

Unpublished Opinion from MI Court of Appeals

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, UNPUBLISHED

October 14, 2008

Plaintiff-Appellee,

v No. 273407

Emmet Circuit Court

JOEL NATHAN DUFRESNE, LC No. 06-002597-FC

Defendant-Appellant.

Before: Hoekstra, P.J., and Cavanagh and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his convictions following a jury trial of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f) (using force or causing injury), and six counts of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(f) (using force or coercion).

We affirm.

Defendant's convictions arose out of multiple forced sexual acts with his former girlfriend. The girlfriend testified that defendant threatened to kill her, her daughters, and her parents if she reported the acts to law enforcement authorities. She further testified that defendant told her that he would take their son away from her if she refused to participate in the sexual acts.

Defendant first argues that his constitutional right to a fair trial was violated when two police officers testified that he invoked his right to counsel and his right to remain silent. We review this preserved claim of error to determine whether any constitutional error occurred; if an error occurred, we then determine whether the beneficiary of the

error has established that the error was harmless beyond a reasonable doubt. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

A defendant's exercise of his Miranda rights may not be used as evidence at trial. *Doyle v Ohio*, 426 US 610, 619; 96 S Ct 2240; 49 L Ed 2d 91 (1976); *People v Dennis*, 464 Mich 567, 573-574; 628 NW2d 502 (2001). Here, the investigating officers both testified, in response to the prosecutor's open-ended questions, that defendant had invoked his right to counsel. The references to defendant's request for counsel were relatively brief, and the prosecutor neither attempted to impugn the request for counsel nor to create any inference from the invocation of the right to counsel. As such, under *Dennis*, supra at 628, the police officers' testimony did not violate defendant's right to a fair trial.

Defendant next argues that prosecutor committed misconduct by eliciting testimony about defendant's ties to a white supremacist organization. Similarly, defendant argues that his trial counsel was ineffective for failing to object to this testimony. We review the unpreserved claim of prosecutorial misconduct for plain error affecting defendant's substantial rights.

Carines, supra at 774. For the preserved claim of ineffective assistance of counsel, we review the trial court's factual findings for clear error and conduct a de novo review of the legal issues.

People v Dendel, 481 Mich 114, 124; 748 NW2d 859 (2008). We see no misconduct on the part of the prosecutor, and conclude that counsel's performance was effective with regard to the general testimony addressing white supremacist activities.

To establish prosecutorial misconduct in this case, defendant must demonstrate that the evidence regarding the white supremacist activities was inadmissible and that the presentation of that evidence denied defendant a fair and impartial trial. *People v Dobek*, 274 Mich App 58, 63-64; 732 NW2d 546 (2007). We conclude that the general testimony about defendant's involvement in the white supremacist activities was admissible, in that it tended to establish certain aspects of defendant's relationship with the victim. See MRE 401. The testimony was not unduly prejudicial under MRE 403, because defendant himself acknowledged his involvement in the organization and described some of the members' activities. Moreover, as defense counsel explained in the Ginther hearing, it was necessary to apprise potential jurors of defendant's white supremacist views in order to ensure that the jurors would be able to treat defendant fairly notwithstanding his views. Because the testimony was relevant and admissible, the admission of the testimony did not violate defendant's constitutional rights and defendant's counsel cannot be deemed ineffective for failing to object to the testimony. "Trial counsel cannot be faulted for failing to raise an objection or motion that would have been futile." *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Similarly, there was no misconduct in the specific questioning of one of the police officers concerning the supremacist organization. Nothing in the prosecutor's questions indicates that the prosecutor was attempting to elicit improper evidence. Although the officer's response, with reference to an FBI investigation of the murder of a Chicago

judge's family, may have been inadmissible, the lack of admissibility cannot be ascribed to any conduct by the prosecutor.

Defendant's counsel acknowledged at the Ginther hearing that he could have asserted an objection to the officer's reference to the Chicago murder. Assuming that the lack of objection was an error by defendant's counsel, no reversal is required unless defendant establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v Washington*, 466 US 668, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

The record demonstrates that the result of the proceeding would have been the same regardless of the reference to the Chicago murder. The prosecutor presented evidence on each element of each offense, and the sole exculpatory testimony came from defendant. The trial court found at the Ginther hearing that defendant's testimony lacked credibility. We defer to the trial court's credibility determinations, *People v Vaughn*, 186 Mich App 376, 380; 465 NW2d 365 (1990), and further note that defendant's coarse, irrational, and often rambling responses would likely undermine his credibility with the jurors. In sum, defendant cannot demonstrate any probability that the result of the trial would have been different had his counsel objected to the challenged testimony.

Defendant presents similar challenges to the testimony of his cellmate regarding defendant's demeanor and the cellmate's concern for his own safety, as well as to other police testimony about the scope of the investigation. We need not address these challenges in detail, other than to state that the challenged testimony was admissible. Given that the testimony was admissible, the prosecutor cannot be deemed to have committed misconduct in eliciting it. See *Dobek*, supra at 66. Moreover, defendant's counsel cannot be deemed ineffective for failing to object to admissible testimony because any objection would have been futile. *Fike*, supra 182-183.

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The jury acquitted defendant on three counts of CSC I.

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Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

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People v Ginther, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Joel P. Hoekstra

/s/ Mark J. Cavanagh

/s/ Brian K. Zahra