STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 15, 2004
v	No. 247897 Tuscola Circuit Court
DELBERT EUGENE WOODRUFF, JR., Defendant-Appellant.	LC No. 02-008443-FC

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of 48 counts of first-degree criminal sexual conduct (CSC) for which he was sentenced to 20 to 60 years' imprisonment for each count. We affirm.

I. FACTS

Defendant and his wife divorced in 1995 when their daughter (the victim) was six years old. After the divorce, the victim and her brothers lived with their mother on schooldays but lived with defendant during the summer and from Friday to Monday during the school year. The victim stated that defendant first had sex with her when she was eight years old.

Defendant's former girlfriend testified that defendant's bedroom windows were covered with black plastic, duct tape, and comforters. Christopher Virant testified that he was defendant's roommate. During that time, a tent was set up 25 or 30 feet from the house, and defendant and the victim often slept in the tent. According to the victim, she and defendant slept alone in the tent most of the time although she had a bedroom in the house.

The victim estimated that defendant put his penis inside her vagina at least forty times that summer. She stated that defendant continued to have sex with her while she slept in his room from fall 2001 to March 2002. According to Virant, the victim slept in defendant's bedroom with defendant the entire time Virant lived with defendant in 2002. The victim estimated that from March 26, 2002 when she turned thirteen to May 2002 defendant put his penis in her vagina approximately 10 to 15 times.

According to defendant, however, he never had sex with his daughter. Defendant claimed that his roommates threatened to ruin his life after he kicked them out of the house

because of a dispute over pop bottles. Virant testified that he waited approximately one week after moving out before he contacted the Family Independence Agency and the Michigan State Police around May 14, 2002. Michigan State Police Detective Sergeant Allen Ogg, who interviewed defendant, testified that defendant changed his story several times but eventually stated that he got drunk one or two times a month and could have had sex with his daughter while drunk without remembering.

According to Ogg, when he asked defendant why his daughter claimed he had sex with her twice a week, defendant replied that he had been drinking a lot more since his girlfriend left. According to defendant, however, he thought he was answering questions about his drinking, and he was confused by the questions because Detective Ogg was yelling at him. Dr. Harry Frederick, M.D. testified that when he examined the victim on May 24, 2002, she had a cleft formation in her hymen that indicated previous penetration consistent with sexual abuse.

II. JURY INSTRUCTIONS

Defendant first argues that the court neglected to make part of the record the supplemental instructions given to the jury at the jury's request. We disagree.

A. Standard of Review

When reviewing a claim of improper ex parte communication, "reviewing courts must first categorize the nature of the communication – substantive, administrative, or housekeeping – and then analyze whether the communication carried any reasonable possibility of prejudice to the defendant." *People v France*, 436 Mich 138, 166; 461 NW2d 621 (1990). A substantive communication carries a presumption of prejudice regardless whether an objection was raised. *Id.* at 143.

B. Analysis

MCR 6.414(A) provides in relevant part:

> The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made part of the record.

And MCR 6.414(G) provides in relevant part:

> On the request of a party or on its own initiative, the court may provide the jury with . . . a partial set of written or recorded instructions if the jury asks for clarification or restatement of a particular instruction or instructions or if the parties agree that a partial set may be provided and agree on the portions to be provided. If it does so, the court must ensure that such instructions are made a part of the record.

With regard to supplemental instructions, our Supreme Court has advised:

> Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an *absence* of prejudice. [*France, supra* at 143 (emphasis in original).]

The presumption of prejudice is overcome where the communication merely presents a "neutral correct explanation of the law," *France, supra* at 158, and by consent of defense counsel before the instruction is given, *id.*, at 165. With respect to the question, "What is the difference between under 13 years old and over 13 years of age?" MCL 750.520b(1)(a) provides in relevant part that a person may be convicted of first degree CSC if he sexually penetrates a person under thirteen years of age. MCL 750.520b(1)(b)(ii) provides in relevant part that a person may also be convicted of first-degree CSC if he sexually penetrates a thirteen-year-old and he is related by blood. Thus, the court's answer, "Counts 41-48 required the proof of the additional element that the defendant was related to the victim. If the victim was under 13, there would be no necessity of that proof" was correct. *France, supra* at 158.

