STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 2, 2000
v	No. 209511 Wayne Circuit Court
ALLEN M. HITCHCOCK, Defendant-Appellant.	Criminal Division LC No. 96-009459

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

PER CURIAM.

Following a bench trial, defendant was convicted of six counts of first-degree criminal sexual conduct ("CSC"), MCL 750.520b(1)(a); MSA 28.788(2)(1)(a), two counts of third-degree criminal sexual conduct, MCL 750.520d(1)(c); MSA 28.788(4)(1)(c), and disseminating sexually explicit material to a minor, MCL 722.675; MSA 25.254(5). Defendant was sentenced to twenty to forty years in prison for each of the first-degree CSC convictions, three to fifteen years in prison for each of the third-degree CSC convictions and to time served for the dissemination conviction, the sentences to run concurrently. Defendant now appeals as of right. We affirm.

During the summer and early fall of 1996, two girls claimed they were sexually assaulted multiple times by defendant, the maintenance supervisor of their apartment building in Detroit. The younger victim was eleven years old at the time of the assaults and the other victim was eighteen years old, but was mentally impaired.

Defendant contends that the trial court abused its discretion by denying his motion for a new trial based on newly discovered evidence. We disagree.

This Court reviews a trial court's denial of a post-conviction motion for a new trial for an abuse of discretion. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). A new trial may be granted based on newly discovered evidence if a party's substantial rights are materially affected by material evidence that "could not with reasonable diligence have been discovered or produced at trial." MCR 2.611(A)(1)(f). To prove such a claim, the moving party must show that "(1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the

evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial." *Lester, supra*, 232 Mich App 271.

The newly discovered evidence in this case was the diary of the younger victim, which was found by Crosby, the apartment building owner, after her family moved out of the building. During the motion hearing, defendant claimed that the evidence was unavailable during trial and that it could not have been presented at that time. Defendant had the burden of showing that the diary was actually newly discovered, that it was not available until after trial and that it could not have been discovered through reasonable diligence. Defendant made no such showing, so those elements were not satisfied.

In addition, the diary is not relevant or material to this case because it does not refer to the time period at issue. The diary is a day-to-day account of the younger victim's thoughts four or more months after the incidents at issue and is not relevant to her thoughts or behavior during the summer and early fall of 1996. Also, the victim's claims of later sexual activity with others in no way evidences her motives or defendant's lack of culpability. Further, as defendant concedes, the diary never even mentions defendant or any of the incidents of assault.

Moreover, even if the diary were considered relevant, it does not support defendant's motion for a new trial. Defendant argued that the diary corroborates his theory that the younger victim behaved inappropriately in the apartment building and shows her ulterior motive to lie about the assaults. Defendant testified at trial that he told the victims' mother that the younger girl had a crush on him and that he felt uncomfortable around her because she was "acting very fast" and was wearing revealing clothes. However, as noted above, there is no mention in the diary of the victim's thoughts about or relationship with defendant.

Moreover, the diary does not show that the younger victim's behavior was inappropriate to others in the building. There is no reference to "constant complaints" by other tenants or about the girl "carrying on publicly" as defendant argued. The victim does mention that Crosby saw her sister let two boys into the apartment on one occasion, but no complaint is discussed. Further, the younger victim's other accounts of dating or sex do not appear to have occurred in public areas of the building or to the annoyance of her neighbors. The diary simply does not support defendant's argument that the younger victim was motivated to lie to cover up her own bad public behavior.

Nor does the diary show that the younger victim lied during her trial testimony. In court, the younger victim testified that she kept a diary of the days on which defendant touched her, but that she left it behind when her family moved out of the apartment. The diary found by Crosby does not mention the incidents but, again, it was not written during the time the incidents occurred. As the trial judge noted in denying defendant's motion, there is no evidence that this diary was the *only* one the victim kept or that a diary reflecting the events of 1996 did not exist.

Finally, defendant argued that the diary shows the younger victim's familiarity with sexual terms even though she feigned innocence in court. During trial, the victim was never asked about her prior sexual experiences. She did decline to use certain technical terms, but she used anatomical names at other points. In short, the younger victim did not indicate a lack of understanding of anatomical words

used by the attorneys and the record does not indicate she showed less knowledge or more modesty than an average twelve-year-old testifying in open court. Further, nowhere in the diary does the victim detail her knowledge of anatomical or sexual words so as to suggest she may have perjured herself. Accordingly, the diary does not support defendant's contention that the victim lied in court.

