

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN SPARKS,

Defendant-Appellant.

UNPUBLISHED

April 1, 2010

No. 281997

Wayne Circuit Court

LC No. 07-010616-FC

Before: STEPHENS, P.J., and JANSEN and WILDER, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of four counts of first-degree criminal sexual conduct, MCL 750.520b(1)(b) (victim between the ages of 13 and 16 years old and related to defendant). Defendant was sentenced to 15 to 30 years' imprisonment for each count. We affirm.

I.

This case arises out of criminal sexual conduct perpetrated on the female victim by defendant, her father, over the course of several years. The victim lived with defendant intermittently since she was three years old. When she lived apart from defendant, she would nevertheless visit defendant occasionally.

The victim testified that, when she was ten years old, she and defendant shared a bedroom at her grandmother's home. She recalled that one night, she awoke and discovered defendant's "mouth was on [her] vagina." She also recalled that defendant unbuttoned her shirt.

The victim further testified that, when she was 13 years old, defendant called her to his room in his home on Littlefield Street and told her she was in trouble. According to the victim, defendant promised that she would not be in trouble if he did her a favor, which he described as "curlin[ing] toes" or wanting "[s]ome of [the victim's] body parts." Defendant then instructed the victim to take a bath, remove her clothes, and return to his room. After bathing, the victim returned to defendant's bedroom, fully clothed, and defendant was sitting on his bed, naked. Defendant then instructed the victim to remove her shirt and pants, and to take her underwear into her bedroom. When she visited her bedroom, the victim saw her brother, but did not speak to him. The victim recalled that, when she returned to defendant's bedroom, she "laid on the bed and [defendant] placed his mouth on [her] breasts and [her] vagina and [her] toes."

The victim testified regarding another incident occurring at defendant's home on Littlefield Street when she was 13 years old. She recalled defendant telling her that he "wanted some." Even though she began to cry, the victim followed his instructions to remove her clothing and lie on his bed. Later, the victim followed defendant's instructions to move to the living room floor, where he "put his mouth on [the victim's] breasts and [] vagina." He also placed the tip of his penis inside the victim's vagina, causing the victim pain. Defendant was unable to penetrate completely because "the hole was too small," but the victim testified that defendant ejaculated while attempting to do so. Thereafter, defendant instructed the victim to kneel on the floor and he placed the tip of his penis inside her anus, causing additional pain. Finally, defendant instructed the victim to lie on top of him and he placed his penis in her mouth while placing his mouth on her vagina.

The victim finally testified regarding an incident occurring at a home, later identified as 12198 Stoepel Street, when she was 14 years old. The victim recalled that defendant asked her to accompany him to look at the home. The victim described the home as "abandoned," but noted that it had curtains and some furniture, including a mattress in the dining room, a television, and a radio. They remained at the Stoepel home for a couple of hours, went to defendant's home on Littlefield Street, and then returned to the Stoepel home later that day. During their second visit, defendant drank alcohol and the victim watched television. After approximately ten minutes, defendant requested a "favor" and the victim refused. The victim recalled that defendant said that she would do him a favor if she loved him. When the victim again refused, defendant slapped her face and instructed her to remove her clothing and lie on the mattress. After the victim lied down without removing her clothing, defendant removed the clothing for her and put his mouth on her breasts and vagina. Then, he required the victim to perform oral sex on him and he ejaculated into the victim's mouth and onto the floor. Afterward, defendant went to the restroom, but when he returned he required the victim to perform oral sex on him and he ejaculated again. The victim pretended to gag and vomit, and when defendant ultimately fell asleep, the victim attempted to leave the Stoepel home. However, defendant awoke, grabbed her by the neck and warned her that something bad would happen to her if she ever told anyone what occurred.

The victim did not report defendant's criminal sexual conduct until she was 16 years old. At trial, defendant denied all of the victim's allegations and testified that he never had sexual relations with her. Rather, defendant testified that the victim was angry with him because he would not allow her to date and he had started living with a girlfriend. Following defendant's testimony, the jury convicted him as charged.

II.

Defendant first argues that the trial court abused its discretion in denying his motion for an adjournment, resulting in prejudice to his constitutional right to present a defense. We disagree.

