

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL MULLINS,

Defendant-Appellant.

UNPUBLISHED

June 17, 1997

No. 183812

Jackson Circuit Court

LC No. 94-69847-FH

Before: Taylor, P.J. and Hood and Gribbs, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b; MSA 29.788(2), involving his fourteen year old stepdaughter. He was sentenced to a term of twenty-five to fifty years. We affirm.

Defendant argues on appeal that the trial court abused its discretion in denying defendant's motion to adjourn one week prior to defendant's trial date. We do not agree. Defendant argued below that the adjournment was necessary to allow counsel to examine a recently received medical report, to comply with the prosecutor's requested discovery, and to allow defendant to take a requested polygraph examination. The adjournment or continuance of a criminal trial should not be granted except for good cause. MCL 768.2; MSA 28.1025. As defendant acknowledges, the decision whether to grant an adjournment is a matter for the trial court's discretion. *People v Charles O Williams*, 386 Mich 565; 194 NW2d 337 (1972).

We find no abuse of discretion in this case. The trial court considered the appropriate factors in making its decision. The trial had already been adjourned at least once because of defendant's failure to appear for an arraignment. Further, in order to address defense counsel's concern about the medical report, the trial court agreed to grant a recess prior to the testimony of the examining doctor so that counsel could consult with the doctor.

Defendant also argues that he had a statutory right to receive a polygraph examination. MCL 776.21; MSA 28.1274(2). Although defendant failed to request the examination in this case during the months between his arrest and the new trial date, we note that the statute does not provide either a time

limit for a defendant's request, or a remedy for situations where compliance with the statute is impossible. In this case, the trial court agreed to permit defendant to take the examination as soon as a polygraph examiner was available, but the examiner was apparently not available prior to defendant's sentencing.

However, we see no useful purpose in remanding for a polygraph examination, and we do not believe the statute requires us to do so. Defendant is no longer "alleged" to have committed a crime, he has been found guilty of the allegations and sentenced for the crime. See MCL 776.21; MSA 28.1274(2). In addition, we note the results of the polygraph examination, even if they had been obtained prior to trial, are not admissible in evidence, *People v Rogers*, 140 Mich App 576, 579; 364 NW2d 748 (1985). Here, where there was physical evidence, testimony by the complainant, and evidence of defendant's flight after revelation of his crime, it would not have been an abuse of prosecutorial discretion to charge defendant even if he had successfully passed the polygraph. We find that neither reversal nor remand are required on this basis.

Defendant argues in propria persona that counsel was ineffective for eliciting evidence concerning defendant's marital relationship and extramarital affairs. There is no merit to this claim. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Poole*, 218 Mich App 702, 718; 555 NW2d 485 (1996); *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987); *People v Kvam*, 160 Mich App 189, 200; 408 NW2d 71 (1987). Here, we are not convinced that counsel was deficient or that evidence of defendant's marital relationship and infidelity affected the outcome of the trial.

Defendant also contends that the trial court erred in admitting, pursuant to MRE 803(4), the complainant's statements to the emergency room doctor. We do not agree. A statement is admissible under MRE 803(4), if it is made for purposes of medical treatment or diagnosis in connection with treatment, and if it describes medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury. *People v Meeboer (After Remand)*, 439 Mich 310, 322; 484 NW2d 621 (1992). The trial court did not abuse its discretion in admitting the evidence, which related complainant's description of the general character of the cause of her injuries, in this case. In addition, the doctor's statements were essentially cumulative to other evidence presented at trial and any error in this regard was harmless.

Defendant argues that the trial court abused its discretion in its determination concerning rereading testimony to the jurors. There is no merit to this claim. The jurors asked to have a portion of complainant's direct examination reread, and the trial court complied with the jury's request. However, the trial court denied defendant's request that defendant's cross-examination of the witness also be reread to the jury. The extent of the material to be reread to the jury is a matter for the trial court's discretion. *People v Lyles*, 148 Mich App 583, 595; 385 NW2d 676 (1986); MCR 6.414(H). The

trial court did not abuse its discretion in refusing to go beyond the jury's request in this case.

Finally, defendant contends that his sentence, which was within the guidelines range, was disproportionate. We disagree. A sentence imposed within an applicable sentencing guidelines range is presumptively proportionate. *People v Broden*, 428 Mich 343, 354-355; 408 NW2d 789 (1987). Defendant in this case has presented no unusual circumstances which overcome the presumption. *People v Daniel*, 207 Mich App 47, 54; 523 NW2d 830 (1994), Defendant was convicted of the sexual penetration of his stepdaughter, a fourteen year old child. Defendant has an extensive juvenile history, a significant adult criminal history, and a record of major misconducts and parole violations. We find defendant's sentence proportionate to the offender and the offense. *People v Milbourn*, 435 Mich 630, 661; 461 NW2d 1 (1990).

Affirmed.

/s/ Harold Hood

/s/ Roman S. Gibbs