STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellant,	UNPUBLISHED July 6, 2010
v	No. 292602 Wayne Circuit Court
ROBERT WILLIAM DUNCAN, Defendant-Appellee.	LC No. 08-003062

Before: METER, P.J., and MURRAY and BECKERING, JJ.

MURRAY, J. (*dissenting*).

Delayed leave to appeal was granted in this case for us to decide whether the trial court abused its discretion in granting defendant a new trial. Although we are dealing with both preserved and unpreserved non-constitutional evidentiary error, the ultimate issue is whether any errors were outcome determinative. See *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) and *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). After review of the trial record I cannot conclude that any error (if any) in the admission of the hearsay evidence and references to defendant's criminal past was more probably than not outcome determinative. I would therefore reverse.

The critical issue is whether the improper hearsay admissions and references to defendant's "felony" record[1] warranted the granting of a new trial. A trial court may order a new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). In order for defendant to prevail under either the appellate reversal prong or the "miscarriage of justice" prong, he must show that it is more probable than not that the evidentiary error (whether it was preserved or unpreserved) was outcome determinative. *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003); *Lukity*, 460 Mich at 495-496. However, the Legislature has also commanded that no verdict shall be overturned on the basis of the improper admission of evidence unless, after

[1] As seen in all three opinions issued in this case, there was no error in the admission of testimony regarding defendant's prior felonies.

examining the entire case, it affirmatively appears that the errors resulted in a miscarriage of justice. MCL 769.26. The *Lukity* Court explained how this is to be determined:

> The object of this inquiry is to determine if it affirmatively appears that the error asserted "undermine[s] the reliability of the verdict." [*People v Mateo*, 453 Mich 203, 211; 551 NW2d 891 (1996).] In other words, the effect of the error is evaluated by assessing it in the context of the untainted evidence to determine whether it is more probable than not that a different outcome would have resulted without the error. Therefore, the bottom line is that § 26 presumes that a preserved, nonconstitutional error is not a ground for reversal unless "after an examination of the entire cause, it shall affirmatively appear" that it is more probable than not that the error was outcome determinative. [*Lukity*, 460 Mich at 495-496 (footnote omitted).]

In granting a new trial the trial court relied upon two errors that it found constituted ineffective assistance of counsel, and then concluded that the cumulative effect of those errors warranted a new trial.[2] Specifically, the court found that defense counsel was constitutionally ineffective in failing to object to several general references that defendant had prior felonies. The court concluded that the evidence was inadmissible and damaged defendant in this credibility contest. The court also found that defense counsel should have objected to several instances of hearsay evidence. Those failures in combination, the trial court concluded, resulted in a trial that "call[ed] into question the integrity and public reputation of this Court's judicial proceedings."

In *People v Petri*, 279 Mich App 407, 410-411; 760 NW2d 882 (2008), we set forth the stringent standard[3] for deciding ineffective assistance of counsel arguments:

> Effective assistance of counsel is presumed and defendant bears the burden of proving otherwise. [*People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).] To succeed on a claim of ineffective assistance of counsel, the defendant must show that, but for an error by counsel, the result of the

[2] The majority asserts that the trial court also based its decision on the "discovery of new evidence," but both it and the trial court held that the information in the Sobo affidavit was *not* newly discovered. Additionally, the trial court made no findings about Sobo's credibility during trial, and only concluded that her affidavit made her testimony "potentially questionable."

[3] In deciding this issue, the trial court cited to *People v Garcia*, 398 Mich 250; 247 NW2d 547 (1976), *People v Breakfield*, 63 Mich App 692; 234 NW2d 758 (1975), and *People v Lotter*, 103 Mich App 386; 302 NW2d 879 (1981). However, the *Garcia* test was rendered obsolete back in 1994, see *People v Carbin*, 463 Mich 590, 597 n 6; 623 NW2d 884 (2001), and since both *Lotter* and *Breakfield* relied on either *Garcia* or the now-outdated cases that *Garcia* relied upon, the tests they utilized are likewise obsolete. *People v Kevorkian*, 248 Mich App 373, 427 n 129, 427-428; 639 NW2d 291 (2001).

> proceedings would have been different, and that the proceedings were fundamentally unfair or unreliable. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). The defendant bears a "heavy burden" on these points. *People v Carbin*, 463 Mich 590, 599; 623 NW2d 884 (2001). Defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

And, because no evidentiary hearing was held on this issue, we are limited to mistakes apparent on the record. *People v Rockey*, 237 Mich App 74, 77; 601 NW2d 887 (1999).

Although there is certainly no per se rule that an attorney engages in constitutionally deficient performance by failing to object to non-responsive hearsay, I will assume that trial counsel did not live up to the required standard in failing to object to the challenged hearsay testimony or the references to defendant's "prior felonies." Nonetheless, the otherwise properly admitted evidence establishes that the errors of counsel did not result in the conviction of an actually innocent defendant, nor did it otherwise impugn the fairness and integrity of the proceedings.

