

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RONALD BOYD WHITE,

Defendant-Appellant.

UNPUBLISHED

June 4, 2009

No. 283750

Wayne Circuit Court

LC No. 07-015195-FC

Before: Bandstra, P.J., and Owens and Donofrio, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of two counts of first-degree criminal sexual conduct, MCL 750.520b(1)(a), and two counts of second-degree criminal sexual conduct, MCL 750.520c(1)(a). He was sentenced to concurrent prison terms of 25 to 40 years for each first-degree CSC conviction and 86 months to 15 years for each second-degree CSC conviction. He appeals as of right. We affirm.

The victim is the cognitively impaired¹ granddaughter of defendant's former girlfriend. The victim testified that defendant engaged in digital-vaginal and lingual-vaginal penetration with her on more than one, but less than five, occasions between October 2006 and June 2007, when the victim was 11 and 12 years old. These incidents occurred when the victim spent the night at defendant's home. When she stayed with defendant, she slept in his bed; he sometimes slept in the bed with her; at other times, he slept on the couch. The victim also testified that defendant kissed her "with his tongue" and fondled her breasts and buttocks on more than one occasion during this period of time. The victim remembered one specific date on which defendant engaged in digital penetration, February 9, 2007, because it was the day of her Valentine's Dance at school. Otherwise, she was unable to identify the specific dates on which the criminal sexual conduct occurred. Defendant bought the victim numerous gifts, including a ring, and he told the victim that they were married. Defendant bought the victim a bikini, which was too small for her and exposed portions of her buttocks and breasts, and he took a picture of her standing next to his car while wearing the bikini. The victim's grandmother testified that the

¹ Testimony indicated that the victim was generally perceived, during the relevant time period, to have the cognitive function of a child approximately half her chronological age.

victim often stayed over night with defendant, that she had done so on February 9, 2007, and that defendant bought the victim numerous gifts, including a ring and a bikini that was too small for her.

During his statement to police, defendant denied ever intentionally touching the victim for purposes of sexual gratification. Defendant acknowledged he slept with the victim on occasion when she stayed at his house; when they were in bed defendant would put his arm around the victim and she would place her head on his chest. Defendant admitted that the victim would kiss him on the lips, explaining that he felt that she was “practicing” on him. Defendant acknowledged that he gave the victim friendly smacks on the buttocks on occasion, and he admitted that there may have been accidental contact with the victim’s buttocks or breasts. Defendant also explained that, when he sat on the couch with the victim, he would rub her abdomen, and she would sometimes move his hand to her breasts, but he stated that he would move his hands away and tell her that it was wrong. Defendant further stated that “about the only time [he] could think of that [any penetration] could have happened” would have been unintentional, when he and the victim were wrestling or “horsing around.” He agreed with the questioning officer that it was possible that his hand made contact with, and his finger slipped inside, the victim’s genital area while wrestling, and likewise, indicated that it was possible that there was unintentional inappropriate contact, or that the victim perceived there to be such contact, when the victim sat on his head while wrestling with defendant. Defendant repeatedly denied ever initiating any sexual contact with the victim, and explained that he had no sexual drive, and did not get sexually aroused “any more.”

I. Rape-Shield Statute

Defendant first argues that the trial court erred by excluding evidence that the victim was allegedly sexually abused by someone else when she was two years old. The trial court excluded this evidence under the rape-shield statute, MCL 750.520j.² We review a trial court’s decision to exclude evidence under the rape-shield statute for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996); *People v Hackett*, 421 Mich 338, 349; 365 NW2d 120 (1984). A trial court abuses its discretion when it selects an outcome that does not fall within the

² MCL 750.520j provides in part:

(1) Evidence of specific instances of the victim’s sexual conduct, opinion evidence of the victim’s sexual conduct, and reputation evidence of the victim’s sexual conduct shall not be admitted under sections 520b or 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim’s past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy or disease.

range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003); *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

In *Hackett*, *supra* at 350-351, our Supreme Court explained the procedure that a trial court should follow when a defendant seeks to establish the relevancy and admissibility of a complainant's sexual conduct with others under the rape-shield statute. In such circumstances, a defendant is required to make an offer of proof regarding the proposed evidence and demonstrate its relevance to the purpose for which he seeks its admission. The trial court must deny the request to admit the evidence, unless there is a sufficient showing of relevancy in the defendant's offer of proof. *Id.* at 350. If there is a sufficient offer of such proof, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court should order an in camera hearing to determine the admissibility of the evidence. *Id.*; see also *People v Byrne*, 199 Mich App 674, 678; 502 NW2d 386 (1993).