In the victim's initial report to police, she stated that all of the incidents of criminal sexual conduct occurred at home. Later, at her preliminary examination, she clarified that the fourth incident actually occurred at an abandoned home in the neighborhood of Davison and Dexter. With this new information, the prosecutor requested that police officers bring the victim to this neighborhood to identify and photograph the home. The request was not fulfilled until the

weekend before trial. The prosecutor notified defendant's attorney of the address on Stoepel and photographs the following Monday and moved to amend the information to include the address on the first day of trial, the following Wednesday. At that time, defendant's attorney moved for an adjournment to allow additional time to investigate the Stoepel home. He suggested that further investigation could reveal that the home was not abandoned at the time of the alleged criminal sexual conduct, which would tarnish the victim's credibility.

"We review the trial court's ruling on defendant's request for an adjournment or a continuance for an abuse of discretion." *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). In *Coy*, this Court discussed the requirements for a continuance or an adjournment as follows:

[T]o invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence. "Good cause" factors include "whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments." Even with good cause and due diligence, the trial court's denial of a request for an adjournment or continuance is not grounds for reversal unless the defendant demonstrates prejudice as a result of the abuse of discretion. [*Id.* at 18-19 (internal citations omitted).]

Defendant arguably presented some good cause for an adjournment, including the constitutional right to present a complete defense, *People v Unger*, 278 Mich App 210, 249; 749 NW2d 272 (2008), and the inability to investigate new evidence presented by the prosecutor. In addition, there is no evidence that defendant had requested previous adjournments. However, defendant was afforded the opportunity to investigate the new evidence during the two days prior to trial. Regardless, even if good cause existed and the trial court abused its discretion in denying defendant's motion for an adjournment, defendant has not demonstrated prejudice as a result of the trial court's ruling. Defendant speculatively argues on appeal that, if he had had time to prove that the Stoepel home was not abandoned at the time of the alleged criminal sexual conduct, the victim's credibility would have been undermined. We reject this claim because such evidence would only prove that the victim mischaracterized the home as abandoned because she and defendant were alone there.¹ Whether the Stoepel home was abandoned, however, was incidental to the victim's allegations. The victim's testimony that defendant performed oral sex on her and repeatedly required her to perform oral sex on him while visiting the home was sufficient to support his conviction under MCL 750.520b(1)(b). See MCL 750.520h (A victim's testimony "need not be corroborated in prosecutions [pursuant to MCL 750.520b through 750.520g].").

Defendant also argues that he was denied the effective assistance of counsel because his attorney: 1) failed to object to hearsay evidence, 2) conducted limited cross-examination of the victim at trial regarding her prior preliminary examination testimony, and 3) referred to the

¹ Evidence that the home was not abandoned would also be consistent with the victim's testimony that the home was furnished and featured a functioning television.

victim's prior testimony at a family division proceeding, but failed to cross-examine her regarding that testimony. We disagree.

Defendant's first two claims of ineffective assistance were not presented in the trial court and our review is limited to mistakes that are apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). The trial court denied defendant's motion for a new trial on his third claim of ineffective assistance following an evidentiary hearing on remand from this Court.² A trial court's decision regarding a motion for a new trial is reviewed for an abuse of discretion. *People v Miller*, 482 Mich 540, 544; 759 NW2d 850 (2008). However, underlying questions of law, such as whether trial counsel was effective, are reviewed de novo. *People v Grant*, 470 Mich 477, 484-485; 684 NW2d 686 (2004); *People v Kevorkian*, 248 Mich App 373, 410-411; 639 NW2d 291 (2001). Also, the trial court's factual findings are reviewed for clear error. *Grant*, 470 Mich at 484. "Clear error exists when the reviewing court is left with the definite and firm conviction that a mistake has been made." *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

To demonstrate ineffective assistance, a defendant must show: (1) that his attorney's performance fell below an objective standard of reasonableness, and (2) that this performance so prejudiced him that he was deprived of a fair trial. *Grant*, 470 Mich at 485-486. Prejudice exists if a defendant shows a reasonable probability that the outcome would have been different but for the attorney's errors. *Id.* at 486. "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 Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001).

