STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 14, 2009
v	No. 281545 Berrien Circuit Court
CHAD DWAINE CUMMINGS, Defendant-Appellant.	LC No. 2006-406086-FC

Before: K. F. Kelly, P.J., and Cavanagh and Beckering, JJ.

PER CURIAM.

This case involves defendant's sexual contact with the daughter of his former girlfriend between December 2004 and May 2005, when defendant was 32 years old and the victim was 12 and 13 years old. After a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) and (1)(b)(*i*),[1] and one count of third-degree criminal sexual conduct (CSC III), MCL 750.520d(1)(a). He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 360 to 750 months for each CSC I conviction and 290 to 750 months for the CSC III conviction. He appeals and we affirm.

I. Sufficiency of the Evidence

Defendant first argues that the evidence was insufficient to support his convictions beyond a reasonable doubt. We cannot agree. We review sufficiency of the evidence claims de novo. *People v McGhee*, 268 Mich App 600, 622; 709 NW2d 595 (2005). In doing so, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). The prosecution charged defendant with two types of CSC I, which required the prosecutor to prove beyond a reasonable doubt that defendant engaged in sexual penetration of the victim and that the victim was under 13 years of age, see *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999); MCL

[1] Defendant was convicted of two counts under § 520b(1)(a) (sexual penetration of a person under 13 years of age) and two counts under subsection § 520b(1)(b)(*i*) (sexual penetration of a person at least 13 years of age, but less than 16 years of age, and who is member of the same household).

750.520b(1)(a), and that defendant engaged in sexual penetration of the victim, who was at least 13 years of age but less than sixteen years of age, and who is a member of the same household as defendant, *People v Phillips*, 251 Mich App 100, 102; 649 NW2d 407 (2002); MCL 750.520b(1)(b)(*i*). In addition, to establish CSC III, the prosecution was required to show that defendant engaged in sexual penetration with the victim and that the victim was at least 13 years but under 16 years of age. See *In re Hawley*, *supra* at 512.

It is plain from the record that the prosecutor presented evidence, if believed, that demonstrated that defendant sexually penetrated the victim when she was between the ages of 12 and 13 years of age and when defendant and the victim were members of the same household. There is no merit to defendant's contrary contention that the evidence was insufficient because the victim's testimony was not credible and because no physical evidence proved that the sexual contact occurred. The victim's credibility and the weight to be afforded the evidence are strictly within the province of the jury. *McGhee*, *supra* at 624. And, the lack of physical evidence is immaterial because uncorroborated testimony, if believed, is sufficient to establish the elements of a crime. *People v Drohan*, 264 Mich App 77, 88-89; 689 NW2d 750 (2004). Because we resolve all conflicts in the evidence in favor of the prosecution, *McGhee*, *supra* at 624, we conclude that the evidence was sufficient to support defendant's convictions.

II. Ineffective Assistance of Counsel

Defendant next argues that he was denied effective assistance of counsel. Because defendant failed to raise these claims in a motion for a new trial or request for an evidentiary hearing, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish ineffective assistance of counsel, a defendant must show that counsel was deficient, such that counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). We note that there is a strong presumption that counsel was effective, and his or her decisions based on sound trial strategy, which the defendant must overcome in order to prevail on this claim. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

A. Jury Selection

Defendant argues that defense counsel was ineffective for failing to challenge two jurors, Juror 12 and Juror 27, for cause, or dismissing them with peremptory challenges, on the ground that they were biased. We disagree. Generally, this Court has been disinclined to grant relief on an ineffective assistance claim where the basis of the claim is the attorney's failure to challenge a potential juror. *Unger*, *supra* at 258. This is because of the non-verbal cues involved in the voir-dire process. *Id.* As this Court observed in *Unger*, *supra* at 258:

> Perhaps the most important criteria in selecting a jury include a potential juror's facial expressions, body language, and manner of answering questions. *People v Robinson*, 154 Mich App 92, 94-95; 397 NW2d 299 (1986). However, as a reviewing Court, we "cannot see the jurors or listen to their answers to voir dire questions." *Id*. at 94.

