STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 16, 2007
v	No. 267246 Bay Circuit Court
RICKY JOHN AIKENS, Defendant-Appellant.	LC Nos. 05-010290-FC 05-010291-FC 05-010292-FC

Before: Whitbeck, C.J., and Talbot and Zahra, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC I) causing injury, MCL 750.520b(1)(f); three counts of CSC I involving a relative between 13 and 16 years old, MCL 750.520b(1)(b)(ii); and three counts of CSC I involving a victim under 13 years old, MCL 750.520b(1)(b)(a). He appeals as of right. We affirm.

I Self-Representation

Defendant first argues that the trial court denied him his right to represent himself. We disagree.

A. Standard of Review

Because the essential facts are undisputed we review application of the relevant constitutional standard to those facts de novo. *People v Russell*, 471 Mich 182; 684 NW2d 745 (2004).

B. Analysis

"Both federal and state law . . . guarantee a defendant the right of self-representation, although this right is subject to the trial court's discretion." *People v Willing*, 267 Mich App 208, 219; 704 NW2d 472 (2005), citing US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1. However, this right is not absolute. *Russell, supra* at 190-191. Before granting a defendant's request to waive the right to counsel and to represent himself or herself, the trial court must determine that the defendant's request is unequivocal, that the defendant is knowingly, intelligently, and voluntarily asserting the right, and that the defendant will not disrupt or unduly

burden the court by representing himself. *People v Anderson*, 398 Mich 361, 367-368; 247 NW2d 857 (1976).

A court should "indulge every reasonable presumption against waiver of the right to counsel." *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). Especially in view of this principle the trial court appropriately found during the first motion hearing that defendant had accepted the trial court's suggestion that he at least speak with another attorney before representing himself at trial because defendant responded, "Yes, sir," to that suggestion. Also, it is apparent that defendant understood after the first motion hearing that he could inform the court that he wished to represent himself because he sent the trial court two letters and a motion after speaking with his new attorney expressing such a desire.

Similarly, applying every reasonable presumption against waiver of the right to counsel, the trial court did not err in holding at the second motion hearing that defendant had decided to withdraw his request to represent himself. After plaintiff informed the trial court it would file a motion to prevent defendant from personally cross-examining the complainants, the trial court informed defendant that it was not familiar with the applicable law on that issue and had no idea how it would rule. Although defendant does not argue that the trial court erred by informing defendant of this potential danger given it did not know how it would rule, the trial court was under no obligation to provide defendant with legal counsel. *Martinez v Court of Appeal of California, Fourth Appellate Dist*, 528 US 152, 162; 120 S Ct 684; 145 L Ed 2d 597 (2000) ("the trial judge is under no duty to provide personal instruction on courtroom procedure or to perform any legal 'chores' for the defendant that counsel would normally carry out") The trial court again reminded defendant that he did not have to dismiss counsel at that moment and could do so any time by writing a letter. When asked what defendant wanted to do, he replied, "I guess I'll wait. Long as I got – long as I got the right later if I decide to represent myself, I still got the right to do so." Notably, our Supreme Court has already held that the trial court "do[es] not impermissibly infringe on the constitutional right to act as one's own counsel" by informing defendant of the dangers of self-representation. *Anderson, supra* at 368.

Defendant also argues that the trial court failed to meet the *Anderson* requirements because it never determined on the record whether self-representation would disrupt the court. Because, for reasons already considered, the trial court did not err in finding that defendant had agreed to speak with another attorney before representing himself, nor did it err in later finding that defendant changed his mind and decided to be represented by counsel, the trial court had no obligation to determine if any *Anderson* requirements were met. To illustrate, although the *Anderson* requirements must be met before a trial court can allow a criminal defendant to represent himself, and defendant's right to represent himself is subject to these requirements, *Anderson, supra* at 367-368, defendant cites no authority establishing that these requirements apply when a defendant requests to represent himself and then decides to be represented by counsel. Moreover, the obvious purpose of determining whether self-representation will disrupt the court is to do just that, and it cannot be reasonably argued that the purpose of this requirement is to encourage a defendant who withdraws his request to reconsider representing himself. Similarly, although defendant also argues that the trial court violated MCR 6.005(E), under the plain language of this rule, the requirements cited by defendant are only triggered when "a defendant has waived the assistance of a lawyer," which did not occur in this case because defendant decided to be represented by counsel.

