

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS EUGENE CAMP,

Defendant-Appellant.

UNPUBLISHED

August 17, 2010

No. 285101

Lenawee Circuit Court

LC No. 07-012858-FC

ON REMAND

Before: SAWYER, P.J., and CAVANAGH and HOEKSTRA, JJ.

PER CURIAM.

Our Supreme Court reversed our original decision in this matter, *People v Camp*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2009 (Docket No. 285101), which reversed defendant's conviction of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a) (victim under age 13), on double jeopardy grounds, and has remanded the case for consideration of issues raised but not decided in defendant's original appeal. After consideration of those issues, we affirm defendant's conviction.

I. FACTS

Defendant was originally charged with several counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim under age 13), and CSC II as a result of allegations that he sexually abused his 12-year-old adopted nephew, AK, during a camping trip in Lenawee County.¹

¹ In a case from Livingston County, defendant was charged with four counts of CSC I and two counts of CSC II as a result of allegations that he sexually abused AK and AK's 11-year-old foster brother, SH. A jury acquitted defendant of all charges in that case.

Before trial, the prosecutor moved to add Laura Sanders, AK's therapist, as a witness. In response, defense counsel² requested Sanders's records related to AK. The trial court remarked that defense counsel would be required to demonstrate a need for the records before the court would conduct an in camera review of the material.

Defendant moved for discovery of AK's educational records, asserting that credibility would be a significant issue in the case, that AK had a significant disciplinary record, that he had been caught stealing and lying at school and had been involved in fights and property damage, that defense counsel could not adequately cross-examine AK about his truthfulness without access to the records, and that access to the records was necessary in order to enable defendant to present a full and fair defense. The prosecutor responded that defendant's request was not specific and should be precluded pursuant to *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994), or limited to an in camera review, and at any rate would be collateral in nature. The trial court ruled that defense counsel could subpoena the records and that the court would review them in camera.

After jury selection was completed, defense counsel inquired as to whether the trial court had reviewed AK's educational records and if any misconduct was disclosed therein. The trial court replied that it had reviewed the records, and had concluded that if any misconduct was shown in the records it would be inadmissible for purposes of impeachment. The trial court declined to disclose any portion of the records to defense counsel.

On direct examination, the first witness at trial, AK's mother and defendant's sister, discussed the sequence of events that had resulted in the charges against defendant, and then referred to the Livingston County case. Defendant moved for a mistrial or, in the alternative, sought to inform the jury that the Livingston County case had resulted in a complete acquittal. Ultimately, the trial court granted defendant's motion for a mistrial. The trial court denied defendant's subsequent motion to dismiss the charges based on double jeopardy grounds.³

At the second trial, AK testified that he and defendant started engaging in sexual acts soon after they met. AK stated that in July 2006 he and defendant went on a camping trip, and that during the trip defendant committed various sexual acts with him, including anal penetration, fellatio, and mutual masturbation. AK acknowledged that he became upset after he returned home, but that he did not tell his parents what was bothering him. He stated that defendant engaged in no further sexual acts with him after the camping trip.

² Defendant was represented by two attorneys at trial. For the sake of simplicity, we will refer to "defense counsel" in the singular.

³ Defendant sought leave to appeal the order denying his motion to dismiss, but this Court denied the application. *People v Camp*, unpublished order of the Court of Appeals, entered November 16, 2007 (Docket No. 281083). Our Supreme Court denied defendant's application for leave to appeal. *People v Camp*, 480 Mich 1022; 743 NW2d 66 (2008).

Defense counsel attempted to cross-examine AK regarding acts of theft or dishonesty at school, in particular an incident regarding a teacher's purse, but the trial court sustained the prosecutor's objection to the questioning. Defense counsel was able to point out some inconsistencies between AK's statement to the police and his trial testimony regarding the sequence of events on the camping trip. The trial court precluded defense counsel from questioning AK regarding AK's false allegation that his parents had beaten him.

Detective Ward of the Lenawee County Sheriff's Department testified he interviewed AK regarding the alleged incidents of sexual activity on the camping trip. Ward acknowledged that AK's statement was inconsistent in some respects with a previous statement AK had given to another police officer.