Here, Juror 12 stated that when she was very young, her sister had been the victim of a sexual crime. Juror 27 stated that she personally knew a potential prosecution witness and had two family members who had worked with him. When questioned by the trial court, both jurors unequivocally stated that they could set these experiences aside and could be fair and impartial in rendering a verdict. Given these statements and whatever other "hunches" counsel may have had, counsel was apparently satisfied that Jurors 12 and 27 could be fair and impartial despite their past experiences. "A lawyer's hunches, based on his observations, may be as valid as any method of choosing a jury." *Unger*, *supra* at 258 (quotation marks and citation omitted). We will not substitute our judgment for that of defense counsel, nor may we use the benefit of hindsight to assess counsel's performance. *Id.* Accordingly, we reject defendant's claim that defense counsel was ineffective for failing to dismiss Jurors 12 and 27.

B. Defendant's Ineffective Assistance Claims – Standard 4 Brief

Defendant also raises a number of additional claims of ineffective assistance in his Standard 4 brief. We consider each in turn.

i. Tether Records

Defendant first claims that counsel was ineffective for failing to obtain his tether records, which would have allegedly impeached the victim's testimony. This argument lacks factual support in the record, and therefore is unavailing. The record shows that counsel presented the testimony of defendant's parole officer, and offered the tether records at trial, which were admitted. Counsel was not ineffective for this reason.

ii. Hotel Records

Defendant next argues that defense counsel was ineffective for failing to obtain hotel records to contradict the victim's testimony that he registered under his boss's name and for failing to question prosecution witnesses regarding those records. We disagree. Decisions regarding what evidence to present and how to question witnesses are presumed to be matters of trial strategy. *People v Horn*, 279 Mich App 31, 39; ___ NW2d ___ (2008). We will not second-guess counsel on such matters, nor will we assess counsel's competence with the benefit of hindsight. *Id.*

Our review of the record shows that counsel explicitly chose not to reveal to the jury what the hotel records contained. Here, the prosecutor attempted to question a witness about the records and defense counsel successfully objected on hearsay grounds. Consequently, defense counsel never questioned the witness regarding the records, nor did counsel ever seek to have any such records admitted into evidence. Given this course of events, it is apparent to us that counsel may have believed that the records were not helpful to the defense. Because counsel's decision appears to be based on sound trial strategy, and defendant has not provided us with any reason or record evidence that rebuts that presumption, we conclude that counsel was not ineffective for failing to produce the hotel records or question a witness about them. *Id.*

iii. Failure to Call Witnesses

Defendant further asserts that defense counsel should have called certain witnesses to testify at trial. We disagree. Decisions regarding whether to call or question witnesses are presumed to be matters of trial strategy, which this Court will not second-guess with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). And, "the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Id*.

First, defendant contends that counsel should have called Officer Slavens to testify regarding what the victim's mother told him that the victim had said. However, this testimony would have been inadmissible hearsay. MRE 801(c); MRE 802. Counsel cannot be ineffective for failing to advocate a meritless position, *Mack*, *supra* at 130, and, because this testimony would have been inadmissible, it could not have provided defendant with a substantial defense. *Dixon*, *supra* at 398. Defendant was not denied effective assistance on this basis.

Next, defendant argues that counsel should have called Judy Pries and Layla Lawson, his mother and cousin, as witnesses. The record shows that defense counsel did intend to have Pries and Lawson testify. However, before they could testify, the trial court excluded their testimony because they violated the court's sequestration order, and as a result it would have been futile to attempt to call Pries and Lawson as witnesses. Again, counsel cannot be ineffective for failing to call these witnesses, as such a request would be meritless, *id.*, and counsel's failure to call them cannot even be attributed to his own decisions.

