STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 6, 2008
v	Nos. 270900; 271156 Wayne Circuit Court
BENNIE LEE BRYANT, Defendant-Appellant.	LC Nos. 05-010650-01; 05-005274-01

Before: Gleicher, P.J., and O'Connell and Kelly, JJ.

PER CURIAM.

These cases were consolidated in the trial court and tried before a single jury. Defendant appeals as of right his subsequent convictions of first-degree criminal sexual conduct, MCL 750.520b(1)(1) (victim under 13), aggravated stalking, MCL 750.411i, and assault and battery, MCL 750.81. Defendant was sentenced to 100 months to 30 years in prison for the first-degree sexual assault conviction, one to five years in prison for the aggravated stalking conviction, and three days in prison for the assault and battery conviction. We affirm.

Defendant's criminal sexual conduct conviction arises from the sexual penetration of the victim, his daughter, in 1990. According to the victim, she was five years old at the time, and while she and defendant were alone in the house, defendant asked her if she wanted to watch a movie. They went into defendant's bedroom, and defendant played a pornographic movie on the television. They both got into bed and the victim fell asleep. When she awoke, defendant was lying on top of her covering her mouth with his hand. He then removed her clothing and put his penis in her vagina. The victim testified that this went on for about an hour or an hour and a half. The victim testified that she then walked to a neighbor's house alone and stayed with the neighbor for about a day. She claimed that she told no one about the incident until she was thirteen years old, and, at that time, she received her first medical examination for sexual assault. No medical records were introduced at trial.

Defendant's assault and battery and aggravated stalking convictions arise from events in April 2005, fifteen years after the sexual assault. The victim testified that, on three occasions, she encountered defendant, who was driving a van, as she was walking to work in the morning. The first time she saw him, she ran to work. The second time she saw him, she ran into an abandoned building, and defendant searched for her but did not find her. The third time, on April 27, 2005, she started to run, but fell. Defendant approached on foot and started kicking her. The victim testified that police happened upon the scene, apprehended defendant, and asked

the victim if she wanted to go to the hospital. However, the victim declined and went to work. When she left the scene, defendant was still in the police car.

The victim's foster mother testified that on April 29, 2005, and May 1, 2005, while she lived with the victim, anonymous notes arrived at her home. The anonymous letters were threatening, offensive, and sexually explicit.[1] They expressly referred to the writer's sexual abuse of the victim when she was young and included details about the abuse and a complaint that the victim was "stolen" from the writer by the foster care system. The notes were signed, "guess who." A handwriting expert compared copies of the notes with samples from defendant's hand and pointed out every similarity between letters and groups of letters she found. The similarities covered almost every letter of the alphabet and included several groups of letters. She testified that there were more similarities than differences between the samples.

Defendant's first argument on appeal is that he was denied effective assistance of counsel because his trial counsel failed to investigate several issues to determine whether they could have helped him at trial. We disagree. "Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. A judge must first find the facts, then must decide whether those facts establish a violation of the defendant's constitutional right to the effective assistance of counsel." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews a trial court's findings of fact for clear error and questions of constitutional law de novo. *Id*. at 484-485.

> To establish a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that counsel's deficient performance prejudiced the defense. In order to demonstrate that counsel's performance was deficient, the defendant must show that it fell below an objective standard of reasonableness under prevailing professional norms. In so doing, the defendant must overcome a strong presumption that counsel's

[1] Specifically, the note of April 29, 2005, stated:

> Dear bitches of this house: Starting with [the victim], when I raped you it felt so good. Your mom went away to rehab, I had a ball with your pussy while you were crying help to your dumb ass brothers and sisters. I cut a piece of your asshole so I could fit it in and your damn foster parent – wherever she is she kidnapped [sic] you from me. Wait till tomorrow. You think I kicked your ass the other day, just wait until I see you, see you tomorrow. From guess who.

The second note stated:

> Dear bitches of this house: [The victim] do you remember when you were about four when I made you suck my dick, I just felt that you should know – you should have knowed [sic] stop having these punk ass niggers call my house. Next motherfucker call my house I'm coming to yours, keep my dick in your mouth and shut up. From guess who.

> performance constituted sound trial strategy. [*People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003) (citations omitted).]

