STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 17, 2009
v	No. 282953 Oakland Circuit Court
DAVID JEROME KATAJA, Defendant-Appellant.	LC No. 2007-213611-FH

Before: Davis, P.J., and Whitbeck and Shapiro, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(A) (person under 13); attempted CSC II, MCL 750.520c(1)(A), MCL 750.92; and furnishing alcohol to a minor, MCL 436.1701(1). We affirm.

Defendant's first alleges that he received ineffective assistance of counsel. Whether defendant was denied his right to the effective assistance of counsel generally presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). This Court reviews de novo issues of constitutional law, but the trial court's findings of fact, if any, are reviewed for clear error. *Id.* "Effective assistance of counsel is presumed, and defendant bears a heavy burden to prove otherwise." *People v Dixon*, 263 Mich App 393, 396; 688 NW2d 308 (2004). To demonstrate a denial of effective assistance of counsel, defendant must show that trial counsel's performance was deficient and that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). Whether defense counsel's performance was deficient is measured against an objective standard of reasonableness. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "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." *Carbin, supra* at 600.

First, defendant argues that defense counsel failed to "thoroughly investigate" the victim's previous contacts with the police officer in charge of the case. Defendant asserts that trial counsel's failure resulted in a deprivation of "potentially admissible useful information regarding the complainant's credibility and ongoing professional relationship" with the testifying officer. Defendant contends that defense counsel should have moved to discover any potential police records showing the previous contacts between the officer and the victim and that any resulting documents could have been used for impeachment and to show bias.

"A defendant is entitled to have his counsel prepare, investigate, and present all substantial defenses." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). "A substantial defense is one that "might have made a difference in the outcome of the trial." *Id*. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland v Washington*, 466 US 668, 691; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

We conclude that, in this case, defense counsel's performance did not fall below an objective standard of reasonableness. *Toma*, *supra*. Counsel's failure to obtain or introduce the victim's police records did not amount to a failure to adequately investigate a "substantial defense." Defendant speculates that such records would have been useful to his defense. However, he fails to demonstrate how any of the alleged documents would have made a difference at trial when, at best, they could only have been used for impeachment. *Kelly*, *supra*. In addition, defense counsel effectively attacked the victim's credibility during his direct examination of the police officer with whom the victim was acquainted without any documents from the police department and, during his cross-examination of the victim, he questioned her regarding inconsistencies in her testimony on direct-examination. Counsel's decision as to what evidence to present for impeachment purposes is a matter of trial strategy that we will not second-guess with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Furthermore, as discussed *infra* at 9-10, although defendant argues that one of the documents would have shown that the victim previously made a false CSC allegation, this assertion is belied by the fact that, after receiving documents post-trial that included the name and address of the man against whom there was a possible CSC allegation, counsel did not obtain an affidavit to show that the victim in this case was the complainant in the other incident or that the allegation was false.

Second, defendant contends that defense counsel rendered ineffective assistance when he failed to object to evidence showing that defendant purchased alcohol for the victim on numerous occasions in addition to the night of the offense, failed to object to evidence showing that two minors were drinking at defendant's house on one occasion, failed to object when the victim testified that one of her friends indicated that defendant also touched her in an inappropriate manner, and failed to object to evidence that defendant made threats to two of the victim's friends shortly after the offenses. Defendant argues that all of this evidence was inadmissible under MRE 404(b).

MRE 404(b) provides in relevant part, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes . . . ." The evidentiary rule provides a nonexclusive list of permissible grounds upon which other acts may be admitted. *People v Starr*, 457 Mich 490, 496; 577 NW2d 673 (1998). Other-acts evidence is admissible where the act "being introduced [is] offered for the purpose of explaining the circumstances leading up to the charged offense and [is] not offered to prove that defendant, by virtue of his commission of the separate act had committed the offense for which he was on trial." *People v Bowers*, 136 Mich App 284, 294; 356 NW2d 618 (1984). "Stated differently: Evidence of other criminal acts is admissible when so blended or connected with the crime of which defendant is accused that proof of one incidentally involves the other or explains the circumstances of the crime." *People v Sholl*, 453 Mich 730, 742; 556 NW2d 851 (1996) (quotations and citation omitted).

In this case, evidence was introduced that defendant purchased and provided alcohol to the victim on numerous occasions. This evidence assisted the jury in understanding the circumstances leading up to the offenses, specifically the relationship between defendant and the victim. It was not offered to show defendant's propensity to commit CSC, or that defendant, by virtue of purchasing and providing alcohol on previous occasions, committed the charged offenses. *Bowers*, *supra*. Similarly, with respect to evidence that defendant threatened certain individuals shortly after the incident, this evidence explained the circumstances surrounding the disclosure of the offenses; it was blended with the circumstances of the crime. *Sholl*, *supra*; *Bowers*, *supra.* With respect to evidence that two of the victim's minor friends were drinking alcohol at defendant's house, the evidence as presented did not relate to any act of defendant. There was no testimony that defendant purchased or supplied the alcohol that the two were drinking. On the record, we conclude that defense counsel's conduct did not fall below an objected standard of reasonableness where objection to the challenged evidence would have been meritless. *People v Goodin*, 257 Mich App 425, 433; 668 NW2d 392 (2003).