Defendant further contends that counsel failed to contact his boss, Rusty Bolton, and should have called Bolton as a witness. According to defendant, this testimony would have significantly undercut the prosecution's theory and discredited the victim's testimony. Although the record reveals that Bolton was not called as a witness, defendant's other assertions are not supported on the record and defendant has failed to offer any support with any documentary evidence. Because our review is limited to errors apparent on the record, *Rodriguez*, *supra* at 38, and we see none here, we conclude defendant has failed to show that he was deprived of a substantial defense and we presume that counsel's decision was based on sound trial strategy.

iv. Defendant's Remaining Ineffective Assistance Claims

Although we have made our best effort to address all of defendant's claims, we must note that defendant provides this Court with a list of complaints concerning counsel's performance, including counsel's failure to: answer defendant's letters and keep defendant informed regarding the status of his case, investigate prosecution witnesses' statements, hire an investigator, locate a child protective services report, obtain jailhouse log sheets, and subpoena a defense witness. Because of these grievances, defendant states that counsel failed to provide a substantial defense. However, because defendant has not explained how these incidences deprived him of a substantial defense or what his substantial defense was, and has not even argued that the trial's result would have been different had counsel undertaken the above-listed tasks, we consider defendant's remaining arguments to be abandoned. Defendant "may not merely announce [his] position and leave it to this Court to discover and rationalize the basis for [his] claims, unravel or

elaborate [his] argument . . . ." *Greater Bethesda Healing Springs Ministry v Evangel Builders & Constr Managers, LLC*, ___ Mich App ___; ___ NW2d ___ (2009).

III. Sentence Enhancement[2]

Defendant next argues that the trial court erred in sentencing him as a habitual offender because he did not receive notice pursuant to MCL 769.13. We disagree. We review the trial court's factual findings for clear error. MCR 2.613(C); *Mack*, *supra* at 125. To the extent that our resolution of this issue requires us to consider the trial court's application of the statute and the statute's meaning, our review is de novo. *People v Williams*, 475 Mich 245, 250; 716 NW2d 208 (2006).

At the sentencing hearing, the trial court determined that defendant received the habitual offender notice within the appropriate time period as required under MCL 769.13. That provision permits a prosecutor to seek an enhanced sentence "by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense *or, if arraignment is waived,* within 21 days after the filing of the information charging the underlying offense." MCL 769.13(1) (emphasis added). Here, defendant waived arraignment and the information was filed with the trial court on December 20, 2006. That same information contained a notice of intent to seek sentence enhancement, which is obviously within the 21-day time period. Further, that same day, defense counsel was served with a copy of the information, as evidenced by the proof of service in the lower court file.[3] Based on these facts, the trial court found that defendant received proper notice under the statute. Defendant's contention to the contrary is factually inaccurate. Accordingly, we cannot conclude that the trial court's finding was clearly erroneous.

Defendant, however, asserts that written notice of sentence enhancement "must be filed within 21 days of arraignment or wavier of arraignment." Defendant's interpretation of the statute is wrong. Our goal in interpreting a statute is to discern and give effect to the intent of the Legislature. *City of Warren v Detroit*, 261 Mich App 165, 168; 680 NW2d 57 (2004). The Legislature is presumed to have intended the meaning of the words it clearly expressed. *Id.* at 169. If a statute is clear and unambiguous, then judicial construction is neither necessary, nor permitted, and we must apply its plain meaning. *Williams*, *supra* at 250.

The statute's language is plain and unambiguous. Clearly, when a defendant waives his arraignment, as the case is here, the 21 days is measured from the time the information is filed, and not from the date that defendant waives his arraignment, as defendant contends. Accordingly, we cannot grant defendant the relief requested.

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[2] Defendant raises the same argument in his Standard 4 brief.

[3] Defendant erroneously contends that no proof of service was filed.

IV. Standard 4 Brief

The remaining matters concern those issues raised by defendant pro per in his Standard 4 brief, other than his ineffective assistance claims already discussed.

