STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID TODD BENNETT, SR.,

Defendant-Appellant.

UNPUBLISHED
September 11, 2008

No. 275854
Calhoun Circuit Court
LC No. 2006-002754-FC

Before: Donofrio, P.J., and Murphy and Fitzgerald, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of ten counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), (CSC-1). This case arises from allegations that defendant sexually abused his minor stepdaughter over a period of several years. Because defendant has not established that his counsel was ineffective at trial, we affirm.

On appeal, defendant raises a number of claims of ineffective assistance of counsel, as well as asserting that the trial court abused its discretion in denying his motion for a *Ginther*[1] hearing. Because the trial court did not hold an evidentiary hearing or make findings, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004). We review a trial court's denial of a motion for a *Ginther* hearing for an abuse of discretion. See *People v Collins*, 239 Mich App 125, 138-139; 607 NW2d 760 (1999).

To sustain a claim of ineffective assistance of counsel, a defendant must prove that trial counsel's "performance was deficient" and that deficiency "prejudiced the defense." *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). A defendant must prove that defense counsel's performance "fell below an objective standard of reasonableness under prevailing professional norms" to establish deficient performance. *Id*. at 690-691; *Matuszak, supra* at 57-58. And, defendant must also demonstrate that, but for defense counsel's performance, the outcome of his trial would have been different. *Id*. at 58.

First, defendant argues that defense counsel should have moved to suppress defendants' statements to the police, in which defendant told the police that the victim awakened him by

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

performing fellatio on one occasion. Specifically, defendant asserts that his statements would have been barred by the *corpus delicti* rule. "In a criminal prosecution, proof of the *corpus delicti* of a crime is required before the prosecution may introduce a defendant's inculpatory statements." *People v Schumacher*, 276 Mich App 165, 180; 740 NW2d 534 (2007). The *corpus delicti* rule prevents the use of a defendant's confession to convict him of a crime that did not occur. *Id*. The *corpus delicti* rule provides that "a defendant's confession may not be admitted unless there is direct or circumstantial evidence independent of the confession establishing (1) the occurrence of the specific injury . . . and (2) some criminal agency as the source of the injury." *People v Konrad*, 449 Mich 263, 269-270; 536 NW2d 517 (1995). However, "the *corpus delicti* rule does not bar admissions of fact that do not amount to a confession of guilt." *Schumacher, supra* at 180-181. A statement constitutes an admission and not a confession, where a fact admitted does not of itself demonstrate guilt, but needs proof of other facts, which are not admitted by the defendant, to establish guilt. *Id*. at 181. Here, defendant's statements to the police are not an "acknowledgment of guilt," but rather an attempt to excuse his conduct from criminal liability. Defendant's statements demonstrated guilt of at least one act of oral sex with an individual less than 13 years of age independent of any other facts and thus constituted a confession. See *Schumacher, supra* at 181.

Because defendant's statements constituted a confession, the trial court properly admitted the statements at trial. At trial, the prosecution presented the victim as its first witness. She testified that she performed fellatio on defendant on two occasions at one of the family's residences; that she performed fellatio on defendant at the family's next residence on different occasions in at least three different rooms; and that defendant digitally penetrated her vagina on at least five occasions at that residence. She testified that all of those incidents occurred when she was younger than 13 years of age. MCL 750.520b(1)(a) provides that "[a] person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and . . . [t]hat other person is under 13 years of age." Sexual penetration includes fellatio. MCL 750.520a(r). The *corpus delicti* was established through the victim's testimony at trial, that established both a specific injury, fellatio and digital penetration, and defendant's criminal act as the source of that injury. *People v Hayden*, 205 Mich App 412, 414; 522 NW2d 336 (1994). See also *People v Lemmon*, 456 Mich 625, 632 n 6; 576 NW2d 129 (1998) (A victim's uncorroborated testimony is sufficient to convict a defendant of criminal sexual conduct). We, therefore, reject defendant's ineffective assistance of counsel argument based on defense counsel's failure to move to exclude defendant's statements to the police by operation of the *corpus delicti* rule. A motion in limine to exclude defendant's statements to the police would have been pointless, and defense counsel was not required to bring a meritless motion. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Second, defendant contends that defense counsel rendered ineffective assistance of counsel by failing to seek school, medical, or counseling records of the victim. Defendant specifically asserts that a *Stanaway*[2] motion was critical to the defense, where the family or a psychologist could present evidence on the victim's problems and how these problems created a conflict between defendant and the victim, and defense counsel could have used this evidence to

