

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVID NIEMIEC,

Defendant-Appellant.

UNPUBLISHED

December 23, 2008

No. 277212

Macomb Circuit Court

LC No. 2006-003117-FC

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOHN DAVID NIEMIEC,

Defendant-Appellant.

No. 277237

Macomb Circuit Court

LC No. 2006-003114-FH

Before: Gleicher, P.J., and Kelly and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of three counts of first-degree criminal sexual conduct, MCL 750.520b(b)(1)(a) (person under 13 years of age) (CSC I), in Docket No. 277212, and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(b)(i) (person between 13 and 16 years old and member of defendant's household) (CSC II), in Docket No. 277237. He was sentenced to 10 to 40 years in prison for each CSC I conviction and 3 to 15 years in prison for each CSC II conviction.¹ We affirm.

¹ Defendant's cases were joined and tried together before a single jury. This Court consolidated defendant's appeals. *People v Niemiec*, unpublished order of the Court of Appeals, entered September 17, 2008 (Docket Nos. 277212 & 277237).

This case arises out of the sexual assaults of two daughters of defendant's girlfriend – A.W., and S.B. The assaults occurred in 1998 and 1999 but were not reported until 2005.

Defendant first argues that the trial court erred in denying his motion for a new trial because the jury's verdict was against the great weight of the evidence. A trial court's grant or denial of a new trial on the ground that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 232; 749 NW2d 272 (2008). A verdict is against the great weight of the evidence "only if the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *Id.* On review, a new trial based on the great weight of the evidence cannot generally be predicated on questions of witness credibility or conflicting testimony. *Id.*

Defendant's sole argument is that A.W. delayed reporting this incident for over seven years and, thus, is not a credible witness.² A.W. testified unequivocally at trial regarding the assault and provided sufficient evidence with which to convict defendant. Any issue related to A.W.'s credibility was unquestionably for the jury to determine. *Id.* Defendant's argument has no merit, as the trial court did not abuse its discretion.

Defendant next argues that MCL 768.27a is unconstitutional because it violates the separation of powers and ex post facto clauses of the Michigan and United States Constitutions. Questions of statutory or constitutional interpretation are reviewed de novo. *People v Keller*, 479 Mich 467, 473-474; 739 NW2d 505 (2007).

MCL 768.27a permits the admission of evidence "that the defendant committed another listed offense against a minor" and states that the evidence "may be considered for its bearing on any matter to which it is relevant." In this case, the trial court granted the prosecutor's pretrial motion to permit each girl to testify in both cases, pursuant to MCL 768.27a.³ MRE 404(b), on the other hand, excludes evidence whose *only* relevance is to demonstrate a defendant's conduct in conformity with past conduct. *People v VanderVliet*, 444 Mich 52, 63-64; 508 NW2d 114 (1993). MCL 768.27a clearly conflicts with MRE 404(b) in some instances.

As to defendant's separation of powers argument, this Court has recently confirmed that "MCL 768.27a is a substantive rule of evidence because it does not principally regulate the operation or administration of the courts." *People v Pattison*, 276 Mich App 613, 619; 741 NW2d 558 (2007). Thus, the statute does not unconstitutionally conflict with the judicial branches role-making power. *Id.*

The Court has also recently addressed defendant's argument that MCL 768.27a is an ex post facto law, holding that when a defendant could have been tried and convicted on the basis of testimony other than that admitted by MCL 768.27a, the statute did not change "the standard for

² Defendant has not made a similar argument for S.B. even though she also failed to report the assault for nearly as long. Instead, both principal briefs address the great weight argument as to A.W.

³ The cases were subsequently joined for trial.

obtaining a conviction” and it did not violate the ex post facto clause. *Pattison, supra* at 619; *People v Dolph-Hostetter*, 256 Mich App 587, 594; 664 NW2d 254 (2003). This Court is bound by its prior decisions. MCR 7.215(J).⁴

Defendant also argues that the trial court failed to properly consider his polygraph examination results when considering his motion for a new trial. We disagree. The decision of whether to grant a new trial is in the trial court’s discretion and is, therefore, reviewed for an abuse of discretion. *People v Brown*, 279 Mich App 116, 144; 755 NW2d 664 (2008); *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998). A trial court’s findings of fact are reviewed for clear error. *Lester, supra* at 271.

