STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 8, 2011
v	Nos. 299684; 299716; 299717 Ingham Circuit Court
WAYLAND LYNN DILTS, Defendant-Appellant.	LC Nos. 09-001331-FH; 09-001265-FC; 09-001332-FC

Before: WHITBECK, P.J., and MURRAY and DONOFRIO, JJ.

PER CURIAM.

A jury found defendant Wayland Dilts guilty of nine counts of first-degree criminal sexual conduct (CSC I),[1] two counts of second degree criminal sexual conduct (CSC II),[2] and one count of assault with intent to commit criminal sexual conduct,[3] in a consolidated trial concerning Dilts' alleged acts of sexual contact with his daughter and two other girls. The trial court sentenced Dilts to concurrent prison terms of 285 to 700 months for the CSC I convictions, 114 to 180 months for the CSC II convictions, and 38 to 60 months for the assault conviction. Dilts appeals as of right, and we affirm.

I. BASIC FACTS

Dilts sexually abused his own daughter, LD. Dilts also sexually abused LD's friends who lived next door, two young sisters, AC1 and AC2. Specifically, the trial court charged Dilts with four counts of CSC I against his daughter, two counts[4] of CSC II against AC1, and five counts of CSC I and one count of CSC II against AC2.

[1] MCL 750.520b(1)(a) (victim under 13).

[2] MCL 750.520c(1)(a) (victim under 13).

[3] MCL 750.520g(2).

[4] The trial court dismissed one count of CSC II because the proofs did not support it, and then, on its own motion, amended the count to assault with intent to commit criminal sexual conduct.

LD testified that the abuse began with Dilts asking her, AC2, and another neighbor girl, JR, to put baby oil on his naked body and "massage" his back, stomach, legs, and penis. LD, AC2, and JR were under the age of six at this time. LD said that she and the two girls would masturbate Dilts in his bedroom. LD said that she did this "[e]very day," sometimes by herself, and sometimes with AC2. LD said this occurred while her mom was at work. Dilts babysat the young children and would give them money after they performed these acts.

LD said that when she was in first grade, about six years old, things escalated. Dilts made LD, AC2, and JR perform oral sex on him. LD said this occurred "all the time." LD also said that Dilts would sometimes pull his white minivan over on dirt roads and make her perform oral sex on him. LD testified that Dilts first tried to have sex with her when she was about eight or nine years old but stopped when she began to cry. After this event, however, LD said that Dilts had sex with her a "couple" of times. LD said the abuse did not stop until 2006, when she was ten years old.

AC2 and JR[5] also testified at trial. The girls said that they would masturbate and perform oral sex on Dilts in his bedroom when no one was home. They also testified that Dilts would give them money afterwards. AC2 testified that she and LD performed oral sex on Dilts in a chair in his basement as well. AC2 also testified that Dilts attempted to have sex with her when she left school because she was sick and Dilts picked her up. Dilts was the emergency contact person for AC1 and AC2 because their mother was in prison and their father worked during school hours. Dilts told AC2 that if she did not perform oral sex on him she would not be able to see LD.

AC1 testified that Dilts made her put baby oil on his penis one day when he babysat her. Dilts said he would kill her if she did not do it or if she told someone. AC1 testified that she once refused to perform oral sex on Dilts. When she refused, Dilts made her stand in the corner while he hit her with a belt.

Dilts maintained that the girls were lying and that these events never occurred. Accordingly, he now appeals.

II. OTHER ACTS EVIDENCE

A. STANDARD OF REVIEW

Dilts argues that the trial court abused its discretion in admitting the other acts testimony of LD's cousin, AL, because the danger of unfair prejudice substantially outweighed the probative value of the evidence. We review a trial court's decision to admit or exclude evidence

[5] It is unclear why the prosecution did not charge Dilts for the acts he allegedly perpetrated against JR. She testified that, although she did not touch Dilts' penis, she did perform oral sex on him at least ten times.

for an abuse of discretion.[6] An abuse of discretion occurs when a trial court chooses an outcome that is outside the range of reasonable and principled outcomes.[7]

B. UNDERLYING FACTS

The other acts witness, AL, was nineteen at the time of trial and her testimony concerned other uncharged acts of sexual abuse that Dilts committed. AL testified that from "the ages of six to about twelve" Dilts touched her breasts and made her touch his penis. Further, she testified that Dilts liked baby oil and would give her money after she performed these acts. She said that one time Dilts assaulted her and her sister at the same time.