Defendant first argues that his attorney was ineffective for failing to object, on the basis of hearsay, to the victim's statement that she told her best friend and then boyfriend about the incidents. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *People v Jambor (On Remand)*, 273 Mich App 477, 481; 729 NW2d 569 (2007), quoting MRE 801(c). In her narrative of events, the victim merely testified that she disclosed defendant's conduct to her best friend and boyfriend, before reporting it to her grandmother and the police. Because the victim did not testify regarding the substance of her statements to her friends, defendant's attorney was not ineffective for failing to make a meritless hearsay objection. See *People v Kulpinski*, 243 Mich App 8, 27; 620 NW2d 537 (2000).

Defendant next argues that his attorney was ineffective for conducting a limited cross-examination of the victim at trial regarding her prior preliminary examination testimony.

"It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then

² *People v Sparks*, unpublished order of the Court of Appeals, entered October 15, 2008 (Docket No. 281997).

search for authority either to sustain or reject his position.” [*People v Kevorkian*, 248 Mich App 373, 389; 639 NW2d 291 (2001).]

Because defendant fails to explain what testimony from the preliminary examination would have been relevant for impeachment of the victim, defendant’s claim is abandoned on appeal. Even if we were to address this claim, however this Court would not second-guess the scope of defendant’s attorney’s cross-examination, which ultimately elicited testimony from the victim that she was not entirely truthful at the preliminary examination because she felt that she was under pressure. See *People v Flowers*, 222 Mich App 732, 737; 565 NW2d 12 (1997) (decision concerning whether and how to impeach a witness is a matter of trial strategy entrusted to an attorney’s professional judgment).

Defendant last argues that his attorney was ineffective for referring to the victim’s prior testimony at a family division proceeding, but failing to cross-examine her regarding several aspects of that testimony. On remand at the evidentiary hearing, defendant’s attorney stated that it was a mistake to reference the prior testimony without using it to impeach the victim. As defendant argues, some minor discrepancies exist between the victim’s testimony at the prior family division proceeding and her testimony at trial, which could have been used for impeachment. For example, at the family division proceeding, the victim identified her age at the time of each incident, like she did at trial, but later at the family division proceeding, she could not recall the first time that defendant put his penis in her “vagina, butt or mouth.” Moreover, at the family division proceeding, the victim testified that defendant’s ejaculate came in contact with her hands, but at trial, she testified that it went into her mouth. Finally, at the family division proceeding, the victim did not testify that she and defendant left the Stoepel home, went to defendant’s home, and later returned to the Stoepel home, and she also could not recall where she had lived in seventh and eighth grade.³ Again, this Court will not second-guess the scope of defendant’s attorney’s cross-examination. *Flowers*, 222 Mich App at 737.

However, even if defendant’s attorney’s cross-examination fell below an objective standard of reasonableness, defendant was not prejudiced by the performance. First, whether the victim and defendant left the Stoepel home during the day before the criminal sexual conduct occurred and whether the victim recalled her address years earlier were not significant issues at trial. Second, even though defendant’s attorney did not specifically cross-examine the victim on the remaining grounds that defendant raises from the family division proceeding, defendant’s attorney attacked her testimony on a number of similar grounds. The attorney focused on the victim’s errors in reporting the Stoepel home incident to the police, eliciting testimony from the victim that she misreported the location of the incident, her age at the time of the incident, and whether defendant ejaculated during the incident. Relying on this testimony, other impeachment evidence, and defendant’s testimony denying the victim’s allegations, defendant’s attorney

³ One alleged discrepancy defendant cites lacks merit. At the juvenile proceeding, the victim did not identify the exact location of the Stoepel home and only testified that it was in the neighborhood of Davison and Dexter. The victim’s testimony was more specific at trial because she had accompanied the police to the neighborhood where she thought the home was located, and identified it, only after the juvenile proceeding.

theorized that the victim fabricated the allegations against defendant because there was enmity between the victim and defendant's girlfriend. Given this unsuccessful trial strategy, defendant has failed to demonstrate a reasonable probability that the outcome would have been different but for the omissions of additional, but similar, impeachment evidence. Consequently, defendant was not denied the effective assistance of counsel and the trial court did not abuse its discretion when it denied defendant's motion for a new trial on this ground.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Kathleen Jansen

/s/ Kurtis T. Wilder