

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RICARDO FELIX VEGA, JR.,

Defendant-Appellant.

UNPUBLISHED

November 23, 2004

No. 249578

Ingham Circuit Court

LC No. 01-000717-FC

Before: Cooper, P.J., and Fitzgerald and Hoekstra, JJ.

PER CURIAM.

Defendant Ricardo Felix Vega, Jr., appeals as of right his jury trial convictions of two counts of first-degree criminal sexual conduct (CSC) (person under the age of thirteen).¹ Defendant was sentenced to concurrent terms of 42 to 120 months' imprisonment for each count. We affirm.

I. Factual Background

The circumstances surrounding defendant's convictions arose from the sexual abuse of his seven-year-old daughter during an overnight visit. The complainant testified that defendant touched her vagina with his fingers and penis over her clothing and also inserted either his penis or finger "a little bit." The complainant told her mother about the incident the following day and was taken to Sparrow Hospital.

Two days after the incident, the complainant told a nurse examiner, Misha Miller, that defendant had sexually assaulted her in the past. Upon examination, which the complainant indicated was painful, Ms. Miller discovered that the complainant's hymen looked torn and was protruding from the labia majora. The complainant's hymen was red and swollen and when Ms. Miller swabbed it, skin flaked off and it began to bleed. The complainant's vagina was also red and torn. When asked about penetration during the history portion of the examination, the complainant told Ms. Miller that defendant "touched his penis to my private area."

¹ MCL 750.520b(1)(a).

Two weeks later, the complainant was examined by Dr. Stephen Guertin, an expert in child sexual abuse. Dr. Guertin found no evidence of injury; however, he testified that this result was expected due to the lapse of time. Dr. Guertin also noted that the complainant's hymen protruded outward, but determined this to be normal. Dr. Guertin disagreed with Ms. Miller's assessment that the complainant's hymen was torn, as such an injury would still be visible two weeks later. However, Dr. Guertin admitted that a red hymen which bleeds and sheds skin when swabbed would indicate an acute trauma.

II. Ineffective Assistance of Counsel

Defendant claims that he was denied the effective assistance of counsel because the only direct evidence of sexual penetration was established during the cross-examination of the complainant and because defense counsel failed to object when the prosecution's medical witnesses gave opinion testimony. Absent a *Ginther*² hearing, our review is limited to plain error apparent on the existing record affecting defendant's substantial rights.³ Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.⁴ To establish ineffective assistance of counsel, defendant must prove that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the proceedings would have resulted differently.⁵ Defendant must overcome the strong presumption that counsel's performance was sound trial strategy.⁶

A. Evidence of Penetration

Defendant's claim that defense counsel introduced the only direct evidence of penetration to support his convictions for first-degree CSC is without merit. There was ample record evidence, even without the complainant's testimony during cross-examination that defendant penetrated her "a little bit," to prove penetration beyond a reasonable doubt.⁷

During direct examination, the complainant testified that defendant touched her between her legs, over her underwear, with his penis and fingertips and that "when defendant was touching her it hurt." Ms. Miller testified that the complainant told her that it hurt when defendant touched her with his penis. Ms. Miller also testified that the complainant's vagina was red and torn and that her hymen showed signs of trauma. Dr. Guertin also testified that a hymen

² *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

³ *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

⁴ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

⁵ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

⁶ *Id.* at 600.

⁷ The trial court instructed the jury to consider whether there was penetration of the complainant's vagina. Michigan law requires a less stringent standard of penetration of the labia majora. *People v Bristol*, 115 Mich App 236, 238; 320 NW2d (1981). As the jury determined beyond a reasonable doubt that the higher standard for penetration had been met, it is unlikely that they would have acquitted if instructed of the lesser.

which bleeds and sheds skin when swabbed is consistent with an acute trauma. In light of this evidence, defendant has failed to establish that the result of his trial would have been different if the complainant had not given the challenged testimony on cross-examination.

B. Failure to Object to Opinion Testimony

We also reject defendant's contention that defense counsel was ineffective for failing to object to Ms. Miller and Dr. Guertin's opinion testimony regarding the complainant's credibility, and the appropriate legal standard for penetration.

