STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT JAMES SNYDER,

Defendant-Appellant.

UNPUBLISHED
September 16, 2004

No. 250047
Montcalm Circuit Court
LC No. 03-000656-FC

Before: Whitbeck, C.J., and Sawyer and Saad, JJ.

PER CURIAM.

A jury convicted defendant Robert James Snyder of two counts of first-degree criminal sexual conduct.[1] The trial court sentenced defendant to concurrent sentences of nine to thirty years in prison for each conviction. Defendant appeals his convictions and sentences, and we affirm.

I. Rape Shield Statute

Defendant argues that the trial court abused its discretion in precluding under the rape-shield statute, MCL 750.520j, the admission of evidence that the victim, who was defendant's daughter, was previously sexually assaulted by persons other than defendant. The determination whether evidence is admissible under the rape-shield statute "is entrusted to the sound discretion of the trial court." *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). "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.* This Court also reviews for an abuse of discretion the trial court's decision regarding whether the probative value of evidence outweighs its prejudicial effect under MRE 403. *Id.* at 351.

Defendant asserts that the trial court abused its discretion in precluding defendant from questioning the victim regarding an instance in which she was sexually assaulted by her half-

[1] MCL 750.520b(1)(a).

brother and a separate instance in which she was sexually assaulted by her half-brother's friend. According to defendant, the trial court should have permitted him to introduce evidence of the victim's prior sexual assaults to show the victim's bias, to explain the victim's age-inappropriate sexual knowledge and to show that the victim was motivated to falsely accuse defendant of sexual abuse so that she could live with her mother.

Under the rape-shield statute, evidence of specific instances of a victim's past sexual conduct with others is generally legally irrelevant and inadmissible. MCL 750.520j; *People v Arenda*, 416 Mich 1, 10; 330 NW2d 814 (1982). The rape-shield statute provides:

> (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
>
> (a) Evidence of the victim's past sexual conduct with the actor.
>
> (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease. [MCL 750.520j.]

Similarly, MRE 404(a)(3) contains a parallel provision that limits the admission of evidence of a criminal sexual conduct complainant's past sexual history to "evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease." The rape-shield statute and MRE 404(a)(3) "constitute a policy determination[] that sexual conduct or reputation as evidence of character and for impeachment, while perhaps logically relevant, is not legally relevant." *Hackett*, *supra* at 346. The rape-shield statute applies in cases of child sexual abuse. *People v Morse*, 231 Mich App 424; 586 Mich 555 (1998).

Although evidence of specific instances of a victim's past sexual conduct with others is generally inadmissible under the rape-shield statute, MCL 750.520j; *Arenda*, *supra* at 10, "in certain limited situations, [evidence of the complainant's past sexual conduct] may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation," *Hackett*, *supra* at 348. In *Hackett*, the Supreme Court cited three situations where such evidence is admissible to preserve a defendant's right to confrontation. First, evidence of a complainant's past sexual conduct is admissible when offered "for the narrow purpose of showing the complaining witness' bias." *Id.* Second, "evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge." *Id.* Third, "the defendant should be permitted to show that the complainant has made false accusations of rape in the past." *Id.* In addition, evidence of a victim's past sexual conduct may be admissible to show that a victim's "age-inappropriate sexual knowledge was not learned from [the] defendant." *Morse*, *supra* at 436. In order for evidence of the victim's past sexual conduct to be admissible to show the source of a victim's age-inappropriate sexual knowledge, however, the facts involved in the past sexual conduct must be "significantly similar" to the conduct of which the defendant is accused. *Id.* at 437.

"[A]pplication of the rape-shield statute must be done case by case and . . . the balancing between the rights of the victim and the defendant must be weighed anew in each case." *Id.* at 433. Here, the trial court did not abuse its discretion in weighing the rights of the victim and defendant and concluding that the evidence was inadmissible.

First, the trial court did not abuse its discretion in ruling that the evidence was inadmissible to establish the victim's age-inappropriate sexual knowledge because the prosecutor did not introduce any evidence or argue at trial that the victim had age-inappropriate sexual knowledge. Therefore, whether the victim possessed age-inappropriate sexual knowledge was not at issue in the case, and the trial court did not abuse its discretion in refusing to admit defendant's proffered evidence on this basis.