The trial court admitted the other acts evidence pursuant to MCL 768.27(a)(1), which provides in part as follows:

> Notwithstanding [MCL 768.27, the statutory equivalent of MRE 404(b)(1)], in a criminal case in which the defendant is accused of committing a listed offense against a minor, evidence that the defendant committed another listed offense against a minor is admissible and may be considered for its bearing on any matter to which it is relevant. . . .

Both CSC I and CSC II are listed offenses.[8]

C. LEGAL STANDARDS

The Legislature designed MCL 768.27(a)(1) in order to expand the range of admissible evidence in a case where the defendant is charged with a sexual offense against a minor.[9] Evidence admitted under MCL 768.27(a)(1) may be considered for its bearing on any matter to which the evidence is relevant[10] and does not have to satisfy MRE 404(b)(1)'s more stringent requirements.[11] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[12] However, pursuant to MRE 403, relevant

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[6] *People v Waclawski*, 286 Mich App 634, 670, 780 NW2d 321 (2009).

[7] *Id.*

[8] MCL 768.27a(2)(a); MCL 28.722(e)(x).

[9] *People v Smith*, 282 Mich App 191, 204; 772 NW2d 428 (2009).

[10] *Id.* at 205.

[11] *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007).

[12] MRE 401.

evidence may be excluded if the danger of unfair prejudice substantially outweighs the evidence's probative value.[13]

Unfair prejudice occurs when there is a tendency that the jury will give the evidence undue or preemptive weight, or when it would be inequitable to allow use of the evidence.[14] The determination whether the prejudicial effect substantially outweighs the evidence's probative value "is best left to a contemporaneous assessment of the presentation, credibility, and effect of the testimony."[15]

D. APPLYING THE LEGAL STANDARDS

Contrary to Dilts' assertion, the danger of unfair prejudice did not outweigh the probative value of AL's other acts testimony. As stated in *Pattison*,[16] this evidence is "extraordinarily pertinent to a given defendant's behavior in a similar case." And in the case of other similar activity involving AL and Dilts, which paralleled the charged acts in that both allegedly included similar instances of touching, the use of baby oil, and the exchange of money, the relevance is clear. Moreover, AL's testimony had considerable probative value because both Dilts' propensity and the credibility of LD, AC1, AC2, and JR were significant issues in the case.

The danger of unfair prejudice was minimal under these circumstances because the challenged testimony lacked specificity and contained no graphic, offensive details of the type likely to arouse passion and prejudice a jury. AL testified only that the abuse had occurred, and her description of the specific circumstances and events surrounding the sexual abuse was minimal and in bland terms. Further, because the trial court took precautions to limit any prejudicial effect, it greatly reduced the danger of unfair prejudice. The trial court specifically instructed the jury that the evidence should only be considered for proper purposes:

> If you believe this evidence you must be very careful again, to consider it only for one limited purpose; that is, to help you judge the believability of testimony regarding the acts for which the defendant is now on trial.
>
> You must not consider this evidence for any other purpose. For example, you must not decide that it shows the defendant is a bad person and is likely to

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[13] We recognize that the Michigan Supreme Court is currently considering whether MRE 403 applies to evidence sought to be admitted under MCL 768.27a. *People v Pullen*, 489 Mich 864; 795 NW2d 147 (2011). However, pursuant to *Pattison*, such an analysis is currently required. *Pattison*, 276 Mich App at 621.

[14] *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002).

[15] *Waclawski*, 286 Mich App at 670.

