# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>May 24, 2016 |
| v | No. 326624<br>Crawford Circuit Court |
| DAVID OWEN MYERS,<br><br>Defendant-Appellant. | LC No. 14-003668-FC |

Before: GLEICHER, P.J., and SAWYER and M. J. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree criminal sexual conduct (CSC I), MCL 750.520b (victim under age 13). Defendant was sentenced to serve 25 to 40 years in prison for the conviction, with credit for 200 days served. Defendant appeals as of right. We affirm.

## I. FACTS

SL alleged that she was sexually assaulted by defendant during the summer of 2008, when she was 10 years old. She testified that she spent the summer in Grayling, living with her father and his then-fiancé, Heather. SL testified that defendant and his wife stayed with them for "a night or two" for a party around the 4th of July, which was the first time that she had ever met defendant. Defendant is Heather's father.

SL testified that she woke up in the morning and found herself alone in the house with defendant. She claimed that she was getting breakfast and still in her pajamas when defendant asked her if she would like to go into the back bedroom and watch him do his breathing treatment. She said that she agreed, went to the bedroom, sat next to defendant on the bed, watched him put on a breathing mask, and that defendant then pushed her onto the floor and sexually penetrated her anus with his penis. SL testified that, after the assault, while defendant was putting his pants back on, he told her that if she told anyone what happened he would kill her parents.

According to SL, she did not tell anyone what happened because she did not want her parents to get hurt. SL said that after the incident she stopped caring about school, her friends, or cleaning her room, and that she had trouble sleeping at night because of nightmares and "waking

up screaming in the middle of the night." SL said that, as a result of her behavior, her mom took her to a therapist in November of 2008, but that she did not tell the therapist what happened. SL testified that she instead pretended like everything was okay and tried to block everything out and not remember that it had happened, again concerned that her family would get hurt. According to SL, a few years later she decided to tell someone about the incident because she was worried about defendant doing the same thing to her half-sister or step-sister, who she said were about the same age as she was when the incident occurred. SL said that she told her mother and sister, and then a therapist, that after she told her mother they went to the police and filed a report, and that the police report she filed was dated July, 31, 2012.

Barbara Cross, a clinical director and psychotherapist at the Maple Clinic in Traverse City, was qualified as an expert in the field of child sexual abuse. Cross testified generally regarding common reactions or behaviors of a child sexual assault victim and did not interview SL or know the specifics of this case. According to Cross, all victims of sexual assault do not react the same way, but react based on a "host of factors depending on what the situation is that the child is in." However, Cross testified that "[a]lmost every child that [she had] met with has delayed in their disclosure," that a delay "is extremely common in this subject matter," that she could only recall one child who had told her mother immediately, and that the child who did so had no "emotional investment" in the person who molested her. Cross explained that the more emotionally connected the child is to the person, the less likely the child is to tell.

Cross testified that if a child is threatened that can have an impact on disclosure as well, and that there are also other possible reasons for a victim to put off reporting abuse. Cross further testified that a child may have a number of "common symptoms" on account of the abuse, including "grades plummeting, behavior changes, fears, nightmares, possibly sleep disturbances, that kind of thing." Defendant's counsel extensively cross-examined Cross regarding the basis for her opinions and the likelihood that a child would fabricate an allegation of sexual abuse.

Prior to the authorization and issuance of the felony complaint and warrant in this case, at defendant's request, a polygraph examination was conducted on him by David Dwyre, a special agent who worked for the Michigan Department of Attorney General in the Criminal Division. After the conclusion of the examination, defendant made some incriminating statements. Defendant moved to suppress the incriminating statements elicited during the examination, asserting that despite Dwyre explaining the *Miranda*[1] rights to defendant before the examination, and defendant waiving those rights and signing documents indicating as much, the statements "were not made voluntarily," where Dwyre told defendant that he would not share the examination with anyone, and where "the so-called 'admissions' were not . . . Defendant's own words, but rather assent to the investigator Dwyre's assertions" that defendant had committed the offense but had repressed memories of the incident. Along with his motion to suppress, defendant also sought "an expert regarding repressed memories and false confessions," should his motion to suppress be denied.