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy. This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999) (citations omitted). "Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005), lv pending 477 Mich 1303 (2007). However, the defense counsel's onus to investigate carries with it the discretion to determine when a particular investigation is no longer fruitful or a particular defense will not be beneficial. *Strickland v Washington*, 466 US 668, 690-691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

It bears noting at the outset that defense counsel was the last in a long line of rejected attorneys who had been appointed to manage defendant's case. One of the attorneys who had recently been assigned to the case before trial had zealously acted on defendant's adamant assurances that he had not written the threatening notes. In response, former counsel obtained the handwriting expert that was actually used by the prosecutor at trial to demonstrate defendant's authorship of the notes. Defense counsel was also faced with defendant's determination to orchestrate, from jail, his witnesses and their trial testimony. The tapes of his jail conversations with his witnesses damaged his witnesses' credibility more than anything else the prosecution raised on cross-examination. In other words, defendant's proactive and overconfident approach to his defense invariably led to detrimental, if not disastrous, results to his case. Moreover, defendant testified on his own behalf at trial, and his testimony stood in stark contrast to the victim's. Defendant flatly denied the sexual contact that the victim alleged, and he flatly denied following her or ever kicking her in the street. The jury chose to believe the victim. Under the circumstances, defendant has the difficult task of demonstrating that the jury's credibility determination was distorted by his trial counsel's poor conduct rather than properly forged in their impressions of his demeanor and their interpretation of the evidence.

Defendant first argues that counsel was ineffective for failing to obtain the victim's medical records pertaining to the alleged assault and failing to hire a medical expert to explain them. Defendant points to three medical records that came to light during the post-trial evidentiary hearing. At the evidentiary hearing, defendant's trial counsel testified that defendant had told him that the victim had been examined at a hospital and the results would be favorable to defendant. He testified that he knew about a 1998 medical examination, but was not aware of a 1991 examination. Counsel testified that he decided not to seek any additional records because he did not know what they would show and feared uncovering evidence damaging to the defense that could be used by the prosecutor.

The records obtained by post-trial counsel are nearly indecipherable and none of them places defendant in a kind, fatherly light. First, there is an emergency room record from Children's Hospital of the Detroit Medical Center, dated November 8, 1991. Under "Diagnosis," the report reads "Alleged Physical Abuse." Dr. Patrice Harold testified at the post-trial evidentiary hearing that the report includes the following notation: "Vaginal: No laceration, bruising, hymen intact." However, she also testified that the size of the victim's vagina when she was five could mean that the victim suffered extremely painful sexual penetration that would

not destroy the hymen. The alleged conduct, at this point, could have occurred one year or more before the examination, which also affected the examination's ability to detect the abuse. Worse for defendant, the report demonstrated a much speedier response to alleged sexual abuse than originally anticipated: less than one year compared with the eight-year delay presumed and argued at trial. The report also contains claims that the victim had been "beaten up" by her sixteen-year-old brother, and reflects the allegation that he had apparently been "putting needles in her legs." It refers to photographs taken of the injuries as well as x-rays of her facial bones.

Without including these volatile 1991 records, defendant's trial counsel was able to elicit that the victim underwent a physical examination for sexual abuse in 1998, and that the prosecutor, who had the burden of proof, did not present any of those records into evidence. Without the records, defense counsel adeptly argued that the case was not brought to light for eight years, and then only after family strife had divided the home. With this void in the prosecutor's proofs, defense counsel indirectly attacked the victim's claims that she was an extremely young child who suffered extreme and prolonged sexual contact. Defense counsel repeatedly argued that such contact would have required medical attention, and yet none was sought for eight years, and nothing was presented that indicated that the 1998 examination found anything amiss. Under the circumstances, defendant fails to demonstrate that the presentation of the 1991 medical records would have provided an additional defense or otherwise altered the outcome of trial, even if they had been fully available to defense counsel and correctly deciphered. See *Riley, supra*; *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

The other records shed even more light on the grim situation facing defendant's trial counsel. The second record is dated October 30, 1998, and it plainly refers to an event of sexual abuse that was less than three weeks old. The report states that the victim, a thirteen-year-old female, presented with claims of sexual abuse. The victim described in detail how she awoke with her clothes off and how her legs were wet with a white substance. Contrary to defendant's adamant assertions, there is no indication that this record referred to the events in 1990 rather than a separate, more recent, event in 1998. The report reflects that the patient initially refused a pelvic exam, but then states that the victim's hymen was thickened and that her rectum lacked any scarring. The third report is dated December 3, 1998, and it appears to state that the pelvic region did not indicate any traumatic force and that there was no evidence of tears or other injury. However, that report also refers to the other report that reflects a recent accusation of sexual assault. Dr. Harold did not address all the contents of the records, but she affirmatively stated that the records were inconsistent with sexual abuse. On cross-examination, she conceded that an adult male could penetrate a five-year-old girl's vagina deeply enough to cause extreme pain, but not enough to tear the hymen or cause other noticeable damage.