[2] *People v Stanaway*, 446 Mich 643, 648-649; 521 NW2d 557 (1994).

explain why the victim falsely accused defendant. Ultimately, defendant's argument boils down to a disagreement over trial strategy, where defendant, with benefit of hindsight, recommends on appeal a different tactic that defense counsel should have taken at trial. Generally, any decisions relating to the introduction of evidence constitute trial strategy, and the failure to introduce evidence constitutes ineffective assistance of counsel only where such an omission denies the defendant a substantial defense. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990).

On appeal, defendant casts the victim as a "troubled child," who has been in counseling for most of her life, asserting that many times the victim's behavior was out of control, which led to conflicts, fights, and physical altercations. Moreover, he states on appeal:

> She had trouble in school (as confirmed by the teacher witness). Family members could testify that [the victim] started counseling at age 3, well before the sexual abuse allegedly began. There would also be testimony that the complainant routinely showed aggressive behavior, resulting in, among other things, the complainant being kicked out of kindergarten. There would be testimony that the complainant attempted suicide on at least one occasion, that she craved attention, and that she would always try to one-up everyone to gain that attention.

However, defendant has not provided any affidavits to support his self-serving assertions. Moreover, the record does not support defendant's assertions, and we find that defendant has stretched a fair reading of the record to make this argument. What effect the admission of the victim's counseling, medical, or school records might have had on the jury is entirely speculative. That the evidence had any probative value to the defense is thus questionable. Significantly, defendant has not articulated "a good-faith belief, grounded on some demonstrable fact, that there is a reasonable probability that the records are likely to contain material information necessary to the defense." *Stanaway*, *supra* at 677. On this record, we reject defendant's claim of ineffective assistance of counsel. And, we point out that at trial, defense counsel cross-examined the victim and her mother regarding the divorce. Defendant presented a theory that the allegations were false and a result of the divorce. While defendant has issues with defense counsel's trial strategy, he has not overcome the strong presumption that counsel's actions constituted sound trial strategy. *Matuszak, supra* at 57-58. And, we will not substitute our judgment for that of defense counsel in reviewing a claim of ineffective assistance of counsel. *Rockey, supra* at 76-77.

Third, defendant argues that defense counsel failed to request a *Daubert*[3] hearing in order to examine the qualifications of the prosecution's expert, specifically whether that expert had any expertise in the area of sexual abuse accommodation in divorce syndrome, and to object to the

[3] *Daubert v Merrell Dow Pharmaceuticals, Inc*, 509 US 579; 113 S Ct 2786; 125 L Ed 2d 469 (1993).

opinion testimony of the prosecution's expert that that syndrome was junk science. MRE 702, which provides:

> If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

The record shows the prosecution's expert witness was admitted as an expert in the field of clinical psychology. It is undisputed that sexual abuse accommodation in divorce syndrome is within the field of clinical psychology. The prosecution's expert was, therefore, qualified to render opinions on this subject. *People v Whitfield*, 425 Mich 116, 122; 388 NW2d 206 (1986) (a witness is qualified to testify as an expert based on knowledge, skill, experience, training, or education); see also *People v Dobek*, 274 Mich App 58, 79; 732 NW2d 546 (2007). While a given expert's expertise may not be as great as another testifying expert, such a consideration goes to the weight of the evidence rather than its admissibility. *Whitfield, supra* at 123. As a result, defendant's claim that counsel was ineffective for failing to move for a *Daubert* hearing regarding the qualifications of the prosecution's expert on sexual abuse accommodation in divorce syndrome, fails.[4] Defense counsel was not required to bring a meritless motion. *Riley, supra* at 142. Moreover, the prosecution's expert could provide an opinion that this "syndrome" was "junk science" based on his qualifications in the field of clinical psychology. Any objection on this opinion would likely have been overruled. See *Matuszak, supra* at 258.

