

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ERIC ANDREW GARDNER,

Defendant-Appellant.

UNPUBLISHED

June 8, 2004

No. 245726

St. Clair Circuit Court

LC No. 02-000488-FC

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right a jury conviction of seven counts of first-degree criminal sexual conduct (CSC I). He was sentenced as a fourth or subsequent offense habitual offender to concurrent terms of 30 to 50 years' imprisonment for each count. We affirm.

I. FACTS

Defendant Eric Gardner moved in with Amy Lashbrook and her two daughters when the girls were 8 and 10 or 9 and 11. Three months later, defendant was living with the girls and their mother on a regular basis. According to the girls, when they were 9 and 11, defendant began touching them in a sexual manner; later, the alleged abuse escalated to include vaginal, oral, and at least one attempted anal penetration. The alleged abuse continued until the one of the girls reported it to her aunt, Cassandra LaPorte, who was visiting in December 2001.

Once Ms. LaPorte learned of the alleged abuse, she took the girls to the City of Port Huron Police Department and to the hospital. The police interviewed the girls, who both recounted several incidents of abuse and acknowledged knowing that defendant was abusing their sibling. During her interview, one of the girls reported seeing a scar above defendant's penis.

At the hospital, the girls were physically examined. Port Huron Hospital emergency room physician Paul Jerry, M.D., later testified that the girls showed physical characteristics consistent with sexual abuse.

Based on this evidence, police confiscated bedding and a sexually explicit video from defendant's Glenwood residence. The bedding was tested for defendant's DNA, but no DNA found. The day after items were confiscated, City of Port Huron Police took defendant to the police station. According to one officer, en route to the station, defendant made a statement to

the effect that this had happened before and the girls would never testify against him. However, the officer did not record this statement. At the station, officers photographed defendant's genitalia. The only scar defendant had was the result of a hernia surgery, located under his navel by his underwear line.

The girls' mother, Amy Lashbrook, was also interviewed. According to police testimony, Ms. Lashbrook stated that defendant told her that one of her daughters gave better "blow jobs" than she did and that defendant had talked her out of taking the girls' for pap smears.

Based on this evidence, police arrested defendant and charged him with multiple counts of first degree criminal sexual conduct, MCL 750.520b.

At trial, during opening statements, defense counsel started to argue that the girls had a history of sexual activity, were on birth control, and that one had a history of making allegations of sexual abuse to get her way. The prosecutor objected, arguing the evidence was barred by the rape-shield law, MCL 750.520(j). The trial judge determined that defendant could present evidence about such an incident in Michigan, later recanted, but not about incidents in Kentucky.

Later, an officer testified about the unrecorded statements made by the defendant. The defense took issue with this testimony because defense counsel had not been informed of the testimony through discovery. The prosecutor explained that the statement had never been recorded and only had been learned the day before trial. Additionally, the statements made by Amy Lashbrook were used to impeach her testimony that she did not suspect defendant of sexually abusing her daughters.

The trial resulted in defendant being found guilty and convicted of seven counts of first degree criminal sexual conduct, MCL 750.520b. This appeal followed.

II. DISCOVERY EVIDENCE

Defendant first argues that he was denied a fair trial by admission of evidence not previously provided by the prosecution, namely, defendant's unrecorded oral statement made en route to the police station for questioning. We disagree.

A. Standard of Review

A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003).

B. Analysis

In criminal proceedings, parties must, if requested, provide "any *written or recorded* statement by a lay witness whom the party intends to call at trial." *People v Holtzman*, 234 Mich App 166, 174; 593 NW2d 617 (1999) (emphasis added), quoting MCR 6.201(A)(2). In *People v Tracey*, 221 Mich App 321, 324; 561 NW2d 133 (1997), this Court stated that the prosecutor had no obligation to disclose to a defendant an unrecorded statement discovered by the prosecutor the day before trial, because MCR 6.201(A)(2) only requires the production of

written or recorded statements. *Tracey, supra*, 221 Mich App at 324. Here, the statements were recalled from an officer's memory; therefore, MCR 6.201(A)(2) does not apply.

III. HEARSAY EVIDENCE

Defendant next argues that the court improperly admitted hearsay. We disagree.

A. Standard of Review

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *Katt, supra*, 468 Mich at 278. An abuse of discretion occurs when an unprejudiced person, considering the facts before the court, would find no justification or excuse for the ruling. *Snider, supra*, 239 Mich App at 419.

B. Analysis

A witness may be impeached by prior inconsistent statements, MRE 613, by the party who called the witness, MRE 607. Moreover, when used for impeachment purposes, a prior statement is not offered to prove the truth of the matter asserted:

When a witness claims not to remember making a prior inconsistent statement, he may be impeached by extrinsic evidence of that statement. *Hill v Harbor Steel & Supply Corp*, 374 Mich 194, 215; 134 NW2d 54 (1965); 2 Torcia, Wharton's Criminal Evidence (14th ed), § 434, pp 749-750. The purpose of extrinsic impeachment evidence is to prove that a witness made a prior inconsistent statement – not to prove the contents of the statement. *People v Rodgers*, 388 Mich 513, 519; 201 NW2d 621 (1972). [*People v Jenkins*, 450 Mich 249, 256; 537 NW2d 828 (1995).]

Amy Lashbrook's prior recorded statements were used to impeach her inconsistent trial testimony, namely, that she did not suspect defendant was abusing her daughters. They were not used to prove the content of those statements. Therefore, the trial court properly admitted the statements.