In this case, defendant sought to elicit evidence that the victim was sexually abused when she was two years old. In accordance with the procedure in *Hackett*, the trial court gave defense counsel an opportunity to explain the relevance of that evidence to a purpose for which it could be admitted, but defendant never identified any such purpose for the evidence, and made no effort to establish its relevancy. Therefore, the trial court did not abuse its discretion in excluding the evidence. Further, the trial court's ruling did not violate defendant's constitutional right to present a defense. A defendant's interest in presenting evidence may bow to accommodate other legitimate interests in the criminal trial process, such as the implementation of evidentiary rules. *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008). Here, the trial court simply adhered to an established evidentiary rule, which was not arbitrary or disproportionate to the purposes it was designed to serve. The court gave defendant an opportunity to establish the relevancy of the evidence to a purpose for which he sought to admit it, as it was required to do, but he failed to do so. Accordingly, there was no error.

II. Defendant's Absence During Trial

Defendant next argues that his right to due process was violated because the trial court gave supplemental jury instructions in his absence. Defendant concedes that this issue was not preserved with an appropriate objection at trial. Therefore, appellate relief is not warranted absent a plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Although defendant had a right to be present when the trial court instructed the jury, that right may be waived. *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984); *People v Bowman*, 36 Mich App 502, 510; 194 NW2d 36 (1971). Assuming that defense counsel's waiver of defendant's presence was ineffective because defendant was required to personally waive that right, see *People v Montgomery*, 64 Mich App 101, 103; 235 NW2d 75 (1975), defendant has not established that his substantial rights were affected. A defendant's absence from a portion of a trial does not require reversal unless there is a reasonable probability of prejudice resulting from that absence. *People v Morgan*, 400 Mich 527, 536; 255 NW2d 603 (1977); *People v Woods*, 172 Mich App 476, 480; 432 NW2d 736 (1988); *People v Kvam*, 160 Mich App 189, 197; 408 NW2d 71 (1987). Here, the trial court merely gave supplemental jury instructions, which defendant's attorney approved, and defendant does not claim that the instructions were improper. Defendant's assertion that the jury may have inferred from his

absence that he either absconded or was not taking the matter seriously is based on unsupported speculation and, thus, fails to establish a reasonable probability of prejudice. We note that defendant was present on subsequent occasions, when the jury returned to the courtroom to hear the court's response to jury questions that arose during deliberations. Because defendant has failed to show that his substantial rights were affected, reversal is not required.

III. Prosecutor's Conduct

Defendant next argues that the prosecutor improperly shifted the burden of proof when she argued that there was no evidence suggesting that the victim had a reason to fabricate her allegations regarding defendant's conduct. Defendant did not object to the prosecutor's argument at trial. Therefore, this Court's review is limited to plain error affecting defendant's substantial rights. *Carines, supra*; *People v Barber*, 255 Mich App 288, 296; 659 NW2d 674 (2003).

A prosecutor may not suggest in closing argument that the defendant "must prove something or present a reasonable explanation for damaging evidence, because such an argument tends to shift the burden of proof." *People v Green*, 131 Mich App 232, 237; 345 NW2d 676 (1983). However, viewed in context, the prosecutor here merely stated that there was nothing in the evidence to suggest that the victim had a reason to lie. A prosecutor properly may comment on her own witnesses' credibility, "especially when there is conflicting evidence and the question of the defendant's guilt depends on which witnesses the jury believes." *People v Thomas*, 260 Mich App 450, 455; 678 NW2d 631 (2004). Thus, there was no plain error.

IV. Defendant's Supplemental Brief.

A. Effective Assistance of Counsel

In his supplemental brief on appeal, defendant argues that a new trial is required because trial counsel was ineffective. We disagree.

"Whether a person has been denied the effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984)." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Thus:

[f]irst, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not performing as the "counsel" guaranteed by the Sixth Amendment. *Strickland, supra* at 687. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* at 690. "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687. To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. *Id.* at 694. [*Id.* at 600.]