Here, in carving out the improper evidence that should have been excluded, the jury still would have heard detailed testimony from the victim that she and defendant had sex on two occasions. The victim's testimony regarding the details of the sexual encounters was clear and consistent, and as the trial court recognized, was sufficient for a jury to convict defendant of the charged offenses.[4]

It is important to remember that a jury may convict based only on the uncorroborated evidence of a CSC victim, *People v Lemmon*, 456 Mich 625, 643 n 22; 576 NW2d 129 (1998); MCL 750.520h, and the jury was so instructed in this case.[5] Although defendant denied any

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[4] The elements of third-degree CSC that defendant was charged with violating are that the individual engages in sexual penetration with another person who is at least 13 years of age and under 16 years of age. MCL 750.520d(1)(a). "'Sexual penetration' means sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body . . . ." MCL 750.520a(r).

[5] The majority makes several references to the fact that the trial court did not instruct the jury on what it means to "sustain" an objection. However, there are no Michigan criminal jury instructions covering this issue, nor is there any case law requiring such an instruction. In light of this, defense counsel could not be faulted, nor could the trial be tainted, by not providing an instruction that does not exist and which is not required. However, during the testimony of the victim's sister, Courtney, and in response to one of ten hearsay objections made during her testimony alone, the trial court indicated to the witness (and the jury) that there can be no

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sexual contact with the victim, determinations of credibility rest with the trier of fact, not this Court. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000). Not only was there sufficient evidence about the actual crime, but evidence from other witnesses existed to support the victim's testimony about what occurred before, during and after the crimes. Additionally, there was evidence (to which no objection was lodged in the trial court nor in our Court) showing defendant expressing a sexual interest in the victim. In other words, without the tainted evidence the jury was still presented with a complete story, with an opposite version (at least as to whether the crimes occurred) from defendant.

There is no doubt that some of the inadmissible evidence supported the victim's credibility in that it buttressed what she said happened, or conversely could have damaged defendant. However, because of the nature and circumstances of its admission, the evidence did not reach a level such that a new trial is should be granted. For example, several hearsay statements made by the victim[6] were simply a repetition of what she had already testified to in open court. *People v Meeboer*, 181 Mich App 365; 373-374; 449 NW2d 124 (1989) aff'd 439 Mich 310 (1992); *People v Anderson*, 79 Mich App 174, 176; 261 NW2d 55 (1977). Additionally, Courtney's testimony that the victim informed her at the gift exchange party that she had just returned from defendant's house was duplicative of the victim's admissible testimony that she told her friends at that party that she was leaving and going to defendant's house, MRE 803(3), as well as that of Courtney who also attended the party and saw the victim leave and come back, *Anderson*, 79 Mich App at 176. Finally, although Courtney testified that defendant's mother initially stated to defendant at a meeting, "you really messed up this time", Courtney almost immediately testified that defendant's mother "did not know what was going on" and appeared "calm" before they sat down to discuss the issue. More importantly, an objection to this testimony was sustained.[7] See n 3, *supra*.

As noted by the majority, the general references to defendant's "prior felonies" were not admitted in error. See *People v Schaw*, __ Mich App __; __ NW2d __ (Docket No. 286410, issued April 20, 2010). However, even if those references did erroneously get before the jury, they were minimized by defense counsel's questioning of defendant, where he indicated that the

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testimony about what other people said unless the court specifically allowed it.

[6] Specifically, the victim testified that (1) she told Melissa Duncan (defendant's daughter) that the rumors of an affair between the victim and defendant were true and (2) that she called defendant and told him she told Melissa that the rumor was true. A third statement at issue was Melissa's testimony that the victim informed her that the rumor was true. Thus, three of the eight hearsay statements found to be inadmissible related to the same conversation topic, i.e., the victim confirming to Melissa that the rumored affair was true.

[7] The majority states that defense counsel only objected twice, but really he only objected to two of the contested hearsay statements. It is important to recognize that this is not a case where defense counsel sat by silently as the trial progressed. Indeed, as an example of defense counsel's performance, he objected ten times on hearsay grounds during Courtney's testimony alone, nine of which were sustained.

convictions were for drug offenses. Thus, even if the jurors were improperly aware that defendant had prior convictions, defense counsel made sure they knew that the prior convictions were not related to any sexually criminal behavior.

In the final analysis, the overall impact of this evidence did not, in my view, render this case unfair[8] or result in outcome determinative error. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). The contested evidence that was admitted without objection simply did not impugn the entire trial such that it would call into question the integrity of the judicial process. There was more than ample untainted evidence supporting defendant's convictions. In reaching this conclusion, I recognize the difficulty faced by an appellate court in deciding whether evidentiary errors actually constitute outcome determinative error, as we are reviewing a "cold" record. Nevertheless, it is our appellate function to make this determination. And, with all due respect to my colleagues, I am convinced that the trial court abused its discretion in granting a new trial.[9]

/s/ Christopher M. Murray

[8] As the trial court correctly noted, a defendant is entitled to a fair trial, not a perfect one. *People v Miller*, 482 Mich 540, 559-560; 759 NW2d 850 (2008). Of course, drawing the line as to what is a "fair" trial can be a difficult task.

[9] I agree with the trial court and majority that the Sobo affidavit did not constitute new evidence, as it did not recant her prior testimony and the basis of the affidavit was certainly discoverable before trial. *Cress*, 468 Mich at 692.