STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MANOJ KUMAR SHARMA,

Defendant-Appellant.

UNPUBLISHED
December 13, 2002

No. 231104
Macomb Circuit Court
LC No. 98-001834-FC

Before: Saad, P.J., and Smolenski and Owens, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). He was sentenced to concurrent terms of 15 to 30 years' imprisonment for the CSC I counts and 10 to 15 years' imprisonment for the CSC II counts. Defendant appeals as of right. We affirm.

Defendant first argues that his counsel was ineffective because he advised defendant to waive the statutory marital privilege, MCL 600.2162. We disagree. Whether an attorney failed to provide effective assistance of counsel is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court's findings of fact are reviewed for clear error, but questions of constitutional law are reviewed de novo. *Id.*

To prevail on a claim that counsel was ineffective, a defendant must show (1) that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). There is a strong presumption that counsel's assistance was sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). Decisions regarding the calling of witnesses are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). In general, this Court will not second-guess a counsel's judgment on matters of trial strategy. *Id.* That a trial strategy fails does not make counsel's assistance ineffective. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001).

Statements attributed to defendant's wife in police reports were highly favorable to the prosecution, but in both a letter to defense counsel and in oral discussions with him, defendant's

wife mitigated those statements and indicated she did not believe defendant had molested their two nieces. After she testified, however, defendant and his counsel concluded that she had not been truthful with them regarding her proposed testimony. The fact that her testimony contradicted their expectations does not change the fact that counsel had good reasons for thinking it would be favorable. *Kevorkian, supra* at 414-415. Therefore, defendant fails to show that his counsel's advice regarding the waiver was not sound trial strategy, and the trial court properly found that defendant received effective assistance of counsel. *Stanaway, supra* at 687; *Rodgers, supra* at 714.

Defendant next argues that his waiver of the marital privilege, while voluntary, was unknowing because his understanding of the admissibility of his wife's statements in the police reports absent her appearance as a witness was inaccurate. Whether a waiver was knowing is a question of law that is reviewed de novo. *People v Daoud,* 462 Mich 621, 629-630; 614 NW2d 152 (2000).

Privilege, with respect to the admission of evidence at trial, "is governed by the common law, except as modified by statute or court rule." MRE 501. The statutory marital privilege, MCL 600.2162, combines the common-law spousal privilege, which bars all testimony if the proposed witness and defendant are legally married at the time the privilege is asserted, and the common-law confidential communication privilege, which applies only to communications made during a marriage and survives regardless of the parties' marital status at the time of trial. *People v Stubli*, 163 Mich App 376, 379-380; 413 NW2d 804 (1987). At the time of trial, MCL 600.2162 read, in pertinent part:

> (1) A husband shall not be examined as a witness for or against his wife without her consent or a wife for or against her husband without his consent, . . .
>
> (2) [A] married person or a person that has been married previously shall not be examined as to any communication made between that person and his or her spouse or former spouse during the marriage.

This case involves both the spousal and the confidential communication privilege because defendant's wife's comments dealt both with events she observed and with communications from defendant.

A waiver is an intentional and voluntary relinquishment of a known right or privilege. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Hamacher*, 432 Mich 157, 170 n 3; 438 NW2d 43 (1989) (Levin, J). The confidential communication privilege "is the privilege of the parties . . . and may be waived." *O'Toole v Ohio German Fire Ins Co*, 159 Mich 187, 192; 123 NW 795 (1909), overruled on other grounds *People v Fisher*, 442 Mich 560 (1993). This rule should also apply to the spousal privilege because "it is the essence . . . of every privilege that it may be waived." 8 Wigmore, Evidence, § 2334, p 645, quoted in *Hamacher, supra* at 193 (Boyle, J, dissenting).

Even if defendant's wife's statements in the police reports were inadmissible absent her testimony, and even if defendant incorrectly assumed they *would* have been admissible in that circumstance, that misunderstanding does not make defendant's waiver ineffective. The level of

understanding required to satisfy the knowledge component in a valid waiver of *Miranda*[1] rights need not include foresight into the "ramifications and consequences" of the choice to waive. *Daoud, supra* at 636. All that is required is that a defendant understand the basic elements of the rights involved. *Id.* at 640. There is no logical or reasoned basis for applying a stricter or higher knowledge requirement to the waiver of the statutory marital privilege than to the waiver of a constitutional guarantee. Therefore, by analogy, only defendant's understanding of the marital privilege itself, and not any misunderstanding regarding the consequences of its invocation or waiver, is relevant. We find the trial court's explanation of the marital privilege adequate and defendant's testimony in waiving the privilege clear, unequivocal, and understanding. Consequently, the court did not err in finding that defendant knowingly waived the marital privilege. *Carter, supra* at 215; *Hamacher, supra* at 170 n 3.

Defendant finally argues that the trial court erred in computing the minimum sentences for his convictions under the judicial sentencing guidelines by scoring ten points for offense variable (OV) 6. The scoring of offense variables is reviewed for an abuse of discretion. *People v Raby*, 218 Mich App 78, 85; 554 NW2d 25 (1996).

Defendant's sentences are controlled by the judicial guidelines because the charged offenses occurred before January 1, 1999. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). OV 6 instructs that ten points be scored if there were two or more victims. Michigan Sentencing Guidelines (2d ed, 1988), p 44. It further states that "[e]ach person who was placed in danger of injury or loss of life [should be counted] as a victim." *Id.* OV 6, therefore, does not require that victims be the subject of crimes; only that they be near enough during the commission of the offense for which a defendant is being sentenced to be in danger of injury or loss of life. *People v Chesebro*, 206 Mich App 468, 473; 522 NW2d 677 (1994). Young girls like the victims in this case who are exposed to the possibility of vaginal penetration are, at a minimum, placed in danger of injury from tearing, bruising, and sexually transmitted disease. *People v Whitfield*, 425 Mich 116, 126; 388 NW2d 206 (1986); *People v Naugle*, 152 Mich App 227, 237; 393 NW2d 592 (1986).

In this case, the reported instances of sexual abuse occurred while defendant's two young nieces were staying in his home. The victims' testimony revealed that defendant had digitally penetrated both girls and that on more than one occasion, each of the girls was assaulted while the other was either present or nearby. This evidence supported the trial court's conclusion that both girls were victims because, when defendant penetrated one girl, the other was also in danger of injury from penetration. Therefore, the trial court did not abuse its discretion in scoring ten points for OV 6 because its conclusion was not so grossly violative of fact and logic that it

evidenced perversity of will, defiance of judgment, and the exercise of passion or bias. *People v*

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

Ullah, 216 Mich App 669, 673; 550 NW2d 568 (1996).

Affirmed.

/s/ Henry William Saad
/s/ Michael R. Smolenski
/s/ Donald S. Owens