STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 10, 2004
v	No. 247827 Genesee Circuit Court
BARRY JOHN STIFF, Defendant-Appellant.	LC No. 02-010963-FC

Before: Hoekstra, P.J., and O'Connell and Donofrio, JJ.

PER CURIAM.

Defendant appeals of right his conviction for first-degree criminal sexual conduct (CSC I, sexual penetration of a victim under the age of thirteen), MCL 750.520b, and CSC IV (sexual contact with a victim within the third degree of affinity), MCL 750.520e, following a jury trial. We affirm. The trial court sentenced defendant concurrently to 25 to 50 years in prison for the CSC I count and 12 to 24 months in prison for the CSC IV count.

Defendant was married to the victim's mother at the time of the events that support the charges. On August 12, 2002, the victim's mother observed defendant fondling the victim's breasts. The victim was sixteen years old at the time. When police arrived, defendant and the victim initially denied the mother's allegations, but when defendant and the police left the house, the victim confirmed her mother's observation and admitted that she and defendant had an ongoing sexual relationship that dated back more than four years.

Defendant first argues that the trial court erred when it prevented him from introducing testimony regarding the victim's accusation of sexual contact by her biological father. We disagree. We review for abuse of discretion a trial court's decision to introduce evidence. *People v Crawford*, 458 Mich 376, 383; 582 NW2d 785 (1998). Defendant relies on *People v Hackett*, 421 Mich 338; 365 NW2d 120 (1984), for the proposition that a defendant may introduce evidence of a victim's previous false allegation of sexual misconduct to discredit the victim's testimony. In this case, however, defendant failed to provide any evidence that the victim's earlier accusation against her biological father was false. In fact, the evidence demonstrated that the biological father acknowledged the contact. Therefore, the trial court did not abuse its discretion when it sustained the prosecutor's objection to this evidence. *People v Williams*, 191 Mich App 269, 273-274; 477 NW2d 877 (1991).

Defendant next argues that the trial court abused its discretion when it overruled defendant's objection to testimony by the victim's mother that recounted the victim's confirmation of her mother's observation and her discussion of defendant's abusive history. We disagree. Careful review of the record reveals that the jury had already heard this testimony on two occasions: once during the victim's examination and once near the beginning of the mother's examination. The defendant failed to object on these first two occasions. While the trial court's determination that the testimony fell under hearsay's excited utterance exception was questionable, the evidence's introduction the first two times did not amount to plain error. Moreover, the jury's exposure to the evidence a third time could not have appreciably impacted the case's outcome. Therefore, we will not reverse based solely on the reintroduction of this evidence. MRE 103.

Next, defendant argues that his trial counsel provided him with ineffective assistance by misinforming him that his minimum sentence on the CSC I count had a range of 11½ to 18½ years under the statutory guidelines rather than correctly applying the relevant judicial guidelines and advising him of a range of 10 to 25 years. Defendant argues that knowledge of the additional 6½ years on the minimum sentence would have caused him to accept a plea offer for two counts of attempted CSC I capped at five years imprisonment. Defendant argues that the trial court should have at least granted his motion for a *Ginther*[1] hearing to flesh out the facts behind his claim. We disagree. Defendant posits that he would have accepted the plea if he had complete and accurate sentencing information. We find this proposition incredible for two reasons, even assuming that defendant can support the basic facts behind the argument. First, defendant acknowledges that he rejected a five-year cap for an opportunity to "roll the dice" and chance a jury trial under the slightly misinformed view that he faced the possibility of an 18½-year minimum prison term. Of course, defendant did not know whether the trial court would sentence him at the high end of the guidelines or whether he would receive an outright acquittal. Nevertheless, the general disparity between the ranges pales in comparison to the disparity between the offer and the high ends of the ranges, so it is extremely unlikely that the difference in the ranges' higher ends would have altered defendant's disposition toward the plea. Second, trial counsel correctly explained to defendant on the record that he faced a flat life sentence on the charges, and defendant rejected the offer anyway. Under these circumstances, the trial court did not err when it found that trial counsel's misinformation had no "reasonable probability" of affecting defendant's plea rejection and it properly denied defendant's motions for a *Ginther* hearing and new trial. *Magana v Hofbauer*, 263 F3d 542, 550 (CA 6, 2001).

Similarly, defendant argues that his trial counsel provided him with ineffective assistance by failing to inform him that the trial court had barred any reference at trial to the victim's accusations against her biological father. Defendant argues that he would have accepted the plea offer if he had known of the evidentiary ruling. We disagree. Following the hearing on the evidentiary issue, the attorneys explained on the record that defendant had already rejected the plea agreement, clearly sometime before the hearing. Defendant's recorded rejection on the day of trial was simply a routine matter of putting the rejection on the record. Because defendant had already rejected the plea before the trial court's ruling, the unfavorable ruling could not have

[1] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

played a significant role in the decision, and trial counsel cannot be found ineffective for failing to presage the hearing's result for defendant's benefit.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Peter D. O'Connell
/s/ Pat M. Donofrio