

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARK R. PETRI,

Defendant-Appellant.

UNPUBLISHED

December 29, 1998

No. 197589

Recorder's Court

LC No. 96-501419

Before: Markey, P.J., and Sawyer and Whitbeck, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), for which he was sentenced to three to ten years' imprisonment. We reverse and remand.

At trial, testimony from some witnesses indicated that defendant sexually assaulted the alleged victim while she and her mother lived with defendant at his house. The victim was between the ages of four and six when the assaults allegedly occurred. The victim testified that, usually on Wednesday evenings when her mother was not home, defendant would take her into the bathroom, or his bedroom, remove his pants and underwear and undress her. The victim testified that defendant would then take lotion and rub some on her "butt" and some on his penis. Then defendant "put [his] private in my butt." The victim also testified that defendant touched her "private."

On appeal, defendant argues that he received ineffective assistance of counsel at trial. Because defendant did not move for a new trial on the basis of ineffective assistance of counsel or request an evidentiary hearing on this issue, our review of this issue is limited to counsel's deficiencies that are apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Barclay*, 208 Mich App 670, 672; 528 NW2d 842 (1995). Upon reviewing the record of defendant's trial, we are convinced that defendant received ineffective assistance of counsel.

To establish ineffective assistance of counsel

the defendant first must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms. The defendant must overcome the strong presumption that counsel's assistance constituted sound trial strategy. Second, the defendant must show that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. [*People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994).]

Defendant argues that he received ineffective assistance of counsel because his attorney failed to bring a motion in limine to exclude the hearsay evidence of the victim's parents, as well as that of police detective Robert Stephens, which corroborated the victim's testimony regarding her sexual abuse. We agree.

This issue can be reduced to the question whether the various witnesses' testimony concerning the victim's statements was properly admitted under a relevant exception to the hearsay rule. "Hearsay" is defined as "a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Hearsay is not admissible, except as provided by the rules of evidence. MRE 802. One exception to the hearsay rule is set forth in MRE 803A, which codified the so-called "tender years" exception to the hearsay rule. *People v Dunham*, 220 Mich App 268, 271; 559 NW2d 360 (1996). This rule allows admission of a child's first corroborative statement about an incident of sexual abuse as long as the evidence meets four requirements: (1) the declarant must be under the age of ten when the statement was made; (2) the statement must be shown to be spontaneous and without indication of manufacture; (3) the declarant must make the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstances; and (4) the statement must be introduced through the testimony of someone other than the declarant. MRE 803A; see also *Dunham*, *supra* at 271-272.

Because the victim made her first corroborative statement regarding her sexual abuse to her mother, the testimony of her father and police witness Stephens regarding the victim's later statements was inadmissible pursuant to the MRE 803A hearsay exception. We further believe that the testimony of the victim's mother concerning the victim's corroborative statements was inadmissible pursuant to MRE 803A because the victim did not make her statements spontaneously. The victim made her statements after her father asked her whether defendant had touched her "in a bad way" and her mother told her that her father believed defendant was "hurting her and touching her private areas." Moreover, the victim spoke to her mother about her abuse in response to her mother's series of yes or no questions on the subject. In light of these facts, we conclude that the victim did not make the statements spontaneously. Because the victim's statements to her mother were not spontaneous, the mother's testimony concerning the victim's statements were not admissible under MRE 803A.

Further, it does not appear that defense counsel's failure to object to the hearsay testimony was a matter of sound trial strategy. The prosecutor's main witness, the victim, was largely unable to present a cogent account of her alleged sexual abuse. In most instances during trial she stated that defendant put his penis *on* her "butt," instead of *in* it. Insofar as the digital penetration charge was concerned, the victim never once stated that defendant placed his fingers *in* her "private." The hearsay testimony of the

victim's parents was the clearest testimony available to the prosecutor for purposes of establishing the elements of defendant's offenses. Moreover, the victim had difficulty defining for the jury exactly what she meant by the term "private" when she referred to her own private and defendant's private. By failing to object, defense counsel allowed the prosecutor to use inadmissible hearsay to establish the elements of defendant's offenses. In essence, defense counsel's actions made it much easier for the prosecutor to prove her case against defendant. Defense counsel's failure to object was not sound trial strategy.

Moreover, we conclude that there was a reasonable possibility that, but for defense counsel's failure to interpose timely objections to the large quantity of hearsay evidence presented in the prosecutor's case-in-chief, the result of defendant's trial would have been different. As discussed, the victim's ability to convey to the jury an accurate, understandable account of her alleged sexual abuse was rather weak. The hearsay testimony of her parents and Stephens conveyed her account in an intelligible, organized manner. Indeed, the hearsay testimony was the sole evidence to establish that defendant used his fingers to vaginally penetrate the victim. Moreover, the corroborative effect of this improperly admitted evidence cannot be underestimated, because "as in most criminal sexual assault cases, the testimony concerning the event was one-to-one, complainant versus defendant." *People v Gee*, 406 Mich 279, 283; 278 NW2d 304 (1979); see also *People v Sabin*, 223 Mich App 530, 540; 566 NW2d 677 (1997) (in prosecution for criminal sexual conduct, "Because defendant denied the sexual conduct, credibility and character became pivotal issues.") Because defendant was sufficiently prejudiced by his attorney's failure to object to the inadmissible hearsay, his convictions must be reversed.