Because the diary is not relevant to the issues in this case and because it does not provide evidentiary support for defendant's arguments, the outcome of the case would not have been affected by its availability at the time of trial. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial.

Defendant also contends the trial court abused its discretion in denying his motion for a new trial based on the ineffective assistance of counsel. We disagree.

Again, this Court examines the trial court's denial of a new trial for an abuse of discretion. *Lester, supra*, 232 Mich App 271. To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance "fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense so as to deny defendant a fair trial." *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). To prevail, the defendant must overcome the presumption that the challenged action might be considered sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). The failure to call a witness at trial may amount to ineffective assistance of counsel if that failure deprives the defendant of a substantial defense that might have made a difference in the outcome of the trial. *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994). In addition, the defendant must show that the claimed deficiency was prejudicial to the defendant. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Reed*, 453 Mich 685, 594-595; 556 NW2d 858 (1996).

Specifically, defendant argues that defense counsel was ineffective for failing to call a medical expert and a certain lay witness at trial. A *Ginther*[1] hearing was held to establish an evidentiary record of defendant's claim of ineffective assistance of counsel. At the hearing, defense counsel testified that he and defendant discussed, at some length, the medical evidence in the case. Defense counsel recalled that defendant wanted to introduce medical records regarding a Gardnerella infection found on the older victim, but that other doctors said such evidence would not be useful. Because the doctor indicated that such evidence was controversial and would not necessarily be exculpatory to defendant, defense counsel chose not to introduce medical testimony to that effect.

Further, defense counsel explained that, in his opinion, it was not necessary to introduce another doctor's testimony because the doctor called by the prosecutor found no medical signs of abuse on the victims. The doctor testified that he would not necessarily expect to see any physical evidence of abuse on the girls and that it was possible for the older victim's hymen to be intact after the abuse occurred. Both defendant and defense counsel apparently considered these conclusions to be incredible. Defense counsel testified that he thought it was obvious to the court that the doctor's conclusions were

nonsensical and that he was not being forthright. He further testified that he thought it was clear to the trial court that at least some medical evidence would be found of the daily abuse described.

The trial transcript supports defense counsel's explanation. He cross-examined the doctor regarding the lack of physical evidence and he even persuaded him to admit that he would expect to find some physical evidence in these circumstances. Further, defense counsel relied on the testimony as support of defendant's innocence in his closing argument. Arguably, defense counsel could have introduced expert testimony to the effect that some evidence would have been found. However, defendant presents no offer of proof that such testimony would apply in this case. First, the assaults allegedly ended 1½weeks before the victims' examinations. Second, the type of assault the younger victim testified she saw defendant perpetrate on her sister would not necessarily cause lasting physical evidence. And third, no evidence was presented regarding the younger victim's hymen or her sexual experience prior to or during the abuse or prior to the examination. Defendant has offered no proof that medical testimony would establish that the older victim's hymen had to have been broken or that the younger victim would have shown signs of defendant's abuse. Accordingly, defendant has not shown he was prejudiced by defense counsel's failure to introduce another doctor's testimony. Defense counsel's choice not to call a medical expert was reasonable trial strategy and did not amount to ineffective assistance of counsel. Therefore, the trial court did not abuse its discretion in denying defendant's motion for a new trial on that basis.

Defendant also argues that defense counsel was ineffective in failing to call Crystal Toth, defendant's girl friend, at trial. His sole support for this contention is his conclusory assertion that Toth would have provided exculpatory evidence. The trial court denied defendant's motion for a *Ginther* hearing on this issue. Defendant has failed to show he was prejudiced by the failure to call Toth because he has not established that she would have testified favorably for him or that there was a reasonable probability that her testimony would have affected the outcome of the trial. *People v Pickens*, 446 Mich 298, 327; 521 NW2d 797 (1994). Defendant's claim, therefore, is without merit.