Defendant also challenges his counsel's failure to object to the victim's testimony that a friend revealed that defendant touched the friend in an inappropriate manner. This was other-acts evidence for which no notice was given to defendant, MRE 404(b), and defense counsel could have objected and requested a curative instruction. However, his failure to do so did not fall below an objective standard of reasonableness. *Toma*, *supra.* Defense counsel called the friend as a defense witness and she denied telling the victim that defendant had inappropriately touched her. Further, during closing argument defense counsel attacked the victim's credibility, informing the jury that the victim failed to mention the incident at any time before trial. Counsel's actions reflect a reasoned trial strategy that we will not second-guess with hindsight. *Rockey*, *supra.*

Defendant next contends that defense counsel was ineffective in failing to object to the testimony of prosecution witness Tricia Schuster, a forensic interviewer at the Care House agency, who was not qualified as an expert. MRE 702 governs admissibility of expert testimony and it 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.

In this case, Schuster offered testimony based on her knowledge, experience and training but was never formally qualified as an expert witness pursuant to MRE 702. Assuming defense counsel was ineffective in failing to object to the witness's testimony absent qualification as an expert, any error was harmless. The record indicates that Schuster was more than qualified to offer expert testimony on forensic interviews and the methods used at Care House. See *People v Dobek*, 274 Mich App 58, 76; 732 NW2d 546 (2007) (unqualified expert testimony did not constitute error requiring reversal where the record indicated that the witness was more than qualified to offer expert opinion under MRE 702).

We agree that the prosecution improperly asked whether the victim appeared truthful and that defense counsel should have immediately objected. *People v Peterson*, 450 Mich 349, 352; 537 NW2d 857 (1995), amended 450 Mich 1212 (1995) (it is improper for an expert in a child sexual abuse case to offer opinion testimony regarding the victim's veracity for truthfulness). We find this failure harmless, however. Schuster did not directly answer the question and stated that she could not testify regarding whether the victim completed the interview to the best of her ability. Furthermore, it was defense counsel who first brought up the issue of truthfulness by asking whether "witnesses at Care House ever lie to Care House workers" and stating "[i]n fact, there's no reason for a child to lie to you." Having contributed to any error, whether by plan or negligence, the error is not reversible. *People v Witherspoon* (*After Remand*), 257 Mich App 329, 333; 670 NW2d 434 (2003).

Finally, defendant contends that defense counsel was ineffective for failing to object when the prosecutor improperly shifted the burden of proof during cross-examination when she asked two defense witnesses if they approached police before trial to offer a statement. In *People v Gray*, 466 Mich 44, 47; 642 NW2d 660 (2002), our Supreme Court adopted the proposition that "no special foundation is necessary before the trier of fact may be apprised that an alibi witness failed to come forward earlier with exculpatory information." That ruling logically and necessarily applies to the situation in this case involving non-alibi witnesses. The two defense witnesses offered exculpatory evidence related to defendant's touching of the victim, but failed to come forward at any time before trial. This fact impacted their credibility and was properly made known to the jury. Defense counsel did not render deficient performance in failing to object to the questioning. *Goodin*, *supra.*

Having found no merit to any of defendant's assertions, we conclude that defendant was not denied the effective assistance of counsel. Additionally, defendant's request for a remand for an evidentiary hearing is not properly before this Court. MCR 7.211(C)(1)(a).

Defendant also contends on appeal that the trial court erred in denying his post-trial motion for discovery, which requested the trial court order the Milford Police Department to turn over unredacted documents showing contacts between the department and the victim in this case. Alternatively, defendant requested that the trial court conduct *in camera* review of the documents to determine if they contained any evidence that would be favorable to his defense. The trial court asked defense counsel what prevented her from obtaining the information without a court order, to which she replied she could probably make a request under the Freedom of Information Act (FOIA). There was some discussion off the record and then defense counsel requested the matter be adjourned for 30 days while she attempted to make a FOIA request for the documents.

Pursuant to the request, the police department disclosed two sets of documents with names of certain involved individuals redacted. The documents showed that unnamed individuals set fire to a field and that an unnamed individual made a CSC complaint against a neighbor for allegedly directing a vulgar comment at her. There were two other documents the police department refused to disclose pursuant to a "parent-child" privilege under FOIA. Defense counsel moved to have the trial court order the production of complete, unredacted documents including the unproduced "privileged" documents. The trial court denied defendant's post-trial discovery motion and held that regardless whether the information was accessible, defendant would not be entitled to a new trial because, at best, the documents would be relevant

for impeachment purposes only. Defendant contends the trial court's ruling denied him his Sixth Amendment right to present a defense.

