STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 9, 2000
v	No. 217842 Barry Circuit Court
KENNETH RICHARD KOAN, SR., Defendant-Appellant.	LC No. 98-000174-FC

Before: Doctoroff, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), and sentenced to 60 to 120 years' imprisonment. Defendant appeals as of right. We affirm.

I

Defendant first contends that inasmuch as the method used to impanel the jury at his trial did not comport with the requirements of MCR 2.511(F), his conviction must be reversed under our Supreme Court's holding in *People v Miller*, 411 Mich 321; 307 NW2d 335 (1981). We disagree.

MCR 2.511(F) provides that once potential jurors have been seated in the jury box, and a challenge for cause has been sustained or a peremptory challenge exercised, another juror must be seated and examined before further challenges may be made. The rule contemplates the seating and examination of a panel of potential jurors equal in size to the jury that will hear the case, thereby allowing each party the opportunity to weigh the relative merits of all potential jurors before deciding whether an individual juror should be challenged. See *Miller*, *supra* at 325-326. In *Miller*, the Court ruled that a defendant is entitled to have a jury selected as provided by GCR 1963, 511.6, now MCR 2.511(F). *Id.* at 326.

The jury selection method employed in this case may have violated MCR 2.511(F). It is undisputed that on at least two occasions the trial court, after excusing several jurors on its own motion for cause, replaced the prospective jurors excused from the panel in groups, rather than individually.

However, unlike the situation in *Miller*, neither party in this case was required to exercise a peremptory challenge against a less than full panel of prospective jurors.

Moreover, we note that defendant failed to raise any objection to the method of jury selection used by the trial court. This Court has previously held that failure to comply with the requirements of MCR 2.511(F) does not require reversal where the issue is raised for the first time on appeal. *People v Lewis*, 160 Mich App 20, 32; 408 NW2d 94 (1987). Inasmuch as the method of jury selection employed by the trial court did not impede defendant's effective use of peremptory challenges, and considering defendant's failure to object to this process at trial, we find no error requiring reversal.

II

Defendant next argues that the trial court erred in permitting testimony, pursuant to MRE 404(b), from the victim and his brother concerning acts of sexual abuse by defendant for which he was not on trial. The decision whether to admit evidence is within the trial court's discretion; an abuse of discretion will not be found by this Court unless an unprejudiced person, considering the facts on which the trial court acted, would conclude that there was no justification or excuse for the ruling made. *People v Lugo*, 214 Mich App 699, 709; 542 NW2d 921 (1995).

In *People v VanderVliet*, 444 Mich 52, 74-74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994), our Supreme Court held that other-acts evidence is admissible under MRE 404(b) if the evidence is offered for a proper purpose under MRE 404(b), it is relevant under MRE 402, and the probative value of the evidence is not substantially outweighed by unfair prejudice under MRE 403. In addition, the trial court may, upon request, provide a limiting instruction to the jury. *Id.* at 75. On appeal, defendant argues that the trial court abused its discretion in finding that the other-acts testimony at issue was not more prejudicial than probative, and therefore, that the evidence was admissible. We disagree.

Our Supreme Court noted in *People v Starr*, 457 Mich 490, 498; 577 NW2d 673 (1998), that the third prong of the test announced in *VanderVliet*, *supra*, "requires nothing more than the balancing process described in MRE 403" and will warrant exclusion of otherwise relevant evidence only where the probative value of such evidence is "*substantially* outweighed by the danger of *unfair* prejudice . . . ."

In this case, defendant was being tried for an incident of abuse that occurred several years earlier. Thus, testimony concerning the nature and extent of other abuses suffered by defendant's children during that period substantiated the victim's claims and explained the reasons for his delay in reporting the crime. The disputed testimony was therefore highly probative. See, e.g., *Starr*, *supra* at 502-503; *People v Dunham*, 220 Mich App 268, 273; 559 NW2d 360 (1996). Moreover, in light of the highly offensive nature of the crime for which defendant was on trial, and considering the limiting instructions given by the trial court, both during the victim's testimony and at the close of proofs, the nature of these additional abuses was not so prejudicial as to require their exclusion. See *Starr*, *supra* at 499-500. Accordingly, the trial court did not abuse its discretion in admitting the disputed testimony.