[16] *Pattison*, 276 Mich App at 621

> commit crimes. You must convict [sic][17] the defendant here because you think he's guilty of the other bad conduct.

Even if the trial Court erred, error in the admission or exclusion of evidence is not grounds for reversal unless refusal to take this action appears inconsistent with substantial justice.[18] Thus, reversal is required only if the error is prejudicial.[19] Here, given the weight and strength of the evidence against Dilts, we find that he cannot show that it is more probable than not that any error in admitting the challenged testimony affected the outcome of the trial.

We note that Dilts also asserts that the prosecutor failed to give adequate notice that he would call AL, as MCL 768.27(a) requires. However, Dilts does not explain how the prosecutor failed to comply with the MCL 768.27(a) requirements. Thus, Dilts has abandoned this issue, given that he does not argue or support the issue in any real sense.[20] Additionally, even if Dilts had adequately briefed this argument, we need not consider it because Dilts did not present it in his statement of questions presented.[21]

In sum, the trial court did not abuse its discretion in admitting this evidence under MCL 768.27(a)(1).

III. INEFFECTIVE ASSISTANCE OF COUNSEL

A. STANDARD OF REVIEW

Dilts argues that he was denied his right to the effective assistance of counsel when defense counsel: (1) did not know about one of the charges until the trial began, (2) was unprepared and caused unfavorable testimony to be presented, and (3) failed to mention evidence during closing argument. A defendant should present a claim of ineffective assistance of counsel to the trial court in a motion for new trial or an evidentiary hearing if there are facts not of record.[22] In the absence of a motion for new trial or an evidentiary hearing, our review is limited

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[17] We address below Dilts' argument concerning the trial court's mistake in omitting the word "not."

[18] *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003), citing MCR 2.613(A) and MCL 769.26.

[19] *Id*., citing *People v Mateo*, 453 Mich 203, 212 n 10; 551 NW2d 891 (1996).

[20] *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959).

[21] *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009).

[22] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

to the existing record.[23] Dilts did none of these at trial, and this Court therefore reviews this issue on the basis of the existing record.[24]

B. LEGAL STANDARDS

To establish ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different.[25] Effective assistance of counsel is presumed, and a defendant claiming ineffective assistance is required to overcome a strong presumption that sound trial strategy motivated defense counsel's conduct.[26]

C. CONFUSION OVER CHARGES

Dilts is correct that defense counsel was confused regarding one of the charges. Defense counsel objected during the prosecution's opening statement when the prosecutor mentioned an incident where Dilts allegedly made AC2 perform oral sex on a road trip. Defense counsel apparently believed this incident was not the basis for any of the charges. Counsel and the prosecutor reviewed the transcripts from Dilts' preliminary examination. The transcripts indicated that Dilts had been bound over and charged for that incident.

Although defense counsel's confusion regarding whether Dilts was bound over and charged for the incident fell below an objective standard of reasonableness under prevailing professional norms, Dilts cannot show that counsel's initial confusion caused prejudice. Dilts asserts that counsel was "not prepared to defend the charge," but does not explain how counsel would have prepared had he not been confused or how that preparation would have changed the result of the proceedings. Counsel still represented Dilts at trial, cross-examined witnesses, called six witnesses, and argued on Dilts' behalf. Moreover, despite counsel's efforts, there was substantial evidence of guilt adduced at trial. Therefore, Dilts cannot show that the result of his trial would have been different if his counsel was not initially confused regarding the charge.

D. FAILURE TO PREPARE ADEQUATELY

As to Dilts' assertion concerning the level of counsel's preparation and whether he caused unfavorable testimony to be presented, during direct examination defense counsel asked Dilts' wife what her hours were when she worked at the cafeteria in the Lewis Cass building, and she responded "I worked 8 a.m. to 3 p.m." Defense counsel also asked her if she "recall[ed] any occasion where [Dilts] may have picked up [AC1 and AC2] from school," and she responded,

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[23] *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

[24] *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

[25] *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001).

[26] *LeBlanc*, 465 Mich at 578.

