

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN MULKEY,

Defendant-Appellant.

UNPUBLISHED

November 21, 2006

No. 261510

Calhoun Circuit Court

LC No. 2004-001028-FC

Before: Murphy, P.J., and Meter and Davis, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b(1)(a). The trial court sentenced defendant to eighteen to forty years' imprisonment. Defendant appeals as of right, and we affirm.

The victim, defendant's stepdaughter, testified that when she was approximately eight years old, defendant penetrated her vaginally with his penis. Further testimony indicated that defendant thereafter penetrated the victim anally almost every day until she was approximately fifteen years old, when she moved out of defendant's house. The victim testified that, at times, if she refused to cooperate with defendant's advances, he would strike her arms or face. On several occasions, the victim's mother observed defendant touching the victim's breasts. When questioned about his conduct, defendant would deny doing anything inappropriate, and the victim's mother would simply leave the room. The victim informed her mother that defendant was striking her and forcing her to have anal sexual relations, but when defendant denied the allegations, the victim's mother believed defendant.

At trial, defendant denied having any sexual relations with the victim. Defendant testified that the first time he heard the victim accuse him of abuse was in 1997 when she contacted the police department.¹ Defendant recalled that, at the time, the victim was residing

¹ In 1997, while residing with her grandmother, the victim informed a police officer that defendant touched her breasts and vagina with his hands. She did not disclose that defendant penetrated her vaginally or anally with his penis, evidently because she was afraid and embarrassed. Later, she informed the police department that she did not wish to proceed with an
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with her grandmother. Defendant indicated that the victim snuck in and out of the house, dated a man he did not approve of, and ran up bills.

On appeal, defendant first argues that the trial court violated his due process right to an impartial jury by allowing jurors to submit questions for the witnesses during trial. See US Const, Am VI, Am XIV. Because defendant failed to object at trial, this issue is unpreserved and will be reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Reversal is warranted, even if plain error exists, only if defendant was actually innocent or if the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.* at 763-764.

In *People v Heard*, 388 Mich 182, 188; 200 NW2d 73 (1972), our Supreme Court held "that the questioning of witnesses by jurors, and the method of submission of such questions, rests in the sound discretion of the trial court." Defendant does not assert that the trial court abused its discretion. Rather, defendant claims that the practice of permitting jurors to question witnesses constitutes structural error and should be abolished by this Court as a matter of law reform. Citing *State v Costello*, 646 NW2d 204 (Minn, 2002), defendant argues that this Court should find the practice improper because it allows the jury to seek out facts and deliberate before the conclusion of the trial. However, this Court is bound by the Supreme Court's decision in *Heard* that the questioning of witnesses by jurors is within the discretion of the trial court. See *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993) ("it is the Supreme Court's obligation to overrule or modify case law if it becomes obsolete, and until this Court takes such action, the Court of Appeals and all lower courts are bound by that authority"), and *Heard*, *supra* at 187-188.

Furthermore, defendant has failed to demonstrate that plain error occurred in this case. The jury submitted several questions for the victim after her testimony. We note that the trial court implemented an appropriate procedure for the jury to submit these questions to the victim. The jurors submitted their questions in writing to the judge, and they were reviewed for admissibility by the judge and counsel off the record before being presented to the victim. Moreover, there is no evidence that the substance of the questions posed to the victim was prejudicial to defendant. *People v Stout*, 116 Mich App 726, 733; 323 NW2d 532 (1982). A trial court may permit juror questions "which could help unravel otherwise confusing testimony" or aid in the fact-finding process. *Id.* at 733, quoting *Heard*, *supra* at 188.

Defendant also argues on appeal that the trial court denied him effective assistance of counsel at a critical stage of the proceedings by excusing a seated juror, and replacing him with an alternate, in defense counsel's absence. Because defendant did not object at trial, this issue is unpreserved and will be reviewed for plain error affecting defendant's substantial rights. *Carines*, *supra* at 764.

At trial, following closing arguments and final instructions, the trial court excused the alternate juror and subsequently directed the remaining jurors to commence deliberations the

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investigation, evidently because she was ashamed and scared.

following morning.² The following day, however, before the jury began deliberating, the court stated that it intended to excuse one of the impaneled jurors because that juror's son was ill and was being transported to the hospital. Defense counsel was not present in the courtroom. However, the trial court spoke with defense counsel about its intention to excuse a seated juror and replace him with an alternate, and defense counsel evidently expressed no objections. The court also informed defendant that his attorney was available to speak with him on the telephone. After ordering that the juror be excused and that the alternate enter the jury panel, the court instructed the jury to begin deliberations.

Defendant contends that his convictions should be reversed because his counsel was absent from the courtroom when the juror in question was excused and replaced by an alternate. We disagree that reversal is required.

Initially, we note that trial courts have broad discretion to excuse a seated juror during trial for reasons such as personal disability or legal disqualification, and they need not hold a hearing to do so. See MCL 768.18; see also *People v Harvey*, 167 Mich App 734, 744; 423 NW2d 335 (1988). The trial court excused the juror in this case because his son became seriously ill. This situation is comparable to cases in which impaneled jurors were excused because they could not concentrate on the proceedings due to personal disabilities. See, e.g., *People v Tate*, 244 Mich App 553; 624 NW2d 524 (2001), and *People v Dry Land Marina, Inc.*, 175 Mich App 322; 437 NW2d 391 (1989).