Defendant also argues that he received ineffective assistance of counsel because his attorney failed to object to admission of testimony that he may have been sexually abused by an uncle during his childhood. Police detective Stephens testified that, during a police interview, he asked defendant whether he had been sexually abused as a child. When asked this question, Stephens stated that defendant became upset and told him that "he had something happen to him as a child from an uncle." Later, defense counsel asked defendant on direct-examination about this portion of defendant's conversation with Stephens, and defendant testified that the conversation "never happened" and denied that he had been sexually abused as a child by any adult. During rebuttal, police officer Terri Smith testified that she was present during Stephens' interview with defendant. Smith testified that defendant stated he had been sexually abused by his uncle and became visibly upset when he admitted this.

We agree with defendant that his attorney's tactical approach to the subject of defendant's previous sexual abuse fell below a minimum standard of reasonableness. Defense counsel should have objected to Stephens' testimony that defendant admitted to being abused by his uncle. MRE 402 provides, as pertinent, "Evidence which is not relevant is not admissible." Relevant evidence is "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." MRE 401; *People v Brooks*, 453 Mich 511, 517; 557 NW2d 106 (1996). To determine whether evidence is relevant, a court must consider whether the evidence is material, and whether the evidence has probative force. *Id.* at 517-518. Further, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403.

Evidence of defendant's sexual abuse was neither material nor probative to any issue to be determined in this case. Although defendant's general denial of guilt placed all elements of his crime at issue, *Sabin, supra* at 538, whether defendant was sexually assaulted as a child is simply not an element of first-degree criminal sexual conduct. Moreover, while defendant's credibility was an issue of consequence to the determination of this action, evidence that defendant may have been a sexual abuse victim was not relevant to the issue of his credibility *until* defendant, in response to defense counsel's questions, denied telling the police about his prior abuse. It is plain to this Court that the prosecutor improperly introduced this evidence at the outset to play on the popularly held belief that people who were physically or sexually abused as children are more likely as adults to physically or sexually abuse children. However, the prosecution offered no evidence to support such a theory. Accordingly, it is highly questionable whether the evidence indicating that defendant may have been sexually abused by an uncle should even be considered marginally relevant under MRE 401. In any event, this evidence should have been excluded under MRE 403 by any reasonable trial court because any marginal relevance of this evidence was substantially outweighed by the danger of unfair prejudice. In light of the grave danger that the jury would be improperly influenced by this notion, we are unable to discern any trial strategy for failing to object to the evidence of defendant's possible sexual victimization.

We believe that there was a reasonable probability that, but for counsel's error in failing to object to this improperly admitted evidence, the result of defendant's trial would have been different. Where a defendant in a sexual assault case enters a general denial of guilt, his character and credibility are of primary significance. *Id.* at 540. This is especially true in the case at hand, where there was no physical evidence that defendant committed the crimes with which he was charged. By taking unfair advantage of defendant's own history as a possible victim of sexual abuse, the prosecutor in effect sought to use an unsupported psychological theory to establish that defendant had a propensity to commit this sort of crime, and at the same time bolstered the victim's credibility. See *id.* Once this evidence was admitted, there was little that defense counsel could do to rebut its prejudicial impact without entering into a tangential, unnecessary debate on the legitimacy of the theory of cyclical abuse.

In *People v Travis*, 246 Mich 514; 224 NW 329 (1929), the Supreme Court addressed a similar problem where the defendant had been charged with and convicted of the statutory rape of his adopted daughter, who accused the defendant of having intercourse with her for some two years before the act charged in the information. *Id.* at 514. The defendant completely denied the charge. *Id.* at 515. On cross-examination, the prosecutor asked the defendant whether he had sexual relations with his wife and, if not, how long it had been since they had cohabited together as husband and wife. *Id.* The defendant testified that he and his wife slept in different rooms and had done so for four years, but claimed that he had engaged in sexual relations with her during this period. *Id.* at 515-516.