Fourth, defendant contends that defense counsel failed to object to the prosecution's personal attack on the defense expert. MRE 611(b) provides, in relevant part, that a "witness may be cross-examined on any matter relevant to any issue in the case, including credibility." In the instant case, the challenged actions, which were not objected to, include questions concerning the defense expert's credibility. During the cross-examination of the defense expert, the prosecution asked questions about his Internet sex advice column, his claims of sexual conquests in his Internet sex advice column, and his former practice as a professor of keeping office hours in a local bar. The record demonstrates that defense counsel objected to questions during the latter two topics. Ultimately, the prosecution's questions with respect to the defense expert's credibility were proper. MRE 611(b). Once again, defense counsel does not render ineffective assistance of counsel when failing to make objections that are lacking in merit. *Matuszak, supra* at 58. Moreover, defendant has not demonstrated that, but for counsel's conduct, with respect to the challenged prosecutorial conduct, the outcome of trial would have been different. *Id.*

[4] In any event, here, the otherwise qualified expert acknowledged his awareness of the theory being advanced and factually stated that it had not been accepted by the professional community. In essence, the expert provided exactly that which a *Daubert* hearing seeks to determine--the acceptability of the theory being advanced.

Fifth, defendant argues that defense counsel failed to seek a bill of particulars to narrow down the time frame of the allegations of sexual abuse. Under MCR 6.112(E), the trial court may, on motion, order the prosecutor to provide a bill of particulars. "Where a preliminary examination adequately informs a defendant of the charge against him, [however] the need for a bill of particulars is obviated." *People v Harbour*, 76 Mich App 552, 557; 257 NW2d 165 (1977). Defendant was charged with five counts of CSC-1 involving fellatio with a person less than 13 years of age contrary to MCL 750.520b(1)(a), and five counts of CSC-1 involving digital penetration of the victim's vagina with a person less than 13 years of age contrary to MCL 750.520b(1)(a). The prosecution alleged the offenses occurred on or about January 1, 1996, to April 2, 2002. At the preliminary examination, the victim testified that the sexual abuse began when she was seven years old, and that there were at least ten instances beginning at that time until she was 13 years old. She testified that "[i]t was pretty much a daily thing." But during cross-examination, she testified:

> Well, I guess I can't really say a daily basis because I mean there were periods of time where my mom worked days and then nothing happened and—well, and it wasn't like an everyday thing. Sometimes nothing would happen and it was—for a while it was a daily thing.

On this record, we conclude that the prosecution would be unable to pinpoint specific dates for the offenses. Nevertheless, the prosecution need not so do, because time is not of the essence or a material element in a criminal sexual conduct prosecution involving a child victim. *Dobek, supra* at 82-83. On appeal, defendant couches his argument in terms of an alibi defense, where defendant was not frequently at home and that he lacked the opportunity to sexually abuse the victim. However, "an alibi defense does not make time of the essence." *Id*. at 83. Even if defense counsel would have moved for a bill particulars, it appears highly unlikely that the trial court would have granted such a motion. At the hearing on defendant's motion for new trial, the trial court ruled that a bill of particulars would not have "flesh[ed] out anything further" than what the victim testified to at the preliminary examination. Moreover, defendant's need for a bill of particulars was obviated, where the preliminary examination adequately informed him of the charges against him. *Harbour, supra* at 557. Defendant's claim of ineffective assistance of counsel based on counsel's failure in not moving for a bill of particulars fails, because defense counsel was not required to bring a meritless motion. *Riley, supra* at 142.