Defendant first argues that his trial counsel was ineffective for failing to assert that evidence that the victim may have been sexually abused as a toddler was admissible under *People v Haley*, 153 Mich App 400; 395 NW2d 60 (1986), and *People v Mikula*, 84 Mich App 108; 269 NW2d 195 (1978), to provide an alternative cause of the complainant's physical condition, namely, the absence of an intact hymen. However, defendant failed to present any evidence, either in the trial court or to this Court, identifying the nature of the alleged past sexual abuse, and there is nothing in the record to indicate that the abuse was of a type that could possibly explain the victim's later condition. The record merely indicates that the victim's grandmother seemingly alluded to an instance of abuse not necessarily involving any penetration, in the child's past. Without more, defendant offers this Court no basis to conclude that the allegation of prior abuse was relevant to the victim's later physical condition, to conclude that defendant's trial counsel performed deficiently by failing to assert more fervently that the evidence was admissible, or to conclude that defendant was prejudiced by counsel's asserted failure in this regard.

Defendant also argues that his trial counsel was ineffective for failing to present medical evidence that he had erectile dysfunction. Decisions regarding what evidence to present 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). The only medical evidence offered in support of defendant's ineffective assistance of counsel claim was evidence that defendant was treated for prostate cancer between August and October 2003, and had "some erectile dysfunction at this time" (emphasis added). Defendant did not present either the trial court or this Court with any medical evidence that he continued to suffer from this condition in 2006 and 2007, when the charged abuse was alleged to have occurred. Because defendant has not shown that he has medical evidence of an erectile dysfunction condition that existed in 2006 and 2007, he has not established factual support for his ineffective assistance of counsel claim. Furthermore, because the charges in this case were based on allegations of digital penetration, oral sex, and defendant's fondling of the victim's breasts and buttocks, defendant was not prejudiced by the failure to present evidence of an alleged erectile dysfunction condition. To the extent that the victim indicated that defendant may have had an apparent erection at one point, or that he may have ejaculated during one of the incidents, these statements were somewhat peripheral to the allegations of misconduct against defendant. Further, as noted previously, the jury was presented with defendant's assertion that he lacked sexual drive and was incapable of becoming aroused "any more" and determined that the victim's testimony remained credible. Thus, defendant cannot show that he was prejudiced by counsel's decision not to present evidence that he suffered from "some" erectile dysfunction 2 to 3 years prior to the alleged incidents.

Lastly, defendant argues that counsel was ineffective for failing to present evidence of store receipts, which allegedly would show that defendant was not at home for most of the day on May 10, 2007. However, the charged incidents were alleged to have occurred between October 2006 and June 2007, and, other than February 9, 2007, the victim was unable to identify any specific dates at trial. Further, even if the May 10 date was specifically relevant, evidence

that defendant was shopping for much of the afternoon and early evening would not foreclose the possibility that defendant engaged in acts described by the victim later that evening.³ Thus, there is no reasonable probability that the result of the trial would have been different if evidence of defendant's whereabouts during portions of May 10 had been presented.

For these reasons, we reject defendant's claim that he was denied the effective assistance of counsel.

B. Sentencing

Finally, defendant argues that he was unconstitutionally sentenced under the enhanced penalty provisions of MCL 750.520b(2)(b), contrary to ex post facto prohibitions. We disagree.

Before August 2006, first-degree CSC was "punishable by imprisonment in the state prison for life or for any term of years." However, MCL 750.520b was amended by 2006 PA 165 and 169, effective August 28, 2006, to add subsection (2)(b), which prescribes a penalty of life imprisonment or a minimum sentence of 25 years where a first-degree CSC offense is committed by an individual 17 years of age or older against an individual less than 13 years of age.

"A statute that affects the prosecution or disposition of criminal cases involving crimes committed before its effective date violates the [state and federal] Ex Post Facto Clauses[, Const 1963, art 1, § 10, and US Const, art I, § 10,] if it '(1) makes punishable that which was not, (2) makes an act a more serious criminal offense, (3) increases the punishment, or (4) allows the prosecution to convict on less evidence.'" *People v McRunels*, 237 Mich App 168, 175; 603 NW2d 95 (1999), quoting *Riley v Parole Bd*, 216 Mich App 242, 244; 548 NW2d 686 (1996). See also, *In re Contempt of Henry*, 282 Mich App 656, 682-683; ___ NW2d ___ (2009). In this case, defendant was convicted of conduct occurring between October 2006 and June 2007, after the effective date of MCL 750.520b(2), as amended. Because the conduct of which defendant was convicted took place after the effective date of the statute, ex post facto prohibitions were not violated.

We affirm.

/s/ Richard A. Bandstra

/s/ Donald S. Owens

/s/ Pat M. Donofrio

³ We note that of the five receipts presented by defendant, only three evidence transactions that took place on May 10, 2007; the other two receipts pertain to transactions on May 11, 2007 and May 12, 2007.