STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 20, 2007
v	No. 270729 Dickinson Circuit Court
CHAD ALLEN WILLIAMS, Defendant-Appellant.	LC No. 05-003480-FC

Before: Murphy, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (sexual penetration with a person under 13), and three counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (sexual contact with a person under 13). The trial court sentenced defendant to concurrent prison terms of 14 to 40 years on each of the CSC I counts and 9 to 15 years on each of the CSC II counts. Because we conclude that there were no errors warranting relief, we affirm.

Defendant first argues on appeal that the trial court erred in allowing a police officer to testify, over a hearsay objection, that one of plaintiff's witnesses had given information "consistent with" testimony provided by the victim. We disagree.

A trial court's evidentiary decisions are reviewed for an abuse of discretion. *People v Martin*, 271 Mich App 280, 315; 721 NW2d 815 (2006). Generally, MRE 802 precludes the admission of hearsay evidence at trial. *Id.* Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). MRE 801(a) defines a statement as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion."

The officer did not offer hearsay testimony. Rather, the officer merely answered in the affirmative when asked whether the "information" given by the individual was "consistent with" that which was provided by the victim. Because the officer did not offer testimony concerning the assertions of another, the testimony did not implicate the prohibition against hearsay. See *People v Jones* (*On Rehearing*), 228 Mich App 191, 204-205; 579 NW2d 82 (1998). Therefore, the trial court did not abuse its discretion when it overruled defendant's objection based on hearsay. *Martin*, *supra* at 315.

Defendant next argues that trial counsel performed ineffectively when he failed to inquire at trial into certain matters that had surfaced at the preliminary examination. Specifically, defendant argues that trial counsel failed to pursue allegations that another man had committed similar acts of sexual misconduct against the victim and that the victim had once played with a vibrator. According to defendant, these matters would have supported his claim of innocence by providing an alternative explanation for the victim's precocious sexual knowledge. We disagree.

We review de novo the issue of ineffective assistance of counsel. *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). Because there was no evidentiary hearing, our review is limited to mistakes apparent on the record.[1] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). To establish ineffective assistance of counsel, a defendant must show that (1) his trial counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms and (2) there is a reasonable probability that, but for the deficient performance, the outcome would have been different. *People v Grant*, 470 Mich 477, 485-486; 684 NW2d 686 (2004).

Defendant has failed to show that his trial counsel's performance fell below an objective standard of reasonableness or that he was deprived of a substantial defense by trial counsel's failure to introduce evidence that the victim had previously stated that she played with a vibrator. The record shows that defense counsel raised several alternative explanations for the victim's precocious sexual knowledge. Moreover, trial counsel may reasonably have concluded that attacking the credibility of the victim should be limited to the proffered explanations so as not to engender any backlash by the jury. This Court will not "substitute its judgment for that of trial counsel in matters of trial strategy." *People v Duff*, 165 Mich App 530, 545; 419 NW2d 600 (1987).

As to the evidence of the victim's prior accusations against another, MCL 750.520j generally precludes the introduction of a complaining child witness's prior sexual activity as an explanation for precocious sexual knowledge unless the trial court can determine by in-camera hearing that (1) defendant's proffered evidence was relevant, (2) another person had been convicted of criminal sexual conduct involving the complainant, and (3) the facts underlying the previous conviction were significantly similar to the charged offenses. See *People v Morse*, 231 Mich App 424, 437; 586 NW2d 555 (1998). Defendant has not alleged and the record does not support a finding that the victim's alleged prior sexual conduct met the above requirements. Defendant's trial counsel may not be faulted for failing to advocate a meritless position. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998). Further, any error did not affect the outcome of the proceedings. *Grant*, *supra* at 486. Therefore, no relief is warranted.

Finally, defendant argues that the trial court abused its discretion when it allowed a child welfare worker to offer an expert opinion about the tendency of victims of child sexual abuse to recant. We need not address this issue because, even if the trial court abused its discretion, it

[1] Defendant's motion before this Court to remand for a *Ginther* hearing, *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973), was denied. *People v Williams*, unpublished order of the Court of Appeals, entered February 21, 2007 (Docket No. 270729).

would not warrant reversal unless "it is more probable than not that a different outcome would have resulted without the error." *People v Lukity*, 460 Mich 484, 495; 596 NW2d 607 (1999). After examining the record as a whole, we conclude that, even if it were error to permit the testimony, the error was harmless. Therefore, no relief is warranted.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Patrick M. Meter