Issues involving a trial court's ruling on a discovery matter in a criminal case are reviewed for an abuse of discretion. *People v Lemcool*, 445 Mich 491, 497; 518 NW2d 437 (1994). A trial court abuses its discretion when its ruling is outside the "principled range of outcomes." *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003). This Court reviews de novo the question whether a defendant was denied his constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

A criminal defendant does not have a general right to discovery. *People v Stanaway*, 446 Mich 643, 680; 521 NW2d 557 (1994). Discovery is generally left to the trial court's discretion and will be ordered when "the thing to be inspected is admissible in evidence and a failure of justice may result from its suppression." *Id.* (citation and quotations omitted). The moving party has the burden to show facts "indicating that such information is necessary to a preparation of its defense and in the interests of a fair trial, and not simply a part of a fishing expedition . . . ." *Id.* Exculpatory evidence, however, must always be disclosed by the prosecutor if such evidence is in his possession. *Id.* at 666.

In this case, the trial court did not abuse its discretion in denying defendant's post-trial motion for discovery. Defendant merely speculates that information contained in the police records would be favorable to his defense, arguing that there may have been something in the requested record that would have been useful for impeachment or would lead to further discovery. This is insufficient, as defendant has provided "no basis for a good-faith belief that it was probable that such information would be found." *Id.* at 651. Accordingly, defendant's motion was a post-trial fishing expedition for impeachment evidence and an in camera inspection was not required. *Id.* at 681-682.

Further, defendant failed to show that any of the documents he sought would be admissible or that a failure of justice would result from suppression of the documents. Defendant argued that the records might have shown that the victim committed an offense involving theft or dishonesty. However, to be admissible under MRE 609, the documents would have to show a conviction. Thus, defendant's request was based on multiple unfounded presumptions: first, that the documents would reflect that there was an incident involving theft or dishonesty and second, that the presumed incidents resulted in convictions. This is too speculative to show either admissibility or a failure of justice based on their suppression. *Id.*

Defendant alleges that the records might have shown that the victim made a false allegation of sexual misconduct against another person. We agree with defendant that, were there such evidence, it would not be subject to the rape-shield law. A defendant may cross-examine the victim about a prior false accusation of a similar nature and submit proof of the false allegation if the victim denies making it. *People v Mikula*, 84 Mich App 108, 115; 269 NW2d 195 (1978). However, prior to introducing testimony regarding the prior accusation, a defendant must first make an offer of proof, showing with concrete evidence, that the prior accusation was false. *People v Williams*, 191 Mich App 269, 273; 477 NW2d 877 (1991). In *Williams*, this Court held that such evidence was inadmissible because:

> In short, defense counsel had no idea whether the prior accusation was true or false and no basis for believing that the prior accusation was false. Counsel merely wished to engage in a fishing expedition in hopes of being able to uncover some basis for arguing that the prior accusation was false. [*Id.* at 273-274.]

The circumstances here are even more tenuous, as there is no evidence that the victim made a prior accusation. But, even assuming that she was the complainant, rather than a witness to the disclosed incident, there is simply no evidence that the prior incident was false.

Although the names of minors were redacted from the documents received based on the FOIA request, the name of the man against whom there was a possible CSC allegation, along with his address, remained in the report. Thus, counsel had the ability to contact this individual and inquire as to whether the victim had made the allegation, if the allegation was false and, if so, obtain an affidavit so stating. Although the affidavit would not necessarily meet the "concrete evidence" standard, it would certainly have supported defendant's claim far more than the mere assertion that such evidence might exist. Further, the fact that counsel did not obtain such an affidavit suggests that either the victim was not the complainant, or the allegation was not false. Having failed to provide any evidence that the prior incident was false, the prior incident was inadmissible and, therefore, not discoverable. *Stanaway*, *supra* at 680. Because there is no evidence that the request was anything other than a fishing expedition, and defendant has not even shown that the requested documents were discoverable, the trial court properly denied the motion.

Although we conclude that the trial court properly denied the motion, we have concerns about the trial court's sua sponte discussion of the application of FOIA as a mechanism the defense could employ to obtain the sought information without the trial court issuing an order. Accordingly, we take this opportunity to caution trial courts that it is their responsibility to determine whether parties are entitled to the discovery they request. Trial courts should not attempt to avoid making a decision simply because there may be another avenue, such as a FOIA request, through which the requested discovery might be obtained. The function of the trial court is to be neutral and impartial. See *People v Williams*, 464 Mich 174, 179; 626 NW2d 899 (2001). If a party is entitled to the requested discovery under the court rules, the trial court should order it. If the party is not entitled to the discovery under the court rules, the trial court should not order it. It is up to the party's attorney, not the trial court, to determine whether there is some other way to obtain the information.

Affirmed.

/s/ Alton T. Davis
/s/ William C. Whitbeck
/s/ Douglas B. Shapiro