Accordingly, the trial court did not err in holding that defendant had not waived his right to counsel.

II Other Acts Evidence

Defendant next argues that the trial court erred in a pretrial ruling regarding other acts evidence under MRE 404(b). We disagree.

A. Standard of Review

Although defendant objected to introduction of the evidence at issue below, this issue has not been properly presented for appellate review because defendant did not raise the issue in his statements of questions presented. *People v Albers*, 258 Mich App 578, 584; 672 NW2d 336 (2003). Nevertheless, we will address the merits of this issue. We review a trial court's decision whether to admit evidence for an abuse of discretion. *People v McDaniel*, 469 Mich 409; 412; 670 NW2d 659 (2003).

B. Analysis

The trial court did not abuse its discretion in holding that the prejudicial effect of the evidence at issue did not outweigh its probative value. MRE 403 provides that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." Prejudice to the defendant is not enough to exclude evidence because all relevant evidence presented by an opponent is necessarily prejudicial. *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995). "What is meant [under MRE 403] is an undue tendency to move the tribunal to decide on an improper basis, commonly, though not always, an emotional one." *Id*. However, some danger of unfair prejudice to the defendant is not enough to exclude the evidence; the defendant must show that the probative value is substantially outweighed by the danger of unfair prejudice. *Id*.

Because the evidence was highly probative to showing defendant's preferred system of engaging in sexual activity, which tends to corroborate each complainant's testimony, the potential for undue prejudice did not substantially outweigh the probative value of the evidence under MRE 404(b). Each complainant testified that defendant would commonly make her perform fellatio on him and would thereafter engage in anal sex, had done so for a number of years, and that he had made specific threats that he would kill each complainant either if she told of the sexual assaults or if she would not perform sex acts with him. Each complainant also testified that defendant would sexually assault the other two complainants in her presence. It should be noted that although the trial court's decision to admit the other acts evidence also applied to evidence from defendant's wife regarding his sexual activities with her, the argument section of defendant's brief devoted to this issue focuses solely on the evidence regarding the complainants. Even assuming that defendant is implying that his sexual relations with his wife might also be viewed as bad act evidence, the unduly prejudicial effect of this other act evidence did not outweigh the highly probative nature of this evidence.

III Effective Assistance of Counsel

Defendant next argues that he was denied the effective assistance of counsel. We disagree.

A. Standard of Review

The denial of effective assistance of counsel is a mixed question of fact and constitutional law, which are reviewed, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

B. Analysis

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that counsel's performance was deficient in that it fell below an objective standard of professional reasonableness, and that it is reasonably probable that but for counsel's ineffective assistance, the result of the proceeding would have been different. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). A defendant arguing ineffective assistance of counsel must overcome a presumption that defense counsel's decisions were matters of sound trial trial strategy. *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004).

Defendant argues that he did not receive effective assistance of counsel because defense counsel conceded to consolidating all three cases. Defense counsel requested consolidation after the trial court overruled his objection to plaintiff's request under MRE 404(b) to introduce testimony of all three victims and their mother in each case. However, defense counsel and the trial court discussed below that without consolidation, the chance that defendant would have been convicted would have "tripled," so the decision to consolidate was a matter of reasonable trial strategy. Further, even if defense counsel had not moved to consolidate, there is no reasonable likelihood that the result would have been different, *Rodgers*, *supra* at 714, because, in light of the trial court's decision to admit the 404(b) evidence, the jury in each case would have heard substantially the same evidence.