Similarly, we reject defendant's claim that the victim was improperly permitted to testify concerning threats of death made by defendant should the victim ever reveal his abuse. As with the evidence of other abuses discussed above, evidence concerning defendant's threats toward the victim was relevant to explain his delay in reporting the alleged abuse. See *Dunham*, *supra* at 273. Inasmuch as this delay bore directly upon the credibility of the victim's claims of abuse, the probative force of such testimony was not sufficiently outweighed by the danger of unfair prejudice as to render it inadmissible. See *People v Mills*, 450 Mich 61, 75-76; 537 NW2d 909, mod 450 Mich 1212 (1995).

III

Next, defendant maintains that his sentence is disproportionately severe. A trial court's imposition of a particular sentence is reviewed on appeal for an abuse of discretion, which will be found where the sentence imposed does not reasonably reflect the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

Defendant's minimum sentence of sixty years' imprisonment exceeds the sentencing guidelines' recommendation of 10 to 25 years. While the guidelines applicable to defendant at the time of sentencing were not legislatively mandated, they have nevertheless been deemed to establish a useful "barometer" with which to measure the proportionality of a sentence. *Id.* at 656. However, a trial court is "entitled to depart from the guidelines if the recommended ranges are considered an inadequate reflection of the proportional seriousness of the matter at hand." *Id.* at 661.

"[T]he 'key test' of proportionality is not whether the sentence departs from or adheres to the recommended range, but whether it reflects the seriousness of the matter." *People v Houston*, 448 Mich 312, 320; 532 NW2d 508 (1995). As is apparent from the trial court's comments during sentencing,[1] the seriousness of defendant's conduct, in both nature and impact on its victims, warranted a term of incarceration in excess of that recommended by the guidelines. Accordingly, defendant's sentence of 60 to 120 years was not an abuse of the trial court's discretion. See, e.g., *People v Lemons*, 454 Mich 234, 257; 562 NW2d 447 (1997); *People v Merriweather*, 447 Mich 799; 527 NW2d 460 (1994).

Similarly, we reject defendant's claim that the sentence imposed by the trial court is invalid under our Supreme Court's holding in *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989). Because *Moore* is no longer good law, we are limited in our review to a determination of the proportionality of the sentence under *Milbourn*, *supra*. See *Merriweather*, *supra* at 808-810; *People v Kelley*, 213 Mich App 8, 15-16; 539 NW2d 538 (1995).

IV

Defendant next argues that testimony from the victim indicating that he had been convicted of sexually assaulting his younger brother was improperly admitted at trial. Specifically, defendant contends that this testimony should have been excluded as both irrelevant and unfairly prejudicial. However, defendant failed to preserve this issue by raising it before the trial court. *People v Grant*,

445 Mich 535, 546; 520 NW2d 123 (1994). A plain, unpreserved error may not be considered by an appellate court for the first time on appeal unless the error could have been decisive of the outcome or unless it falls under the category of cases where prejudice is presumed or reversal is automatic. *Id.* at 553; see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). We find no error requiring reversal in the admission of this testimony.

Any tendency to prove a fact in issue constitutes sufficient probative value for purposes of relevancy. *Starr*, *supra* at 497-498. Here, inasmuch as the disputed testimony offered the jury a factual context regarding the circumstances in which the allegations against defendant came to light, the testimony was relevant to the victim's credibility. In addition, because the victim indicated that it was not until this time that he felt "safe" in discussing his abuse, testimony concerning his offense and time spent at the facility aided in explaining his delay in reporting the abuses. Thus, contrary to defendant's assertion, we do not believe the disputed testimony was irrelevant.

Furthermore, the trial court did not err in finding that the probative value of this evidence was not substantially outweighed by unfair prejudice. See MRE 403. In determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, "prejudice" means more than simply damage to an opponent's cause; rather, it is the undue tendency of the evidence to move the trier of fact to decide the case on an improper basis. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). Here, with respect to his offense, the victim offered nothing more than the fact that it was the offense that resulted in his being placed in the treatment program where he revealed defendant's abuse. Even assuming the existence of unfair prejudice, considering both the limited nature of the testimony and its high probative value regarding the credibility of the victim, it cannot be said that the probative value was substantially outweighed by any such prejudice. Accordingly, we find no error requiring reversal in the admission of this testimony at trial.

In light of the foregoing, we likewise reject defendant's claim that the prosecutor's comments on such evidence during opening statements were improper. Indeed, opening argument is the appropriate time to comment on the evidence that will be produced at trial. See *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991).

V

Defendant next argues that his trial counsel's failure to request fees in order to procure expert psychological testimony with which to impeach the validity of his confession denied him the effective assistance of counsel. Defendant's failure to request an evidentiary hearing on his claim of ineffective assistance of counsel limits this Court's review to errors apparent on the record. *People v Burton*, 219 Mich App 278, 292; 556 NW2d 201 (1996).

