STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 4, 2012
v	No. 300959 Kent Circuit Court
JASON LEE SHAVER, Defendant-Appellant.	LC No. 09-011041-FC

Before: HOEKSTRA, P.J., and K. F. KELLY and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant Jason Lee Shaver of two counts of first-degree criminal sexual conduct (CSC 1), MCL 750.520b(2)(b) (victim under 13, defendant 17 years or older), for sexually abusing his cousin's two children: J.R. and B.R. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to concurrent sentences of 28 to 56 years for each count. Defendant appealed as of right, and we remanded the case to the trial court for an evidentiary hearing to determine the following: (1) whether the facts underlying the conviction of the victims' father were highly similar to the conduct the victims testified to in the instant proceeding and, therefore, relevant to explain the victims' age-inappropriate sexual knowledge and (2) whether defendant was denied the effective assistance of counsel at trial because of counsel's failure to investigate and present exculpatory witnesses and evidence. The trial court held an evidentiary hearing and determined that the facts underlying the conviction of the victims' father were not similar to defendant's sexual conduct in this case. We then remanded the case a second time directing the trial court to conduct a *Ginther*[1] hearing to address counsel's alleged failure to investigate and present exculpatory witnesses and evidence. On the basis of the testimony presented at the hearing, the trial court concluded that defendant was not denied the effective assistance of counsel. For the reasons set forth below, we affirm defendant's convictions.

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Defendant's convictions arise from alleged sexual contact between defendant and two minors: J.R. and B.R. At the time of trial, J.R. was ten years old, and B.R. was nine years old. Defendant is a cousin of J.R.'s and B.R.'s father. Defendant lived with the family "off and on" over the 11 years the children's parents were married. When defendant stayed with the family, he slept either on the couch or in the extra bunk bed in J.R.'s bedroom. In 2005, when J.R. was four years old and B.R. was three years old, the family moved to Florida with defendant. According to the children's mother, she, the children's father, and defendant engaged in a "sexual act together" when they were living in Florida. After staying in Florida for one year, the family moved to Cedar Springs.

J.R. testified at trial that the sexual conduct with defendant started when he was four years old and living with defendant in Florida and that the conduct continued when they lived together in Cedar Springs. According to J.R., there were 17 instances of sexual conduct involving defendant, although he could not remember all of the specific details of each occurrence. J.R. stated that defendant put his penis in J.R.'s mouth and "butt" and that defendant once put his finger in J.R.'s "butt." Furthermore, defendant made J.R. put his penis in defendant's mouth and "butt." J.R. specifically testified that "white stuff came out" and went on his chin, which defendant told J.R. to wipe off. J.R. described defendant's penis as "medium sized with yellow and whitish hair." According to J.R., defendant told him not to tell anyone about the sexual conduct or he would kill J.R.'s mother. J.R. testified that he initially did not tell anyone because he knew that defendant had a knife, which he kept in the bathroom cabinet above the toilet. J.R. ultimately disclosed defendant's conduct to his mother and to his aunt after defendant moved out of the home.

B.R. testified that when defendant lived with them "[h]e put his thing in [her] butt." According to B.R., it felt "[b]ad," and defendant did it to her 20 times on different dates, which she could not specifically remember. B.R. explained that defendant told her that he would "call the cops on [her] mom" if B.R. told anyone what happened. B.R. ultimately told her mother about the sexual conduct one night after defendant "left."

The children's mother testified that she found "a sharp-edged knife" in her bathroom in "a middle drawer." She did not tell J.R. about the knife, but he knew about it nonetheless. She also testified that her husband's hair was "light brown."

Royce Brooks testified that he and defendant shared a cell in the county jail in September and October 2009. According to Brooks, he returned to his cell from the nurse's station on about October 22, 2009, and saw defendant in the cell crying "like he did many, many times." Brooks could not go to sleep, so he asked defendant "what the problem was." Defendant "just blurted out, I did it." Brooks replied, "Did what?" Defendant then said "that he had been involved in a sexual relationship with a man and a woman and they had two children, and that at some point in time during the ménage a trois . . . the children came into the room and witnessed what went on in there including homosexual acts between the two men." Defendant then told Brooks that, "[a]t some point in time," he "went into the kitchen, and was standing in front of the sink, and the male child, he allowed the male child to perform fellatio on him." Defendant "started to say what happened between him and the girl that was involved in this," but Brooks "shut him up."

