STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2008
v	No. 279404 Kent Circuit Court
ERIC DAVID RAY, Defendant-Appellant.	LC No. 06-010876-FH

Before: Hoekstra, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant Eric Ray appeals as of right from his jury trial conviction of third-degree criminal sexual conduct involving a physically helpless victim,[1] for which the trial court sentenced him to six to 15 years' imprisonment. We affirm.

I. Basic Facts And Procedural History

On October 14, 2006, the complainant and several other people, including Ray, attended a party at Ray's father's house. The complainant consumed numerous alcoholic drinks and smoked marijuana. Others, including Ray, were also drinking and smoking marijuana. Some time in the early morning, the complainant, who was very intoxicated, and her boyfriend went to sleep, fully clothed, on the living room couch. The complainant later awoke to the feeling of being both vaginally and anally penetrated. According to the complainant, without noticing who was touching her, she swatted a hand away and went back to sleep. The complainant awoke a second time when she again felt something penetrating her vagina. This time, she yelled and got up from the couch to go to the bathroom. As she did, she had to step over Ray who was next to the couch. Once in the bathroom, she discovered that her pants had been cut down the left side and that her underwear were ripped and "mangled."

Ray was charged with one count of third-degree criminal sexual conduct involving a physically helpless victim and one count of criminal sexual conduct by force or coercion. At the close of the prosecution's proofs, the trial court permitted an amendment to the information to

[1] MCL 750.520d(1)(c).

conform to the proofs, so as to allege two identical counts of third-degree criminal sexual conduct involving a physically helpless victim. Defense counsel acknowledged that such amendment conformed to the complainant's testimony. The trial court instructed the jury on two identical counts of third-degree criminal sexual conduct. The jury acquitted Ray of the first count and convicted him of the second.

II. Amendment Of The Information

A. Standard Of Review

Ray argues that the trial court abused its discretion by permitting the prosecution to amend the information at the close of its proofs to add a second count of third-degree criminal sexual conduct involving a physically helpless victim. This Court reviews for an abuse of discretion a trial court's decision to grant a motion to amend the information.[2] A trial court abuses its discretion if it chooses an outcome that is not within the range of reasonable and principled outcomes.[3]

B. MCL 767.76

Pursuant to MCL 767.76, "[a]n information may be amended at any time before, during or after trial to cure any defect, imperfection, or omission in form or substance, including a variance between the information and the proofs, as long as the accused is not prejudiced by the amendment and the amendment does not charge a new crime."[4] An amendment will be found to prejudice the defendant only where it requires a different defense or evidence[5] or where it results in "unfair surprise, inadequate notice, or an insufficient opportunity to defend."[6]

C. Applying The Statute

The record here indicates that throughout the proceedings Ray was charged with two counts of third-degree criminal sexual conduct, and not merely a single count for which the prosecution presented alternate theories. Ray and his counsel acknowledged this situation on numerous occasions. Notably, in Ray's pretrial motion to dismiss Counts 2 and 4 of the information, Ray and his counsel specifically acknowledged that Count 1 referred to the first

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[2] *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008).

[3] *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231(2003).

[4] *People v Higuera*, 244 Mich App 429, 444; 625 NW2d 444 (2001). See also *People v Sims*, 257 Mich 478, 481; 241 NW 247 (1932) (stating that the trial court's authority does not extend to permitting "the changing of the offense nor the making of a new charge by way of amendment"); *Unger*, *supra* at 221 ("A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant.").

[5] *Sims*, *supra* at 481; *People v McGee*, 258 Mich App 683, 688; 672 NW2d 191 (2003).

[6] *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

time the complainant was awakened by an alleged instance of inappropriate touching, while Count 2 referred to the second instance in which the complainant was awakened by an alleged inappropriate touching. Similarly, in his written rejection of the prosecutor's offer of a plea agreement, nearly three months before trial, Ray acknowledged that he understood he was charged with two counts of third-degree criminal sexual conduct, along with one count of possession of a controlled substance and one count of aggravated assault. Additionally, defense counsel argued early on in the proceedings that Count 2 should be the same, factually, as Count 1, because the complainant was "asleep both times." And, following the trial court's ruling on the prosecution's motion to amend Count 2, defense counsel acknowledged that two identical counts of a physically helpless victim was what Ray had been "asking for." Because the complainant testified that she was asleep during both alleged penetrations, and not that she was overcome by force or surprise during the second alleged penetration, the trial court properly exercised its discretion to permit the prosecution to amend Count 2 to conform to the proofs.