The record reflects that counsel was aware of a 1998 allegation of abuse that had received medical attention and that the examination did not substantiate any claims of sexual assault. During trial, defense counsel carefully argued the case in this light–no physical or medical evidence substantiated the allegations of severe abuse–without raising the possibility that the 1998 examination was the product of a fresh set of accusations or occurrences. The record reflects that defendant was also aware of a full investigation of the 1998 allegations of abuse, and he knew that the prosecutor decided not to charge defendant. Counsel testified at the post-trial hearing that the 1998 records would not have been relevant to the incident that allegedly

occurred in 1990 and that he did not want to draw the jury's attention to another alleged incident of abuse.

Clearly, the decision to leave well enough alone regarding the 1998 investigation and medical records was a matter of trial strategy. Placing the victim's claim of repeated abuse before the jury had serious risks of backfiring, especially considering that defense counsel could harp on the prosecutor's lack of direct evidence without raising anything else that might damage the case. Similarly, even if deciphered and ultimately used as appellate counsel advocates, the 1991 medical records would not have added much, if anything, to the defense. Instead, they would have demonstrated that the victim pursued her allegations of abuse relatively quickly and before most of the later claims of unfair parental treatment had tarnished her credibility. The records also undermined defendant's theory that the victim reported a series of fictional events, because the 1991 records appear to reflect a very real beating at the hands of a much older brother. Under the circumstances, defendant has failed to demonstrate deficient performance by counsel's failure to obtain the 1991 medical records or by his decision to avoid the 1998 medical records, and defendant further fails to persuade us that the claimed deficiencies had any effect on the outcome of his trial.

Defendant next argues that counsel was ineffective for failing to obtain police records of an investigation conducted in response to allegations of sexual abuse made by the victim in 1998. Particularly, defendant argues that defense counsel should have obtained the results of a polygraph examination administered to defendant in 1998, the denial of a warrant request in 1999, and a letter written by an investigator stating that the 1998 investigation had been closed without charges being filed. However, defendant fails to demonstrate how any of these items would have survived rudimentary challenges to their admissibility, and he fails to account for the fact that raising the issue of the investigation in 1998 would have necessarily raised the issue of the victim's later allegations of abuse.

Whatever benefit defendant could have potentially gained in undermining the victim's credibility by bringing forth the documents, he most certainly would have lost in limiting the case to a single, potentially exaggerated or misremembered, fifteen-year-old incident belatedly asserted by a twenty-year-old estranged daughter under highly questionable circumstances. Defendant would also have destroyed the illusion that the allegations lay essentially dormant for seven years until after the victim attempted, unsuccessfully, to reconcile with defendant. These strong arguments did not carry the day, but they would not have existed at all if defendant had raised issues regarding a second accusation and a second legal defense in 1998. Defendant's argument also ignores evidence that a prosecutor had discussed the polygraph issue with his trial attorney and informed him that, before the successful polygraph examination in 1998, defendant had allegedly failed a polygraph examination following the 1990 incident.[2] Presenting a record

[2] The context of the prosecutor's arguments underscores another problem with the 1998 investigation and polygraph examination. The victim's accusations in 1998 were much more vague about whether she experienced any sexual penetration by defendant. Instead, she described awaking to find evidence that defendant had apparently ejaculated on her legs. In this context, defendant's ability to pass a polygraph regarding his sexual penetration of the victim is

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of the 1998 investigation to the jury also would have drawn more attention to defendant's attempts to orchestrate his defense, because then his tape-recorded allusions to his earlier, successful defensive efforts would have had an even better defined and more insidious context. Under the circumstances, defendant fails to demonstrate that any of the documents regarding the 1998 police investigation, even if somehow admissible, would have ultimately helped his defense against the alleged events of 1990.

Defendant next argues that counsel was ineffective for failing to present evidence that defendant was not arrested until May 10, 2005, which defendant argues would have impeached the victim's testimony that defendant was arrested immediately following the alleged physical assault on April 27, 2005. However, defense counsel extensively argued the lack of police corroboration for the victim's account of the unusual events, and he elicited from the officer in charge that the interview following defendant's arrest did not occur until May 10, 2005. Under the circumstances, defendant fails to indicate how his trial counsel could have done more to "prove" that the events never transpired because of the delay between the street fight and his actual arrest. As the trial court pointed out, an individual may be taken into custody without being booked and without any report issuing. Therefore, defendant fails to persuade us that the jury would not have convicted him but for defense counsel's inadequate performance.

Defendant argues that counsel was ineffective for failing to investigate the distance the victim claimed to have walked after the alleged assault and to present this evidence to the jury. He argues that the distance from defendant's house, where the alleged assault occurred, to the house to which the victim claimed to have walked was 1.4 miles, so it was impossible that a five-year-old child would have walked that far alone after suffering from such an egregious assault. Although it is true that defense counsel did not elicit testimony about the actual distance the victim claimed to have walked, he challenged her credibility on this point by eliciting that the distance was substantial and suggesting that the victim's account did not make sense because she would have been in "dire need of some kind of medical attention." Counsel's failure to present evidence and argument concerning the specific distance the victim claimed to have walked did not constitute ineffective assistance of counsel.