Moreover, we conclude that defendant has failed to show that the trial court's decision to excuse the seated juror and replace him with the alternate, outside the physical presence of defense counsel, had any effect on the jury's finding of guilt. See *Killebrew, supra* at 627. The trial court excused the juror and replaced him with an alternate before the jury deliberations even commenced. In *People v Fountain*, 392 Mich 395; 221 NW2d 375 (1974), our Supreme Court held that the trial court did not abuse its discretion by excusing a juror without informing the defendants or defense counsel of its reasoning for doing so because the reason for excusing the juror was justified, the court provided the record for post-trial consideration, and the juror did not participate in the verdict. *Id.* at 398-400. Like in *Fountain*, defendant here was not prejudiced by the removal of an impaneled juror who never participated in reaching the verdict and who had a legitimate reason for being excused. Moreover, we note that the trial court replaced the juror with an alternate who had already been adjudged by defense counsel to be a qualified member of the jury, who had sat through the trial, and who had indicated that he had abided by the court's previous instructions and that he was ready to participate in the deliberations.

Additionally, the trial court in this case did not commit a plain error here in excusing the juror from further service and replacing him with an alternate, despite the absence of defense counsel's *physical* presence. Indeed, we emphasize that defendant was not completely denied the assistance of counsel. Although defense counsel was not present in the courtroom, the trial judge informed counsel of his intention to excuse the juror and replace him with the alternate

² The trial court instructed the alternate juror not to discuss the case with anyone or formulate an opinion about the case in the event the juror might have to take part in deliberations.

before so ordering, and the record reflects no objection from counsel. The judge also provided defendant the opportunity to speak to his attorney during the proceedings in question. Under the circumstances, reversal is unwarranted.

Defendant lastly argues on appeal that defense counsel's failure to investigate and call a known witness to testify about the victim's character for untruthfulness constituted ineffective assistance of counsel. A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing under *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), and *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). This Court previously denied defendant's motion to remand for a *Ginther* hearing. *People v Mulkey*, unpublished order of the Court of Appeals, entered August 4, 2006 (Docket No. 261510). Therefore, our review of this issue is limited to the existing record. *Rodriguez*, *supra* at 38.

Following trial, defendant's appellate counsel obtained an affidavit from defendant's brother-in-law. The affidavit stated, in relevant part, that the affiant knew the victim "all of her life;" that in his opinion, the victim was a liar; that the victim had a reputation for sneaking guys into her bedroom despite being told not to, when she was living with her grandmother; that the victim never mentioned anything about alleged sexual activity with defendant until after she married her own husband; that the affiant believed the victim's husband to have a vendetta against defendant; and that the affiant was not contacted by anyone for the defense before defendant's trial. Defendant's brother-in-law also averred that he would have been available to testify at trial, if called.

Additionally, defendant signed an affidavit, stating that he gave defense counsel a list of potential witnesses before trial. The list included his brother-in-law. Defendant claims that defense counsel said "he did not need to call [the] witnesses." According to the affidavit of a paralegal at the State Appellate Defender Office, defense counsel remembered that defendant provided a list of potential witnesses before trial, but he did not recall if he and defendant discussed having any witnesses testify about the victim's character for untruthfulness.

Defendant claims defense counsel rendered ineffective services by failing to call his brother-in-law to testify. To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's failure to call the witness to testify, there is a reasonable probability that the proceeding's outcome would have been different. *Id.* at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id.*

The failure to call a witness to testify constitutes ineffective assistance of counsel only if it deprived defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). A substantial defense is one which "might have made a difference in the outcome of the trial." *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). Moreover, the decision whether to call a witness is presumed to be a matter of trial strategy, *Dixon*, *supra* at 398, and we will not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004).

The record does not disclose to what extent, if any, defense counsel considered calling witnesses to testify about the victim's character for untruthfulness, or his reasons for deciding not to do so. Therefore, we cannot conclude that defendant has overcome the presumption that the failure to call such witnesses was anything but sound trial strategy. *Henry, supra* at 146. We additionally find that defendant has failed to show that he was denied a substantial defense by defense counsel's failure to call his brother-in-law to testify. *Dixon, supra* at 398; *Hyland, supra* at 710. In *Dixon*, a criminal sexual assault case, the defense counsel's failure to call a witness to testify that the victim consented to sex did not deprive the defendant of the defense of consent because counsel raised the defense through cross-examination of the victim and in closing argument. *Id.* at 398. Like in *Dixon*, the issue of the victim's credibility here was already before the jury by way of the victim's and defendant's testimony, as well as defense counsel's opening and closing arguments. Accordingly, we find that defendant failed to establish that he was denied any substantial defense.

In reaching our conclusion, we note that defendant asserts that it is highly likely that the jury would have acquitted him if additional evidence of the victim's character for untruthfulness had been presented at trial. We disagree. The record does not establish that defense counsel's failure to call defendant's brother-in-law as a witness was outcome-determinative. *Henry, supra* at 146; *Hyland, supra* at 710. The statements provided by the defendant's brother-in-law were somewhat duplicative of evidence presented at trial, and they did not include any credible information to specifically contradict the victim's charges against defendant. Because defense counsel was able to raise the issue of the victim's credibility as a defense at trial, and because defendant's brother-in-law apparently possessed no information related to the charged offense itself, we have no basis on which to conclude that defense counsel's failure to call the potential witness was outcome-determinative. For these reasons, we find that defendant has failed to establish his claimed denial of effective assistance of counsel.

Affirmed.

/s/ William B. Murphy

/s/ Patrick M. Meter

/s/ Alton T. Davis