D. Late Amendment

Ray also claims that the late amendment prejudiced him. However, there is no basis for Ray to claim prejudice where the complainant consistently alleged two separate penetrations throughout the proceedings, and where Ray's trial strategy was to argue that he never engaged in any sexual conduct with her at all. In *People v Hunt*,[7] the Michigan Supreme Court concluded that an amendment to conform to the proofs, resulting in a change from gross indecency between males to third-degree criminal sexual conduct, did not prejudice the defendant where the elements of both offenses were shown and the defendant did not "suggest[] anything that his attorney would have done differently." Similarly, in *People v Striklin*,[8] this Court concluded that the defendant was not prejudiced by the amendment of criminal sexual conduct charges to allege oral sex rather than anal penetration, based on the testimony of the complainant at trial, where the defendant defended the original charges on the grounds that the complainant "was promiscuous and sexually aggressive" and "[n]othing in the record suggest[ed] that he would have presented a different defense at trial if the charge had originally" alleged oral sex rather than anal penetration.

Similarly, there is nothing in the record here to suggest that Ray would have presented a different defense, or that his attorney would have proceeded differently had both counts of third-degree criminal sexual conduct been stated originally as involving a physically helpless victim. Thus, Ray has not established any basis for a finding of prejudice arising from the amendment of Count 2 to conform to the proofs presented at trial. Whether Ray believed he was charged with only one count of third-degree criminal sexual conduct, with one count of third-degree criminal sexual conduct involving a physically helpless victim and one count of third-degree criminal sexual conduct by force or coercion, or with two counts of third-degree criminal sexual conduct involving a physically helpless victim is not determinative. The complainant's allegations remained the same throughout the proceedings, and Ray had ample notice, motivation, and

[7] *Id*. at 365.

[8] *People v Striklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

opportunity to defend against both alleged sexual penetrations. In fact, Ray's assertion that he may have challenged more vigorously the complainant's assertions regarding the first penetration had he known that he faced two counts of third-degree criminal sexual conduct, belies logic. Regardless whether Ray faced a single count, or multiple counts, it was in his interest to refute all alleged incidents of inappropriate touching to gain complete acquittal. Therefore, we will not reverse on this basis.

III. Jury Instructions

A. Standard Of Review

Ray argues that the trial court erred in its instructions to the jury, permitting the jury to return a verdict that may not have been unanimous. When reviewing claims of instructional error, this Court examines the instructions in their entirety. If the instructions adequately protect a defendant's rights by fairly presenting the issues to the jury, there is no basis for reversal.[9] Thus, "[i]nstructions that are somewhat imperfect are acceptable, as long as they fairly present to the jury the issues to be tried and sufficiently protect the rights of the defendant."[10]

B. Legal Standards

It is beyond question that a defendant is entitled to a unanimous verdict[11] as well as to a properly instructed jury.[12] In most cases, a general unanimity instruction is sufficient to protect a defendant's rights to a unanimous verdict.[13] A specific unanimity instruction is only required when there is evidence of multiple, alternative acts allegedly committed by a defendant, which each satisfy the actus reus elements of a single charged offense, and (1) "'the alternative acts are materially distinct (where the acts themselves are conceptually distinct or where either party has offered materially distinct proofs regarding one of the alternatives, or (2) there is reason to believe the jurors might be confused or disagree about the factual basis of [the] defendant's guilt.'"[14]

C. Ray's Argument

We first note that defense counsel's affirmative statement that there were no objections to the jury instructions constitutes express approval of the instructions and waiver of review of the instructions on appeal.[15] Even were this issue not waived, however, it lacks merit. Ray asserts

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[9] *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006).

[10] *People v Perry*, 218 Mich App 520, 526; 554 NW2d 362 (1996), aff'd 460 Mich 55 (1999).

[11] Const 1963, art 1, § 14; *People v Cooks*, 446 Mich 503, 510-511; 521 NW2d 275 (1994).

[12] *People v Riddle*, 467 Mich 116, 124; 649 NW2d 30 (2002).

[13] *Cooks*, *supra* at 524; *Martin*, *supra* at 338.

[14] *Martin*, *supra* at 228, quoting *Cooks*, *supra* at 524.

[15] *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).

that the trial court failed to specifically delineate the conduct underlying each of the respective third-degree criminal sexual conduct charges and failed to advise the jurors specifically that they must all agree that the same act of criminal sexual conduct occurred to return a guilty verdict on either or both of the two third-degree criminal sexual conduct charges. Therefore, Ray claims, the verdict against him may not have been unanimous.