"[n]o." During cross-examination, the prosecutor impeached this testimony with a written statement, which indicated that Dilts' wife worked until 3:30 p.m., and also asserted that Dilts had picked up the sisters from school on one occasion. Defense counsel also asked Dilts' wife why she did not believe her daughter's allegation of sexual abuse. Dilts' wife explained that she questioned whether her daughter was telling the truth because her daughter's allegation was "like a recycled story" and "was the same story that her older sister had claimed before and it had been proven a lie."

Defense counsel also called Dilts' sister-in-law as a witness. The sister-in-law's testimony also supported Dilts' theory that the girls made false allegations. On cross-examination, the sister-in-law testified that she had a sexual relationship with Dilts when she was 17 years old, while Dilts and his wife were married.

On appeal, Dilts asserts that his counsel "did not properly prepare to examine his wife," "solicited testimony from [his wife] that he should have known would be impeached," and that she "volunteered damaging evidence regarding yet another of the Dilts' alleged victims as a result of another of [defense counsel's] questions." Regarding the sister-in-law's testimony, Dilts states: "If the assistant prosecutor knew to ask [the sister-in-law] the question regarding extramarital sex, why did defense counsel not know that fact before he called her?"

Dilts' arguments concerning his wife's testimony are unpersuasive. Dilts offers no argument regarding why defense counsel should have been aware that Dilts' wife would answer inconsistently regarding her schedule and Dilts' role in picking the sisters up from school. Additionally, Dilts' wife never specified against whom her older daughter made the supposedly false allegation. Thus, Dilts is incorrect in his assertion that counsel introduced evidence that was directly damaging to him. Dilts is essentially asking this Court to assess trial counsel's decision to ask these questions with the benefit of hindsight, that is, after the answers to the questions are known, which we will not do.[27]

In regard to the sister-in-law's testimony, "whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy,"[28] and defense counsel could have believed that her positive testimony outweighed the risk that the prosecutor would ask about the extramarital affair. Defense counsel could have believed that even if the affair was exposed, it was of little relevance to the allegations in this case given that no money was exchanged and it occurred only one time when the sister-in-law was much older than the victims in this case. In sum, Dilts cannot show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms.

Moreover, while Dilts is entitled to have his counsel adequately prepare for trial,[29] when making a claim of ineffective assistance based on trial counsel's lack of preparation, Dilts must

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[27] See *People v Rice* (*On Remand*), 235 Mich App 429, 445; 597 NW2d 843 (1999).

[28] *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008).

[29] *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990),

show that the lack of preparation prejudiced him.[30] Given the substantial evidence of guilt adduced at trial, Dilts cannot show that the result of his trial would have been different had counsel not asked these questions or had counsel not called the sister-in-law as a witness.

E. CLOSING ARGUMENT

Regarding Dilts' third claim of ineffective assistance, he is correct that during closing arguments counsel did not reiterate LD's testimony that she did not report the abuse during a police interview in 2006. Again, however, we presume that counsel's focus during closing argument was a matter of trial strategy.[31] And defense counsel likely chose not to address this fact during closing argument since the police interview was on a matter unrelated to the abuse. Thus, LD's failure to report the abuse to police under these circumstances was of little weight. Dilts has failed to overcome the strong presumption that counsel engaged in sound trial strategy.

IV. JUDICIAL BIAS

A. STANDARD ON REVIEW

Dilts argues that the he was denied his right to a fair trial because the trial judge was biased. This Court reviews unpreserved challenges of judicial bias for plain error affecting substantial rights.[32] We will reverse only when a plain error resulted in a conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.[33]

B. LEGAL STANDARDS

The trial court, pursuant to MRE 614(b), may question witnesses in order to clarify testimony or elicit additional relevant information,[34] but its actions cannot pierce the veil of judicial impartiality.[35] "[T]he trial court must exercise caution and restraint to ensure that its questions are not intimidating, argumentative, prejudicial, unfair, or partial."[36] "A trial judge has discretion to question witnesses to shed light on something unclear in the testimony but must not allow his views on disputed issues of fact to become apparent to the jury."[37] The test to determine whether a new trial is warranted is whether the judge's questions and comments may

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[30] *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990).

[31] *Horn*, 279 Mich App at 39.

[32] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[33] *Id*. at 774.

[34] *People v Conyers*, 194 Mich App 395, 404-405; 487 NW2d 787 (1992).

[35] *People v Davis*, 216 Mich App 47, 50; 546 NW2d 1 (1996).

[36] *Conyers*, 194 Mich App at 405.

[37] *People v Pawelczak*, 125 Mich App 231, 236; 336 NW2d 453 (1983).

well have unjustifiably aroused suspicion in juror's minds regarding a witness's credibility and whether partiality quite possibly could have influenced the jury to the detriment of the defendant's case.[38] The party claiming bias "must overcome a heavy presumption of judicial impartiality."[39] Comments critical of or hostile to counsel or the parties, or comments expressing impatience, dissatisfaction, annoyance, or anger are ordinarily not supportive of finding bias or partiality.[40]

C. APPLYING THE STANDARDS

Dilts does not explain how the incidents he cites demonstrate bias. Rather, he merely asserts that they do. In any event, the trial court had discretion to control the testimony of Dilts' wife when she was talking out of turn; had discretion to control Dilts' testimony when he continued to speak and offer unsolicited testimony; and had discretion to make vulnerable witnesses more comfortable.[41] Moreover, the trial court's statements concerned the conduct expected from a witness during the trial and not the substantive merits of the case. Therefore, they were not likely to unduly influence the jury or lead it to believe that the trial court had an opinion on the case. The trial court's decision to make a vulnerable witness more comfortable likewise had nothing to do with the substantive merits of the case. For these reasons, Dilts does not show that the trial court's conduct pierced the veil of judicial impartiality and unduly influenced the jury.

Dilts also appears to take issue with the trial court's examination of certain witnesses, asserting that the trial court "questioned [witnesses] to bring out more damaging testimony." While it is true that the trial court asked witnesses additional questions regarding the sexual assaults, the inquiries were material to the case, limited in scope, and did not communicate to the jury an opinion that the trial judge may have had regarding these matters. As such, these questions did not unjustifiably arouse suspicion in the jurors' minds regarding a witness's credibility or influence the jury to the detriment of Dilts' case.[42] Moreover, Dilts cannot show he was prejudiced as a result of the trial court's questioning. The trial court instructed the jury that its comments, rulings, questions, and instructions are not evidence, and that a person accused of a crime is presumed innocent. The trial court also instructed the jury that "[i]f you believe that I have an opinion about how you should decide this case, you must pay no attention to that opinion." "It is well established that jurors are presumed to follow their instructions."[43]

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[38] *Conyers*, 194 Mich App at 405.

[39] *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996).

[40] *Id*. at 497 n 30.

[41] See *People v Paquette*, 214 Mich App 336, 340-341; 543 NW2d 342 (1995) (acknowledging that a trial court has wide discretion and power in conducting a trial).

[42] *Conyers*, 194 Mich App at 405.

[43] *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

In a pro se supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, Dilts also argues that the trial judge was biased. In support, he points to a mistake regarding the other acts evidence instruction. As noted above, the trial judge left out the word "not" before the word "convict" in this instruction. Dilts argues that the trial judge did this intentionally because she was biased against him. However, we do not believe that this mistake reflects any bias on behalf of the trial judge. There is nothing to indicate that the trial judge did this intentionally. It is more likely that the trial judge simply misspoke. We do not find such an apparent mistake sufficient to overcome the heavy presumption of judicial impartiality.

We further find, though not specifically raised on appeal, that this error did not deny Dilts a fair trial given the remainder of the other act instruction. Jury instructions need not be perfect.[44]

We affirm.

/s/ William C. Whitbeck
/s/ Christopher M. Murray
/s/ Pat M. Donofrio

[44] *People v Chapo*, 283 Mich App 360, 373; 770 NW2d 68 (2009).