

APPENDIX A

Court of Appeals, State of Michigan

ORDER

People of MI v Carl Allen Watts

Docket No. 339174

LC No. 2010-232734-FH

Colleen A. O'Brien
Presiding Judge

Kathleen Jansen

Jonathan Tukel
Judges

The Court orders that the motion to waive fees is GRANTED and fees are WAIVED for this appeal only.

The application for leave to appeal is DENIED because defendant has failed to establish that the trial court erred in denying the motion for relief from judgment.

Colleen A. O'Brien
Presiding Judge



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

DEC 15 2017

Date

Jerome W. Zimmer Jr.
Chief Clerk

APPENDIX B

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE

Plaintiff,

v

WATTS, CARL ALLEN,

Defendant,

NO: 2010-232734-FH

HON. HALA JARBOU

ORDER

At a session of Court
held in Oakland County, Michigan
on 07/21/2017

THE COURT FINDS:

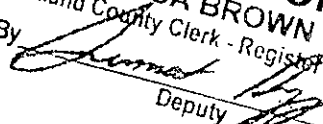
Defendant has filed a Motion for Reconsideration and Motion for Ginther Hearing. The motions pertain to this Court's Opinion and Order dated June 19, 2017 denying Defendant's Motion for Relief from Judgment. As to the Motion for Reconsideration, the Court finds that Defendant merely presents the same issues ruled upon by the Court, either expressly or by reasonable implication. MCR 2.119(F)(3). As to the Motion for Ginther hearing, the Court determined that an evidentiary hearing was not required in the June 19, 2017 Opinion and Order. Accordingly, this motion is actually a motion for reconsideration. The Court finds Defendant merely presents the same issues ruled upon by the Court, either expressly or by reasonable implication. MCR 2.119(F)(3).

THEREFORE, THE COURT HEREBY ORDERS:

Defendant's Motion for Reconsideration is DENIED.
Defendant's Motion for a Ginther Hearing is DENIED.


HON. HALA JARBOU

Circuit Court Judge

A TRUE COPY
LISA BROWN
Oakland County Clerk - Register of Deeds
By  Deputy

Proof of Service

The undersigned certifies that the foregoing was served upon the parties or attorney(s) in the above cause by depositing a copy in the U.S. Mail, postage prepaid in an envelope addressed to same on 7/21/17


Judicial Law Clerk/Judicial Staff Attorney

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v

Case No. 2010-232734-FH
Hon. Hala Jarbou

CARL ALLEN WATTS,

Defendant.

JESSICA R. COOPER (P23242)
Oakland County Prosecutor
1200 N. Telegraph Rd.
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DANA B. CARRON (P44436)
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Westland, MI 48185
(734) 502-5680

OPINION AND ORDER

At a session of said Court held in the
Courthouse, City of Pontiac, Oakland County,
Michigan on 6/19/2017

PRESENT: THE HONORABLE HALA JARBOU, Circuit Judge

This matter is before the Court on Defendant's motion for relief from judgment under MCR 6.501 *et seq.* The prosecutor has filed a response. After reviewing the motion, the response and the record, this Court has determined that an evidentiary hearing is not required. MCR 6.508(B). Defendant is not entitled to the relief requested.

I.

Following a jury trial, Defendant was convicted of three counts of third-degree criminal sexual conduct (person at least 13 and under 16 years of age), MCL 750.520d(1)(a). He was sentenced as a fourth habitual offender, MCL 769.12, to 20 to 60 years' imprisonment.¹ He appealed as of right, arguing that the trial court abused its discretion when it allowed the prosecutor to admit evidence pursuant to MCL 768.27a, of three of Defendant's other sexual acts with the victim without assessing the relevance of the acts, without determining whether they were unduly prejudicial under MRE 403, and without requiring the prosecutor to specify which three of the other acts listed in the prosecutor's motion that the prosecutor intended to introduce at trial. The Court found no abuse of discretion in that all of the acts listed, which the trial court counted as "at least 15, and probably more like 20," were relevant to prove Defendant's propensity to commit the charged offenses. The Court also found that, because the trial court limited the introduction of other-acts evidence to only three acts, the court decreased the potential for unfair prejudice. In addition, the Court found that Defendant had ample notice of the evidence that the prosecutor sought to introduce and, therefore, could not claim surprise.