MCL 775.15; MSA 28.1252 authorizes funds for payment of expert witness fees for indigent defendants who are able to establish that they "cannot safely proceed to a trial" without the proposed witness. Whether a defendant has established the requisite need is left to the discretion of the trial court. See *In re Klevorn*, 185 Mich App 672, 678-679; 463 NW2d 175 (1990).

On the basis of the record currently before this Court, there is nothing that would indicate that defendant's confession was the product of any psychological malady that could impeach its validity. Accordingly, defense counsel's failure to procure funds for expert testimony in this regard was not unreasonable. Furthermore, decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy on which this Court will not substitute its judgment for that of counsel. See *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987).

Defendant also argues that in the absence of counsel's request for fees with which to procure such expert testimony, it was incumbent upon the trial court to appoint such an expert on defendant's behalf. However, even assuming such judicial obligation exists, as discussed above, the absence of any factual basis indicating the necessity for such action on behalf of the trial court renders defendant's claim in this regard factually untenable. Accordingly, the trial court did not err in failing to act sua sponte on defendant's behalf.

VI

Finally, defendant argues that the trial court erred in precluding the testimony of two psychotherapists, who treated the victim and his younger brother, pursuant to MCL 330.1750; MSA 14.800(750). Although this Court has previously determined that the psychologist-patient privilege, codified at MCL 330.1750; MSA 14.800(750), cannot absolutely bar the introduction of privileged materials into evidence without violating a defendant's constitutional right to confrontation, whether to allow the use of such privileged information for purposes of impeachment remains a question that is within the trial court's discretion. *People v Adamski*, 198 Mich App 133, 139-140; 497 NW2d 546 (1993); see also *People v Fink*, 456 Mich 449, 458; 574 NW2d 28 (1998).

Moreover, the failure of a trial court to permit a defendant to use impeachment evidence stemming from privileged information does not require reversal unless the evidence is material to the defense. *Fink*, *supra* at 455, 459. As explained by the Court in *Fink*, such materiality exists only where there is a "reasonable probability" of a different result. *Id.* at 459. "The question is whether, in the absence of the disputed evidence, the defendant received a fair trial, i.e., a trial resulting in a verdict worthy of confidence." *Id*. We do not believe such a showing has been made in this case.

At a pretrial motion hearing on this matter, defense counsel indicated that she sought the trial testimony of these witnesses in order to establish that one of the boys had made prior inconsistent statements regarding the abuse by defendant, to show that each boy was aware of the other's allegations before speaking with police, and to elicit opinion testimony that one of the boys was "prone to lying." With respect to prior inconsistent statements, the trial court specifically found that the records disclosed by the treatment facilities were devoid of any indication that the boys had previously informed these witnesses of information contrary to their current allegations. Such evidentiary findings resulting from an in-camera review of privileged documents have been left to the discretion of the trial court. Cf. *id.* at 460. Furthermore, at trial, the victim acknowledged that he had previously told his court-appointed special advocate that his father had never sexually abused him, thereby reducing the significance of any testimony from the challenged witnesses. Similarly, during cross-examination of the

investigating detective, counsel for defendant was able to elicit that before speaking with police each of the boys had knowledge that the other had made allegations of abuse by defendant during sessions with their therapists. Finally, because there does not appear to be any basis to conclude that either of the boys had a motive to lie specifically about the abuse suffered by them at the hands of defendant, and considering the written statement signed by defendant acknowledging such abuse, a mere notation in the records indicating that one of these boys was prone to lie is not sufficient to lead this Court to conclude that elicitation of that fact at trial would have "put the whole case in such a different light so as to undermine confidence in the verdict." See *id.* at 454.

Accordingly, we do not believe that the trial court abused its discretion in precluding the disputed testimony.

Affirmed.

/s/ Martin M. Doctoroff
/s/ David H. Sawyer
/s/ Mark J. Cavanagh

[1] In this case, during sentencing the trial court offered a myriad of reasons for the upward departure from the sentencing guidelines, including the failure of the guidelines to reflect the torturous nature of the abuse suffered by defendant's children and the long-term psychological impacts that these abuses would most certainly have on those children. The trial court further indicated its belief that the guidelines in effect at the time of defendant's sentencing failed to adequately assess the risk to society demonstrated by defendant's ability to commit such "truly evil" deeds.