According to defendant, his polygraph examination results constitute newly discovered evidence and the trial court erred in failing to properly consider the results. As the trial court noted, however, the question of whether to consider the polygraph results is irrelevant because defendant’s own polygraph examination results do not constitute newly discovered evidence. *People v Cress*, 250 Mich App 110, 135-136; 645 NW2d 669 (2002), rev’d in part on other grounds 468 Mich 678 (2003); *People v Mechura*, 205 Mich App 481, 484; 517 NW2d 797 (1994). Defendant testified at trial and denied the allegations. The polygraph results were merely intended to bolster defendant’s credibility on this same testimony. The trial court did not abuse its discretion in failing to consider defendant’s polygraph results in the motion for a new trial.⁵

Finally, we disagree with defendant that his trial counsel was ineffective. Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). A trial court’s findings of fact are reviewed for clear error, while questions of constitutional law are reviewed de novo. *Id.*

Generally, counsel is presumed effective and the defendant must show that: (1) counsel’s performance fell below an objectively reasonable standard, and (2) that defendant was so prejudiced by counsel’s deficiency that there is a reasonable probability that, without the error, the outcome would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). In order to demonstrate that an attorney’s performance was substandard, a defendant must overcome a strong presumption that the attorney’s trial strategy was sound, even if the strategy is ultimately unsuccessful. *People v Rodgers*, 248 Mich App 702, 715; 645 NW2d 294 (2001).

⁴ Defendant similarly argues that MRE 404(b) should have governed the admission of the girls’ testimony because it was a question of procedure. As noted above, MCL 768.27a is a substantive rule of evidence. As such, it may overrule the application of MRE 404(b). *People v Watkins*, 277 Mich App 358, 365; 745 NW2d 149 (2007), lv gtd 480 Mich 1167 (2008). Defendant’s argument has no merit.

⁵ Defendant waived his argument that the trial court erred when it joined the two cases for trial when he expressly stipulated to the joinder at the hearing on this motion. *People v Gonzalez*, 256 Mich App 212, 224; 663 NW2d 499 (2003).

Defendant first argues that defense counsel should have objected to the prosecutor's attempts to question defendant and his girlfriend regarding the credibility of other witnesses. "It is generally improper for a witness to comment on the credibility of another witness" *People v Dobek*, 274 Mich App 58, 71; 732 NW2d 546 (2007).

In the first instance, the prosecutor asked defendant if the officer-in-charge of the case "made up" one of defendant's interview answers that defendant disputed at trial. Defendant responded, "I have no idea." Not only did this question not seek to elicit defendant's opinion of the officer's credibility generally, but he also did not provide any such opinion. Moreover, defendant's opinion of the officer's credibility would have been obvious to the jury. Defense counsel does not need to make futile objections. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

In the second instance, the prosecutor asked defendant's girlfriend whether defendant would be lying if he testified that he had never been arrested on cocaine charges. She responded that he would be. This does not constitute an opinion of defendant's credibility, but is a factual question designed to impeach defendant's testimony. Again, defense counsel need not register futile objections. *Id.*

Defendant also asserts that defense counsel was ineffective for failing to adequately impeach S.B. regarding a discrepancy between her testimony and the original police report. This discrepancy was clarified by the officer-in-charge of the case who attributed it to a clerical error. It is a fair inference that defense counsel knew of the clerical error and concluded that merely eliciting further confirmation from S.B. would be fruitless. Defendant has not provided any foundation for concluding that this was not trial strategy and that defense counsel was ineffective for failing to pursue this line of questioning.

Defendant next argues that his trial counsel failed to object to the lack of foundation regarding a witness's characterization of the victims' mother's bruises. The witness concluded that defendant was abusive on the basis of these bruises. Because defense counsel called this witness, it may be presumed that defense counsel did not want to delve into whether the witness had detailed knowledge of defendant's potentially abusive behavior. Defendant has not offered any argument to overcome this presumption.⁶

As his final assertion, defendant argues – without supporting legal authority – that trial counsel was ineffective for failing to move to suppress evidence of defendant's "drinking, prior arrests, charges, and convictions." However, not only was defendant's drug use relevant to his ability to recall the events of the relevant time period, it was also relevant to the relationship between defendant and his primary corroborating witness. Additionally, evidence of defendant's prior violent conduct toward the victims' mother or her children was eminently relevant to this case. Finally, evidence of defendant's prior criminal charges was only introduced on rebuttal to

⁶ Defendant also argues that defense counsel should have objected to hearsay testimony introduced by the officer. However, we are unable to locate any hearsay statement to which defense counsel could have objected in the transcript pages cited by defendant.

impeach defendant's testimony that he had never been charged with drug possession or domestic violence. As above, defendant has not provided any basis for concluding that defense counsel's conduct was anything but sound trial strategy. *Rodgers, supra* at 714.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ Christopher M. Murray