IV. EVIDENCE OF FALSE ALLEGATIONS

Defendant next argues that exclusion of evidence of false allegations, the girls' sexual activity, and their use of birth control violated his right of confrontation. We disagree.

A. Standard of Review

Admissibility of evidence under MCL 750.520j is reviewed for an abuse of discretion. *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). "The trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation. *Id.* at 351. Unpreserved constitutional issues are reviewed for clear error affecting a defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999), citing *United States v Olano*, 507 US 725, 731-734; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

B. Analysis

To determine whether the victim's sexual conduct with others is admissible, a defendant must make an offer of proof with respect to relevancy; if the offer of proof is insufficient the court will deny the motion. *People v Haley*, 153 Mich App 400, 407; 395 NW2d 60 (1986), citing *Hackett, supra* at 350-351. "[A] determination whether the notice requirement violated a defendant's right of confrontation must be made case by case." *People v Lucas*, 193 Mich App 298, 303; 484 NW2d 685 (1992), citing *Michigan v Lucas*, 500 US 145; 111 S Ct 1743; 114 L Ed 2d 205 (1991).

Where evidence of a complainant's prior sexual conduct is offered to show the complaining witness's bias or to show past false allegations of rape, it is almost always material and admissible. *Hackett, supra* at 348. And it may be admissible to show the complainant's motive "for making a false charge." *Id.* However, *People v Garvie*, 148 Mich App 444, 448-449; 384 NW2d 796 (1984), and *People v Dale Williams*, 191 Mich App 269, 272-274; 477 NW2d 877 (1991), suggest that before a defendant may present evidence of false allegations, the defendant must show that the allegations are actually false. Moreover, unless the defendant can show that the allegations are false in his offer of proof, he is not entitled to an evidentiary hearing with respect to their admissibility. *Dale Williams, supra* at 274. Regardless, a defendant is not denied the right of confrontation when he is given a limited opportunity to present his theory of defense. *Hackett, supra* at 353.

With respect to defendant's claim that he should have been permitted to present evidence that the girls' hymens were destroyed by someone else, the right of confrontation only extends to relevant and admissible evidence. *Hackett, supra* at 354. Still, evidence of previous sexual contact with someone other than the defendant may be relevant to show misidentification. *People v Adair*, 452 Mich 473, 481 n 6; 550 NW2d 505 (1996) ("the evidence of adult third-party penetration was relevant to prove that the condition of the eight-year-old girl's hymen may have been caused by someone other than the defendant"), citing *Haley, supra* at 407. Our review of the record indicates that defendant was allowed to present – albeit in limited fashion – his theory of defense; he was not denied a right of confrontation. *Hackett, supra* at 353.

Evidence of the victims' sexual conduct with people other than defendant was only minimally relevant and carried a danger of unfair prejudice. *Hackett, supra* at 344-345, citing *People v Arenda*, 416 Mich 1, 8-11; 330 NW2d 814 (1982). Given its minimal relevance, suppression under these circumstances usually does not affect a defendant's right of confrontation. *Hackett, supra* at 345. "There is no logical nexus between a complainant's reputation for unchastity . . . and the character trait for truthfulness." *Hackett, supra* at 352. Therefore, defendant's claim that he was denied the right to confront the victims was without merit.

V. EFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that he was denied effective assistance by his counsel's failure to comply with statutory notice requirements. We disagree.

A. Standard of Review

Appellate review of an ineffective assistance of counsel claim involves a mixed question of fact and constitutional law. *People v Le Blanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's findings of fact for clear error and constitutional questions de novo. *Id.* Appellate review is limited to "mistakes apparent on the record." *People v Walter Williams*, 223 Mich App 409, 414; 566 NW2d 649 (1997).

B. Analysis

To establish a claim of ineffective assistance of counsel, a defendant must show (a) counsel's performance fell below an objective standard of reasonableness, *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000), (b) the proceedings were fundamentally unfair as a result, *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001), and (c) it would have been reasonably probable if not for counsel's error that the results would have been different, *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002). Because defendant was given a limited opportunity to present his theory of defense, he was not denied the right of confrontation. *Hackett, supra* at 353. Therefore, his trial was not fundamentally unfair. Moreover, counsel is presumed effective, and it is up to the defendant to prove otherwise. *LeBlanc, supra* at 578. To do so, the defendant must overcome the presumption that his counsel's actions were matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

Where . . . a defendant does not comply with the statutory notice provision, the trial court should . . . consider the timing of the defendant's offer to produce evidence of this nature. The closer to the date of trial the evidence is offered, the more this factor suggests willful misconduct designed to create a tactical advantage and weighs in favor of exclusion. [*Lucas, supra* at 303.]

Defense counsel's strategy did not work in the instant case because defendant was convicted. However, even where counsel was mistaken regarding matters of trial strategy, this Court will not assess competence using hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Nevertheless, even if cross-examination was improperly limited, the error was subject to a harmless error analysis. *People v Whitfield*, 425 Mich 116, 125; 388 NW2d 206 (1986). A constitutional error is harmless "[if it] is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Mass*, 464 Mich 615, 640 n 29; 628 NW2d 540 (2001), quoting *Neder v United States*, 527 US 1; 119 S Ct 1827; 144 L Ed 2d 35 (1999). By finding defendant guilty, the jury discounted his claims that the victims manufactured their allegations. In light of the evidence supporting conviction, a jury could have found defendant guilty beyond a reasonable doubt. *Mass, supra* at 640 n 29. Therefore, any error in excluding the unrelated allegations of abuse was harmless.

Affirmed.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper