

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT HARRELL BOWMAN,

Defendant-Appellant.

UNPUBLISHED

January 29, 2008

No. 270342

St. Clair Circuit Court

LC No. 05-002856-FC

Before: Beckering, P.J., and Sawyer and Fort Hood, JJ.

PER CURIAM.

Defendant was found guilty by a jury of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a) (person under the age of 13), and was sentenced to concurrent terms of 10 to 30 years' imprisonment. Defendant thereafter moved for a new trial, asserting that trial counsel was ineffective. At the conclusion of a *Ginther*¹ hearing, the trial court denied the motion. Defendant appeals as of right. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Defendant was convicted of engaging in two sexual acts with the then five- or six-year-old daughter of a friend approximately six years prior. The evidence established that the criminal sexual conduct occurred in the detached garage at the victim's home where defendant was staying at the time. The victim testified at trial that defendant forced her to perform fellatio on him and performed cunnilingus on her. The victim's brother testified that he observed defendant performing the latter act from a window in the garage. Defendant denied that the incidents ever occurred.

On appeal, defendant contends the trial court abused its discretion in denying his motion for a new trial on the basis of his ineffective assistance of counsel claim. We disagree.

A trial court's ruling on a motion for a new trial will not be disturbed on appeal absent an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998). The abuse of discretion standard recognizes that there may be no single correct outcome in certain

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

situations. Instead, there may be more than one reasonable and principled outcome. When the trial court selects one of these principled outcomes, it has not abused its discretion and so the reviewing court should defer to the trial court's judgment. An abuse of discretion occurs when the trial court chooses an outcome falling outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). Regarding the trial court's factual findings delivered following the *Ginther* hearing, we review those findings for clear error. *People v Grant*, 470 Mich 477, 484; 684 NW2d 686 (2004). We also review constitutional determinations de novo on appeal. *Id.* at 485.

To establish a claim of ineffective assistance of counsel, a defendant must demonstrate that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and that this deficiency resulted in prejudice so egregious that it altered the outcome of the trial. *People v Toma*, 462 Mich 281, 302-303; 613 NW2d 694 (2000). Because effective assistance of counsel is presumed, the defendant bears the heavy burden of demonstrating otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). The defendant also must overcome the presumption that counsel's performance could have been sound trial strategy. *Grant, supra* at 485. "A reviewing court must not evaluate counsel's decisions with the benefit of hindsight. On the other hand, the court must ensure that counsel's actions provided the defendant with the modicum of representation that is his constitutional right in a criminal prosecution." *Id.* Citation omitted.

Defendant argues that his trial counsel rendered ineffective assistance of counsel by failing to adequately prepare for trial in several respects. First, defendant contends that trial counsel's short time of preparation was inadequate. When a defendant claims ineffective assistance of counsel because of counsel's unpreparedness, the defendant must demonstrate prejudice resulting from the lack of preparation. *People v Caballero*, 184 Mich App 636, 640; 459 NW2d 80 (1990). At the *Ginther* hearing, trial counsel stated that, in preparation for trial, he reviewed the pertinent police reports and made notes. He did not find anything that needed further investigation. Trial counsel also met with defendant on more than one occasion where they discussed the case and the possibility of a plea agreement, which defendant rejected. The record does not support that trial counsel was unprepared. Trial counsel focused the jury's attention on the lack of physical evidence, the delay of six years in reporting this incident and the defendant's lack of a criminal record. Therefore, defendant did not demonstrate that he was prejudiced by defense counsel's performance.

Second, defendant claims that trial counsel failed to properly prepare for trial by not interviewing a key witness. At trial, the victim testified that she told a friend about the assault. However, defendant argues that the friend denied being told about the incident. Despite the existence of a police report indicating that the victim disclosed to her mother the fact that she had told her friend, trial counsel declined to interview the friend before the trial. Defendant contends that his counsel was ineffective for failing to discover through proper investigation this supposed evidence and that this evidence would have changed the outcome of the trial.

At the evidentiary hearing, the victim's friend testified that she did not recall the victim telling her about the incident. However, the friend did not affirmatively state that the victim did not tell her about the incident, as defendant suggests. Even assuming the friend's testimony directly conflicted with the victim's testimony, it was not unreasonable for trial counsel to

decline to interview her. The friend's testimony, while it might have been somewhat favorable to defendant, would not have changed the result of the proceeding. Rather than emphasize minor inconsistencies, which trial counsel believed would only alienate the jury, counsel chose to imply that the friend's absence from trial indicated that the victim lacked credibility. Furthermore, it was possible that the friend could have been a valuable witness for the prosecution. Trial counsel's decision to not interview the friend was not unreasonable under the circumstances. Moreover, in light of the victim's testimony and her brother's eyewitness account, this minor inconsistency would not have seriously affected the outcome of defendant's trial.

Third, defendant asserts that trial counsel improperly waived a preliminary examination. Such an error relates to trial strategy. We will not substitute our judgment for that of counsel regarding matters of trial strategy. *Rockey, supra* at 76-77. At the *Ginther* hearing, trial counsel testified that a preliminary examination would have permitted the prosecution the opportunity to prepare its witnesses for trial. Moreover, trial counsel expressed his view that he did not believe that a preliminary examination would benefit the defense. Because trial counsel's strategy for waiving the preliminary examination was reasonable, defendant failed to overcome the presumption that counsel provided effective assistance.

Fourth, defendant contends that trial counsel's reservation of his opening statement until after the prosecution's case-in-chief and the brevity of that opening statement demonstrate his lack of trial preparation. The reason for an opening statement is to "state the facts to be proven at trial." *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991). A defendant has a right to give an opening statement immediately after the prosecution's opening statement, to reserve it until after the prosecution rests, or to not give it at all. MCR 6.414(C). This decision is a matter of trial tactic. *People v Hempton*, 43 Mich App 618, 624; 204 NW2d 684 (1972).

Trial counsel chose to reserve his opening statement until after the prosecution rested its case. When asked at the *Ginther* hearing about this decision, trial counsel explained that the prosecution bore the burden of proof and that, "if I had something to get up and say at that point that directly contradicted their case, I probably would have." Trial counsel presented a strategic reason to support his decision to reserve the opening statement and, while brief, gave an opening statement that included facts to be proven and emphasized the arguments he would later make in closing. We do not second-guess counsel regarding matters of trial strategy. *Rockey, supra* at 76-77. Accordingly, defendant failed to overcome the presumption that trial counsel's decision to reserve the opening statement and to give only a brief statement constituted sound trial strategy.

Fifth, defendant asserts that part of trial counsel's failure to adequately prepare for trial was motivated by his personal belief that sexual abuse allegations are reliable. Defendant's assertion mischaracterizes trial counsel's testimony at the *Ginther* hearing. Trial counsel's statements regarding the presumption that children do not lie were in reference to a general belief among jurors, not his personal belief. Regarding his opinion of sexual abuse cases, trial counsel explained that "there's more to it than just the allegations," there are generally other signs of abuse, such as a change in the child's behavior. When viewed in their totality, trial counsel's statements do not establish the presence of a personal opinion that would have jeopardized defendant's case.

Next, defendant argues that he is entitled to reversal of his convictions because trial counsel was ineffective by failing to impeach the victim and her brother with various statements and testimony they gave regarding the alleged incident—accounts that defendant alleges were conflicting. Many of the prior statements that defendant asserts are inconsistent are easily reconcilable with the witnesses’ trial testimony. Moreover, the actual discrepancies in the statements and testimony are minor and of doubtful value for impeachment purposes. For example, whether the victim was playing with puppies or kittens before the incident, whether the victim was seated on a washing machine or a table at the time of the assault, whether the victim’s brother yelled at defendant from the window or from the door, whether the victim was already in the garage when defendant entered or the two entered the garage together, and when the victim and her brother first spoke after the assault, are of minimal value for discrediting the witnesses’ testimony.