Dr. Lenna Dev, the medical director of the child protection team at the University of Michigan, performed a physical examination of AK, but found no evidence of sexual abuse. Dr. Dev testified that the lack of physical evidence did not mean that abuse did not occur. She characterized the examination as "inconclusive." Defense counsel sought to cross-examine Dr. Dev regarding an allegation that AK had acted as a "lookout" while another child sexually abused AK's younger sister. Dr. Dev indicated that such an incident would have had no bearing on her findings. The trial court precluded defense counsel from pursuing this line of questioning, finding that it was irrelevant.⁴

Laura Sanders, AK's therapist, provided certain documents to the trial court prior to her testimony, and the court examined some of them in camera. The trial court allowed defense counsel to review the documents it had reviewed, save for one letter. Sanders testified that it was not unusual for a child to fail to disclose sexual abuse while it was taking place. On cross-examination, Sanders indicated that she had learned that AK had been removed from the home of his biological parents due to physical abuse and neglect. She acknowledged that AK had a history of lying and stealing, and stated that she had been informed that he had stolen a teacher's purse and had lodged a false accusation of physical abuse by his adoptive parents.

Defendant testified that he took AK on the camping trip as a reward for AK doing chores around defendant's house. Defendant denied that sexual activity of any kind took place between him and AK during the trip.

The trial court and the parties agreed, based on AK's testimony regarding the dates on which certain alleged acts occurred, that several counts should be removed from the jury's consideration. Ultimately, the jury considered five counts of CSC I, with CSC II as a lesser included offense on each count. The jury acquitted defendant of four counts of CSC I and convicted him of one count of CSC II. The trial court sentenced defendant to four years, nine months to 15 years' imprisonment.

⁴ This exchange took place outside the presence of the jury.

Defendant moved for a new trial and an evidentiary hearing alleging: (1) he was denied the effective assistance of counsel because counsel failed to initiate an in camera review of AK's records pursuant to *Stanaway*; failed to investigate the case properly and present a psychological expert witness; erred by agreeing with the prosecution that it was not relevant that AK had acted as a lookout when his sister was sexually abused; and failed to object to Dr. Dev's testimony; (2) he was denied his right to present a full and complete defense and his right to confrontation because he was precluded from inquiring into areas that would support the defense theory that AK's allegations were false; and (3) he was denied a fair trial because the trial court did not comply with *Stanaway* procedures with respect to AK's school and prior therapy records.

The trial court denied defendant's motion for a new trial and an evidentiary hearing. The court noted that defense counsel succeeded in placing before the jury various allegations of misconduct by AK that could have affected the jury's evaluation of AK's credibility, and concluded that defendant was not denied the rights to present a defense or to a fair trial.

This appeal followed. During the pendency of the appeal, defendant moved to remand the matter to the trial court for an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). This Court denied the motion.⁵

On September 17, 2009, this Court issued its opinion in the case, holding:

Because defendant did not consent to the mistrial and the mistrial was not supported by manifest necessity, the retrial violated defendant's constitutional double jeopardy protections. We, therefore, reverse defendant's CSC II conviction. [*People v Camp*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2009 (Docket No. 285101), slip op at 7.]

Given our ruling on the double jeopardy issue, we declined to address the other issues raised by defendant on appeal. *Id.*, slip op at 7 n 5.

In this remand from the Supreme Court, we have been directed to address those other issues.

II. ANALYSIS

A. INEFFECTIVE ASSISTANCE OF COUNSEL

To establish ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Yost*, 278 Mich App 341, 387; 749 NW2d 753 (2008). Counsel must have made errors so serious that he was not performing as the "counsel" guaranteed by the federal and

⁵ *People v Camp*, unpublished order of the Court of Appeals, entered January 16, 2009 (Docket No. 285101).