Finally, defendant argues that counsel's errors, considered cumulatively, produced a trial that was fundamentally unfair. Because none of the claimed instances of ineffective assistance constitute professional error, and because defendant has failed to demonstrate any prejudice to his defense in any event, we reject his argument for cumulative error. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

Defendant next argues that he was denied due process because the prosecution failed to disclose material evidence that was favorable to defendant. We disagree. To establish that a prosecutor has committed a violation of the policies set forth in *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963), a defendant must establish:

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not nearly as persuasive as if the polygraph had been taken in 1991. Again, it was well within defense counsel's discretion to decide whether to expose a jury to all these details or leave them as unfilled voids subject to the jury's skepticism.

> (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).]

With regard to the medical records, defendant has not established what evidence the state possessed, much less that it withheld any record that would have benefited defendant. The prosecutor testified that the November 8, 1991, record from Children's Hospital was in her file, and that she gave defense counsel the opportunity to inspect the file. Likewise, any other scraps of medical records from other sources were reportedly in the file.

This leads to the second problem with defendant's arguments. Even assuming that the state possessed medical records that were favorable to him, defendant has not shown that he could not have obtained this evidence with reasonable diligence or that the prosecutor prevented its discovery. On the contrary, the prosecutor testified that when defense counsel took over the case from his predecessor, he received everything the previous attorney had already obtained, including materials the prosecutor had delivered. The prosecutor also met with defendant's new counsel to go over discovery in an effort to avoid delaying the trial. At that time, she gave defense counsel her entire file, including the partial medical records she had obtained from the victim's caretakers, and allowed him to make copies of anything he wanted. She did not keep track of the documents defense counsel copied and did not know whether he had copied anything. All the records at issue came from one hospital, so a record request to that hospital should have led to any records that defendant desired.

Defendant also alleges that the prosecution withheld several documents pertaining to the 1998 investigation into allegations that defendant sexually abused the victim. These include a letter written by the initial investigating officer, dated February 8, 1999, stating that the investigation had been closed and no charges were being filed against defendant. Defendant also claims he was barred access to the victim's first statement to police made on December 5, 1998, the results of the polygraph examination administered to defendant on February 9, 1999, and the investigating officer's case notes, which refer to the prosecution's denial of a warrant after the 1998 investigation. However, trial counsel clearly testified that he believed that all the events transpiring after 1998 were related to a second incident of sexual misconduct, so they were not relevant to the case. This explained why counsel never sought the records of the 1998 investigation and did not receive any records of that investigation. In addition, he said that defendant told him that he took a polygraph examination during the investigation, but did not tell him that he had passed. Counsel testified that he had not attempted to obtain the polygraph examination and the result. Under the circumstances, defendant can only speculate that the prosecution would have withheld this documentation from defense counsel, if defense counsel had requested it.

Finally, defendant argues that the prosecutor withheld two reports from the Family Independence Agency. However, the allegation simply lacks any factual support. At the evidentiary hearing, the prosecutor testified that the reports were in the prosecutor's file, so defense counsel had the opportunity to see them before trial. She testified that she and defense counsel had a specific conversation about the first report. Defendant does not dispute that the

second report was in the file. Under the circumstances, we reject defendant's argument that he could not have obtained these documents through the exercise of reasonable diligence or that the prosecution suppressed this evidence.

Defendant's final argument is that he was denied due process because there was a six-year delay "in bringing charges after investigating the case." We disagree. "Before dismissal may be granted because of prearrest delay there must be actual and substantial prejudice to the defendant's right to a fair trial and an intent by the prosecution to gain a tactical advantage." *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000). Defendant alleges that he was prejudiced by the delay because any opportunity to form an explanation for the events had gradually eroded over time. However, defendant does not specify which witnesses have become unavailable as a result of the delay, or explain how their testimony would have been beneficial to his defense. See *id*. at 166-167. "Without specific references to instances of prejudice-generating occurrences, and without specific allegations of actual prejudice resulting therefrom, the prosecution would be at an insuperable disadvantage indeed in attempting to show how such unspecified prejudice was in fact justified. We will not put the cart before the horse." *People v Loyer*, 169 Mich App 105, 120; 425 NW2d 714 (1988). In this case, defendant has failed to allege specific "instances of prejudice-generating occurrences," *id*., so he has failed to meet his burden of establishing actual and substantial prejudice.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly