

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ALFRED MCGEE, JR.,

Defendant-Appellant.

UNPUBLISHED

July 22, 2004

No. 248710

Oakland Circuit Court

LC No. 2002-184710-FC

Before: Jansen, P.J., and Meter and Cooper, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (victim under the age of thirteen). He was sentenced to 18½ to 40 years' imprisonment. He appeals as of right. We affirm.

Defendant first argues that the trial court abused its discretion when it denied his motion to introduce other-acts evidence that the victim had previously been disciplined for performing an "act of masturbation" on another adult male. We disagree. The decision whether to admit other-acts evidence is within the discretion of the trial court and will not be disturbed on appeal absent a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). "An abuse of discretion is found only if an unprejudiced person, considering the facts on which the trial court acted, would say that there was no justification or excuse for the ruling made[.]" *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000), or if the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or a defiance of judgment. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002).

Under the rape-shield statute, MCL 750.520j, evidence of a victim's past sexual conduct with others is generally legally irrelevant. *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). The statute provides two narrow exceptions that are not applicable here. However, our Supreme Court has recognized that in certain limited situations, such other-acts evidence may be relevant and its admission may be required to preserve a criminal defendant's Sixth Amendment¹ right to confrontation. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). For

¹ US Const, Am VI.

example, such evidence may be admissible for the narrow purpose of showing the victim's bias, showing the victim's ulterior motive for making a false charge, or showing that the victim has made false accusations of rape in the past. *Id.* However, our Supreme Court has also observed that

[t]he determination of admissibility is entrusted to the sound discretion of the trial court. In exercising its discretion, the trial court should be mindful of the significant legislative purposes underlying the rape-shield statute and should always favor exclusion of evidence of a complainant's sexual conduct where its exclusion would not unconstitutionally abridge the defendant's right to confrontation. [*Id.*]

The right of confrontation protects the introduction of evidence relevant to the matter being tried. See, generally, *People v Davis*, 91 Mich App 434, 441; 283 NW2d 768 (1979).

In the present case, defendant sought to introduce the evidence in question in order to show that the victim had an ulterior motive to fabricate her allegations against defendant. Specifically, defendant wanted to show that because the victim was fearful of being punished for performing an unsolicited and unconsented-to sexual act on defendant, she retrieved some of defendant's semen, inserted it into her rectum, and contrived a false allegation of rape. Identifying an ulterior motive for a claim of rape is precisely one of the exceptions recognized by our Supreme Court to the general rule barring evidence of a victim's past sexual conduct with others. *Hackett, supra* at 348. However, we believe that the relevance of the evidence sought to be introduced was minimal in the present case. While it would tend to show a pattern of sexual conduct on the victim's part that would, accordingly, make it somewhat more probable that defendant's version of events was the correct one, the evidence of the victim's having been disciplined in the past for sexual conduct does not explain how defendant's seminal fluid came to be found in the victim's rectum.² Moreover, defendant was not precluded from asserting that the victim had performed unconsented-to oral sex on defendant while he was asleep or from arguing whatever reasonable inferences could be drawn from such testimony. At the same time, the danger of unfair prejudice that would result from the introduction of the other-acts evidence was very high, and its introduction would also invade the victim's privacy. See, generally, *id.* at 345. Under the circumstances, we find that the trial court correctly found that this evidence was barred by MCL 750.520j and that its exclusion did not abridge defendant's right to confrontation. Accordingly, the trial court did not abuse its discretion when it denied defendant's motion.

Defendant also argues that he was denied the effective assistance of counsel when his counsel failed to move in limine to introduce the above 404(b) evidence within ten days of defendant's arraignment by information, as required under MCL 750.520j(2). We disagree. The defendant bears the burden of overcoming the presumption that counsel was effective and must

² The nurse who took the sample from the victim's rectum testified that she was certain the DNA material she obtained came from inside the victim's rectum and not from the area surrounding the rectum.

meet a two-pronged test to establish ineffective assistance of counsel. *Strickland v Washington*, 466 US 668, 687-689; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, the defendant must show that counsel's performance fell below an objective standard of reasonableness under the circumstances according to prevailing professional norms. *Id.* at 687-688; *People v Pickens*, 446 Mich 298, 311; 521 NW2d 797 (1994). Second, the defendant must show that the deficiency was so prejudicial that he was deprived of a fair trial; in other words, he must show a reasonable probability that, but for counsel's unprofessional error or errors, the trial's outcome would have been different. *Strickland, supra* at 687; *Pickens, supra* at 314; *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000).

In regard to counsel's failure to move in a timely fashion for the introduction of 404(b) evidence, we noted that the trial court explicitly waived the timeliness requirement and decided the motion based on its merits. Accordingly, counsel's alleged failure had no effect whatsoever on the outcome of the trial.

Defendant also asserts that trial counsel was ineffective in failing to seek a plea or sentence agreement on defendant's behalf once the court had denied defendant's motion to introduce 404(b) evidence. However, because no evidentiary hearing was conducted in this case, appellate review is limited to the existing record, *People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), and the record contains no evidence to support defendant's assertion that trial counsel did not seek such an agreement. Accordingly, defendant has failed to demonstrate that counsel's performance was deficient.

Defendant further argues that trial counsel was ineffective in failing to change his trial strategy once the court had denied defendant's motion. However, the fact that a strategy does not work does not constitute the ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 414-415; 639 NW2d 291 (2001). Furthermore, this Court has also held that it 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). Moreover, defendant has not set forth what other strategies might have been employed. Accordingly, we find that this argument is also without merit.³

Affirmed.

/s/ Kathleen Jansen
/s/ Patrick M. Meter
/s/ Jessica R. Cooper

³ We decline to grant defendant's unsupported and improperly-presented request for a remand. See, e.g., MCR 7.211(C)(1)(a)(ii).