state constitutions, US Const, Am VI; Const 1963, art 1, § 20. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). Counsel's deficient performance must have resulted in prejudice. To demonstrate the existence of prejudice, a defendant must show a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *id.*, and that the result that did occur was fundamentally unfair or unreliable, *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). Counsel is presumed to have provided effective assistance, and the defendant bears the burden of proving otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant argues that he was denied the effective assistance of counsel at trial. Specifically, he contends that trial counsel rendered ineffective assistance by: (1) failing to investigate and call a psychological expert witness to undermine the testimony given by Sanders; (2) failing to request all of AK's past therapy records for a *Stanaway* in camera review to assess the potential for a false allegation; (3) agreeing that evidence that AK acted as a lookout when his sister was abused was irrelevant when, in earlier testimony, Dr. Dev noted that this fact would make it much more likely that AK would engage in inappropriate sexual behavior; and (4) failing to object to Dr. Dev's testimony, which was useless and, because at one point she referred to AK's "last contact" with defendant, improper. We disagree in each instance.

The expert defendant contends should have been called to undermine Sanders, Jeffery Kieliszewski, Ph.D., did not treat AK. Defendant asserts that Kieliszewski could have criticized Sanders's methods and used examples of AK's previous troubled behavior to call into question AK's allegations. However, the failure to call a witness or to present evidence can constitute ineffective assistance only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Id.* We conclude that the failure to call Kieliszewski did not make a difference in the outcome of the trial. Defense counsel attacked AK's credibility during the cross-examinations of Sanders and two police officers, and pointed out inconsistencies in AK's statements during AK's own testimony. Even if Kieliszewski had testified, the jury would have been entitled to believe the testimony given by Sanders and AK, and to find that defendant abused AK. See *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). We will not substitute our judgment for that of counsel regarding matters of trial strategy, and will not assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Defendant has not shown that he was deprived of a substantial defense, and thus has not established that counsel rendered ineffective assistance by failing to call Kieliszewski.

Furthermore, defendant's allegation that counsel rendered ineffective assistance by failing to seek AK's other therapy records and make the case for a *Stanaway* in camera review is without merit. In *Stanaway*, 446 Mich at 677-678, our Supreme Court held that if a defendant demonstrates a reasonable probability that privileged counseling records are likely to contain material necessary to his defense, the trial court must conduct an in camera review of the records to ascertain if the records in fact contain such evidence. Only if a record contains such evidence may it be revealed to the defendant. *Id.* at 679. The showing of reasonable probability must be grounded on some demonstrable fact. *Id.* at 677. A generalized assertion that the records might contain inconsistent statements by the victim or might lead to exculpatory evidence is insufficient to warrant an in camera review. *Id.* at 680-681.

Defense counsel did not seek an in camera review of records from AK's therapists other than Sanders. We hold that counsel did not render ineffective assistance by failing to do so because defendant cannot meet the threshold requirements established in *Stanaway*. Defendant asserts that counsel should have sought an in camera review of the records in order to ascertain "whether evidence suggesting a false allegation was present." This request is not based on a "demonstrable fact[] that there is a reasonable probability," *id.* at 677, that the records would reveal the type of information sought. Defendant knew of one instance in which AK made a false allegation of physical abuse by his adoptive parents, but that instance was disclosed to the jury. Defendant has not identified any other instance that might have been contained in the records of any other therapist. Thus, defense counsel did not render ineffective assistance by failing to seek an in camera review of the records. Counsel is not required to bring a meritless motion. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

In addition, defendant's assertion that defense counsel rendered ineffective assistance by agreeing with the court that evidence that AK acted as a "lookout" while a neighbor child sexually assaulted AK's younger sister was irrelevant is without merit. Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Evidence which is not relevant is not admissible." MRE 402. Defendant sought to introduce evidence of the sexual abuse of AK's younger sister during Dr. Dev's cross-examination just after she indicated that her examination of AK had been inconclusive. Dr. Dev stated that whether AK had been present when his sister was abused would not have had any bearing on the results of AK's physical examination.⁶ The trial court correctly concluded that, in this context, the evidence was irrelevant. Moreover, even if Dr. Dev had stated in previous testimony that the incident with his sister would have made AK predisposed to engage in inappropriate sexual behavior, the issue in the instant case was whether AK was a victim of sexual abuse. Defense counsel did not render ineffective assistance by conceding that this evidence was irrelevant. *Snider*, 239 Mich App at 425.