Finally, defendant argues that the prosecutor presented insufficient evidence to support the convictions. The standard of review for a sufficiency of the evidence claim in a bench trial is whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt when the evidence is viewed in the light most favorable to the prosecution. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

To prove a claim of first-degree criminal sexual conduct in this case, the prosecutor was required to show that defendant engaged in a sexual penetration with the younger victim and that the victim was under thirteen years of age. *People v Dilling*, 222 Mich App 44, 50; 564 NW2d 56 (1997). To prove a claim of third-degree criminal sexual conduct in this case, the prosecutor was required to show that defendant engaged in sexual penetration with the older victim and that defendant knew or had reason to know that she was mentally incapable or mentally incapacitated. *People v Breck*, 230 Mich App 450, 453; 584 NW2d 602 (1998). Finally, to prove a claim of disseminating sexually explicit material to minors, the prosecutor was required to prove that defendant knowingly disseminated to one of the victims sexually explicit visual material that is harmful to minors. MCL 722.675; MSA 25.254(5).

In dispute is whether there was sufficient evidence that the sexual penetrations and dissemination actually occurred. Defendant correctly asserts that witnesses other than the younger victim did not see him behave inappropriately toward either of the victims. However, there were times during which defendant had both the opportunity and the access necessary to perpetrate the assaults. The victims' mother left the girls alone all day during the summer of 1996 and she asked defendant specifically to look after them. During that time, the victims saw defendant on a daily basis. Also, the girls appeared to be alone with defendant regularly. Defendant took the girls to the store and drove the older girl to work. The girls also helped defendant with building repairs and repeatedly went to defendant's apartment.

Testimony also established that others were not necessarily present when defendant was with the victims. Newsome visited defendant approximately three times per week and usually at night or in the late afternoon. It appears that Crosby may not have been in the apartment building during the day because he ran a video store across the street and, when the younger victim was locked out of her apartment, she had to cross the street to get the key from him. Finally, although Toth lived with defendant for at least part of the period in question, testimony varied regarding when she was actually in the apartment building. This evidence, taken in the light most favorable to the prosecution, was sufficient for the court to conclude that defendant had access to the victims and that the girls were alone with him on different occasions.

The younger victim described vaginal and anal penetrations, as well as oral sex, and she indicated that these assaults occurred on a daily basis. The younger victim further testified that she saw defendant penetrate her sister and perform oral sex on her. And, she testified that defendant gave her a copy of Playgirl magazine and showed her pornographic movies. In support of this testimony, the victims' mother stated that her daughter told her in November 1996 that defendant gave her the Playgirl magazine. Further, she testified that both girls reported the repeated sexual assaults to her at that time. The victims were also interviewed by the staff at Children's Hospital when they were examined for the assaults on November 23, 1996. The doctor testified that the younger victim reported vaginal, anal and oral intercourse throughout the previous summer. The older victim also indicated that vaginal and oral intercourse was performed on her. This information given to the girls' mother and to the examining doctor in November 1996 was consistent with the testifying victim's statements at trial and the trial court could have found that it lent credibility to her claims.

The evidence in this case, taken in the light most favorable to the prosecution, was sufficient for conviction. Evidence at trial is considered sufficient if, taken as a whole, it justifies submitting the case to the trier of fact, and that was satisfied here. *People v Legg*, 197 Mich App 131, 132; 494 NW2d 797 (1992). Further, in deciding a case, the "trier of fact may make reasonable inferences from the facts, if the inferences are supported by direct or circumstantial evidence." *Id*. In this case, it was for the trial court, acting as the trier of fact, to determine the weight of testimony and to resolve credibility disputes and this Court should not resolve such issues anew. *People v Wolfe*, 440 Mich 508, 514; 489 NW2d 748, amended 441 Mich 1201 (1992). Also, if a question arises regarding conflicting testimony, the trial court's resolution of a factual issue is entitled to deference. *People v Burrell*, 417 Mich 439, 448-449; 339 NW2d 403 (1983). And, finally, because it is a well established rule that a conviction may be

based on the uncorroborated evidence of a criminal sexual assault victim, defendant's convictions were supported by sufficient evidence. *People v Lemmon*, 456 Mich 625, 642-643 n 22; 576 NW2d 129 (1998).

Affirmed.

/s/ Mark J. Cavanagh
/s/ David H. Sawyer
/s/ Brian K. Zahra

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