Reversing the defendant's conviction on the basis of the prosecutor's prejudicial line of questioning, the Supreme Court made the following statements that we find instructive:

In admitting this testimony and limiting it to a time prior to the arrest, the jury was given to understand that a man who had not had sexual intercourse for a considerable period of time would be more inclined to commit rape than one whose

sexual desires had been regularly satisfied. It was on this theory that the prosecuting attorney brought out the testimony and apparently on this theory the court admitted it as evidence which the jury might weigh against the defendant in determining his guilt. The prejudicial effect of this testimony would more plainly appear in the case of an unmarried defendant called upon to answer a charge of rape. His virtue and continence would be used against him. The jury was required to determine the truth of the story told by the girl or that related by the defendant. Against the probability of the truth of the defendant's story, which was a complete denial of the charge, they were allowed to consider the fact that he had not had sexual intercourse with his wife for four years. The harmful effect of this testimony was emphasized by the prosecuting attorney in again referring to it in his argument to the jury. For this error the judgment should be reversed. [*Id.* at 516.]

Here, the prejudicial effect of using defendant's own status as a sexual abuse victim against him is readily apparent. To this Court, it is simply untenable to force defendant to defend against not only the crimes for which he was charged, but also a crime that was possibly perpetrated against him. To compound this error, the prosecutor sought admission of this testimony to avail herself, albeit surreptitiously, of a questionable, yet popularly credited, theory of human behavior. Plainly, this was highly unfair, yet defense counsel did nothing to prevent the prosecutor from eliciting this testimony. In light of this, we reverse defendant's convictions and grant him a new trial.

Defendant also argues, *inter alia*, that his attorney was ineffective for failing to object to evidence that he engaged in anal sex. Stephens testified that he asked defendant whether he ever participated in anal sex, because "anal sex was one of the accusations that was made by [the victim]." Stephens testified that defendant admitted to engaging in anal sex.

We agree with defendant's argument that his attorney was ineffective for failing to object to the admission of Stephens' testimony that he admitted to engaging in anal sex. MRE 404(b) provides, as pertinent, that evidence of other acts is not admissible to prove a person's character to show action in conformity therewith, although such evidence may be admissible to show motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when material. *People v Ullah*, 216 Mich App 669, 674; 550 NW2d 568 (1996). This evidence simply was not relevant as to any element of defendant's offenses, and was not used to show motive, opportunity, intent, or any other "non-character" matter permissible under MRE 404(b). Instead, the prosecutor elicited this evidence for the purpose of showing that defendant was more likely to have anally penetrated the victim because at some point in his life he had engaged in anal sex. Such propensity reasoning is not a proper ground for admitting evidence under MRE 404(b). See *People v Jones*, 417 Mich 285, 289-290; 335 NW2d 465 (1983) ("Prior sexual acts between the defendant and persons other than the complainant are not part of the principal transaction.") In light of the prejudicial aspects of this testimony, not least of which was its tendency to force defendant to defend an aspect of his private sex life that had nothing to do with his criminal charges, we believe that defense counsel should have advanced a timely objection to its admission pursuant to MRE 404(b). Defense counsel's failure to object to such blatantly inadmissible and prejudicial testimony fell below an objective standard of professionalism and cannot be considered a matter of sound trial strategy.

Further, there is a reasonable probability that, but for defense counsel's error in failing to object, the result of defendant's trial would have been different. Here, a skilled police detective testified that he asked defendant whether he engaged in anal sex "[b]ecause anal sex was one of the accusations that was made by [the victim]," thus implying that, in his professional experience, those who once engaged in presumably consensual acts of anal sex with an adult are more likely to engage in non-consensual acts of anal sex, or anal sex with child victims. In a criminal sexual conduct case, where the defendant denies the sexual conduct, "credibility and character [become] pivotal issues." *Sabin, supra* at 540. In this situation, admission of unfairly prejudicial bad acts evidence is grounds for reversal because it may lead the jury to convict the defendant simply because he is viewed as "unsavory and also may . . . divert[] the jury from an objective appraisal of defendant's guilt or innocence for the crimes charged." *Ullah, supra* at 676. This may be especially true where a trained police detective suggests some correlation between a defendant's practice of what might be considered little more than a somewhat unusual sexual practice and the commission of a serious felony. See *People v Kulick*, 209 Mich App 258, 260; 530 NW2d 163 (1995), remanded 449 Mich 851; 535 NW2d 788 (1995) (prosecutor may not seek to obtain conviction based on the prestige of the police). Because defense counsel's failure to object to Stephens' testimony fell below an objective standard of reasonableness and prejudiced defendant, we find further grounds for reversal of defendant's convictions.

In light of our above conclusions, we do not reach defendant's other allegations of error.

Defendant's convictions are reversed. This case is remanded for a new trial or other appropriate proceedings consistent with this opinion. We do not retain jurisdiction.¹

/s/ David H. Sawyer

/s/ William C. Whitbeck

I concur in result only.

/s/ Jane E. Markey

¹ Defendant raises numerous other issues in his brief on appeal. However, because we reverse his convictions on the basis that he received ineffective assistance of counsel at trial, there is no need to address these additional issues.