Finally, defendant's argument that defense counsel rendered ineffective assistance by failing to object to Dr. Dev's testimony on the grounds that it was "useless" because her examination revealed no evidence of sexual assault, and that it was improper because she referred to AK's "last contact" with defendant is without merit. Dr. Dev's testimony that she found no evidence of physical abuse made the existence of sexual abuse less probable; however, she also noted that the lack of physical evidence did not mean that no abuse occurred. The testimony was relevant and admissible, MRE 401 and 402, and defense counsel was not required to make a frivolous objection to it. *Snider*, 239 Mich App at 425. Defense counsel did not object when, in response to the prosecutor's question about the "presumed last assault," Dr. Dev remarked that she did not know when AK's "last contact" with defendant occurred. We find that in all likelihood defense counsel made a strategic decision not to object and call further attention

⁶ Dr. Dev made this statement outside the presence of the jury.

to this remark. We will not second-guess counsel in matters of trial strategy. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

B. DENIAL OF A RIGHT TO PRESENT A DEFENSE

A criminal defendant has a constitutional right to present a defense. US Const, Ams VI, XIV; Const 1963, art 1, §§ 13, 17, 20. A criminal prosecution “must comport with prevailing notions of fundamental fairness.” *People v Anstey*, 476 Mich 436, 460; 719 NW2d 579 (2006), quoting *California v Trombetta*, 467 US 479, 485; 104 S Ct 2528; 81 L Ed 2d 413 (1984). However, a defendant does not have “an unlimited right to admit all relevant evidence or cross-examine on any subject.” *People v Adamski*, 198 Mich App 133, 138; 497 NW2d 546 (1993). The rules of evidence “do not abridge an accused’s right to present a defense as long as they are not arbitrary or disproportionate to the purposes they are designed to serve.” *People v Unger*, 278 Mich App 210, 250; 749 NW2d 272 (2008) (internal quotations and citations omitted). We review de novo the question whether a defendant was denied the constitutional right to present a defense. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

We review a trial court’s decision regarding the admission of evidence for an abuse of discretion. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). “A preserved nonconstitutional evidentiary error will not merit reversal unless it involves a substantial right, and, on review of the entire cause, it affirmatively appears that it is more probable than not that the error was outcome-determinative.” *People v Houston*, 261 Mich App 463, 466; 683 NW2d 192 (2004), *aff’d* 473 Mich 399 (2005).

Defendant argues that several rulings by the trial court served to prevent him from presenting a defense. First, defendant asserts that the trial court abused its discretion by refusing to admit evidence, which was supported by a police report, that AK ran away from home and made the allegation—that he later recanted—that he did so because his parents beat him. Defendant contends that this evidence was admissible as similar acts evidence under MRE 404(b). Second, defendant claims that the trial court abused its discretion by refusing to allow defense counsel to ask AK about alleged incidents of theft or dishonesty at school, as those incidents were relevant to AK’s credibility and character for truthfulness. Defendant asserts that MRE 608(b) permitted the questions. Third, defendant claims that the trial court abused its discretion by refusing to allow AK’s grandmother to testify regarding AK’s truthfulness or his reputation for truthfulness. Defendant contends that the testimony was admissible under MRE 608(a). Fourth, defendant maintains that the trial court denied him the right to confrontation when it granted, over defense counsel’s objection, the prosecution’s motion to strike Amy Johndro, who was described as a therapist but who in fact performed the forensic interview with AK, from the witness list.

MRE 404(b)(1) provides:

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, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other

crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The rule is not limited to a defendant's acts; it applies to the acts of any person. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991). To be admissible under MRE 404(b), other acts evidence must (1) be offered for a proper purpose, (2) be relevant, and (3) not have a probative value substantially outweighed by unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004).

The trial court did not abuse its discretion by refusing to allow defense counsel to cross-examine AK regarding an allegation that he ran away from home and falsely told neighbors that he did so because his parents beat him. Defense counsel sought to introduce information found in a police report, which, in a criminal case, generally constitutes inadmissible hearsay. MRE 803(8); *People v McDaniel*, 469 Mich 409, 412-413; 670 NW2d 659 (2003). Moreover, defense counsel sought to introduce the evidence to attack AK's credibility, which is not a proper purpose under MRE 404(b).