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

Following a *Walker*[2] hearing on defendant's motion to suppress, the trial court reviewed an audiorecording of the examination and then issued a written opinion and order denying defendant's motion, holding that defendant's "statements were voluntary and therefore should not be suppressed on that basis." As for defendant's alternative motion regarding an expert in repressed memories and false confessions, the trial court denied it "at this time," stating that it had "no information from which to conclude that such an expert is necessary or that any testimony from such an expert would be relevant," adding that it "would allow such a motion to be brought again at a later date should such information be presented."

At trial, Dwyre testified about the incriminating statements that defendant made during the "interview," "meeting," or "interrogation" he had with defendant, and defense counsel cross-examined Dwyre in regard to these statements and the circumstances in which he elicited them. The jury was never told about the polygraph examination.

Heather testified that SL was never left alone with defendant during the time period in question, and that she would never have left SL alone at home because SL was only ten at the time. Heather testified that she would never leave a young girl in a situation where she could possibly be abused, because she herself had been sexually abused as a child, and was thus extremely aware of such situations. Heather testified that defendant never stayed at their house, and that defendant never brought his breathing treatment to the house because he was never there long enough to need it. Heather testified that she never went to get groceries with defendant's wife for a 4th of July party, adding that anytime she went to get groceries SL was "either with me or with her [SL's] dad." Heather testified that SL may have made the allegations because in early July of 2012 she and SL's dad decided not to get SL a new phone that could access the internet, adding that SL "was mad because she wasn't going to get a phone."

During closing argument, defendant's counsel argued that the circumstances of the delayed disclosure provided strong circumstantial evidence that no assault occurred. After deliberating for approximately two hours, the jury found defendant guilty.

## II. DEFENDANT'S MOTION TO SUPPRESS INCRIMINATING STATEMENTS

Defendant first argues that the trial court erred in denying his motion to suppress the incriminating statements he made to Dwyre, asserting as he did below that the statements were not voluntary. We disagree.

> The issue of voluntariness is a question of law for the court's determination. The prosecution has the burden of proving voluntariness by a preponderance of the evidence. In reviewing the trial court's findings, this Court examines the entire record and makes an independent determination of voluntariness. However, this Court, recognizing the trial court's superior ability to view the evidence, gives deference to the trial court and will not reverse the

[2] *People v Walker*, 374 Mich 331; 132 NW2d 87 (1965).

trial court's findings unless they are clearly erroneous. [*People v Etheridge*, 196 Mich App 43, 57; 492 NW2d 490 (1992) (citations omitted).]

In *People v Cipriano*, 431 Mich 315, 333–334; 429 NW2d 781 (1988), our Supreme Court set forth the criteria for determining whether a confession is voluntary:

> The test of voluntariness should be whether, considering the totality of all the surrounding circumstances, the confession is "the product of an essentially free and unconstrained choice by its maker," or whether the accused's "will has been overborne and his capacity for self-determination critically impaired . . . ." The line of demarcation "is that at which governing self-direction is lost and compulsion, of whatever nature or however infused, propels or helps to propel the confession." In determining whether a statement is voluntary, the trial court should consider, among other things, the following factors: the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.
>
> The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [Citations omitted.]

The trial court did not clearly err in finding that the incriminating statements were voluntary. The totality of the circumstances surrounding the statements indicates that they were freely and voluntarily made. There is no evidence of any force, coercion, or intimidation by Dwyre. Rather, defendant was properly advised of his rights during an extensive and lengthy conversation at the start of the interview, including his right to stop answering questions and end the interview at any time. Dwyre treated defendant with courtesy and respect throughout the entire examination. Both before and after the interview, defendant signed a form reiterating that he was there voluntarily and that he was medically sound. Defendant was at ease and did not appear to be outwardly uncomfortable with the examination or the demeanor of Dwyre, and in fact at various times defendant and Dwyre joked and engaged in casual conversation about motorcycles, corvettes, hunting, and fishing. Defendant recognized his freedom to leave at any time but chose to stay and answer questions. At the end of the interview, defendant wrote that his treatment was "excellent."

While the interview was about 2 hours long (10:48 a.m. to 12:39 p.m.), the duration was not unreasonable or coercive. Defendant was offered multiple opportunities to take a break, which he declined. Defendant indicated that he had gotten adequate rest the night before (7.5 hours), that he was mentally alert, and that he was not under the influence of any drugs or

alcohol. Further, on the basis of listening to the audiorecording of the interview, the trial court found that defendant did not appear to be in any acute physical discomfort, and defendant has not disputed this finding. Defendant described his physical condition as "good." Defendant also stated during the interview that he had been charged and convicted of various crimes in the past, and had worked in the prison system for 18 years, which indicates that he was not new to the criminal justice system and likely has an understanding of his rights and in particular his right to remain silent.

Again, considering the totality of the circumstances, we hold that the trial court did not clearly err in finding that the incriminating statements were voluntary. As a result, the trial court properly denied defendant's motion to suppress the statements. To the extent defendant argues that his statements were not "clear confessions," we hold that the trial court also correctly determined that the weight of the statements was for the jury to determine, rather than an issue regarding admissibility.

## III. DEFENDANT'S MOTION TO APPOINT AN EXPERT WITNESS ON REPRESSED MEMORIES AND FALSE CONFESSIONS

Defendant next argues that the trial court erred when it denied his request for an expert witness on repressed memories and false confessions. We disagree.

"This Court reviews for abuse of discretion a trial court's decision whether to grant an indigent defendant's motion for the appointment of an expert witness." *People v Carnicom*, 272 Mich App 614, 616; 727 NW2d 399 (2006).

In his brief on appeal, defendant states:

> Because the polygraph examiner had convinced Mr. Myers that he had sexually assaulted the complainant and repressed the memory (since Mr. Myers couldn't remember it occurring), trial counsel requested an expert regarding repressed memory and false confessions. The trial court denied this type of expert.

Defendant then identifies the requirements of MRE 702, which concern the criteria that must be met before a trial court can permit a witness to provide expert testimony. The rule requires that the expert's testimony be based on sufficient facts, be the product of reliable principles and methods applied reliably to the facts of the case, and be necessary to help the jury understand a fact at issue. MRE 702. After quoting MRE 702, defendant then "argues," as follows:

> An expert in this regard would have helped illustrate how Agent Dwyer [sic] persuaded Mr. Myers that polygraphs don't make mistakes and if he couldn't remember the assault then he must be repressing it. Mr. Myers, relying on the word of the good Christian Agent Dwyer [sic], said "Oh this puts it all in a new perspective." . . . He agreed that he must have suppressed the memory (incriminating) but he still couldn't remember it.

Defendant never addresses the trial court's concerns regarding necessity and relevance and does not elaborate on what a "repressed memory" expert would even say. Thus, this Court lacks the information it needs to adequately evaluate defendant's argument. *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998) ("An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment with little or no citation of supporting authority."); See *Mitcham v Detroit*, 355 Mich 182, 203; 94 NW2d 388 (1959) ("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 search for authority either to sustain or reject his position.").

Moreover, the authority cited by defendant in his brief on appeal—MRE 702—is not controlling on the issue. The one thing that is clear from defendant's trial motion is that he sought "the appointment of an expert witness *at the state's expense*" (emphasis added). Such a request requires a defendant to establish, among other things, a "nexus between the facts of the case and the need for an expert." *Carnicom*, 272 Mich App at 616. Defendant does not even identify, much less address or discuss, this standard in his brief on appeal. Thus, defendant has not properly argued, much less shown, that the trial court abused its discretion in denying defendant's request for appointment of an expert witness on repressed memories at the state's expense. *Kelly*, 231 Mich App at 640-641.

## IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant next argues that his counsel rendered ineffective assistance. We disagree.

The determination as to whether there has been a deprivation of the effective assistance of counsel is a mixed question of law and fact. The factual findings are reviewed for clear error and the matters of law are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The ultimate decision whether counsel rendered ineffective assistance is reviewed de novo. *Id.* As no evidentiary hearing on the effectiveness of counsel has been held, there are no factual findings on defendant's ineffective assistance of counsel claims, and this Court is left to review this issue on the basis of the existing record. *People v Thomas*, 260 Mich App 450, 456; 678 NW2d 631 (2004).

Defendant argues that he was denied the effective assistance of counsel because his trial counsel (1) failed to adequately cross-examine SL, (2) failed to request SL's medical records from the emergency room that SL visited when she had strep throat in July 2008, and (3) failed to present an expert witness as to why a child would lie about sexual abuse.

Our Supreme Court set forth the standards for a claim of ineffective assistance of counsel, as follows:

> A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, a convicted defendant must satisfy the two-part test articulated by the United States Supreme Court in *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). First, 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. In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. Second, the defendant must show that the deficient performance prejudiced the defense. 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. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Because the defendant bears the burden of demonstrating both deficient performance and prejudice, the defendant necessarily bears the burden of establishing the factual predicate for his claim. [*People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001) (footnotes, citations, and quotation marks omitted).]

"Decisions regarding what evidence to present, whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy." *People v Horn*, 279 Mich App 31, 39; 755 NW2d 212 (2008). "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).

Regarding defendant's first claim, he cannot show that counsel's performance in cross-examining SL was constitutionally deficient. Defense counsel's cross-examination of SL, which spread over approximately 27 pages of transcript, was more than adequate. Counsel first questioned SL as to why she delayed disclosing the incident despite seeing a therapist over a dozen times. Counsel then attacked SL's veracity and credibility by pointing out that SL's preliminary examination testimony conflicted with her trial testimony regarding when she told her therapist about the assault, and whether the Tylenol she used came from the kitchen or the bathroom. Counsel also proved that SL's testimony that she had not seen defendant between the summer of 2008 and July 27, 2012 was incorrect; counsel introduced pictures of SL and defendant together at a wedding in 2010 and at a Thanksgiving that occurred between the two dates.

Defendant asserts that counsel should have asked SL a number of questions regarding the statement that she filed with the police on July 31, 2012, and that the "only explanation" for counsel not doing so is that "counsel failed to adequately prepare." On the contrary, there is no indication that counsel failed to adequately prepare or had no strategy in regard to SL's police statement. Counsel had the statement with her at trial, and she presented it to SL on multiple occasions throughout SL's cross-examination, using it to show that SL's trial testimony contradicted what SL had written in the signed statement.

Simply because counsel did not ask the questions that defendant on appeal now thinks she should have asked does not mean that counsel failed to adequately prepare or had no trial strategy. "[H]ow to question witnesses are presumed to be matters of trial strategy." *Horn*, 279 Mich App at 39. Defendant essentially wants this Court to assess counsel's competence with the

benefit of hindsight, which we will not do. *Garza*, 246 Mich App at 255.[3] Counsel not asking specific questions did not create an error so serious that counsel was not performing as the counsel guaranteed by the Sixth Amendment. *Carbin*, 463 Mich at 600. Accordingly, defendant has failed to show that counsel's performance in cross-examining SL fell below an objective standard of reasonableness under prevailing professional norms or that there is a reasonable probability that the outcome of the proceedings would have been different. *Id*.