Defendant also claimed for the first time on appeal that the prosecutor elicited testimony regarding more than three of the listed other acts. The Court of Appeals, however, expressly found that the prosecutor elicited testimony from the victim during direct examination regarding only three of the listed other acts. On cross-examination, defense counsel asked if anything had happened in August. After the victim answered, "Yes," defense counsel quickly moved on. On redirect, the prosecutor asked the victim what happened in August, and the victim explained that she and Defendant had engaged in vaginal, anal, and oral sex during August of

¹ Now-retired Judge Rudy Nichols presided over the trial and imposed sentence.

2007. (Tr, Trial, Vol I, p 193.)

The prosecutor maintained that defense counsel had opened the door on cross-examination and that the prosecutor on redirect sought only an explanation of the victim's answer. Though the Court of Appeals questioned whether the circumstances called for an explanation, defense counsel did not object and the trial court twice provided the jury with a cautionary instruction, which the Court held eliminated any prejudice. (Tr, Trial, Vol I, pp 106-107; Vol II, p 113.) The Court of Appeals concluded that Defendant had not demonstrated plain error affecting his substantial rights with regard to the additional other-acts evidence.

Defendant further argued that MCL 768.27a was unconstitutional and violated the separation of powers because it infringed on the Supreme Court's exclusive authority to prescribe rules governing court practice and procedure. Following precedent while recognizing that the Supreme Court had granted leave to address the issue, the Court of Appeals rejected Defendant's argument and concluded that his constitutional claims lacked legal merit.² The Court affirmed Defendant's convictions. *People v Watts*, unpublished opinion per curiam of the Court of Appeals, issued March 27, 2012 (Docket No. 301371). The Supreme Court thereafter denied Defendant's application for leave to appeal. *People v Watts*, 493 Mich 856; 821 NW2d 165 (2012).

Defendant now seeks relief from judgment claiming (1) ineffective assistance of appellate counsel for not presenting on appeal the issue of trial counsel's failure to object to the prosecutor's failure to adhere to the trial court's pretrial order limiting the introduction of other-

² The Supreme Court subsequently held "that MCL 768.27a irreconcilably conflicts with MRE 404(b), which bars the admission of other-acts evidence for the purpose of showing a defendant's propensity to commit similar acts, and that the statute prevails over the court rule because it does not impermissibly infringe on this Court's authority regarding rules of practice and procedure under Const 1963, art 6, § 5." The Court further held "that evidence admissible under MCL 768.27a remains subject to MRE 403, which provides that a court may exclude relevant evidence if the danger of unfair prejudice, among other considerations, outweighs the evidence's probative value." *People v Watkins*, 491 Mich 450, 455-56; 818 NW2d 296 (2012).

acts evidence to a maximum of three other acts; (2) ineffective assistance of appellate counsel for failing to present on appeal the issue of trial counsel's ineffective assistance for failing to move for a mistrial on the ground of prejudice based on the introduction of more than three other acts and the prosecutor's alleged misconduct in introducing the evidence; and (3) ineffective assistance of appellate counsel for failing to present on appeal the issue of prosecutorial misconduct for a statement made during closing argument.

II.

"Post-conviction relief is provided for the extraordinary case in which a conviction constitutes a miscarriage of justice." *People v Reed*, 449 Mich 375, 381; 535 NW2d 496 (1995) (Boyle, J). Defendant has the burden of establishing entitlement to the relief requested. This Court may not grant a motion for relief from judgment that alleges grounds for relief that were decided against the defendant in a prior appeal or 6.500 motion, unless the defendant establishes a retroactive change in the law that has undermined the prior decision. MCR 6.508(D)(2). Additionally, this Court may not grant a motion for relief from judgment that alleges grounds for relief, other than jurisdictional defects, that could have been raised on appeal or in a prior motion, unless the defendant demonstrates both good cause for failure to raise the issue and actual prejudice from the alleged irregularities that support the claim of relief. MCR 6.508(D)(3).