MRE 608 provides in pertinent part:

(a) The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness[.]

We hold that the trial court abused its discretion by preventing defense counsel from cross-examining AK's grandmother regarding AK's reputation for truthfulness pursuant to MRE 608(a). However, that the error was not outcome-determinative because the jury had evidence from Laura Sanders, AK's therapist, that enabled it to evaluate AK's credibility. Sanders testified that AK had a history of stealing and lying, and gave examples of specific incidents, including AK's theft of a teacher's purse and his false allegation of physical abuse at the hands of his parents. Because the error was not outcome-determinative, reversal is not warranted. *Houston*, 261 Mich App at 466.

Similarly, we hold that, pursuant to MRE 608(b), the trial court abused its discretion by preventing defense counsel from cross-examining AK regarding specific incidents of theft or dishonesty at school, as well as the false allegation against his parents. However, this error, too, was not outcome-determinative. Had defense counsel questioned AK regarding these incidents and had AK denied that they occurred, defense counsel would not have been allowed to use extrinsic evidence to prove that AK was not testifying truthfully. However, these incidents were

brought to the attention of the jury during the cross-examination of Sanders, and the jury was able to consider them in its evaluation of AK's credibility. Because the error was not outcome-determinative, it does not warrant reversal. *Houston*, 261 Mich App at 466.

We next find that the trial court's grant of the motion to strike Johndro from the witness list did not result in reversible error. Defendant correctly states that the presentation of testimony from the forensic interviewer in a criminal sexual conduct case involving a child victim is important. See, e.g., *People v Petri*, 279 Mich App 407; 760 NW2d 882 (2008); *People v Tesen*, 276 Mich App 134; 739 NW2d 689 (2007). We note that the trial court struck Johndro as a witness some three months before defendant's second trial began, yet defendant gives no reason for not seeking to subpoena her testimony. Moreover, it appears from the record that Detective Ward conducted the forensic interview with AK regarding the alleged acts with which defendant was charged. Defense counsel cross-examined Ward regarding his interview techniques, and was able to point out inconsistencies in AK's statements. Defendant was not denied the right of confrontation in this instance. *Yost*, 278 Mich App at 369-370.⁷

C. DISCOVERY OF SCHOOL AND THERAPY RECORDS

We review a trial court's decision to order an in camera review for an abuse of discretion. *People v Laws*, 218 Mich App 447, 455; 554 NW2d 586 (1996). A trial court's decision on a close evidentiary question cannot be considered an abuse of discretion. *People v Bahoda*, 448 Mich 261, 289; 531 NW2d 659 (1995).

Defendant asserts that he was entitled to a *Stanaway* in camera review of all of AK's school records and of the records of AK's therapists other than Sanders in order to ascertain whether the records contained evidence that AK's allegations against defendant were false. We disagree.

The trial court conducted an in camera review of AK's school records, and determined that nothing in those records would assist defendant. Defendant does not contend, and nothing in the record suggests, that the trial court was untruthful in this regard. We cannot conclude that the trial court abused its discretion by declining to allow defense counsel access to the records.

Furthermore, the trial court conducted an in camera review of those items from Sanders's file that defendant requested be reviewed, and disclosed those items to defense counsel. Defendant can point to no specific evidence that the trial court improperly withheld from him.

⁷ Defendant also contends that the trial court erred by refusing to admit evidence that AK served as a "lookout" during an incident when his younger sister was sexually abused and testimony from AK's grandmother regarding the way AK and his siblings were disciplined. However, because defendant provides no legal analysis regarding these alleged errors, we do not address them.

Finally, because defendant never made a formal request for an in camera review of the records from AK's other therapists, the trial court never ruled on this issue. However, as we stated earlier, defendant cannot demonstrate that he was entitled to a *Stanaway* review of these records.

III. CONCLUSION

Defendant has failed to show that he was deprived of the effective assistance of counsel, that any evidentiary error was outcome-determinative, or that any discovery errors occurred. We therefore affirm defendant's convictions.

Affirmed.

/s/ David H. Sawyer
/s/ Mark J. Cavanagh
/s/ Joel P. Hoekstra