

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LORINDA IRENE SWAIN,

Defendant-Appellant.

UNPUBLISHED

February 24, 2004

No. 244804

Calhoun Circuit Court

LC No. 01-004547-FC

Before: Sawyer, P.J., and Saad and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a). She was sentenced to four concurrent terms of twenty-five to fifty years' imprisonment. She appeals as of right. We affirm.

Defendant first argues that trial counsel's failure to list Dr. Stephen Miller as a defense expert and his late filing of the witness list days before trial deprived her of her constitutional right to effective assistance of counsel. We disagree.

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, but for counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Kevorkian*, 248 Mich App 373, 411; 639 NW2d 291 (2001).

Defendant has failed to establish that trial counsel's failure to respond to the prosecutor's initial demand to produce a list of expert and lay witnesses before August 2, 2002, constituted objectively unreasonable representation. Testimony presented at the *Ginther*¹ hearing established that trial counsel filed a witness list naming Miller at least seven days before trial and furnished the prosecutor with that list. Thus, the prosecutor was apprised that defense counsel might call the witness. Further, defendant presents no evidence establishing that defendant's representation was adversely affected by trial counsel's decision to wait until August 2, 2002, to file that witness list. Defense counsel's testimony indicates that his reason for not calling Miller

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

had nothing to do with the timing of the filing of his witness list. Accordingly, there is no indication that his delay in filing his witness list amounted to objectively unreasonable representation or that it affected the outcome of trial in any way.

Likewise there is no indication that defense counsel's failure to call Miller to testify at trial was objectively unreasonable representation. Trial counsel testified that his decision not to call Miller to the stand was based on trial strategy after the court issued the sequestration order. Because this Court will not substitute its judgment for that of counsel regarding matters of trial strategy, *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999), and because decisions as to whether to call witnesses are presumed to be matters of trial strategy, *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999), defendant has failed to establish that defense counsel's failure to call Miller rose to the level of ineffective assistance.

Defendant next argues that nine instances where trial counsel failed to object to allegedly improper evidence introduced at trial deprived her of her right to effective assistance. Because defendant failed to demonstrate how trial counsel's failures likely affected the outcome of trial, she has failed to establish a claim of ineffective assistance.

Defendant next argues that trial counsel's questioning of a prosecution expert witness regarding his opinion as to whether the victim was abused and trial counsel's failure to object to an expert witness' testimony that the victim manifested behavior consistent with some children who have been sexually abused deprived her of effective assistance of counsel. We disagree.

The expert never expressed an opinion regarding defendant's guilt or innocence, or an opinion regarding the credibility of the victim's testimony. On direct-examination, the expert explained certain behaviors that sexually abused children typically manifest. Then he compared the victim's behaviors with those common symptoms of sexually abused children and determined that the behaviors and symptoms were "consistent." He never testified that defendant abused the victim, or that the victim was credible. On the contrary, he testified that he could not state whether abuse occurred and that his role, as a psychologist, is not to determine guilt or innocence. He then explained how the law prohibited him from expressing his opinion as to whether criminal sexual conduct occurred. Because we conclude that defendant's argument is based on a misrepresentation of trial testimony, we further conclude that defendant failed to establish a claim of ineffective assistance.

Next, defendant argues that the trial court erred when it permitted the expert to testify about the allegations contrary to the parameters set forth in *People v Peterson*, 450 Mich 349, 373-374; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995). Reviewing this unpreserved issue for plain error that affected defendant's substantial rights, *People v Carines*, 460 Mich 750, 763, 773; 597 NW2d 130 (1999), we disagree.

Under *Peterson*, an expert may testify that the victim's behavior is consistent with that of a sexually abused child where defendant attacks the child's credibility on the basis of that behavior. *Peterson, supra*. During cross-examination, defense counsel attacked the victim's credibility by asking the victim why he waited so long to tell anyone about the abuse and by asking him whether his getting into trouble for doing "bad sexual things" to his cousin prompted him to disclose the abuse. Implicit in defense counsel's questioning was the suggestion that the victim contrived the allegations in order to avoid getting in trouble for committing improper

sexual acts with one of his cousins. Defense counsel's decision to raise the victim's sexually reactive behavior towards other children opened the door for the prosecution expert's testimony that the victim's behavior was consistent with that of sexually abused children. *People v Lukity*, 460 Mich 484, 501; 596 NW2d 607 (1999). Because the expert's testimony fell within the parameters of permissible expert testimony set forth in *Peterson*, defendant has failed to establish any error, let alone plain error that affected defendant's substantial rights.

Defendant next argues that trial counsel deprived her of her right to the effective assistance of counsel by failing to object to, or opening the door to, the admissibility of prejudicial evidence regarding defendant's crack cocaine addiction, her prostitution, her violation of court orders, her threats, and her marijuana and alcohol use. Defendant has abandoned this issue because her two-sentence argument does not properly address the merits of her assertion of error. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 406; 651 NW2d 756 (2002).

Defendant argues that an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), is necessary to establish that trial counsel's failure to present a videotape of the victim denying that defendant abused him deprived her of effective assistance. Because defendant received a *Ginther* hearing on this issue, we find no merit to this argument. At that hearing, trial counsel testified that the reason he did not introduce the videotape into evidence was because it was inadmissible hearsay and because he already elicited the victim's sworn testimony that the victim told his grandparents the sexual abuse never occurred. Because defendant has failed to establish how defense counsel's failure to present inadmissible evidence constituted objective unreasonable representation or how the failure to introduce the inadmissible videotape likely affected the outcome of trial, we find no merit to defendant's argument.

Defendant also argues that the trial court abused its discretion when it denied his motion for a new trial on the basis of newly discovered evidence. We disagree.

To justify a new trial on the basis of newly discovered evidence, the moving party must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the newly discovered evidence is not merely cumulative; (3) including the new evidence on retrial would probably cause a different result; and (4) the party could not with reasonable diligence have discovered and produced the evidence at trial. *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003).

Defendant has failed to show that the newly discovered evidence is not merely cumulative and that the new evidence on retrial would probably cause a different result. The incident report and victim's statement attached to defendant's new trial motion are cumulative because trial counsel elicited testimony that the victim told his grandparents, aunt and cousins that no sexual abuse occurred. Thus, the jury had evidence that the victim previously recanted the allegations of sexual abuse. In addition, defendant has not established that the incident report and statement would probably cause a different result on retrial because similar evidence was placed before the jury at trial.

Affirmed.

/s/ David H. Sawyer
/s/ Henry William Saad
/s/ Richard A. Bandstra