"Good cause" may be established by proving the ineffective assistance of appellate counsel or by showing that some external factor prevented counsel from previously raising the issue. MCR 6.508(D)(3)(a); *Reed, supra* at 378. To demonstrate "actual prejudice," a defendant must show that but for the alleged error, the defendant would have had a reasonably likely chance of acquittal, or that the irregularity was so offensive to the maintenance of a sound

judicial process that the conviction should not be allowed to stand regardless of its effect on the outcome of the case. MCR 6.508(D)(3)(b)(i) and (iii). If either "good cause" or "actual prejudice" is lacking, this Court need not address the other prong before denying the motion. *People v Jackson*, 465 Mich 390, 405-406; 633 NW2d 825 (2001).

III.

Though Defendant bases his motion for relief from judgment on claims of ineffective assistance of counsel, he has failed to request a *Ginther*³ hearing. This Court's consideration of Defendant's motion, therefore, is limited to the record. *People v Heft*, 299 Mich App 69, 80; 829 NW2d 266 (2012). Ineffective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). To establish ineffective assistance of counsel, Defendant must establish that counsel's performance fell below an objective standard of reasonableness and resulting prejudice. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish prejudice, Defendant must demonstrate a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.*; *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

A. Failure to Object.

Defendant first claims that trial counsel was ineffective for failing to object to the introduction of more than three other acts.⁴ However, trial counsel did object when the prosecutor questioned the victim on re-direct examination regarding acts that occurred in August 2007. (Tr, Trial, Vol I, pp 106-107.) The prosecutor responded that, pursuant to her motion to introduce other offenses against the victim pursuant to MCL 768.27a, she had indicated to

³ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

defense counsel that she would be talking about acts that led up to the offense in Waterford. Defendant then stated that, if the court was going to allow the testimony, he would ask for a curative instruction. The court gave the instruction as requested.

The Court of Appeals thoroughly addressed this issue, expressly found that the prosecutor introduced only three other acts, and ruled that any potential prejudice by the introduction of additional other-acts evidence was eliminated by the trial court's limiting instruction to the jury that it could not convict Defendant of the crimes based on his other acts against the victim, citing *People v Wacławski*, 286 Mich App 634, 674; 780 NW2d 321 (2009). Defendant has not alleged a retroactive change in the law that has undermined the Court of Appeals's decision and this Court is bound to follow that ruling. MCR 6.508(D)(2).

As a result, Defendant cannot demonstrate the prejudice necessary for this Court either to find that he was denied the effective assistance of counsel, *Carbin*, 463 Mich at 599–600, or to grant relief on this ground, MCR 6.508(D)(3)(b). The fact that appellate counsel was ultimately unsuccessful on appeal does not necessarily establish that counsel was ineffective. *People v Kevorkian*, 248 Mich App 373, 414–415; 639 NW2d 291 (2001). Defendant has not established that but for the introduction of the additional other-acts evidence, "there is a reasonable probability that the outcome of [the defendant's trial] would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

B. Failure to Move for a Mistrial.

Defendant next argues that trial counsel was ineffective for failing to move for a mistrial based on the introduction of more than three other acts. "A mistrial should be granted only for

⁴ Defendant has not alleged that trial counsel was constitutionally ineffective for "opening the door" by asking the victim if anything happened in August.

an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995) (citations omitted).

The Court of Appeals recognized that a witness should be allowed to explain an answer elicited on cross-examination, citing *People v Bowen*, 77 Mich App 684, 689; 259 NW2d 189 (1977). Though the Court questioned whether an explanation was called for here, the Court nonetheless held that any prejudice would have been eliminated by the court's cautionary instruction. It is well established that jurors are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 487; 581 NW2d 229 (1998). Because the alleged error did not result in any prejudice to Defendant, he cannot establish that his trial counsel was ineffective for failing to seek a mistrial. Counsel is not required to make futile motions. *People v Horn*, 279 Mich App 31, 42 n 5; 755 NW2d 212 (2008). Similarly, an appellate attorney is not required to raise every conceivable issue. *People v Reed*, 198 Mich App 639, 646; 499 NW2d 441 (1993). The failure to assert all arguable claims is not sufficient to overcome the presumption that counsel functioned as a reasonable appellate attorney in selecting the issues presented. *Id.*