Defendant next argues that defense counsel denied him effective assistance of counsel by failing to admit evidence or cross-examine a nurse who testified for plaintiff to establish there was no evidence that any of the victims were vaginally penetrated. Although defendant attaches various medical documents to his appellate brief to support his allegation that there was no evidence of vaginal penetration, defendant does not cite where these were filed in the lower court records, and we could not find these documents after searching the lower court records. Thus, these documents cannot be considered. See MCR 7.212(C)(7) ("Facts stated must be supported by specific page references to the transcript, the pleadings, or other document or paper filed with the trial court."); *People v Mackle*, 241 Mich App 583, 604 n 4; 617 NW2d 339 (2000).

Moreover, the lack of direct medical evidence establishing that vaginal penetration occurred does not diminish testimony that there was vaginal penetration. Defendant also cannot overcome the presumption that defense counsel declined to pursue the issue as a matter of trial strategy. Indeed, pointing out the alleged lack of medical evidence of vaginal penetration could have highlighted the medical evidence indicative of anal penetration.

Defendant next argues that defense counsel should have requested that the trial court redact a letter that defendant wrote his wife in prison that essentially stated that defendant fired

his lawyer to receive 100 years in prison rather than 20 years in prison to show his wife how sorry he was. Defendant neither explains why the letter should have been redacted nor cites any authority to support this argument. "A party may not merely state a position and then leave it to this Court to discover and rationalize the basis for the claim." *Mackle, supra* at 604 n 4 (Citations omitted).

Accordingly, defendant was not shown that defense counsel was constitutionally ineffective.

IV Prosecutorial Misconduct

Defendant next argues that the prosecutor committed prosecutorial misconduct warranting a new trial. We disagree.

A. Standard of Review

Because plaintiff did not object to the alleged instances of prosecutorial misconduct below, this issue is not preserved. *People v Sardy*, 216 Mich App 111, 117-118; 549 NW2d 23 (1996). "[A] defendant's unpreserved claims of prosecutorial misconduct are reviewed for plain error. In order to avoid forfeiture . . . , the defendant must demonstrate plain error that was outcome determinative." *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001) (citation omitted).

B. Analysis

Defendant first argues that the prosecutor committed prosecutorial misconduct when it "minimized [d]efendant's innocence" by stating during voir dire that the prosecutor had the burden of proof to show defendant's guilt beyond a reasonable doubt and that this presumption of innocence would apply even if someone committed a crime on camera at a World Series game in front of the audience and viewers. The prosecutor added that the jury's verdict would have to be unanimous and that the court would not keep the jury indefinitely if it could not reach a verdict.

The propriety of a prosecutor's remarks depends on all the facts of the case. *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). It is not plain that the jury would view the remarks at issue as undercutting the presumption of innocence. Rather, they can reasonably be understood as innocuous remarks intended to generally explain the presumption of innocence and procedures related to the requirement of a unanimous verdict.

Defendant next argues that the prosecutor improperly "made the following statement as to the burden of proof:"

Count three is really an alternate count to count 1. If you don't agree that we've proven count 1 to you beyond a reasonable doubt, or the 12 of you go back into the jury room can't agree on

whether we've proven it or not, then you look at count 3, which charges what's called third degree criminal sexual conduct, and that he did engage in sexual penetration, to-wit . . .

Defendant fails to articulate how the above statement is improper "as to the burden of proof," and therefore fails to show prosecutorial misconduct.

Defendant next argues that the prosecutor improperly discussed defendant's possible penalty when he told the jury during closing argument that although defendant had a motive to not be truthful because the verdict "could have a profound impact on his life," the jury should not simply disregard his testimony because defendant was concerned with the outcome. Because "[i]t is common knowledge that a verdict of not guilty means that the prisoner goes free and that a verdict of guilty means that he is subject to such punishment as the court may impose[,]" *People v Szczytko*, 390 Mich 278, 286; 12 NW2d 211 (1973), this statement by the prosecutor does not constitute prosecutorial misconduct.

Finally, defendant argues that prosecutor committed misconduct when he introduced and referenced the letter stating that defendant had tried to fire his attorney. Although defendant again does not explain how this statement was improper, defendant's argument regarding the letter lacks merit for reasons considered above. Moreover, "prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence." *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999).

Affirmed.

/s/ William C. Whitbeck
/s/ Michael J. Talbot
/s/ Brian K. Zahra