

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

---

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOEL ANTHONY CLAYTON-MCGOWAN,

Defendant-Appellant.

---

UNPUBLISHED

December 19, 2000

No. 216847

Livingston Circuit Court

LC No. 98-010546-FH

Before: Smolenski, P.J., and Wilder and Meter, JJ.

PER CURIAM.

Defendant was charged with third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c), and assault with intent to commit criminal sexual conduct involving penetration, MCL 750.520g(1); MSA 28.788(7)(1). He was convicted of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b); MSA 28.788(5)(1)(b) and was sentenced to a term of 1 to 2 years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the prosecutor's failure to timely provide defense counsel with a complete copy of the police report in pre-trial discovery deprived him of his constitutional right to testify at trial on his own behalf. We disagree.

A criminal defendant has a due process right to information that the prosecutor possesses that might lead a jury to entertain a reasonable doubt about the defendant's guilt. *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). Upon request, the prosecutor must provide each defendant with exculpatory information known to the prosecutor, including any police report concerning the case and any written or recorded statement by a defendant. MCR 6.201(B)(1)-(3). If the prosecutor fails to comply with MCR 6.201(B), the trial court may exercise its discretion to exclude the testimony or evidence which the prosecutor failed to provide, or may exercise its discretion to order "another remedy." MCR 6.201(J).

In this case, the prosecutor provided certain documents to defense counsel during pre-trial discovery, but failed to provide a supplemental police report that contained an inculpatory statement which defendant had made to police. Unaware of defendant's inculpatory statement, defense counsel advised him to undergo a polygraph examination, which defendant failed. During and after the polygraph examination, defendant made statements to police regarding his

actions on the night in question, which were inconsistent with the initial statements he made to police. When defense counsel received the supplemental police report on the day of trial, she moved for dismissal of the charges against defendant. The trial court denied the motion to dismiss, but ordered that defendant's statement found in the police report and defendant's contradictory statements made during and after the polygraph examination could not be used in the prosecutor's case in chief. However, the trial court made clear that the prosecutor could use the suppressed evidence to impeach defendant's testimony if defendant "somehow introduces those statements and then tries to deny them."

Defendant argues that the trial court erred when it suppressed evidence of his statements, rather than dismissing the charges against him. Specifically, defendant argues that the trial court erred in allowing the prosecutor to use defendant's inconsistent statements for impeachment purposes. In defendant's view, his inconsistent statements were created by the prosecutor's failure to provide defense counsel with the supplemental police report. Because he would have been impeached with those inconsistent statements if he had taken the witness stand, defendant contends that the prosecutor effectively prevented him from testifying at trial on his own behalf. We review a trial court's decision regarding the appropriate remedy for discovery violations in a criminal case for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997). In the present case, we believe the trial court acted within its discretion when refusing to dismiss the charges against defendant because of the prosecutor's discovery violation.

In *Michigan v Harvey*, 494 US 344, 351; 110 S Ct 1176; 108 L Ed 2d 293 (1990), the United States Supreme Court addressed the use of illegally obtained evidence for the sole purpose of impeaching a testifying defendant:

The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections. But use of statements so obtained for impeachment purposes is a different matter. If a defendant exercises his right to testify on his own behalf, he assumes a reciprocal "obligation to speak truthfully and accurately," *Harris v New York*, 401 US 222, 225; 91 S Ct 643; 28 L Ed 2d 1 (1971), and we have consistently rejected arguments that would allow a defendant to "turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths." *Id.* at 224 (quoting *Walder v United States*, 347 US 62, 65; 74 S Ct 354; 98 L Ed 503 (1954)).

We hold that neither the prosecutor's discovery violation nor the trial court's ruling that defendant's statements could be used for impeachment purposes precluded defendant from testifying on his own behalf. By allowing the prosecutor to use defendant's admissions solely for impeachment purposes, the trial court imposed the reciprocal duty that defendant speak truthfully and accurately, should he choose to testify. Therefore, we hold that the trial court did not err in denying defendant's motion to dismiss, and defendant was not denied his constitutional right to testify at trial on his own behalf.

Defendant next argues that the trial court erroneously allowed the jury to hear evidence of the victim's virginity because that evidence constituted impermissible character evidence under MRE 404(a). We disagree.

Because defense counsel failed to object to the admission of this testimony at trial, we review this unpreserved claim of nonconstitutional error under the plain error doctrine. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999).

To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. . . . Finally, once a defendant satisfies these three requirements, an appellate court must exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when the error “‘seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings’ independent of the defendant’s innocence.” [*Id.* at 763, internal citations omitted.]

In the present case, it is clear that testimony regarding the victim's virginity was introduced because defense counsel strategically planned to impeach the victim's credibility with that testimony. The jury first heard testimony regarding the victim's virginity when defense counsel purposefully elicited that testimony from the victim on cross-examination. Defense counsel questioned the victim about a statement she made to a friend, that a physician's assistant had told her that she was no longer a virgin. Defense counsel pursued this line of questioning until the victim admitted that she had misled her friend because she was afraid that her friend would think she lied about defendant's conduct. Defense counsel later elicited testimony from the physician's assistant that she never told the victim that she was not a virgin. In fact, under questioning by the prosecutor, the physician's assistant testified that a pelvic examination would not reveal whether a sexual assault had occurred, and would not reveal whether the patient was a virgin.

Error requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence. *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999). Because defense counsel strategically planned to elicit testimony from the victim regarding her virginity, the admission of that testimony cannot constitute plain error.

Defendant next argues that the trial court failed to properly instruct the jury regarding consent. We disagree.