Second, the trial court did not abuse its discretion in refusing to admit the evidence to show the victim's bias against defendant. "Although the 'bias' of a . . . complainant is almost always material," *Arenda*, *supra* at 14, defendant's brief on appeal does not specify the nature of the victim's alleged "bias" against defendant, and the lower court record does not disclose any such bias on the part of the victim. A party may not merely announce his position or assert an error and leave it to the appellate court to discover and rationalize the basis for his claims or unravel and elaborate for him his arguments. *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Third, the trial court did not abuse its discretion in refusing to admit defendant's proffered evidence because the facts did not support defendant's claim that the victim fabricated the allegations so that she could live with her mother. Accordingly, we agree with the trial court that evidence regarding defendant's prior sexual assault by her half-brother was not relevant to establishing a motive for the victim to fabricate sexual abuse allegations against defendant. The trial court did not abuse its discretion in ruling that this evidence was inadmissible under the rape-shield statute, MCL 750.520j.

II. Ineffective Assistance of Counsel

Defendant says that defense counsel was ineffective in failing to challenge for cause a juror who stated during voir dire that he was not sure that he could set aside his tendency to favor the victim, but who also said that he would "give it a try," and in failing to object to Detective Sergeant Ronald Warren's testimony that the victim did not exhibit any of the demeanor clues that would indicate that she was lying.

The right to counsel guaranteed by the United States and Michigan Constitutions, US Const, Am VI; Const 1963, art 1, § 20, is the right to effective assistance of counsel. *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). 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 counsel's representation was so prejudicial that it denied the defendant a fair trial. *Strickland v Washington*, 466 US 668, 687-688; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

We reject defendant's claim that defense counsel was ineffective in failing to challenge the juror for cause. It is an extremely rare case where a defense counsel's failure to challenge a juror may form the basis for a claim of ineffective assistance of counsel. *People v Robinson*, 154 Mich App 92, 95; 397 NW2d 229 (1986). ("Our research has found no case in Michigan where defense counsel's failure to challenge a juror or jurors has been held to be ineffective assistance of counsel. We cannot imagine a case where a court would so hold, and we do not so hold in this case."). "[A]n attorney's decisions relating to the selection of jurors generally involves matters of trial strategy" that this Court "normally decline[s] to evaluate with the benefit of hindsight." *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001).

Although it would have been preferable for the juror to be less equivocal in his statement regarding whether he could be impartial and decide the case based on the evidence, this case does not present the unimaginable case contemplated in *Robinson* where defense counsel's failure to challenge a juror would amount to ineffective assistance of counsel. *Robinson, supra* at 95. It is not apparent from the record that defense counsel lacked a sound strategic reason for retaining the juror. "A reviewing court cannot see the jurors or listen to their answers to voir dire questions. A juror's . . . facial expression, or manner of answering a question may be important to a lawyer selecting a jury[.]" *Robinson* at 94-95. Furthermore, "[a] lawyer's hunches, based on his observations, may be as valid as any method of choosing a jury." *Id.* at 95. During voir dire, defense counsel had the opportunity to observe the juror's demeanor and facial expressions and any other cues that may have affected defense counsel's decision not to challenge the juror for cause. Defense counsel's decision not to challenge the juror was a matter of trial strategy that this Court will not evaluate with the benefit of hindsight. *Johnson, supra* at 259.

We also reject defendant's contention that defense counsel was ineffective in failing to object to Detective Warren's testimony on redirect examination that, in his opinion, the victim did not exhibit any demeanor clues that would indicate that she was lying. Counsel is not ineffective for failing "to advocate a meritless position." *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000). Any objection to Warren's testimony would have been meritless because Warren's testimony was proper lay witness opinion testimony under MRE 701. Furthermore, defendant himself opened the door to this line of questioning when, on cross-examination, he asked Warren whether he was capable of knowing when a child was lying to him.

III. Presentence Investigation Report

Defendant argues that this Court must remand for correction of his presentence investigation report (PSIR). We agree. At sentencing, defense counsel asked the trial court to delete information in defendant's PSIR relating to his adult criminal history regarding two domestic violence charges from Florida that were dropped and a disorderly person charge from Michigan that was dismissed. According to defendant, the information should be deleted from the PSIR because it involved "allegations of criminal conduct neither admitted nor proved." The trial court declined to delete the information, but stated that it would not give defendant's dropped or dismissed charges "any weight" when it imposed defendant's sentence. "When a court, for purposes of expediency, efficiency or otherwise, disregards information challenged as inaccurate, the court in effect determines that the information is irrelevant to sentencing. The defendant is therefore entitled to have that information stricken." *People v Taylor*, 146 Mich

App 203, 205-206; 380 NW2d 47 (1985). Because the trial court did not rely on the challenged information in imposing defendant's sentence, defendant is entitled to have the information stricken from the PSIR. MCL 771.14(6); MCR 6.425(D)(3)(a); *People v Harmon*, 248 Mich App 522, 533; 640 NW2d 314 (2001). We therefore remand for the ministerial task of correcting the PSIR.

We affirm defendant's convictions, but remand to the circuit court so that the challenged information may be stricken from the presentence report. We do not retain jurisdiction.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ Henry William Saad