Brooks got angry because he had grandchildren and "did not really want to know this story." Brooks testified that defendant made another comment to him the next day, which "just set [him] off again."

Becky Yuncker, an interview specialist and clinical supervisor at the Children's Assessment Center, testified that she interviewed B.R. before the children disclosed defendant's sexual conduct. Yuncker did not interview J.R. at that time and did not know whether anyone else had done so. B.R. did not disclose any sexual contact between her and defendant. Yuncker's notes indicated that defendant was still living in the home as of that date. However, B.R. was interviewed again after the disclosures to her mother and, at that time, described sexual contact involving penetration with defendant.

The jury convicted defendant of one count of CSC 1 premised on oral-penile penetration with J.R. and one count of CSC 1 premised on anal-penile or vaginal-penile penetration with B.R.

Defendant appealed as of right, arguing the following: (1) the trial court erred by excluding evidence that the victims' father's pleaded *nolo contendere* and was convicted of one count of CSC 1 involving B.R. one month before J.R.'s and B.R.'s disclosure of defendant's acts and that this evidence provides an alternate explanation for the children's age-inappropriate sexual knowledge; (2) defendant received ineffective assistance of counsel because counsel failed to investigate and present exculpatory evidence and witnesses; and (3) the verdict was against the great weight of the evidence. We remanded the case to the trial court for an evidentiary hearing regarding the first two issues, which required two remand orders and resulted in two evidentiary hearings, as described above.

II. ANALYSIS

A. RAPE-SHIELD ACT AND RIGHT TO CONFRONTATION

Defendant first argues that the trial court erroneously denied his request to introduce evidence that the victims had been sexually abused by their father. Specifically, defendant sought to present the jury with evidence that, about one month before the victims disclosed defendant's sexual conduct with them, the victims' father was convicted of criminal sexual conduct "similar" to the instant offenses. Defendant insists that the rape-shield act, MCL 750.520j, does not apply to this evidence and that the exclusion of this evidence violated his right to confront the witnesses against him. We disagree.

We review a trial court's decision to exclude evidence for an abuse of discretion and review de novo preliminary questions of law such as whether a statute precludes the admission of evidence. *People v Jones*, 270 Mich App 208, 211; 714 NW2d 362 (2006). We also review de novo the constitutional question of whether a defendant was denied the right to confront the witnesses against him. *People v Breeding*, 284 Mich App 471, 479; 772 NW2d 810 (2009).

As an initial matter, we conclude that the trial court properly ruled that evidence of the victims' father's conviction was inadmissible under the rape-shield act. Defendant's assertion that the rape-shield act does not apply to evidence of the children's prior sexual abuse by their father because the acts were nonconsensual lacks merit. In *People v Arenda*, 416 Mich 1, 6, 14;

330 NW2d 814 (1982), the Michigan Supreme Court prohibited the admission under the rape-shield act of "any evidence of sexual conduct between the victim [an eight-year-old boy] and any person other than defendant." Moreover, this Court has stated that "[i]n Michigan, as in our sister states, rape-shield statutes are typically invoked where the victim is an adult. However, our courts and others have ruled on the applicability of rape-shield statutes in cases of child sexual abuse." *People v Morse*, 231 Mich App 424, 430; 586 NW2d 555 (1998). Thus, the rape-shield act applies to the evidence that defendant sought to admit in this case. Further, that evidence did not fall into either of the exceptions for the admission of evidence of prior sexual conduct by the victims set forth in the rape-shield act. See MCL 750.520j(1)(a)-(b). Therefore, the trial court did not abuse its discretion in excluding this evidence under the act itself.

However, in certain limited situations, evidence that is not admissible under one of the statutory exceptions set forth in the rape-shield act may nevertheless be relevant and admissible to preserve a criminal defendant's Sixth Amendment right of confrontation. *People v Hackett*, 421 Mich 338, 348; 365 NW2d 120 (1984). Such circumstances include situations where another person has been convicted of criminal sexual conduct involving the complainants and the facts underlying the previous conviction were significantly similar to the charged offense so as to show that the children's "age-inappropriate sexual knowledge was not learned from defendant." *Morse*, 231 Mich App at 436. As we explained in *Morse*, a trial court may admit evidence of the previous guilty plea under such circumstances after holding an evidentiary hearing "to determine whether: (1) defendant's proffered evidence is relevant, (2) defendant can show that another person was convicted of criminal sexual conduct involving the complainants, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding." *Id*. at 437. We emphasize that, to warrant relief, defendant must establish "that the sexual conduct of which he is accused is highly similar to that charged against the victim[s'] father. . . . [I]f the father engaged only in relatively dissimilar sexual conduct, the evidence would be inadmissible as irrelevant, its prejudicial impact grossly exceeding its probative value." *People v Byrne*, 199 Mich App 674, 679; 502 NW2d 386 (1993).[2]

[2] That defendant failed to provide notice of intent to introduce this evidence within the time limit set forth in MCL 750.520j does not require a different result. Even when no notice is given under the act, the trial court must determine on a case-by-case basis whether a defendant's right of confrontation would be violated by the exclusion of the evidence of previous sexual abuse. *People v Lucas (On Remand)*, 193 Mich App 298, 301-302; 484 NW2d 685 (1992). In addition to determining whether the previous misconduct with the victims is "highly similar" to the charged misconduct in the case before it, the trial court also is to consider whether the defendant's timing of the offer to produce such evidence suggests any improper tactical purpose. *Id*. at 302-303; see also *People v Dixon*, 263 Mich App 393, 399-400; 688 NW2d 308 (2004). Here, considering the correspondence between the parties regarding discovery by defense counsel of the prosecution's file on the offenses committed by the children's father against them and that the children's father was listed on the prosecution's witness list, there is no suggestion of any improper tactical purpose in defendant's failure to file a notice under the act. Thus, the absence of formal notice under the statute should not have precluded the trial court from holding an in camera hearing to evaluate the relevance of the evidence. Indeed, this Court has held that a

In this case, the prosecutor listed the victims' father as a witness but did not contest that the father had pleaded *nolo contendere* to one count of CSC 1 or defense counsel's representation that the father's conduct was similar to defendant's. The prosecutor specifically argued to the jury that the children's age-inappropriate sexual knowledge tended to establish defendant's guilt, inviting defendant to establish another source for that knowledge while knowing that the trial court had precluded defendant from doing so.[3] Exclusion of the evidence of the children's father's offenses against them violated defendant's right of confrontation if the father's acts were "highly similar" to those underlying the charges against defendant here. See *id.*

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trial court errs by excluding evidence under MCL 750.520j solely on the basis of a defendant's failure to give notice "without exercising its discretion in light of the particular circumstances of the case." *People v McLaughlin*, 258 Mich App 635, 655; 672 NW2d 860 (2003). Moreover, the purpose of the notice provision is to protect the prosecution from surprise. *Lucas*, 193 Mich App at 302. There is nothing in the record to suggest that the prosecution was in any way surprised by defendant's attempt to introduce this evidence.

[3] Although not raised in the context of a prosecutorial-misconduct claim in this appeal, we note that the prosecutor's argument at trial regarding defendant's failure to present evidence illustrating an alternate source of the victims' age-inappropriate sexual knowledge was highly inappropriate. For example, in *People v De Goenaga*, 202 Mich 503, 504-505; 168 NW 436 (1918), the prosecutor successfully obtained the exclusion of hearsay evidence that would have explained why the defendant's alleged alibi witness was unavailable to testify at trial. During closing argument and over the defendant's objection, the prosecutor repeatedly emphasized the absence of testimony from the alleged alibi witness, arguing that it illustrated the defendant's guilt. *Id.* at 505-506. Our Supreme Court reversed the defendant's conviction, opining as follows:

> Irrespective of whether the court acted properly in excluding the testimony by which it was sought to explain the absence of the witness, the testimony having been excluded, and the respondent having been denied the opportunity of making an explanation, it was clearly improper and highly prejudicial to respondent's case to allow the prosecuting attorney in his closing argument to dwell upon the failure to produce the witness and to insist that the failure to produce the witness in itself should be sufficient for the jury to find the respondent guilty. This, in itself, in our opinion, is sufficient error to cause a reversal of this conviction. [*Id.* at 506.]

Similarly, in *People v Rich*, 414 Mich 961; 326 NW2d 824 (1982), our Supreme Court reversed and remanded for a new trial where "[i]t was improper for the prosecutor to argue the implications of the failure of the defendant to produce witnesses when the prosecutor had successfully opposed the defendant's efforts to subpoena those witnesses."

During the evidentiary hearing on remand, no evidence was presented that the victim's father engaged in sexual conduct with J.R. The trial court was presented with testimony that the victims' father pleaded *nolo contendere* to a single count of CSC 1 for inserting his penis into B.R.'s mouth. In this case, defendant is charged with genital and anal penetration with B.R. and anal and oral penetration with J.R. On remand, the trial court found that the acts of oral penetration committed by the victims' father were not highly similar to defendant's sexual acts in this case. We agree. The victims' father's oral penetration of B.R. is not highly similar to defendant's penetration of B.R. and J.R. Rather, it is "relatively dissimilar sexual conduct," which is inadmissible as irrelevant. See *id.* Defendant, therefore, is not entitled to relief on the basis of a violation of his right to confrontation. See *id.*; *Morse*, 231 Mich App at 437. Accordingly, we hold that the trial court did not abuse its discretion by excluding evidence of the victims' father's sexual conduct as an explanation for the victims' age-inappropriate sexual knowledge.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant also argues that he was denied the effective assistance of counsel. Specifically, defendant claims that his trial counsel failed to investigate and present certain exculpatory witness testimony and documents that showed (1) that defendant was impotent and (2) that defendant's pubic hair was a different color than was testified to by J.R. We disagree that defendant was denied the effective assistance of counsel.

Whether defendant was denied the effective assistance of counsel is a question of constitutional law and fact. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge must first find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* We review for clear error a trial court's findings of fact and de novo questions of constitutional law. *Id.*

To prevail on his claim of ineffective assistance of counsel, defendant must meet 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). *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). First, defendant must show that his counsel's performance "fell below an objective standard of reasonableness" under prevailing professional norms. *Strickland*, 466 US at 687-688. Courts strongly presume that counsel rendered adequate assistance. *Id.* at 690. Second, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. Under the *Strickland* test, defendant "bears the burden of establishing the factual predicate for his claim." *Carbin*, 463 Mich at 600.

With respect to counsel's alleged deficiency for not presenting evidence of defendant's impotence, we conclude that defendant has failed to overcome the strong presumption that counsel rendered adequate assistance. See *Strickland*, 466 US at 690. Decisions regarding what evidence to present and what witnesses to call are presumed to be matters of trial strategy. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). Defendant's trial counsel testified at the *Ginther* hearing that she was aware before trial that defendant claimed to have impotence issues but that there was not conclusive evidence that defendant was impotent. According to counsel, she was aware that

defendant was involved in a sexual relationship with Robert Farrington, and defendant admitted that he was "involved" with the victims' father. Counsel testified that "[defendant's] statements regarding the children's father and his relationship with the children's father contradicted his inability to maintain an erection." Furthermore, counsel testified that her research regarding defendant's alleged causes for his impotency did not guarantee impotence. Counsel did not want to present the impotence issue at trial and open a "can of worms" by having the prosecution introduce evidence of defendant's homosexual relationships and argue that defendant could perform sexually with some people but not others. In light of this evidence, counsel's strategic decision not to present evidence of impotence was not professionally unreasonable. See *Strickland*, 466 US at 687-688.