The trial court instructed the jury on the elements of third-degree criminal sexual conduct, the lesser included offense of fourth-degree criminal sexual conduct, and assault with intent to commit criminal sexual conduct involving penetration. Defendant argues that the trial court read the jury instruction regarding consent after the elements of the assault charge, but erroneously failed to read the consent instruction in connection with the criminal sexual conduct charge.

Therefore, defendant argues that the jury convicted him of fourth-degree criminal sexual conduct without considering whether the victim consented.

Because defendant failed to object to the jury instructions, we review this unpreserved claim of nonconstitutional error under the plain error doctrine. See *Carines*, *supra* at 761-764. We believe that the trial court's instructions, when viewed as a whole, adequately protected defendant's rights. The trial court explained to the jury that it must find that the victim was physically helpless, in order to convict defendant of either third-degree or fourth-degree criminal sexual conduct. The trial court defined "physically helpless" to mean that the victim "was unconscious, asleep, or physically unable to communicate that she didn't want to take part in the alleged act." Under the instructions given, the jury could not have convicted defendant of fourth-degree criminal sexual conduct without concluding that the victim was physically helpless and unable to consent. Therefore, we do not believe that the jury instructions given by the trial court constituted plain error.

Finally, defendant argues that his conviction should be reversed due to ineffective assistance of trial counsel. Defendant argues that his trial counsel was ineffective in three ways: (1) she failed to accompany defendant to a polygraph examination; (2) she improperly elicited testimony regarding the victim's virginity when no evidence indicated that she was a virgin at the time of the alleged sexual assault; and (3) she failed to object to the prosecutor's characterization in her closing argument that the sexual assault was the victim's "first sexual experience." We disagree that defendant's trial counsel rendered ineffective assistance of counsel.

Because defendant failed to request an evidentiary hearing under *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), we review defendant's claim of ineffective assistance of counsel only to the extent that defense counsel's mistakes are apparent on the record. *People v Harris*, 201 Mich App 147, 154; 505 NW2d 889 (1993). A claim of ineffective assistance of counsel must be examined under *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984) and *People v Pickens*, 446 Mich 298, 326; 521 NW2d 797 (1994). A defendant must satisfy a two-pronged test to establish an ineffective assistance of counsel claim:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. [*Strickland*, *supra*, 466 US 687].

Defendant first argues that his trial counsel was deficient because she allowed him to appear at the polygraph examination without her presence. Defendant relies on *People v Sclafani*, 132 Mich App 268; 347 NW2d 30 (1984), in which this Court determined that the defendant's trial counsel performed deficiently when advising the defendant to undergo a polygraph exam. *Id.* at 271-272. In *Sclafani*, we noted that "[i]n most instances, a defense attorney's advice regarding the taking of a polygraph examination is a matter of trial strategy." *Id.* at 271. However, the defendant's counsel in that case admitted that he never would have

advised his client to take the examination, if he had realized the potential use of defendant's statements for impeachment at trial. *Id.* at 272. Therefore, the defense counsel's advice in that case "was based not on trial strategy, but on a clear misunderstanding of the police procedures associated with the administration of polygraph examinations and with the subsequent use of the examination results." *Id.* We believe that this case is distinguishable from *Sclafani*. In this case, defendant's counsel did not misunderstand the fact that statements made in the course of a polygraph examination may be used at trial for impeachment purposes. Instead, she was simply uninformed that her client had already made a statement to police which he might contradict if he changed his story during the polygraph examination. Neither defendant's failure to inform defense counsel of his inculpatory statement to police nor the prosecutor's failure to provide defense counsel with a copy of that statement rendered defense counsel's performance deficient.

Defendant has also failed to overcome the presumption that defense counsel's advice to undergo a polygraph exam was sound trial strategy.<sup>1</sup> *Strickland, supra*, 466 US 689. "[T]his Court will not second-guess counsel regarding matters of trial strategy, and even if defense counsel was ultimately mistaken, this Court will not assess counsel's competence with the benefit of hindsight." *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999), citing *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Defense counsel's testimony clearly indicates that she was exercising sound trial strategy by advising defendant to undergo the polygraph exam. Defense counsel testified that after speaking with defendant, she believed that he had consensual intercourse with the victim. Therefore, she reasonably believed that defendant would pass a polygraph exam on the issue of consent, and the prosecutor would drop the charges against defendant. Because defendant has failed to demonstrate that defense counsel performed deficiently, there is no need to address whether defendant was prejudiced by defense counsel's performance.

Next, defendant argues that his trial counsel was deficient because she improperly elicited testimony regarding the victim's virginity when no evidence indicated that the victim was indeed a virgin at the time of the sexual assault. Defense counsel's decision to cross-examine the victim regarding her statements to other witnesses concerning her virginity can be attributed to sound trial strategy. Specifically, defense counsel attempted to impeach the victim's credibility by eliciting testimony that the victim made misleading statements about the results of her medical examination. Because defendant has failed to demonstrate that defense counsel's attempt to impeach the victim's credibility was not sound trial strategy, there is no need to address whether defendant was prejudiced by defense counsel's performance.

Finally, defendant claims that he was denied effective assistance of counsel because defense counsel failed to object to the prosecutor's characterization in her closing argument that the sexual assault was the victim's "first sexual experience." Because the trial transcript is silent regarding defense counsel's reason for not objecting to the prosecutor's remark in her closing argument, and because defendant has not explained how he was prejudiced, defendant has failed

---

<sup>1</sup> Defendant failed to address how defense counsel's *absence* from the polygraph examination, as opposed to her initial advice to submit to the polygraph examination, constituted deficient performance.

to demonstrate that defense counsel's decision was not within the range of competence demanded of attorneys in criminal cases. *People v Thew*, 201 Mich App 78, 89-90; 506 NW2d 547 (1993).

Affirmed.

/s/ Michael R. Smolenski

/s/ Kurtis T. Wilder

/s/ Patrick M. Meter