Defendant challenges Ms. Miller's testimony regarding the appropriate legal standard for determining whether penetration occurred.⁸ "[T]he general rule is that courts will not permit even expert witness testimony on a question of domestic law because it is the exclusive responsibility of the trial judge to find and interpret the applicable law."⁹ Ms. Miller did testify regarding the proper standard of sexual penetration in Michigan. However, her definition of penetration was correct. The trial court properly instructed the jury before deliberation that it must take the law as given by the court and not the attorneys. The jury is presumed to follow the court's instructions.¹⁰ Furthermore, as noted previously, the court's definition of penetration actually required a more stringent standard for the prosecutor, but the jury found that standard satisfied. Therefore, defendant has again failed to establish that defense counsel's failure affected the outcome of his trial.

We also reject defendant's contention that defense counsel was ineffective for failing to object to the testimony of the two medical witnesses that they believed the complainant. Ms. Miller testified that the complainant "was appropriately answering questions" during the history portion of the examination. We first note that this testimony is admissible pursuant to MRE 803(4) as taking a history is standard procedure in diagnosing sexual abuse. Furthermore, the comment does not indicate that Ms. Miller believed the complainant, only that the complainant was being cooperative. Ms. Miller further stated that the complainant was "not really understanding, I don't think, what was going on," during the examination. However, the comment only related to the complainant's demeanor during the examination. As the testimony was admissible and was unrelated to the complainant's credibility, defense counsel was not required to raise a futile or meritless objection.¹¹

Defendant also argues that defense counsel was ineffective by failing to object when Dr. Guertin "essentially" told the jury that he believed the complainant and that his failure to find

⁸ Ms. Miller testified as follows: "Well, I would think that to get this type of trauma in anything – by Michigan law, anything that is introduced or past the labia majora is considered penetration. And I have to do some serious rubbing for any of these kinds of injuries. I don't think it just could happen."

⁹ *People v Lyons*, 93 Mich App 35, 45-46; 285 NW2d 788 (1979).

¹⁰ *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

¹¹ *People v Moorer*, 262 Mich App 64, 76; 683 NW2d 736 (2004).

evidence of sexual abuse showed that she was “testifying from actual experience.” However, Dr. Guertin merely testified that he made a determination based on his conversation with the complainant regarding the location of any physical evidence and the severity of the injury. Dr. Guertin *never* stated that the fact that the complainant’s history did not conflict with the results of her physical examination implied that she was testifying from actual experience. Accordingly, defendant’s contention is without merit and defendant has failed to show that defense counsel was ineffective on any ground.

III. Cumulative Error

Finally, we reject defendant’s argument that the cumulative effect of the errors establish ineffective counsel. Defendant supports his claim of cumulative error with the previously discussed potential errors and defense counsel’s alleged overall lack of preparation. To establish cumulative error, a defendant must show “cumulative unfair prejudice” from an aggregate of actual errors,¹² including prejudice resulting from counsel’s alleged lack of preparation.¹³

Defendant relies on defense counsel’s “feeble and ultimately fruitless objection” to the introduction of blood evidence obtained during Ms. Miller’s examination. Defendant argues that defense counsel should have filed a pretrial motion for an independent lab analysis of the blood evidence or filed a motion in limine to challenge the blood evidence. However, it was never asserted that the blood belonged to someone other than the complainant. Accordingly, such tests and objections could have no effect on defendant’s trial.

Defendant also claims that defense counsel failed to interview any of the subpoenaed members of the complainant’s family before trial. Defendant argues that the witnesses may have provided evidence of the complainant’s mother’s fabrication of the molestation charges and her motive to lie. However, defendant failed to move for a new trial or evidentiary hearing and failed to support his claim with affidavits indicating what testimony these witnesses would have offered. As such, we cannot determine from the existing record whether the testimony of these witnesses would have affected the outcome of defendant’s trial. Absent such information, we are unable to conclude that defense counsel’s failure to interview or present these witnesses constituted ineffective assistance. As defendant failed to establish any errors prejudicing his trial, his claim of cumulative error must also fail.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Joel P. Hoekstra

¹² *People v LeBlanc*, 465 Mich 575, 591-592 n 12; 640 NW2d 246 (2002).

¹³ *People v Caballero*, 184 Mich App 636, 642; 450 NW2d 80 (1990).