Sixth, defendant contends that defense counsel failed to renew her objection to the testimony regarding a sculpture of an erect penis created by the victim in a fifth grade art class. This argument has no merit, because the record does not support the assertion. Following the first day of trial, the prosecution informed the trial court that the victim's former art teacher would be testifying regarding that sculpture. Defense counsel argued that that testimony would be highly prejudicial. The trial court allowed the art teacher to testify, concluding that the sculpture was probative of sexual abuse, and that its probative value was not outweighed by unfair prejudice. Defense counsel thereafter renewed her objection before the first witness testified at trial, on grounds that unfair prejudice outweighed the evidence's probative value and that the sculpture, itself, was hearsay. The trial court reaffirmed its relevancy ruling, and rejected defense counsel's hearsay argument. On the record, defense counsel clearly objected to the art teacher's testimony regarding the sculpture. When the art teacher testified, the trial court had already rejected defense counsel's objections. Another objection by defense counsel would

have unlikely changed the trial court's ruling. Further, the art teacher's testimony regarding the sculpture was properly admitted at trial. The art teacher testified about an incident that she observed. See MRE 602 (generally, a witness may not testify to matter unless the witness has personal knowledge thereof). The evidence was probative that the victim was sexually abused, MRE 401 ("evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); and, on this record, there was no evidence that the evidence was given undue or preemptive weight by the jury, or that it would have been inequitable to allow use of the evidence. *People v Taylor*, 252 Mich App 519, 521-522; 652 NW2d 526 (2002). Defense counsel does not render ineffective assistance of counsel when failing to make objections that are lacking in merit. *Matuszak, supra* at 58.

Seventh, defendant argues that defense counsel failed to obtain a movie that influenced the victim's decision to disclose the allegations of sexual abuse. Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy that this Court will not review with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant seems to contend that defense counsel should have reviewed the movie to determine if the victim's testimony was consistent with the "sound track" of the movie. The substance of the movie was not relevant, but rather, its affect on the victim was relevant because it influenced her decision to disclose the allegations of sexual abuse. Further, the movie was one of the reasons that the victim decided to come forward, but it was not the only reason. The victim testified at trial that she was concerned that defendant may sexually abuse someone else. Specifically, she feared for the safety of the daughters of defendant's new girlfriend. Defendant has not overcome the "strong presumption" that defense counsel's performance in not obtaining and using the movie constituted sound trial strategy. Moreover, he has not shown that defense counsel "fell below an objective standard of reasonableness under prevailing professional norms" by failing to introduce the aforementioned movie at trial, *Riley, supra* at 140; *Strickland, supra* at 690-691, particularly where the contents of that movie are not revealed to this Court, and as such, we cannot conclude that its introduction to the jury would have aided the defense.

We also reject defendant's argument that he was entitled to a new trial due to cumulative error. Cumulative error requires reversal only where several minor errors of consequence, when combined, had the effect of denying defendant a fair trial. *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). In this case, "[t]here are no errors that can aggregate to deny defendant a fair trial," and that defendant is not entitled to a new trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003).

None of defendant's claims of ineffective assistance of counsel have merit. Additionally, we conclude that the trial court did not abuse its discretion in denying defendant's request for a *Ginther* hearing. Defendant has not explained why a hearing to develop any of his claims of ineffective assistance of counsel was necessary. The purpose of a *Ginther* hearing is to develop the record. *People v Ginther*, 390 Mich 436, 443-444; 212 NW2d 922 (1973). Defendant devotes only a cursory portion of his appellate brief to this issue. An appellant may not merely announce his position and leave it to the appellate court to discover and rationalize the basis for his claim, nor may he give only cursory treatment of an issue with little or no citation of supporting authority. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Finally, defendant repeatedly asserts on appeal that the trial court erroneously rejected his foregoing claims of ineffective assistance of counsel when denying his motion for new trial. This issue was not presented in defendant's statement of questions presented; thus, this Court need not review this issue. MCR 7.212(C)(5); *People v Miller*, 238 Mich App 168, 172; 604 NW2d 781 (1999). Nevertheless, defendant was not entitled to a new trial based on his meritless claims of ineffective assistance of counsel.

Affirmed.

/s/ Pat M. Donofrio
/s/ William B. Murphy
/s/ E. Thomas Fitzgerald