent to the court's ruling, the admission of evidence of other instances of criminal sexual conduct, or amendment of the petition's language to reflect a different date, we find no error requiring reversal under the circumstances. Respondents were well aware of the allegations of additional incidents of sexual conduct because they and their attorneys were present for the victims' depositions more than one month before trial. In any event, because no new charges were added to the petition and the jury deliberated on only a single count of second-degree criminal sexual conduct, the amendment of the petition changing the date of the alleged incident did not prejudice respondent Johnson. *Weathersby, supra* at 104. In fact, as recognized by the trial court, the practical effect of the amendment was to foreclose future prosecution regarding any additional incidents that occurred during this time frame. We therefore conclude that respondent Johnson has failed to show that he was prejudiced as a result of the amendment of the petition.

VI

Respondent Johnson next argues that error requiring reversal occurred when the trial judge left the courtroom during the time that the videotaped depositions were played for the jury, thereby purportedly giving the jury the impression that the trial court had already determined that respondent was guilty. Defendant never registered an objection to the judge's physical absence from the courtroom. Hence, this issue has not been preserved for appellate review.

In any event, the absence of the trial judge during even critical stages of the trial is not grounds for reversal unless prejudice is shown. *People v Clyburn*, 55 Mich App 454, 459; 222 NW2d 775 (1974). Here, the judge had earlier presided over the taping of the depositions. At that time, any objections to testimony had been made or later edited out. When the jury viewed the taped depositions, the trial judge's role was primarily as an observer of the tapes, not as a participant in the trial process. The judge periodically checked on the proceedings, which progressed without incident or

interruption. Under these circumstances, we conclude that respondent was not prejudiced by either the judge's absence from the courtroom or his explanation for the absence to the jury. Compare *Scott v Angie's, Inc*, 153 Mich App 652, 663-664; 396 NW2d 429 (1986).

VII

Respondent lastly cites error in the trial court's instructions to the jury regarding the requirement of a unanimous verdict. Because defendant did not object to these instructions below, review is foreclosed absent manifest injustice. *People v Ullah*, 216 Mich App 669, 676; 550 NW2d 568 (1996). We conclude that manifest injustice will not result from our failure to provide review or relief to defendant because the instructions as a whole adequately conveyed to the jury the concept of unanimity applicable under the circumstances. See, generally, *People v Cooks*, 446 Mich 503, 511; 521 NW2d 275 (1994).

I
Docket No. 211379

Respondent Miller contends that the trial court abused its discretion by allowing the mother of one of the complainants to testify at trial contrary to the court's sequestration order. The mother had been present during her son's videotaped deposition as his support person. Respondent argues that allowing her to testify at trial was highly prejudicial because her testimony was of the same subject matter as her son's testimony, she identified respondent from the photograph array and, on redirect examination, she was able to "mold" her testimony consistent with the testimony of other witnesses. We disagree.

The decision whether to exclude the testimony of a witness who violates a sequestration order is left to the trial court's discretion. *People v Solak*, 146 Mich App 659, 669; 382 NW2d 495 (1985). The trial court's decision is reviewed for an abuse of discretion. *Id*. When a party alleges as error on appeal a witness' violation of a sequestration order, that party is required to demonstrate that prejudice resulted from the violation of the order. *Id*.

We find no abuse of discretion under the circumstances. A review of the record indicates that the mother was a last-minute substitute for the originally designated support person at her son's deposition. The mother's subsequent testimony at trial did not relate to her son's testimony, but rather set the stage for the events that transpired. She testified about the circumstances in her home, the day-care services she provided to the complainants, and how this incident came to her attention. The witness did not offer any hearsay testimony about the boys' statements. She also identified respondents, but she already knew them from the neighborhood. Moreover, there is no basis for concluding that the mother's rebuttal testimony was influenced by her presence at her son's deposition as his support person. In the absence of prejudice to respondent, we find that the trial court did not abuse its discretion in admitting the mother's testimony. *Solak, supra*.