C. Prosecutor's Closing Argument.

Defendant next contends that the prosecutor made improper comments during closing argument. Defendant does not argue that his trial counsel was ineffective for failing to object to the prosecutor's statement, but, rather, maintains that his appellate counsel was ineffective for failing to present the issue on appeal. However, Defendant did not preserve his allegation of prosecutorial misconduct by objection. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Consequently, reversal would have been warranted only if plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of Defendant's innocence. *People v*

Ackerman, 257 Mich App 434, 448-449; 669 NW2d 818 (2003) (citations omitted). Thus, where a curative instruction could have alleviated any prejudicial effect, the Court of Appeals will not find error requiring reversal. *Id.* at 449.

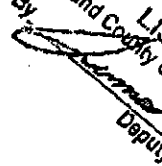
Allegations of prosecutorial misconduct must be examined and evaluated in context. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). In addition, the prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000). "Prosecutors are accorded great latitude regarding their arguments and conduct." *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (citations omitted). They are "free to argue the evidence and all reasonable inferences from the evidence as it relates to [their] theory of the case." *People v Gonzalez*, 178 Mich App 526, 535; 444 NW2d 228 (1989). Nevertheless, prosecutors should not express their personal opinion of a defendant's guilt. *Bahoda*, 448 Mich at 282-283.

Defendant claims that the prosecutor committed prejudicial error by injecting her personal opinion regarding Defendant's guilt and refers this Court to but a single instance in the record: "If you believe beyond a reasonable doubt that three of those sex acts occurred, then you come back with a verdict of guilty, 'cuz that is exactly what he is." The prosecutor's comment came immediately following a recitation of the facts in evidence of the three charged acts. Reviewing this isolated comment in context, this Court finds no outcome-determinative plain error that would have required reversal. Any improper prejudicial effect could have been cured by an appropriate instruction, upon request. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). Again, Defendant has not overcome the presumption that counsel functioned as a reasonable appellate attorney in selecting the issues presented. *Reed*, 198 Mich App at 646.

Defendant has not established a retroactive change in the law that has undermined the Court of Appeals's decision regarding the additional other-acts testimony, MCR 6.508(D)(2). He has demonstrated neither good cause for failing to present his other issues on appeal nor actual prejudice from the alleged irregularities, MCR 6.508(D)(3)(a) and (b). Consequently, this Court cannot grant the relief requested.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Defendant's motion for relief from judgment is denied.


HALA JARBOU, Circuit Judge

A TRUE COPY
By  LISA BROWN
Oakland County Clerk - Registrar of Deeds
Deputy

APPENDIX C

Order

Michigan Supreme Court
Lansing, Michigan

July 27, 2018

Stephen J. Markman,
Chief Justice

157044

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 157044
COA: 339174
Oakland CC: 2010-232734-FH

CARL ALLEN WATTS,
Defendant-Appellant.

On order of the Court, the application for leave to appeal the December 15, 2017 order of the Court of Appeals is considered, and it is DENIED, because the defendant has failed to meet the burden of establishing entitlement to relief under MCR 6.508(D).



10723

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

July 27, 2018

Clerk

APPENDIX D

Order

Michigan Supreme Court
Lansing, Michigan

November 16, 2018

Stephen J. Markman,
Chief Justice

157044(26)(27)

Brian K. Zahra
Bridget M. McCormack
David F. Viviano
Richard H. Bernstein
Kurtis T. Wilder
Elizabeth T. Clement,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 157044
COA: 339174
Oakland CC: 2010-232734-FH

CARL ALLEN WATTS,
Defendant-Appellant.

On order of the Court, the motion for reconsideration of this Court's July 27, 2018 order is considered, and it is DENIED, because it does not appear that the order was entered erroneously. The motion for an evidentiary hearing is DENIED.



d1106

I, Larry S. Royster, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 16, 2018

Clerk