In addition to the testimony above regarding defendant's sexual performance, Amy Vanover testified that defendant could maintain a partial erection and ejaculate. Not only has defendant failed to establish that his counsel was deficient, but defendant has not established the factual predicate of his claim on the basis of impotence to an extent that "excludes hypotheses consistent with the view that his trial lawyer represented him adequately." *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999), quoting *Ginther*, 390 Mich at 442-443.

With respect to counsel's alleged deficiency for not presenting evidence of defendant's pubic-hair color, we likewise conclude that counsel's decision not to present such evidence was a matter of trial strategy for which counsel was not professionally unreasonable. See *Strickland*, 466 US at 687-688, 690. Moreover, defendant has not established the factual predicate of this claim. See *Hoag*, 460 Mich at 6. At trial, J.R. testified that defendant's pubic hair was "yellow and whitish." However, defendant insists that it is brown or black and that counsel, therefore, should have presented evidence of his hair color. On remand, the trial court determined that there was only a slight discrepancy between defendant's actual pubic-hair color and the color described by J.R. This finding was not clearly erroneous. See *LeBlanc*, 465 Mich at 579. During the *Ginther* hearing, counsel testified that defendant "yanked out some of his pubic hair" in her presence and showed it to her. According to counsel, defendant's pubic hair did not look black or dark as defendant insisted; it would have passed for "reddish blond" or light brown. Counsel testified that the color was "close" to what J.R. described and could have passed for "a little boy's description." On the basis of counsel's testimony regarding the color of defendant's pubic hair, we will not second guess her decision not to present evidence regarding the color of defendant's pubic hair where it was "close" to the description that J.R. offered. See *Rockey*, 237 Mich App at 76; see also generally *United States v Mandycz*, 447 F3d 951, 960-961 (CA 6, 2006) (explaining that modest discrepancies do not undermine an identification finding); *United States v Hajda*, 135 F3d 439, 444 (CA 7, 1998) (stating that a minor variance in hair color does not invalidate an identification of a defendant). Counsel has wide discretion regarding matters of trial strategy. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

Accordingly, we conclude that defendant has failed to establish his claim of ineffective assistance of counsel.

C. GREAT WEIGHT OF THE EVIDENCE

Defendant's final argument is that the verdict was against the great weight of the evidence. We disagree. We review for an abuse of discretion the trial court's denial of a motion

for a new trial on the ground that the verdict was against the great weight of the evidence. *People v Stiller*, 242 Mich App 38, 49; 617 NW2d 697 (2000). A court should grant a new trial on the basis of the weight of the evidence only where the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998); see also *People v Gadomski*, 232 Mich App 24, 28; 592 NW2d 75 (1998). Conflicting testimony and questions of witness credibility are insufficient grounds for granting a new trial. *Lemmon*, 456 Mich at 647. Exceptions include instances where "testimony contradicts indisputable physical facts or laws," where the testimony "is patently incredible or defies physical realities," "where a witness's testimony is material and is so inherently implausible that it could not be believed by a reasonable juror," and where a witness's testimony has been seriously impeached and the case is marked by "uncertainties and discrepancies." *Id.* at 643-644 (citations omitted).

In this case, there was no evidence at trial to suggest that the testimony of the prosecution's witnesses contradicted indisputable physical facts, was patently incredible, or defied physical realities. The evidence does not so heavily preponderate against the verdict that it would be a miscarriage of justice to allow defendant's convictions to stand. See *id.* at 642. We note that defendant insists that the verdict was contrary to physical realities because he is impotent. Notwithstanding the evidence received by the trial court at the *Ginther* hearing contradicting defendant's assertion of impotence, no evidence of impotence was presented at trial; we only consider the evidence presented at trial when reviewing defendant's great-weight-of-the-evidence claim. See *People v Roper*, 286 Mich App 77, 89; 777 NW2d 483 (2009) (stating that a claim that a verdict is against the great weight of the evidence is considered by evaluating the evidence presented at trial).

Accordingly, we hold that the trial court did not abuse its discretion by denying defendant's motion for a new trial on the ground that the verdict was against the great weight of the evidence.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly
/s/ Jane M. Beckering