As for defendant's second claim, he cannot show that he was denied his right to effective assistance of counsel when counsel "failed" to request the 2008 medical record. Counsel *did* request SL's physical and mental health records, and even *specifically requested* the records at issue here, noting that SL "was in fact treated in the emergency room here in Grayling during that period of time subsequent to the allegation but prior to being returned to her mother." Defense counsel argued during the hearing on this request that "in an emergency type setting" the doctors would likely have noted whether SL had bruising. The trial court denied the request.

Even if defense counsel had "failed" to seek this record, defendant's ineffective assistance of counsel argument would still fail because it is premised on defendant's unfounded assertion that "a physician could not have overlooked [the bruises] when SL was examined for strep throat." Defendant provides no evidence for this assertion, there is no reason to presume that the physician who was examining the throat would have had her remove clothing that might have revealed bruising, and any argument regarding what the records would or would not have revealed amounts to nothing more than speculation. Further, defendant cannot even establish that the ER visit occurred within the range of when bruising would have still been present. Accordingly, defendant has failed to show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms or that there is a reasonable probability that the outcome of the proceedings would have been different. *Carbin*, 463 Mich at 600.

As for defendant's third claim, he asserts that his attorney was ineffective because she failed to present "an expert witness to rebut the information provided by the State's expert regarding post-incident behavior of a sexually abused child." Defendant cannot overcome the strong presumption that sound trial strategy motivated counsel's conduct in regard to presenting an expert witness. Defendant fails to recognize that defense counsel *did* secure an expert witness to rebut the state's expert. Defendant's October 21, 2014 amended witness list indicates that "Daniel H. Swerdlow-Freed, Ph.D." from Farmington Hills "may testify as to his review of the file and of related problems of delayed disclosure issues." Likewise, the trial court entered an order on October 23, 2014, stating that "defendant's counsel is approved $1,500.00 for expert

[3] We note, however, that this appears to have been a sound strategic decision. SL's trial testimony as to the specifics of the assault was fairly brief and did not contain many of the more repulsive details that were included in the police statement. Counsel might have strategically, and soundly, chosen not to reveal to the jury, e.g., that a ten-year old said she was bleeding from her anus and in severe pain for a week, which would have been required in order to ask the questions defendant proposes should have been asked.

testimony by Daniel H Swerdlow-Freed, Ph.D." At trial, defense counsel chose not to call Swerdlow-Freed as a witness because she was able to elicit from plaintiff's expert witness the testimony that she wanted regarding the likelihood that a child would fabricate an allegation of sexual abuse. Defense counsel thought that Swerdlow-Freed's testimony would be cumulative, and explained the issue to the jury during closing argument, as follows:

> I want to take the testimony of Ms. Cross. She—I—in my opening statement, I indicated to you that we intended to call an expert. I didn't call that expert because Ms. Cross acknowledged the same point that I was going to make with my very own expert, and that's that delayed disclosure is not proof an allegation is true. I think that's the most important thing that you need to consider from her testimony, because a—because a victim behaves in a particular way is not proof that they were actually abused. Ms. Cross acknowledged that on more than one occasion. She acknowledged that behavior could have multiple reasons why a child was behaving in a particular way, one of them being that they were sexually abused.

Given the above, defendant cannot overcome the strong presumption that sound trial strategy motivated counsel's conduct in regard to presenting an expert witness. Counsel's decision to use plaintiff's expert witness to her advantage, and not to present what would have been cumulative testimony from her expert witness, was sound trial strategy. *Horn*, 279 Mich App at 39 ("whether to call witnesses, and how to question witnesses are presumed to be matters of trial strategy"). Because counsel's decision was sound trial strategy, defendant has failed to show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms or that there is a reasonable probability that the outcome of the proceedings would have been different. *Carbin*, 463 Mich at 600.

Affirmed.

/s/ Elizabeth L. Gleicher
/s/ David H. Sawyer
/s/ Michael J. Kelly