A. Substitution of Counsel

Defendant argues that the trial court abused its discretion by denying his motion for new counsel and claims that the court failed to adequately inquire into the alleged difficulties between defendant and counsel.[4] We disagree. We review for an abuse of discretion a trial court's decision regarding a defendant's motion for substitute counsel. *People v Akins*, 259 Mich App 545, 556; 675 NW2d 863 (2003). An indigent defendant may obtain a substitute counsel upon a showing of "good cause" and where such a substitution will not unreasonably interrupt the judicial process. *People v Bauder*, 269 Mich App 174, 193; 712 NW2d 506 (2005). "Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic." *Id*.

Here, the basis of defendant's motion was a breakdown in the attorney-client relationship because of defense counsel's alleged failure to provide defendant with discovery materials and failure to interview certain witnesses. At the motion hearing, defendant claimed he had received nothing from counsel, aside from part of a police report. After a discussion on the record with defendant and both opposing counsels, the trial court determined that the materials were either privileged, had not been delivered to defense counsel or possibly did not exist, or had just been delivered to defense counsel. Accordingly, the trial court found that a substitution of counsel was not warranted.

Given these facts, we cannot conclude that the trial court abused its discretion. Nothing about defendant's complaints indicates that counsel and defendant had developed a legitimate difference of opinion with respect to a fundamental trial tactic. And, further, the trial court's inquiry into the matter revealed that counsel had not provided the documentation for reasons other than the pursuit of a different trial strategy. Accordingly, defendant failed to demonstrate good cause, as the trial court's inquiry revealed, and the trial court did not err by denying his motion for substitute counsel.

B. Exclusion of Witness Testimony

Defendant next argues that the trial court abused its discretion when it excluded the testimony of two defense witnesses because they violated the court's sequestration order. We

[4] Our consideration of this issue is limited to defendant's motion for substitution and appointment of new counsel that was filed on January 9, 2002, which is the motion attached to defendant's Standard 4 brief. Although defendant filed a second motion in February 2007, there is no indication in the record, nor does defendant assert, that the second motion was ever noticed for hearing, heard, or denied.

cannot agree. We review for an abuse of discretion a trial court's decision to exclude the testimony of a witness who violates a sequestration order. *People v Meconi*, 277 Mich App 651, 654; 746 NW2d 881 (2008). Three sanctions are available to a trial court for the purpose of remedying the violation of a sequestration order: "(1) holding the offending witness in contempt; (2) permitting cross-examination concerning the violation; and (3) precluding the witness from testifying." *Id*. (quotation marks and citation omitted). Preclusion from testifying is the most extreme sanction and should be used sparingly. *Id*.

Here, the trial court precluded the testimonies of two witnesses, Pries and Lawson, who were discovered peeking through the courtroom door during the victim's testimony and who could hear the testimony from their position by the door. Because these witnesses could have overhead the testimony of the victim, whose testimony they were to impeach with their own testimonies, we conclude that there was no abuse of discretion in the trial court's decision to disallow their testimonies.

C. Right to Transcripts

Lastly, defendant contends that appellate counsel's failure to loan or provide him with copies of the trial transcripts free of charge violates his constitutional rights. It is true that a defendant's equal protection rights are violated when a state denies appellate review solely due to a defendant's inability to pay for transcripts. *Griffin v Illinois*, 351 US 12, 18-19; 76 S Ct 585; 100 L Ed 891 (1956); *People v Caston*, 228 Mich App 291, 295-297; 579 NW2d 368 (1998). Consistent with this principle, our court rules require the lower courts to provide, free of charge, transcripts to an indigent criminal defendant who requests them. MCR 6.433(A). As defendant concedes on appeal, appellate counsel requested and received the transcripts. Accordingly, defendant's rights were satisfied. Defendant's allegation that appellate counsel refused to provide the transcripts free of charge, thereby violating his constitutional rights, is misplaced. Any complaint defendant has against appellate counsel is better addressed in alternative forums.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Jane M. Beckering