Ray relies on this Court's decision in *People v Yarger*[16] in support of this argument. However, *Yarger* is distinguishable. In *Yarger*, the complainant testified to two separate sexual penetrations by the defendant, but the jury was presented with only a single count of criminal sexual conduct, upon which it convicted the defendant. This Court reversed the defendant's conviction, explaining:

> The complainant's trial testimony, if accepted as true, would have supported two separate convictions of third-degree criminal sexual conduct, each based on a separate sexual penetration. The jury instructions allowed the jury to convict [the] defendant on the single sexual penetration charged if it believed that the evidence proved either penetration, or both, beyond a reasonable doubt. While we find nothing objectionable in the instruction itself, because only a single count of third-degree criminal sexual conduct was submitted to the jury, error occurred when the jury was not instructed that it must unanimously agree on *which* act(s) was proven beyond a reasonable doubt. In other words, a possibility exists that, for example, six jurors were convinced that the fellatio had occurred, but not the intercourse, while the other six jurors held the opposite view.[17]

This Court instructed that "[i]f this case is retried, [the] defendant should either be charged with two separate counts of third-degree criminal sexual conduct or else an appropriate instruction should be given to the jury."[18]

Here, the complainant testified to two separate sexual penetrations, and as *Yarger* counsels, the jury considered two separate counts of third-degree criminal sexual conduct. The trial court instructed the jury that it was to consider each charged offense separately and that its verdict must be unanimous. The complainant testified to two distinct, sequential penetrations and Ray was charged with separate counts of third-degree criminal sexual conduct. In this context, it is clear that the two counts of third-degree criminal sexual conduct upon which the trial court instructed the jury referred to the two sequential incidents to which the complainant testified. This is not a situation presenting multiple, alternative acts, each of which satisfied the actus reus element of a single charged offense. Consequently, the trial court's general unanimity instruction was sufficient.

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[16] *People v Yarger*, 193 Mich App 532; 485 NW2d 119 (1992).

[17] *Id*. at 536-537 (citations omitted).

[18] *Id*. at 537.

Additionally, Ray alleges error in the manner in which the trial court memorialized the amendment to the information following the verdict. We share Ray's confusion regarding why the trial court came to refer to his third-degree criminal sexual conduct conviction as "Count 5." But the trial court's post-verdict ministerial actions taken to memorialize its ruling permitting the prosecution to amend Count 2 at the close of its proofs to conform to the evidence in no way undermined the integrity or substance of the jury's verdict. The jury convicted Ray of, and the trial court sentenced Ray on, one count of third-degree criminal sexual conduct involving a physically helpless victim. There being no error in Ray's conviction or sentence, we will not reverse on this ground.

IV. Ineffective Assistance Of Counsel

A. Standard Of Review

Ray argues that he was denied the effective assistance of counsel at trial. Ray has preserved this claim of error by way of a motion to remand filed in this Court.[19] However, because no evidentiary hearing was held, this Court's review of Ray's claim of error regarding counsel's performance at trial is limited to facts contained in the record.[20] The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. Ordinarily, we review for clear error a trial court's factual findings while we review de novo its constitutional determinations.[21] Here, however, the trial court was not presented with and did not rule on Ray's claim. Therefore, this Court is left to its own review of the record in evaluating Ray's assertions.

B. Legal Standards

To establish a claim of ineffective assistance of counsel, a defendant must show that his attorney's representation fell below an objective standard of reasonableness under prevailing professional norms, and that, but for his counsel's errors, there is a reasonable probability that the results of the proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable.[22] That is, a defendant must establish that his counsel's performance was deficient and that this deficient performance was prejudicial to him.[23] To establish that his counsel's performance was deficient, a "defendant must overcome the strong presumption that his counsel's action constituted sound trial strategy under the circumstances."[24] "This Court will not substitute its judgment for that of trial counsel regarding matters of trial

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[19] *People v Rodriguez*, 251 Mich App 10, 29-30; 650 NW2d 96 (2002).

[20] *Id*. at 38.

[21] *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[22] *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

[23] *People v Corteway*, 212 Mich App 442, 444; 538 NW2d 60 (1995).

[24] *Toma*, *supra* at 302.

strategy, even if that strategy backfired."[25] Defense counsel is not ineffective for failing to assert a meritless objection or position.[26]

C. Ray's Arguments

Ray first claims that he was denied the effective assistance by his trial counsel's failure to object to certain hearsay statements, including that Ray's father told police that Ray is "a kid who does stupid things and is always getting into trouble," and the nurse examiner's testimony regarding the complainant's description of the assault. However, based on the record presented, we conclude that defense counsel's decision not to draw attention to these comments, by objecting to them, was a strategic decision that we should not second-guess. Further, even if counsel's failure to object to these brief remarks constituted deficient performance, considering the complainant's unequivocal testimony that Ray twice sexually penetrated her while she was sleeping, together with corroborating testimony by her boyfriend and by Ray's father acknowledging that the complainant's pants had been damaged, Ray cannot establish that there is a reasonable probability that the outcome of his trial was affected by such failure.

Ray also complains about the manner in which the prosecution was permitted, without objection from his counsel, to inquire about statements contained in police reports. This included the prosecutor asking the complainant's boyfriend who made a comment quoted in a police report that "E[27] ripped my clothes off and was messing with me," impeaching Ray's father by referring to a statement Ray made to the police, and asking Ray's father if he remembered making certain statements contained in the police report, without first asking him whether the substance of the statements was true. Ray is correct that the procedure for impeachment with prior inconsistent statements employed by the prosecution here did not fully conform to the requirements of MRE 613 in every instance. The prosecutor did not first elicit a direct contrary statement before referring to the prior statement contained in the police report. However, any objection would have been only as to form, not as to substance. Had defense counsel objected, the prosecutor would have followed proper procedure and the trial court would have admitted. Therefore, even if counsel's failure to object could be deemed unreasonable, Ray cannot establish any resulting prejudice.

Ray argues further that defense counsel was also ineffective for failing to object to the prosecution's "addition" of a second count of third-degree criminal sexual conduct at trial, or to the jury instructions as given. However, for the reasons discussed at length above, the trial court was within its discretion to allow the prosecution to amend the existing Count 2 to conform to the evidence, and that amendment did not constitute the addition of a second, previously uncharged offense. Further, there was no error in the jury instructions the trial court gave. Therefore, defense counsel was not required to object to these actions by the trial court, and Ray's claims in this regard necessarily fail.

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[25] *Rodgers, supra* at 715.

[26] *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

[27] Testimony indicated that Ray was often referred to as "E" or "Little E."

V. Confrontation Of Witnesses

A. Standard Of Review

Ray argues he was denied his constitutional right to confront the witnesses against him by the trial court's refusal to allow defense counsel to ask Ray's father on cross-examination whether he was lying to protect Ray. The decision whether to admit evidence is within the discretion of the trial court, and we will not be disturb that decision on appeal absent an abuse of that discretion.[28] An abuse of discretion occurs when the trial court chooses an outcome that is not within the range of reasonable and principled outcomes.[29] An evidentiary error does not merit reversal in a criminal case unless, after an examination of the entire cause, it appears that it is more probable than not that the error was outcome determinative.[30] This Court reviews de novo constitutional claims.[31]

B. Legal Standards

The Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."[32] The Michigan constitution also guarantees the same right.[33] The purpose of cross-examination, to satisfy the Confrontation Clause, is to allow the defendant an opportunity to uncover bias or defects in memory or observation.[34] The protection of the right to confront a witness guarantees the defendant an opportunity for effective cross-examination, that is, a reasonable opportunity to test a witness' testimony; it does not guarantee whatever cross-examination the defendant desires.[35] A defendant must still comply with established rules of evidence and procedure, allowing the trial court to exclude irrelevant evidence.[36] Trial courts retain "'wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant.'"[37]

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[28] *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

[29] *Babcock*, *supra* at 269.

[30] *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

[31] *People v Harper*, 479 Mich 599, 610; 739 NW2d 523 (2007).

[32] US Const, Am VI.

[33] Const 1963, art 1, § 20.

[34] *People v Chavies*, 234 Mich App 274, 283; 593 NW2d 655 (1999), overruled on other grounds, *People v Williams*, 475 Mich 245; 716 NW2d 208 (2006).

[35] *Id*.; *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993).

[36] *Adamski*, *supra* at 138.

[37] *Id*., quoting *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986).

C. The Cross Examination Of Ray's Father

Here, we conclude that the trial court afforded defense counsel the opportunity to fully cross-examine Ray's father regarding his bias or defects in memory or observation.[38] The trial court's decision not to allow counsel to inquire of Ray's father whether he was lying to protect Ray did not hinder the opportunity to cross-examine Ray's father in any meaningful manner. Thus, the trial court was within its "latitude . . . to impose reasonable limits on such cross-examination,"[39] when it sustained the prosecutor's objection on the basis that the question of the credibility of Ray's father was for the jury to determine. Further, even if the trial court should have permitted the question, the ruling had negligible effect on the verdict. Presumably, Ray's father would have answered that he was not lying. In any event, this was of marginal relevance or value to the jury in determining whether the testimony was credible in light of all of the evidence presented, including his prior inconsistent statements to police. Thus, the trial court's decision to exclude this evidence neither impinged upon Ray's right of confrontation nor constituted an abuse of discretion. We will not reverse on this ground.

Affirmed.

/s/ Joel P. Hoekstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

[38] *Chavies*, *supra* at 283.

[39] *Adamski*, *supra* at 138.