Trial counsel explained his strategy for declining to pursue these minor inconsistencies when he testified that “nitpicking” would only “alienate the jury” without offering any material evidence. Trial counsel’s decision not to impeach the victim and her brother as defendant suggests was reasonable. Whether and how to impeach a witness are matters of trial strategy best left to counsel’s professional judgment. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997). We will not substitute our judgment for that of counsel with regards to trial strategy, nor will we evaluate counsel’s competence with the benefit of hindsight. *Rockey, supra* at 76-77. It was not unreasonable for trial counsel to believe that cross-examining the witnesses as defendant suggests would have provoked the displeasure of the jury. Moreover, it has not been established that emphasizing such minute differences would have changed the outcome of the trial. Accordingly, trial counsel was not ineffective for declining to impeach the victim and her brother with their prior statements and other testimony.

Further, defendant claims trial counsel was ineffective when he admitted into evidence a statement suggesting that defendant was guilty of an uncharged act of misconduct. In a handwritten statement to police, the victim’s brother described the incident at issue in this case and another incident in which he witnessed defendant exposing his penis to the victim. Defendant contends that it was unreasonable for trial counsel to introduce the statement because it implicates him in a similar act of misconduct. However, trial counsel explained his strategy for introducing this statement. In the statement, the victim’s brother wrote that he did not immediately tell his mother about the incident because he was “stunned” at the time. Trial counsel, who received this handwritten statement on the day of the trial, mistook the “u” for an “o” and concluded that the brother had stated that he was “stoned” at the time he observed the incident. Trial counsel introduced the evidence as a means of impeaching the brother and in anticipation of the prosecution seeking its admittance. During cross-examination, the victim’s brother testified that he meant “stunned,” as in “[s]hocked.”

The decision regarding what evidence to present is a matter of trial strategy. *Rockey, supra* at 76. Again, we will not substitute our judgment for that of counsel in matters of trial strategy, nor will we review trial counsel’s strategy with the benefit of hindsight. *Id.* at 76-77. Trial counsel introduced the evidence for the purpose of showing that the victim’s brother was under the influence of a controlled substance when he allegedly saw the sexual assault at issue. Although this strategy was not helpful in retrospect, it was reasonable at the time. Moreover, given the strength of the other evidence against defendant it is doubtful that the suppression of

the uncharged conduct would have resulted in a different outcome. Therefore, trial counsel was not ineffective for introducing the handwritten statement.

Finally, defendant contends that trial counsel was ineffective by failing to object to improperly admitted evidence. At trial, the victim's mother testified about a statement that the victim made to her describing the incident in which defendant performed sexual acts on the victim. Defendant asserts that this statement was inadmissible under MRE 803A since it was not the victim's first statement corroborating the incident.

MRE 803A codified Michigan's common-law tender years hearsay exception and provides for the admission of corroborative statements describing an incident that included a sexual act performed on the declarant by the defendant. However, "[i]f the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule." MRE 803A. Defendant argues that the victim's first corroborative statement was made to her friend, and therefore, the subsequent statement made to her mother was inadmissible. First, it is not clear from the record whether the victim made a corroborative statement to her friend. Second, even assuming that the statement was inadmissible under MRE 803A, the statement would be admissible under MRE 803(24), which allows for the admission of a statement with sufficient "circumstantial guarantees of trustworthiness." See *People v Katt*, 468 Mich 272; 662 NW2d 12 (2003). In determining the trustworthiness of such statements, a reviewing court must examine the totality of the circumstances, including:

(1) the spontaneity of the statements, (2) the consistency of the statements, (3) lack of motive to fabricate or lack of bias, (4) the reason the declarant cannot testify, (5) the voluntariness of the statements, i.e., whether they were made in response to leading questions or made under undue influence, (6) personal knowledge of the declarant about the matter on which he spoke, (7) to whom the statements were made . . . , and (8) the time frame within which the statements were made. [*People v Lee*, 243 Mich App 163, 178; 622 NW2d 71 (2000) (citations omitted).]

Here, the victim's statement was (1) spontaneous, (2) consistent with her trial testimony, (3) made without an apparent motive to fabricate and without bias, (4) supported by her own testimony, (5) given voluntarily and without provocation, (6) about an incident that she had personally experienced, and (7) made to her mother. Although the statement was given several years after the sexual abuse occurred, the delay is excusable because the victim was embarrassed and afraid others would learn of the incident.

Because the mother's testimony on this matter was admissible under MRE 803(24), it was reasonable for trial counsel to not object to its admission. Counsel is not required to make a futile objection. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003). Furthermore, even if this evidence was inadmissible, its suppression would not have produced a more favorable result for defendant. This hearsay statement was cumulative to the testimony of the victim and her brother—testimony that concerned their personal knowledge of the incident. Therefore, trial counsel was not ineffective for failing to object to this evidence.

Also at trial, the victim was questioned about the events that occurred after she told her mother about the incident. The victim testified that she told her caseworker “[w]hat I just told you” and the investigating police officer the “[s]ame thing I just told you.” Defendant argues that these statements were inadmissible as prior consistent statements.

Where the prior extra-judicial statement of a witness is consistent with his trial testimony, the out-of-court comment is not generally admissible under the established exceptions to the hearsay rule. *People v Smith*, 456 Mich 543, 567 n 4; 581 NW2d 654 (1998). In this case, the statements did not refer to the substance of the victim’s testimony. The only evidence admitted was her assertion that she told her caseworker and a police officer about the abuse at various times after telling her mother. We conclude that the victim’s assertion that she had made the prior statements, without more, added nothing to her credibility. Therefore, defendant cannot show that he was prejudiced by trial counsel’s failure to object to the testimony.

In sum, we hold that the record amply supports the trial court’s conclusion that defendant failed to establish ineffective assistance of counsel. Therefore, the trial court did not abuse its discretion by denying defendant’s motion for a new trial on the basis of this claim.

Also on appeal, defendant claims the trial court abused its discretion by denying his motion for a new trial on the basis of a due process violation. We disagree.

We review a trial court’s ruling on a motion for a new trial for an abuse of discretion. *Lemmon*, *supra* at 648 n 27. In addition, we review constitutional determinations de novo on appeal. *Grant*, *supra* at 485.

Specifically, defendant contends that his due process rights were violated when the investigating officer failed to timely draft and the prosecution failed to turn over a supplemental report summarizing a second interview with the victim, an interview at which defendant suggests the victim made statements inconsistent with her trial testimony. In support of his due process claim, defendant relies on *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), in which the Supreme Court held that it is a due process violation for the prosecution to suppress material evidence favorable to the accused. Material has been interpreted to denote exculpatory evidence that would raise a reasonable doubt regarding the guilt of the defendant. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994).

In her initial interview with the officer, the victim stated that she had not told anyone about the incident for “years and years.” However, a police report of the interview with the victim’s mother indicated that the victim had told a friend about the incident at some point. In response to this information, the officer conducted a subsequent interview with the victim at which the victim stated that she “started to, to talk to [her friend] about something bad that happened,” but then told the friend that she was “just kidding.” The officer did not draft a supplemental report with information about this interview until after the jury trial. Defendant contends that the subsequent information the victim gave to the officer contradicted her trial testimony and should have been disclosed to defense counsel before trial.

Contrary to defendant’s claim, the victim’s trial testimony was not materially different from her prior statement to the officer. At trial, the victim testified that she told her friend about

the incident, but then said that she was “kidding.” The victim consistently asserted that she told her friend something about what occurred between defendant and her and immediately said that she was only kidding. The victim never gave details of the conversation with her friend. This is not the type of evidence that would raise a reasonable doubt about defendant’s guilt. Without such a showing, there is no basis for finding a *Brady*-based due process violation and, therefore, no basis for finding an abuse of discretion.

Affirmed.

/s/ Jane M. Beckering
/s/ David H. Sawyer
/s/ Karen M. Fort Hood