With respect to the question "Does each count define one act of penetration?" although a single penetration may be accompanied by more than one aggravating circumstance, it may only result in one charge. *People v Johnson*, 406 Mich 320, 331; 279 NW2d 534 (1979). Conversely, a defendant may be charged with multiple counts of first-degree CSC where multiple penetrations occurred. *People v Rogers*, 142 Mich App 88, 92; 368 NW2d 900 (1985). Thus, the instruction, "Each count represents a separate incident of penetration," was correct. *France, supra* at 158. Defense counsel did not challenge the given instructions, and the instructions were correct statements of law; therefore, the presumption of prejudice was overcome. *Id.* at 158, 165.

III. PROSECUTORIAL CONDUCT

Defendant next argues that the prosecutor committed misconduct by calling him a liar. We disagree.

A. Standard of Review

Claims of prosecutorial misconduct are reviewed de novo to determine whether a defendant "was denied a fair and impartial trial." *Ackerman, supra*, 257 Mich App at 448. Unpreserved claims are reviewed for "plain error affecting substantial rights." *Id.* "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *Id.* at 448-449.

B. Analysis

A prosecutor may argue from the facts that a defendant's statement is not believable. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor's

arguments were supported by the facts presented. Moreover, calling defendant a liar was not improper. A prosecutor need not state an argument in the blandest of terms. *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001).

Defendant also argues that the prosecutor committed misconduct by calling defendant a monster and appealing to the jury's sympathy. We disagree.

In *People v McElhaney*, 215 Mich App 269, 285; 545 NW2d 18 (1996), we stated that calling the defendant a monster because he committed the charged offenses was permissible commentary on the evidence. *Id.* Nevertheless, improper appeals to a jury's sympathy may be cured by a cautionary instruction. *People v Watson*, 245 Mich App 572, 591-592; 629 NW2d 411 (2001). The prejudice could have been cured; therefore, reversal is not warranted. *People v Swartz*, 171 Mich App 364, 372-373; 429 NW2d 905 (1988). Where, as here, evidence of defendant's guilt is overwhelming, isolated improper comments do not require reversal. *Launsburry, supra* at 361.

IV. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues he was denied a fair trial by counsel's failure to challenge joinder of his offenses. We disagree.

A. Standard of Review

Appellate review of an ineffective assistance claim involves a mixed question of fact and constitutional law. *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error and constitutional questions de novo. *Id.* at 579. However, review of unpreserved issues is limited to "mistakes apparent on the record." *People v Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997), and those errors must satisfy the plain error standard. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

B. Analysis

To establish a claim of ineffective assistance of counsel, a defendant must show (a) counsel's performance fell below an objective standard of reasonableness, and (b) the defendant was denied a fair trial from the resulting prejudice. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Offenses are severable by right when they are unrelated. MCR 6.120(B). However, offenses are related when they involve the same conduct or acts indicating a single scheme or plan. MCR 6.120(B)(1), (2). Here defendant continuously used the same victim for sexual gratification. These offenses were a series of acts constituting a single scheme or plan and were related; thus, defendant did not have a right to mandatory severance. *People v Tobey*, 401 Mich 141, 151-152; 257 NW2d 537 (1977), citing ABA Commentary to Standard 1.1(b), 12-13.

Severance is *permissible* if it promotes a fair determination whether a defendant is guilty or innocent. MCR 6.120(C). The court did not have the opportunity to determine whether severance was appropriate because it was not requested. The court's determination whether to sever would have been reviewed for an abuse of discretion. *People v Duranseau*, 221 Mich App 204, 208; 561 NW2d 111 (1997). Where evidence of one offense would have been admissible to

prove intent in a trial for another offense, a trial court's decision not to sever the two offenses is not an abuse of discretion. *Id.* at 208. Moreover, "there can be no abuse of discretion where the trial court's discretion has not been invoked in the first place." *People v Rice (On Remand),* 235 Mich App 429, 438-439; 597 NW2d 843 (1999).

In addition, there is a strong presumption that counsel's actions are trial strategy. *People v Marcus Davis,* 250 Mich App 357, 368; 649 NW2d 94 (2002). Matters of trial strategy will not be second guessed on appeal. *Rice, supra* at 445. Defendant has not demonstrated plain error affecting his substantial rights where the offenses involved sexual penetrations of the same minor victim, committed continuously over a period of years, and would have been admissible pursuant to MCL 768.27 and MRE 404(b) to show a system, plan, or scheme. *People v Krist,* 93 Mich App 425, 437; 287 NW2d 251 (1979).

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper