

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
September 24, 2013

v

EARL ROBERT KRANZ,
Defendant-Appellant.

No. 304853
Allegan Circuit Court
LC No. 10-016625-FC

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

M. J. KELLY, J. (*dissenting*)

I agree with the majority's conclusion that defendant Robert Earl Kranz failed to establish that the trial court's use of a witness screen or the prosecutor's questioning amounted to errors that independently warrant a new trial. I also agree that the trial court exceeded the scope of its authority on remand when it went beyond resolving the factual dispute that we asked it to resolve. See *People v Gioglio (On Remand)*, 296 Mich App 12; 815 NW2d 589 (2012), leave denied in relevant part 493 Mich 864 (noting that a trial court is bound to follow this Court's orders in the utmost good faith and cannot take any action that is inconsistent with this Court's order). I am, however, convinced that the trial court erred when it limited Kranz's lawyer's ability to cross-examine the prosecution's similar acts witnesses and erred when it imposed improper conditions on Kranz's lawyer before it would permit him to question Kranz about prior proceedings. Kranz's lawyer then compounded the trial court's error by failing to present to the trial court the documentary proof that the trial court demanded. As a result of these errors, Kranz's lawyer could not and did not effectively present Kranz's defense. I admit that I have addressed errors that for whatever reason were not properly presented to this Court; and I further acknowledge that, in light of the deficiencies in Kranz's appeal, the majority has applied the law in a fair and principled manner to reach its decision to affirm. Nevertheless, given the strength of the impeachment evidence and the peculiar and confusing rulings below, I would—in the interests of justice—reverse Kranz's convictions and remand this case for a new trial.

I. BASIC FACTS

The prosecution's charges arose from allegations that Kranz sexually abused his daughter, BK. She testified in detail that he sexually abused her every day over a period of months. She stated that she first revealed the abuse to her brother and step-sister, JL. Although BK's testimony was admittedly compelling and was sufficient to support the charges against Kranz, there was also evidence that cast some doubt on her veracity.

BK admitted that she wrote a letter recanting the allegations a few months after she made them and in which she stated that she made them up because she was mad. She also stated that she was glad to testify because she could "make somebody go away for what they've done to me and other people." There was also evidence that BK did not report the abuse until long after it occurred.

Kranz's wife also testified on Kranz's behalf and offered information about the family's home and interactions that permitted an inference that it would be difficult for such pervasive abuse to have gone unnoticed. She also offered testimony concerning her sexual relations with Kranz that might explain the existence of some evidence and some elements of BK's testimony. Other witnesses also offered testimony that permitted an inference that the specifics that BK related were implausible. Finally, Kranz testified on his own behalf and denied the allegations.

When all the evidence is considered in context, it is evident that the jury was presented with a classic credibility contest and that the resolution of that contest could have gone either way. For that reason, the prosecution plainly felt the need to bolster BK's testimony by presenting evidence that Kranz had in the past sexually assaulted another daughter, RK, and tried to engage in sex acts with his step-daughter, JL. And RK and JL's testimony—when presented out of context—constituted compelling evidence that Kranz had a propensity to sexually assault young girls from his family and acted in conformity with that propensity.

RK testified that she was Kranz's daughter and BK's half-sister. She said that Kranz sexually abused her from the time she was in "diapers" until she moved out at around age 13 or 14. She described abuse that was strikingly similar to BK's testimony. She also told the jury that she did not reveal the abuse because Kranz told her it would break up the family and she did not want to cause trouble, which testimony was also similar to BK's testimony. Nevertheless, RK admitted that she revealed the abuse to family members or authorities when she was four, six, and 15. She also admitted that, after she made her allegations, Kranz and her mother divorced and Kranz got custody of the children. She also testified that Kranz allowed her to move in with her mother when she asked.

JL testified that Kranz also made sexual advances toward her after her mother married him. However, she was older than BK or RK when he made those advances.

At trial, Kranz's lawyer tried to cross-examine both RK and JL about the proceedings that occurred after they made their allegations and about the circumstances surrounding their allegations that tended to suggest that both witnesses had either fabricated their allegations or had been coached to make them. However, the trial court sustained the prosecution's objections. Nevertheless, there was evidence that JL was unhappy with her mother's decision to marry

Kranz and did not get along with him. Indeed, she reportedly began striking Kranz after BK's allegations and told him: "I got you now."

After RK and JL testified, the court heard arguments about its prior evidentiary rulings. Kranz's lawyer indicated that RK had made allegations of sexual abuse in the past, which had been investigated and found incredible. For that reason, Kranz's lawyer wanted to elicit testimony from Kranz that RK had accused him of sexual abuse in the past and that he had to endure investigations and court proceedings related to the allegations. The trial court, however, refused to allow Kranz's lawyer to question any witness about prior proceedings unless he first presented evidence that there were in fact prior investigations. Thus, even though Kranz had first-hand knowledge of the prior events, the trial court determined that Kranz's lawyer could not elicit testimony from Kranz about his experience with the investigation unless he first proved that there were prior investigations with documentary evidence. In response, Kranz's lawyer argued that there was no rule that required him to prove that Kranz endured prior investigations before he could ask him about the prior allegations and what happened to him as a result of those investigations: "Because he [Kranz] went through it. How does any witness testify to any of that that occurred? There is no requirement by any Court Rule, by any Rule of Evidence that we have to support testimony by other evidence." The trial court reiterated that it would not permit Kranz to testify about specific proceedings, rulings, or matters that arose during a prior proceeding.

On the next day, Kranz testified on his own behalf and denied that he sexually abused his daughter. He stated that RK and JL had made prior allegations of abuse and that he had been investigated, but that he was not convicted of any crimes. After his testimony, the jury asked the court to inquire if Kranz knew why BK would fabricate her allegations. The trial court then excused the jury and created a record concerning Kranz's proposed response.

Kranz stated that it was his belief from the prior proceedings that RK and JL had learned to use allegations of abuse to manipulate him and his wife. He also stated that the prior proceedings showed that RK had a history of making up allegations and had been coached by her maternal grandparents to do so. It was his belief that BK had also learned that she could use allegations of abuse as a tool to get what she wants.

The trial court again determined that Kranz could not refer to records from the prior proceedings that suggested that RK had been coached. The court also explained that it had not allowed Kranz's lawyer to question RK and JL about the prior proceedings because the questions amounted to an attack on their credibility using specific instances of conduct and there was no documentary evidence to support the claims.

After the jury convicted Kranz, he moved for an evidentiary hearing concerning his trial lawyer's representation. In support of that motion, Kranz presented documents from the prior proceedings involving the allegations that he sexually assaulted RK and JL. Those documents included a court order cancelling a restraining order against Kranz because there was no proof that he sexually assaulted RK, a psychological report where the author concluded that RK fabricated her allegations and otherwise did not show any signs of having been sexually abused, a document showing that Kranz's name had been removed from the central registry of child abusers, a letter stating that RK should not have contact with her grandparents because they

coached her to make false allegations (the report indicated that RK's mother admitted to being present when RK's grandparents coached her to accuse Kranz), and a divorce decree granting Kranz custody of his children because it was in their best interests. He also attached excerpts from trial testimony in the prior proceedings where a social worker related that RK had recanted her allegations, had been diagnosed with Munchausen by Proxy or factitious disorder by proxy, and that RK had been coached by her grandparents to make the allegations. Kranz also attached a psychological evaluation of JL that concluded that she bullied her mother and Kranz, was opportunistic and manipulative, and had the capacity to falsify a report of sexual abuse.

In its opinion after remand for an evidentiary hearing, the trial court opined that RK and JL's testimony was vitally important to the prosecution's case:

The testimony of [JL] and [RK] drew a revealing and distasteful picture of a pattern in [Kranz's] life in which he casually and repeatedly sexually mistreated or attempted sexual manipulation of young girls in his family over a period of many years. Establishing this pattern tremendously fortified the testimony of [BK]. It showed that her experience was not the product of an impulsive, irrational departure from the otherwise proper course of [Kranz's] life, but a purposeful, repetitive choice of familiar deviant behavior with young people living under his roof, successfully avoiding detection all the while. In the full context of this trial, the other acts testimony of [JL] and [RK] was graphic, specific, and convincing.

The trial court rejected Kranz's lawyer's contention that it was the trial court's erroneous evidentiary decisions that led to his inability to cross-examine RK and JL or to elicit testimony concerning the prior allegations. Instead, it concluded that it was Kranz's lawyer's failure to come forward with the documentary evidence from the prior proceedings in order to make an offer of proof or establish a foundation for his questions that led to the trial court's rulings. It likewise concluded that Kranz's lawyer's failure to present those documents fell below an objective standard of reasonableness under prevailing professional norms and prejudiced Kranz's trial. The trial court determined on that basis that Kranz should receive a new trial.

II. EVIDENTIARY ERRORS

A. STANDARDS OF REVIEW

This Court reviews a trial court's decision to preclude the admission of evidence for an abuse of discretion. *People v Roper*, 286 Mich App 77, 90; 777 NW2d 483 (2009). A trial court abuses its discretion when its ruling falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007). This Court reviews de novo whether a statute or rule precludes the admission of evidence as a matter of law. *Roper*, 286 Mich App at 91. A trial court necessarily abuses its discretion when it premises its ruling on an error of law. *Id.*

B. APPELLATE REVIEW

As a preliminary matter, I acknowledge that Kranz's appellate lawyer has not directly challenged the trial court's evidentiary rulings, but would nevertheless address the errors on our own initiative.¹ This Court is "an error-correcting court that has broad authority to take corrective action with regard to lower court proceedings." *Gioglio*, 296 Mich App at 17.

We have the power to 'exercise any or all of the powers of amendment of the trial court or tribunal,' to 'permit amendment or additions to the grounds for appeal,' and to 'permit amendments, corrections, or additions to the transcript or record.' MCR 7.216(A)(1), (3), and (4). This Court also has the power to 'enter *any judgment or order* or grant further or different relief as the case may require,' MCR 7.216(A)(7) (emphasis added) [*Id.*]

And this Court can raise and address issues sua sponte in the interests of justice. See *City of Dearborn v Bacila*, 353 Mich 99, 118; 90 NW2d 863 (1958) (recognizing that appellate courts can and do decide important issues sua sponte, but stating that the courts do so only sparingly and with full realization of the restrictions and limitations on the exercise of that power).

Here, the trial court made rulings that were at the least confusing and in some cases plainly in error. As a result of these rulings, it is apparent that Kranz's lawyer's plan for presenting Kranz's defense was significantly curtailed. To compound the error, Kranz's lawyer failed to come forward with the documentary evidence to support his theory. Even if the documents were themselves inadmissible, which is not entirely clear, it is clear from the trial court's statements on the record and in its opinion after the evidentiary hearing that it would have granted Kranz's lawyer more latitude to cross-examine RK and JL and would have allowed Kranz to testify about the prior proceedings to a greater extent had he come forward with the documents. Thus, it appears to me that Kranz's claim that his lawyer provided ineffective assistance is inextricably intertwined with the trial court's responses to his attempts to elicit testimony in support of Kranz's theory of the case. Under those circumstances, I believe this Court can and should address the trial court's decision to curtail Kranz's lawyer's efforts to present evidence as an alternate basis for granting relief. MCR 7.216(A)(7); *City of Dearborn*, 353 Mich at 118.

C. EVIDENCE OF PRIOR ALLEGATIONS

The trial court effectively precluded Kranz's lawyer from asking RK or JL about their prior allegations and whether those allegations had been substantiated or refuted in prior proceedings. The trial court offered various reasons for its decisions. It noted that some of the questions called for hearsay because the answers would have required the witnesses to state the conclusions reached by the investigators of the prior allegations. At a later point, it indicated that

¹ I find it inexplicable that Kranz's appellate lawyer failed to address the trial court's evidentiary rulings on appeal. In my view, those rulings were properly preserved, plainly in error, and independently warrant relief.

Kranz's lawyer could not inquire into specific instances of conduct to impeach RK and JL's credibility. In addition, it also stated that it would not permit inquiry into these past proceedings unless Kranz's lawyer first established that the prior proceedings occurred through documentary evidence.

While some of Kranz's lawyer's questions implicated the hearsay rule, Kranz's lawyer could have inquired about the witnesses' individual statements, acts, and experiences involving the prior allegations without calling for statements by persons involved in the prior proceedings or offering those statements for the truth of the matter asserted. See MRE 801; MRE 802. In addition, Kranz's lawyer could inquire into those matters without first presenting documentary evidence that the prior proceedings had in fact occurred. Generally, every witness is presumed to be competent to testify and may establish that he or she has personal knowledge of a matter through his or her own testimony. MRE 601; MRE 602. Finally, a witness may be asked about specific instances of conduct on cross-examination if probative of his or her truthfulness or untruthfulness. MRE 608(b).

Kranz's lawyer had every right to question RK and JL about their past allegations and the circumstances under which the allegations arose; Kranz's lawyer could properly elicit testimony that the allegations arose during a custody matter and resulted in an investigation. He could also ask about the results of those proceedings to the extent that the witnesses knew or experienced the results, including whether the witnesses gave testimony or submitted to evaluations, and could inquire whether the witnesses were coached to make the allegations by family members involved in those proceedings or otherwise fabricated the allegations. These questions would have implicated the witnesses' potential for bias or the existence of improper influences, which would be relevant and admissible. See MRE 401; MRE 402; *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005) (stating that evidence of bias is always relevant and noting that a defendant has the right to present evidence that the witness' testimony might have been influenced by outside factors). Accordingly, the trial court erred when it prevented Kranz's lawyer from cross-examining RK and JL about the circumstances surrounding their prior allegations.

Similarly, the trial court erred when it limited Kranz's lawyer's ability to question Kranz about RK and JL's allegations and the proceedings that resulted from those allegations. Kranz clearly had first-hand knowledge of those events to the extent that he experienced them and could, for that reason, offer testimony about those events. MRE 602; MRE 401; MRE 402. Nevertheless, the trial court refused to let Kranz testify about the circumstances that surrounded the original allegations. He was only permitted to deny that he committed the acts alleged by RK and JL and that he was not convicted of crimes arising from those allegations.

D. PREJUDICIAL ERROR

Generally, a criminal verdict cannot be reversed on the basis of an evidentiary error unless it affirmatively appears that the error resulted in a miscarriage of justice. *People v Lukity*, 460 Mich 484, 491-492; 596 NW2d 607 (1999), quoting MCL 769.26. "[T]he 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." *Lukity*, 460 Mich at 495. Here, I believe that the trial court's erroneous rulings precluded Kranz's

lawyer from presenting critical evidence about the circumstances surrounding RK and JL's prior allegations, which would have seriously undermined the probative value of their testimony and would have indirectly undermined BK's testimony.

Testimony that a defendant has committed prior bad acts is—on some minimal level—relevant to show that the defendant is more likely to have committed the bad act at issue; however, courts have also long recognized that there is a significant danger that juries will give such evidence weight that is disproportionate to its probative value. See *People v VanderVliet*, 444 Mich 52, 62 n 11; 63-64; 508 NW2d 114 (1993). And the danger that a jury will give disproportionate weight to such evidence is stronger still in cases involving allegations of child sexual abuse. See *People v Beckley*, 434 Mich 691, 721-722; 456 NW2d 391 (1990) (opinion by BRICKLEY, J.) (noting that criminal sexual conduct cases involve one of society's most heinous offenses and that, given that nature and the terrible consequences of a miscalculation, juries might be unduly swayed by evidence that seems to offer an objective basis for conviction). For that reason, the rules of evidence generally preclude a party from presenting evidence that the defendant committed a prior bad act in order to show that he or she has bad character and acted in conformity with that character. See MRE 404(b). However, the Legislature has since determined that such evidence should be admissible in cases involving allegations of child sexual abuse, see MCL 768.27a, and evidence that implicates propensity may nevertheless be admissible for purposes other than to prove propensity, see MRE 404(b)(1). But courts must still carefully apply MRE 403 to ensure that such evidence does not unfairly prejudice the defendant. See *VanderVliet*, 444 Mich at 74-75; *People v Watkins*, 491 Mich 450, 486-490; 818 NW2d 296 (2012).

Kranz's lawyer should have been given the opportunity to present evidence that RK and JL's allegations were suspect in order to avoid the danger that the jury would give them undue weight. Unfortunately, the trial court effectively precluded Kranz's lawyer from presenting any evidence to seriously contradict RK and JL's testimony. Hence, the jury was left with testimony that Kranz had previously sexually assaulted two daughters from a young age and tried to engage in sexual contact with a step-daughter with only his bare denials to persuade the jury that he was not a serial pedophile.

In a case where the allegations of criminal sexual conduct involved a pre-pubescent daughter and were particularly heinous, there is a significant chance that the jury would give such testimony undue weight when countered by unsupported denials; as such, the outcome of the credibility dispute between BK and Kranz may very well have turned on the fact that there was evidence that he had in the past sexually assaulted or tried to sexually assault girls in his family. This testimony was left unchallenged even though there was substantial and compelling evidence that RK might have been coached to make the allegations as part of a custody dispute and despite the evidence that JL had a tendency to use allegations to manipulate her family life and bully her parents. Moreover, given the evidence that BK first revealed her allegations to JL and might have been motivated to rectify some perceived harm inflicted on RK and JL, had the jury known about the circumstances surrounding the prior allegations and custody disputes—including the evidence that RK and JL may have fabricated their claims—it might reasonably

have inferred that BK's allegations were influenced by these prior events or her siblings desire to 'get' Kranz. Consequently, I conclude that the trial court's erroneous decision to limit Kranz's lawyer's questioning amounted to error warranting relief. *Lukity*, 460 Mich at 495-496.²

III. INEFFECTIVE ASSISTANCE

A. STANDARD OF REVIEW

Whether a defendant received the effective assistance of counsel is a mixed question of fact and law. *Gioglio*, 296 Mich App at 19. This Court reviews de novo whether a particular act by a defendant's trial lawyer fell below an objective standard of reasonableness under prevailing professional norms and prejudiced the defendant. *Id.* at 19-20. However, this Court reviews the trial court's factual findings after an evidentiary hearing for clear error. *Id.* at 20.

B. THE DOCUMENTARY EVIDENCE

In order to establish an ineffective assistance claim, the defendant must show that his trial lawyer's representation fell below an objective standard of reasonableness under prevailing professional norms and that, but for the unprofessional errors, there is a reasonable probability that the outcome would have been different. *Id.* at 22.

I generally agree that Kranz's trial lawyer cannot be faulted for initially determining that he would not need to submit documentation from the previous proceedings involving RK and JL's allegations in order to effectively cross-examine them or impeach their testimony. Although I believe that many—if not most—trial lawyers would have utilized some of that documentation or called witnesses from the prior proceedings to testify at trial, I concede that Kranz's trial lawyer might have been able to present an adequate defense through cross-examination and testimony by the listed defense witnesses. See *id.* at 22-23 (explaining that courts will typically indulge in a strong presumption that the trial lawyer's decisions fell within the range of reasonable and professional assistance). However, the same cannot be said for his decision to proceed without the documentation in the light of the trial court's rulings.

At trial, the court repeatedly emphasized that it would not allow Kranz's lawyer to cross-examine RK or JL about the prior proceedings arising from their allegations or permit him to elicit testimony from Kranz about the circumstances of the prior allegations unless he first provided documentation to establish that they had occurred and to provide a foundation for the cross-examination or testimony. A reasonable lawyer in Kranz's trial lawyer's position would at that point have realized that, even if the trial court's rulings were erroneous, he could no longer effectively cross-examine RK or JL and could not offer effective impeachment evidence through Kranz without first presenting the documentation requested by the trial court. The trial court found at the evidentiary hearing that Kranz's trial lawyer either actually had the documents or had a reasonable opportunity to obtain the documents. And, given that finding, it cannot be said

² I would reach the same result even under a plain error test. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

that Kranz's lawyer's decision to withhold the documentation constituted sound trial strategy. I also must conclude that this failure prejudiced Kranz. On remand, the trial court conceded that the documentary evidence strongly undermined RK and JL's testimony; it also opined that, had Kranz's trial lawyer presented the requested documentation, he would have been able to more fully cross-examine RK and JL and could have elicited testimony about the prior proceedings that could have served to impeach RK and JL. It even suggested that it might have allowed Kranz's lawyer to admit some of the documents. For these reasons, I would conclude that Kranz's trial lawyer's decision to withhold the documentation from the trial court fell below an objective standard of reasonableness under prevailing professional norms and that, but for that error, there is a reasonable probability that the outcome would have been different. *Id.* at 22.

IV. CONCLUSION

Given the deficiencies in Kranz's appeal, I agree that this Court could reasonably conclude that Kranz has not established his right to appellate relief. However, under the unique facts of this case, I would exercise our discretion to address errors that were not raised or that were improperly raised before this Court. It is evident to me that Kranz was deprived of the opportunity to present an effective defense by a combination of erroneous or confusing evidentiary rulings and his trial lawyer's failure to reasonably respond to those rulings. Accordingly, I would reverse Kranz's convictions and remand for a new trial.

For these reasons, I must respectfully dissent from the majority's decision to affirm Kranz's convictions.

/s/ Michael J. Kelly