II

Respondent next contends that it was error for the trial court to admit the testimony of a police lieutenant regarding a statement respondent made at the time of his polygraph examination when that statement was not voluntarily given under the totality of the circumstances. This issue has not been properly preserved for appellate review; although respondent moved to exclude this testimony at trial, he did so on grounds different from the argument now made on appeal.[4] *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993). Although respondent now argues this issue in terms of a violation of his constitutional rights, errors of a constitutional magnitude may still be forfeited if not properly preserved in the trial court. *Carines, supra* at 761-767. Respondent has not met the test for plain error under *Carines, supra*. Moreover, we cannot conclude that the admission of respondent's statement affected the fairness or integrity of these proceedings to his prejudice when he denied participating in any sexual conduct with the victims.

III

Respondent Miller's final argument on appeal is that the prosecutor engaged in misconduct during his opening statement and closing arguments to the jury. Respondent concedes that he did not object to the alleged improper prosecutorial conduct. The issue therefore may be reviewed on appeal only if a cautionary instruction could not have cured the prejudicial effect or if the failure to consider the issue would result in a miscarriage of justice. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

Claims of prosecutorial misconduct are decided case by case and the challenged comments must be read in context. *People v McElhaney*, 215 Mich App 269, 283; 545 NW2d 18 (1996). This Court reviews the prosecutor's remarks in context to decide if the comments deprived the defendant of a fair and impartial trial. *People v Lawton*, 196 Mich App 341, 353; 492 NW2d 810 (1992).

Contrary to respondent's argument, we conclude that the prosecutor's arguments were proper. His arguments were focused on deciding the credibility questions in this case based on the witnesses' testimony and demeanor. This case turned on the credibility of the prosecution witnesses. The prosecutor's arguments were all made in reference to the evidence the jury heard, either what they could observe of the witnesses or the reasonable inferences that could be drawn from the evidence. Thus, he did not argue facts not in evidence. *People v Modelski*, 164 Mich App 337, 347; 416 NW2d 708 (1987). Moreover, the prosecutor neither personally vouched for his witnesses, *People v Bahoda*, 448 Mich 261, 276; 531 NW2d 659 (1995), nor suggested to the jury that he had some special knowledge about the witnesses' truthfulness. *Id.* In sum, no error requiring reversal is reflected in the record.

Affirmed.

/s/ Richard Allen Griffin
/s/ David H. Sawyer
/s/ Michael R. Smolenski

[1] At the time of trial, respondent Johnson was ten years old and respondent Miller was thirteen years old.

[2] In the order granting respondent's motion to remand, this Court denied the motion as to all remaining (undesignated) issues not for lack of merit, but "because respondent has failed to demonstrate that the issues should be decided initially by the trial court."

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[4] A review of the record indicates that during trial, respondent argued that his statement was involuntary because his parents' waivers were not knowingly or voluntarily made. The trial court ruled that it was not a relevant consideration in admitting respondent's statement. Counsel for respondent also objected to the police lieutenant testifying because there was purportedly no evidence that a valid waiver had been signed by respondent Miller's parents. Authorization forms for the polygraph, signed by both parents, were in fact produced at trial. The trial court ruled that the voluntariness of the parents' waivers was not a relevant consideration in admitting respondent Miller's statement and, considering the totality of the circumstances, Miller's statement was voluntarily made. See *People v Givans*, 227 Mich App 113, 120-121; 575 NW2d 84 (1997). Now, on appeal, respondent Miller attempts to use the offer of proof made to the trial court about Mrs. Miller's understanding of the basis for the investigation as grounds for an evidentiary hearing to determine if respondent Miller understood the reason for the polygraph examination. He also challenges the circumstances surrounding the statement from respondent Miller's perspective to argue that the statement was involuntarily given. This argument was never made to the trial court and, in fact, respondent Miller has not made an offer of proof on the voluntariness of his statement in either the trial court or this Court.